

# **PRACTICAL ASPECTS OF INSOLVENCY LAW**

**(4th Edition)**

**ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS**

**(A Wholly owned subsidiary of ICSI and registered with IBBI)**

First Edition April, 2017  
Second Edition May, 2018  
Third Edition August, 2018  
Fourth Edition November, 2019

**Price :** Rs. 1000/- (*Postage extra*)

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**Published by :**

**ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS**

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Laser typesetting at: Aarushi Graphics

Printed at: Indian Offset/300/November 2019

## PREFACE TO THE FOURTH EDITION

The Insolvency and Bankruptcy Code, 2016 which lays down the legal framework for insolvency resolution in India has an underlying theme contained in it. This underlying theme requires transparency of information as well as a timely and time-bound resolution of insolvency. The intent is to enable maximization of the value of assets of the Corporate Debtor, promote entrepreneurship, availability of credit and balancing the interests of all stakeholders.

The IBC, being an economic legislation, has given due regard to the commercial aspects of insolvency, and thus, the commercial wisdom of Committee of Creditors (CoC) has been separated from its Judicial aspects. The judicial pronouncements have played a very important role in shaping the law, and while IBC has provided the skeleton, the flesh and blood thereof has come from the judicial decisions itself. The roles played by the IBBI, the Adjudicating Authorities, the Appellate Authority and the Apex Court too have been crucial in ensuring that the legislation proves its worth. Several contentious issues, including questions relating to constitutional validity of Code (and the amendments made to it) already stand settled, and this has led to a huge amount of clarity as to what is permissible and what is not under the new insolvency law regime in India.

The present edition titled **Practical Aspects of Insolvency Law** contains an elaborate discussion on the practical aspects of Insolvency Resolution including those relating to Eligibility requirements for an Insolvency Professional, Model application for initiation of CIRP, Checklist for NCLT for scrutiny of an application, Information Memorandum, *et al.* The very fact that the book is updated time and again, and within such short span of time, the Fourth Edition of the book is being brought forth reflects the evolution that the law.

I commend the dedicated efforts put in by Team – ICSI Institute of Insolvency

Professionals led by CS Lakshmi Arun, Head (Education & Training) consisting of Mr. Nitin Satija, Ms. Ankita Aggarwal, CS Nitika Manchanda, CS Swati Agarwal, with support from Ms. Anjali Gupta and under the overall supervision and guidance of Dr. Binoy J. Kattadiyil, Managing Director in bringing out this publication. I also thank CS Amit Gupta, Practicing Company Secretary, for his valuable inputs in the Chapter titled “Resolution Plan”.

I am confident that the readers shall find this publication helpful and it shall also assist the Insolvency Professionals in discharging their professional responsibilities more effectively.

**November 05, 2019**  
**New Delhi**

**CS RANJEET PANDEY**  
**PRESIDENT, THE ICSI**

## **PREFACE TO THE THIRD EDITION**

**“Change is the only constant.”**

It was only recently that I had penned my words for the second edition of this book and the fact that the Third edition is in order speaks volumes about the dynamic and ever-changing nature of the law. It is to support the professional pursuing the activities of Insolvency Resolution to develop a heightened understanding of the processes undertaken, that the '**Practical Aspects of Insolvency Law**' to need to be refurbished to take into account the most recent developments.

Since May, 2018, further significant developments since the Insolvency and Bankruptcy Code, 2016 have been notified, in the form of amendments to the Code, Regulations there under. Besides the judicial pronouncements by Supreme Court, National Company Law Tribunal, and National Company Law Appellate Tribunal, have been settling issues especially relating to judicial interpretations.

This edition of 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. The intent is to assist the resolution professionals as regards the manner of filing applications before the National Company Law Tribunal for pursuing the process of resolution and also in identification of significant aspects, documents involved, critical issues settled through landmark judgements, etc.

I commend the dedicated efforts of the Team - ICSI Institute of Insolvency Professionals led by CS Lakshmi Arun, Head (Education & Training) & Company Secretary consisting of CS Nitika Manchanda, Consultant and others under the overall supervision of CS Alka Kapoor, Chief Executive Officer, ICSI Institute of Insolvency Professionals in bringing out this publication.

I am quite assured of the fact that the revised edition shall prove to be great help and assistance to the insolvency professionals in the dispensing of their day-to-day activities.

**CS MAKARAND LELE  
PRESIDENT**

**August 24, 2018**

**The Institute of Company Secretaries of India**



## **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 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 land mark 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 ever since this new Insolvency and Bankruptcy law regime has been introduced in India. Besides, a number of landmark judgments pronounced by National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT) and Supreme Court have contributed towards development of jurisprudence on the subject.

First edition of this publication *Practical aspects of Insolvency Law* was very well received and on popular demand ICSI Institute of Insolvency Professionals (ICSI IIP) came out with an updated second edition covering nuances of resolution process, including the procedural and drafting aspects of it.

The Second edition contained formats of minutes/agenda for the meeting of Committee of Creditors, Model Information Memorandum, Model Resolution Plan, format of Expression of Interest etc. which was also highly appreciated by the readers.

To cope up with the pace of changes being made in the law, ICSI IIP brought out the third edition which covered the changes introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 and the related changes in Regulations, Circulars etc.

Since the last edition, there have been further legislative, judicial and regulatory developments in the law and the law has been further strengthened. Realising crucial nature of such developments, this fourth edition is being brought before the readers wherein an attempt has been made to exhaustively cover such changes. The changes *inter alia* pertain to the passage of *Insolvency and Bankruptcy Code (Amendment) Act, 2019*, introduction of concept of *Authorisation for Assignment* for IPs, changes brought in through various circulars issued by IBBI, as well as the landmark judgement on constitutional validity of IBC amendment relating to Home buyers, application of Limitation Act to the IBC, limited application of Section 29A to MSMEs *et al.*

Having made the best of our efforts, the possibility of an error creeping in cannot be overlooked or denied, and therefore, I would encourage the readers to inform us on any such instance in the book.

**Dr. Binoy J. Kattadiyil**  
**Managing Director**

**November 05, 2019**

**ICSI Institute of Insolvency Professionals**

## **ABOUT ICSI IIP**

*ICSI Institute of Insolvency Professionals* (ICSI IIP) is a frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016 (IBC). It is a company incorporated under section 8 of the Companies Act, 2013 and is a wholly owned subsidiary of the *Institute of Company Secretaries of India*. As a Regulator (under the IBC), ICSI IIP has been vested with different key responsibilities, *inter alia* including, enrolling, educating, training as well as monitoring the functioning of its professional members, laying down standards of professional conduct as well as taking disciplinary measures (as per the law) in respect of defaulting members. ICSI IIP has about 900 registered members (IPs) belonging to a very wide spectrum of professionals, like Company Secretaries, Management Professionals, Advocates, Cost Accountants and Chartered Accountants. The Governing Board of ICSI IIP consists of eminent personalities who are acting as Independent Directors and Nominee Directors of ICSI IIP.

Since its inception, ICSI IIP has carried out a number of activities as a part and in discharge of its mandate as an Insolvency Professional Agency (IPA). Such activities *inter alia* include, bringing out important publications like *Practical Aspects of Insolvency Law*, *Interim Resolution Professional – A Handbook*, *Pronouncements under the Insolvency and Bankruptcy, 2016: Issue Analysis, Judicial/Regulatory Ruling for Stakeholders – A Handbook*, *Voluntary Liquidation : A Hand book*, Organising and carrying out intensive training programmes for IPs, holding interactive sessions with different stakeholders, conducting webinars on important subjects under IBC with specific focus on practical challenges faced by the Insolvency Professionals. The activities are motivated to contribute towards Education, Training and Development of

Insolvency Professionals. ICSI IIP is also the first organisation to have come up with a *monthly journal* (ICSI IIP's Insolvency and Bankruptcy Journal) dedicated exclusively to the Insolvency and Bankruptcy Law in India (and also other relevant jurisdictions). ICSI IIP has also been issuing *Daily Learning Curves* and *Knowledge Reponere* which have been designed to keep the Insolvency Professionals abreast of legislative, judicial and regulatory developments under IBC.

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***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. 1<sup>st</sup> 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 18<sup>th</sup> 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),”

In relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

## **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 paid 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;

For the purpose of this sub-clause,

- (i) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) The expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act , 2016.
- (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 payment 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.

Home Buyers are not “Operational Creditors”: Prior to the insertion of explanation to section 5(8)(f) vide 2018 Amendment Act (effective from 6th June, 2018), in the case of Col. Vinod Awasthy v. AMR Infrastructure Limited,<sup>1</sup> Hon’ble Appellate Tribunal (NCLAT) had clarified that Home Buyers would not fall within the definition of “operational creditors” as defined under s. 5(20), IBC.<sup>2</sup> It was observed that “...given the time line in the Code it is not possible to construe section 9 read with section 5(20) & (21) of the Code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company...”

In **Nikhil Mehta & Sons vs. AMR Infrastructure Ltd.** [SEE ANNEXURE TO CHAPTER XI], 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’.

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1. 2017 Indlaw NCLT 101.

2. SajiveKanwar v. AMR Infrastructure; Pawan Dubey &Anr. v. J.B.K. Developers Pvt. Ltd.

**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.

**Amendment to IBBI (CIRP) Regulations:** The IBBI, in exercise of its power available u/s 240, IBC, amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and inserted Regulation 9-A whereby it introduced Form-F, whereunder, the claimants not covered by Forms B, C, D or E could file their claims against the CD before the IRP. The step was intended to specifically remedy the grievances of home-buyers making their claims admissible before the IRP. However, the remedy thus provided was not considered as sufficient to address the grievances of Home Buyers since they could not file application under either s. 7 or s. 9, IBC against the Builder/Developer.

**IBC (Amendment) Act, 2018:** Bringing respite to thousands of Home-Buyers, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated on June 6, 2018, whereby the Home-Buyers were recognised as “financial creditors” providing them with all rights of Financial Creditors under the Code qua the real estate developers, including, right to file petition u/s 7, IBC against the developer and due representation in the CoC. Subsequently, upon passing of IBC (Amendment) Act by the Parliament the changes introduced through the said Ordinance were made a part of the Code itself. Subsequently, there were a bunch of Writ Petitions filed before Hon’ble SC challenging the constitutional validity of the aforesaid amendment Act. The petitions, however, were dismissed by Hon’ble SC vide its judgment dt. 9th August 2019 passed in the matter of Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors. inter alia holding that the objects of the Code are sub-served by treating allottees as “Financial Creditors”.

#### I. RESOLUTION APPLICANT

**Section 5(25)** “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.*

J. **“RESOLUTION PLAN”**

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

## **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 registration 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 or regulation 9, as the case may be;
- (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 Limited Insolvency Examination within twelve months before the date of his application for enrolment with the insolvency professional agency;
- (b) has completed a pre-registration educational course , as may be required by the Board, from an insolvency professional agency after his enrolment as a professional member; and
- (c) has-
  - (i) Successfully completed the National Insolvency Programme, as may be approved by the Board;
  - (ii) successfully completed the Graduate Insolvency Programme, as may be approved by the Board;

- (iii) fifteen years' of experience in management, after receiving a Bachelor's degree from a university established or recognised by law; or
- (iv) Ten years' of experience as –
  - (a) Chartered Accountant registered as a member of the Institute of Chartered Accountants of India,
  - (b) Company Secretary registered as a member of the Institute of Company Secretaries of India,
  - (c) Cost Accountant registered as a member of the Institute of Cost Accountants of India,
  - (d) Advocate enrolled with a Bar Council.

### **INSOLVENCY PROFESSIONALS TO HOLD VALID AUTHORISATION FOR ASSIGNMENT (“AFA”) BEFORE TAKING UP ANY ASIGNMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016**

This concept of authorisation for assignment was introduced on 23<sup>rd</sup> July, 2019 via amendments to

- (a) Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (**“IP regulations”**)
- (b) Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (**Model Bye Laws and GB of IPA Regulations**).

The salient amendments effected by the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2019 in relation to AFA include:

- (a) An insolvency professional shall not accept or undertake any assignment as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Insolvency and bankruptcy Code, 2016 unless he holds an ‘Authorisation for Assignment’ issued by his Insolvency Professional Agency.
- (b) An insolvency professional shall not engage in any employment when he holds an Authorisation for Assignment or when he is undertaking an assignment.

This is effective from 1st January, 2020

As per the amended Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2019 an insolvency professional shall be eligible to obtain an Authorisation of Assignment if he has not attained the age of seventy years.

### **The Definitions**

Clause 4(1) of the Model Bye-Laws of an Insolvency Professional Agency in terms of Regulation 3 read with Regulation 2(1)(c) of the Model Bye Laws and GB of IPA Regulations and Regulation 2 of IP regulations state that:

- (a) “assignment” means any assignment of an insolvency professional as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Code;
- (aa) “Authorisation for assignment” means an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws;

### **Applicability of Authorisation for Assignment**

As per Regulation 7A of IP Regulations, an insolvency professional shall not accept or undertake an assignment after 31<sup>st</sup> December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

- (a) 31st December, 2019; or
- (b) the date of expiry of his authorisation for assignment.

### **Procedure for obtaining authorisation for assignment**

Regulation 12A of Model Bye Laws and GB of IPA Regulations states the procedure for obtaining the authorisation for assignment which is summarised as follows:

#### **1. Application for authorisation/its renewal**

A professional member shall apply to Insolvency Professional Agency for obtaining the Authorisation for Assignment in such form, manner and with such fee, as may be provided by the Agency.

[Professional members are to apply for Authorisation for assignment through IP login at IBBI portal in Form \_\_\_. The Authorisation for assignment is to be provided by IPAs only, IBBI portal is just being used as a common platform/database of all the information]

Provided that an application for renewal of an authorisation for assignment shall be made any time before the date of expiry of the authorisation, but not earlier than forty-five days before the date of expiry of the authorisation.

## 2. **Eligibility**

A professional member shall be eligible to obtain an authorisation for assignment, if he-

- a) is registered with the Board as an insolvency professional;
- b) is a fit and proper person in terms of the Explanation to clause (g) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

Explanation to clause (g) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 reads as under:

*Explanation: For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-*

- (i) *integrity, reputation and character,*
- (ii) *absence of convictions and restraint orders, and*
- (iii) *competence, including financial solvency and net worth.*
- c) is not in employment;
- d) is not debarred by any direction or order of the Agency or the Board;
- e) has not attained the age of seventy years;
- f) has no disciplinary proceeding pending against him before the Agency or the Board;
- g) complies with requirements, as on the date of application, with respect to
  - (i) payment of fee to the Agency and the Board;

- (ii) filings and disclosures to the Agency and the Board;
- (iii) continuous professional education\*; and
- (iv) other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.

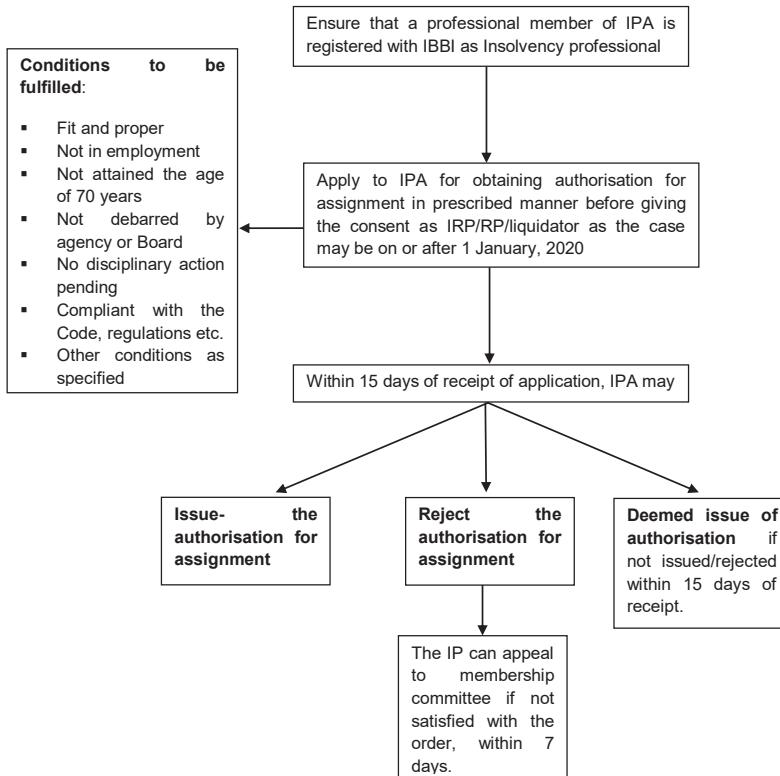
\*The professional members are to comply with guidelines on Continuing Professional Education issued by IBBI on 6<sup>th</sup> August, 2019, which is effective from 1<sup>st</sup> January, 2020, which means for taking up authorisation for assignment for the first year, CPE guidelines will not be applicable.

3. If all the above mentioned conditions are fulfilled, agency will issue or renew, as the case may be, an authorisation for assignment to the professional member in Form B. (Enclosed as Annexure-2.1). Otherwise, the agency has to reject the application with a reasoned order.

If the authorisation for assignment is not issued, renewed or rejected by the Agency within fifteen days of the date of receipt of application, the authorisation shall be deemed to have been issued or renewed, as the case may be, by the Agency.

An applicant aggrieved of an order of rejection of his application by the Agency may appeal to the Membership Committee within seven days from the date of receipt of the order.

The Membership Committee shall pass an order disposing of the appeal by a reasoned order, within fifteen days of the date of receipt of the appeal.

**A Flow chart is enclosed before for easy reference:****OTHER IMPORTANT POINTS WITH REGARD TO AUTHORISATION FOR ASSIGNMENT**

- The authorisation for assignment shall stand suspended upon initiation of disciplinary proceedings by the Agency or by the Board, as the case may be in pursuance of regulation 23A of the Model Bye-Laws of an Insolvency Professional Agency in terms of Regulation 3 read with Regulation 2(1)(c) of the Model Bye Laws and GB of IPA Regulations.
- The Authorisation for Assignment concept has substituted temporary surrender of professional membership. The Regulation 10(1) of IP regulations and Regulation 26 of Model Bye Laws and GB of IPA Regulations relating to temporary surrender of professional membership has been substituted by surrender of Authorisation for Assignment.

This means that from January, 2020, there will no temporary

surrenders; the IPs who do not have any assignments and who wish to take up employment can do so without surrendering the professional membership. They just will not apply for Authorisation for Assignment.

Further, if someone has already taken the authorisation for assignment and wishes to surrender it, he can apply to the Insolvency professional agency in accordance with regulation 26 of schedule to Model Bye Laws and GB of IPA Regulations in a form (as specified by the agency) atleast 30 days before

- He becomes person resident outside India;
- Takes up any employment ;or
- starts any business, except as specifically permitted under the Code of Conduct

No surrender of Authorisation for assignment will be accepted, if it has been suspended, an assignment is continuing or name of the professional member is included in any panel prepared by the Board for undertaking assignment.

The concept of permanent surrender of professional membership is still persistent.

- The details of issue, renewal, suspension, revocation of suspension, cancellation and acceptance of surrender of authorisation for assignment and authorisation number will be maintained by the IPAs in the register of members in pursuance of clause 12 of the Model Bye-Laws of an Insolvency Professional Agency in terms of Regulation 3 read with Regulation 2(1)(c) of the Model Bye Laws and GB of IPA Regulations.

### **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.

As per Regulation 7(2) of IBBI (Insolvency Professionals) Regulations, 2016, the registration of insolvency professional shall be subject to following conditions:

- a) at all times abide by the Code, rules, regulations, and guidelines there under and the bye-laws of the insolvency professional agency with which he is enrolled;
- b) at all times continue to satisfy the requirements under Regulation 4;
- ba) undergo continuing professional education, as may be required by the Board;
- bb) not outsource any of his duties and responsibilities under the Code, except those specifically permitted by the Board.]
- c) pay to the Board, a fee of ten thousand rupees, every five years after the year in which the certificate is granted and such fee shall be paid on or before the 30th April of the year it falls due;
- ca) pay to the Board, a fee calculated at the rate of 0.25 percent of the professional fee earned for the services rendered by him as an insolvency professional in the preceding financial year, on or before the 30th of April every year, along with a statement in Form E of the Second Schedule;]
- d) not render services as an insolvency professional unless he becomes a partner or director of an insolvency professional entity recognised by the Board under Regulation 13, if he is not a citizen of India;
- e) take prior permission of the Board for shifting his professional membership from one insolvency professional agency to another, after receiving no objection from both the concerned insolvency professional agencies;

- f) take adequate steps for redressal of grievances;
- g) maintain records of all assignments undertaken by him under the Code for at least three years from the completion of such assignment;
- h) abide by the Code of Conduct specified in the First Schedule to these Regulations; (enclosed as **Annexure- III.1**) and
- i) abide by such other conditions as may be imposed by the Board.

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:

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

Circular No. IP/005/2018 dated 16<sup>th</sup> 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.2.**

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

Circular No. IP/004/2018 dated 16<sup>th</sup> 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.3.**

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

Circular No. IP/002/2018 dated 3<sup>rd</sup> 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.4.**

**(IV) Insolvency Professional not to outsource his responsibilities**

This Circular No. IP/003/2018 dated 3<sup>rd</sup> 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.5.**

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

This Circular No. IP/001/2018 dated 3<sup>rd</sup> 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.6.**

**(VI) Insolvency professional to maintain confidentiality relating to Processes under the Insolvency and Bankruptcy Code**

The Circular No. IP(CIRP)/007/2018 dated 23<sup>rd</sup> Feb 2018 provides that an Insolvency professional must ensure confidentiality of the information relating to the processes is maintained at all times. Though he can disclose the information with the consent of the relevant parties or when it is required by law. The circular is annexed as **Annexure III.7.**

**(VII) Professional members to undergo pre-registration educational course from an Insolvency Professional Agency**

The Circular No. IPA/011/2018 dated 23<sup>rd</sup> April 2018 provides that every professional member will be eligible to be registered as an Insolvency Professional after completing a pre-registration educational course covering various topics in a total of 50 hours from an Insolvency Professional Agency. The circular is annexed as **Annexure III.8.**

**(VIII) Commencement of Disciplinary Proceeding against Insolvency Professional**

The Circular No. LA/010/2018 dated 23<sup>rd</sup> April 2018 provides that an Insolvency Professional may be appointed as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee if no disciplinary proceeding is pending against him. A disciplinary proceeding is considered pending against an insolvency professional from the time he has been issued a show cause notice by Insolvency and Bankruptcy Board of India till its disposal by the disciplinary committee ; and

An insolvency professional who has been issued a show cause notice shall not accept any fresh assignment under the Code. The circular is annexed as **Annexure III.9.**

**(IX) Insolvency Professional needs to disclose the fees and other expenses incurred for Corporate Insolvency Resolution Process**

The Circular No. IBB/I/P/013/2018 dated 12<sup>th</sup> June, 2018 provides that an Insolvency Professional needs to be compensated for his professional services along with he needs to pay fee or incur other

expenses for conducting the CIRP and managing the operation of the corporate debtor as a going concern. Further, IP needs to disclose the fees charged and other expenses expenses during the CIRP to Insolvency Professional Agencies within specified time. The circular is annexed as **Annexure III.10.**

**(X) Insolvency Professional Entities shall provide their services only to the Insolvency professionals who are its partners or directors**

The Circular No. IBBI/IPE/014/2018 dated 6<sup>th</sup> July, 2018 provides that the sole objective of an Insolvency Professional Entity is to provide support services to the insolvency professionals, who are its partners or directors. Thus an IPE cannot provide any service to any person. Further IPEs are directed to refrain from seeking empanelment with or joining any panel of any market participant. The circular is annexed as **Annexure III.11.**

**(XI) Interim Resolution Professional to offer a choice to the class of Creditors to appoint Authorised Representative**

The Circular No. IBBI/CIRP/015/2018 dated 13<sup>th</sup> July, 2018 provides that where the corporate debtor has at least ten financial creditors in a class, the IRP shall offer a choice of three insolvency professionals and a creditor in the class may chose one amongst the three, to act as its authorised representative. The Insolvency professional, who is chosen by maximum number of creditors in the class, is appointed as the authorised representative of the creditors of the respective class subject to the approval of Adjudicating Authority. The authorised representative collects voting instructions, attends the meetings of the committee of creditors (CoC) and casts vote. The circular is annexed as **Annexure III.12.**

**(XII) Interim Resolution Professional shall direct the Financial Creditors to be represented by competent persons who can take on the spot decisions.**

The Circular No. IBBI/CIRP/016/2018 dated 10<sup>th</sup> August, 2018 provides that the Interim Resolution/Resolution professional as the case may be, shall in every notice of CoC and other communications addressed to Financial Creditors (except creditors under section 21(6A)(B) of the Code) mention that the representatives in CoC shall be such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors. The circular is annexed as **Annexure III.13.**

**(XIII) Insolvency professionals shall appoint only registered valuers during corporate insolvency resolution process**

The circular No. IBBI/RV/019/2018 dated 17th October, 2018 provides that every valuation required under the Code is required to be conducted by a ‘registered Valuer’, that is, a Valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017.

It was further directed that w.e.f 1st February, 2019, no IP shall appoint a person other than a registered Valuer to conduct any valuation under the Code or any of the regulations made thereunder. The circular is annexed as **Annexure. III.14.**

**(XIV) Compliance with regulations 7 (2) (ca) and 13 (2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.**

The Circular No. IBBI/CIRP/020/2019 dated 12th April, 2019 provides that all Insolvency Professionals should comply with Regulation 7 (2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) that specify the requirement and manner of payment of fees by an Insolvency Professional (IP) to the Insolvency and Bankruptcy Board of India (Board). The circular is annexed as **Annexure III.15.**

**(XV) Temporary Surrender and Revival of Professional Membership of an Insolvency Professional.**

The Circular No. IBBI/IP/021/2019 dated 2nd May, 2019 provides for Regulation 10 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clause 26 of the Schedule to the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws Regulations) provide for temporary surrender and revival of professional membership by an Insolvency Professional (IP). The Circular advised that the Insolvency Professional Agency (IPA) shall not ordinarily accept temporary surrender of professional membership of an IP in cases under Para 2 of the Circular. The Circular is annexed as **Annexure III.16.**

**(XVI) Repercussions on Insolvency Professionals on non appointment of registered valuers**

The circular No. IBBI/RV/022/2019 dated 13th August, 2019 provides the repercussions of non appointment of registered valuers i.e.

1. Appointment of any person, other than a 'registered valuer', that is, a valuer registered with the IBBI on or after 1st February, 2019, to conduct any valuation is illegal and amounts to violation of the 17th October circular.
2. Payment, whether as fee or otherwise, to any person, other than a 'registered valuer' shall not form part of the insolvency resolution process costs or liquidation cost.

The circular is annexed as **Annexure III.17**.

**(XVI) Filing of Forms for the purpose of monitoring corporate insolvency resolution processes and performance of insolvency professionals under the Insolvency and Bankruptcy Code, 2016 and the regulations made thereunder.**

The circular No. IBBI/CIRP/023/2019 dated 14th August, 2019 provides that IBBI in pursuance of Section 208(2)(d) and Section 31(3)(b) devised a set of forms to facilitate submission of records and information by IPs to the IBBI as well as for monitoring of the processes and performance of IPs.

Seven forms have been devised by IBBI which were required to be submitted by IPs as follows:

- the Forms along with relevant information and records, which have become due on or before 15th September, 2019 by 30th September, 2019 (the date was further extended till 15th October)
- the Forms along with relevant information and records, which will become due on or after 16th September, 2019 in respect of CIRPs conducted by him, by the timelines as specified in the circular.

The circular is annexed as **Annexure III.18**.

**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****CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS****Integrity and objectivity**

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.
2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.
3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.
- 3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.
4. An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not himself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

**Independence and impartiality**

5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
6. In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.
7. An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner

or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

8. An insolvency professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.
- 8A. An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.
9. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

#### **Professional competence**

10. An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

#### **Representation of correct facts and correcting misapprehensions**

11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.
12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

#### **Timeliness**

13. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly

communicate with all stakeholders involved for the timely discharge of his duties.

14. An insolvency professional must not act with mala fide or be negligent while performing his functions and duties under the Code.

### **Information management**

15. An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.
16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.
17. An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.
18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorized by the Board or the insolvency professional agency with which he is enrolled.
19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.
20. An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

### **Confidentiality**

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

**Occupation, employability and restrictions**

22. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.
23. An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.
- 23A. Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.
- 23B. An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.
- 23C. An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

*Explanation.-* For the purpose of clauses 23A to 23C, “related party” shall have the same meaning as assigned to it in clause (24A) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.

24. An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

**Remuneration and costs**

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.
- 25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional

- agency of which he is a professional member and the agency shall publish such disclosure on its website.
26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.
  27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

### **Gifts and hospitality**

28. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.
29. An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

**Annexure III.2**

**Insolvency and Bankruptcy Board of India**

7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

**CIRCULAR**

No. IP/005/2018

16<sup>th</sup> 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:

<b>Relationship of the Insolvency Professional with</b>	<b>Disclosure to be made within three days of</b>
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 :

<b>Relationship of the other Professional(s) with</b>	<b>Disclosure to be made within three days of</b>
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:

<b>Kind of Relationship</b>	<b>Nature of Relationship</b>
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.
D	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 31<sup>st</sup> 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](mailto: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						
<b>Any other Professional (Write kind of Profession)</b>			<b>NA</b>						

**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.3**

**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](mailto: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/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](mailto: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/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](mailto:sreekararao@ibbi.gov.in)

**Annexure III.6**

**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: sreekararaao@ibbi.gov.in

**Annexure III.7**

**Insolvency and Bankruptcy Board of India**

7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

**CIRCULAR**

No. IP(CIRP)/007/2018

23<sup>rd</sup> February, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Subject: Confidentiality of Information relating to Processes under the Insolvency and Bankruptcy Code, 2016**

Attention is drawn to provisions of clause 21 of the Code of Conduct appended to the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The said clause reads as under:

***“21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.”.***

2. Besides, there are specific provisions for keeping the information confidential or for providing information to stakeholders under confidentiality agreement. For example, section 29 (2) of the Insolvency and Bankruptcy Code, 2016 (Code) reads as under:

***“(2) The resolution professional 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.”.***

3. The disclosure of information, except as provided for in the Code, or rules, regulations or circulars issued thereunder, is restricted. Unauthorised access to or leakage of such information has the potential to impact the processes under the Code. An Insolvency Professional, whether acting as Interim Resolution Professional, Resolution Professional or Liquidator, except to the extent provided in the Code and rules, regulations or circulars issued thereunder, -

- (i) shall keep every information related to confidential; and
- (ii) shall not disclose or provide access to any information to any unauthorised person.

Yours faithfully,

-Sd -

(Dilip Arjun Khandale)  
Deputy General Manager  
Email: [dilip.khandale@ibbi.gov.in](mailto:dilip.khandale@ibbi.gov.in)

**Annexure III.8****Insolvency and Bankruptcy Board of India**7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

Circular No. IPA/011/2018

23<sup>rd</sup> April, 2018

To

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Subject: Pre-registration educational course under regulation 5(b) of the IBBI (Insolvency Professionals) Regulations, 2016**

In terms of the IBBI (Insolvency Professionals) Regulations, 2016, an individual is eligible for registration as an insolvency professional, subject to meeting other requirements, if he has completed a pre-registration educational course, as may be required by the Board, from an insolvency professional agency (IPA) after his enrolment as a professional member.

2. In consultation with IPAs, the IBBI hereby specifies the details of pre-registration educational course to be conducted by them as under:

<b>Sl. No</b>	<b>Coverage</b>	<b>Time (Hours)</b>
1	<p>Insolvency and Bankruptcy Reforms</p> <ul style="list-style-type: none"> <li>• Report of the Bankruptcy Law Reforms Committee</li> <li>• Report of the Joint Committee of the Parliament</li> <li>• Report of the Insolvency Law Committee</li> <li>• Legislative Guide on Insolvency Law of UNCITRAL</li> </ul>	2
2	<p>Drafting and Filing of Applications for initiation of CIRP on behalf of :</p> <ul style="list-style-type: none"> <li>• Financial Creditor</li> <li>• Operational Creditor</li> <li>• Corporate Debtor</li> <li>• Drafting and Filing of other Miscellaneous Applications Case Laws relating to Admission for CIRP</li> </ul>	2

3	Familiarisation with Forms and Formats under: <ul style="list-style-type: none"> <li>• Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016</li> <li>• IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016</li> <li>• IBBI (Liquidation Process) Regulations, 2016</li> <li>• IBBI (Voluntary Liquidation) Regulations, 2017</li> <li>• IBBI (Inspection and Investigation) Regulations, 2017</li> <li>• IBBI (Grievances and Complaint Handling Procedure) Regulations, 2017</li> </ul>	2
4	Taking over the Corporate Debtor as IRP / RP <ul style="list-style-type: none"> <li>• Finance</li> <li>• Labour</li> <li>• Security</li> <li>• Essential Services</li> <li>• Litigations</li> </ul>	2
5	Managing the Corporate Debtor <ul style="list-style-type: none"> <li>• Going Concern as IRP / RP</li> <li>• Interim Finance</li> <li>• Statutory Compliances</li> </ul>	3
6	Claims with Examples <ul style="list-style-type: none"> <li>• Verification</li> <li>• Rejection</li> <li>• Disputed Claims</li> <li>• Contingent Claims</li> <li>• Appeals</li> <li>• Constitution of CoC</li> </ul>	2

7	Conduct the first meeting of the CoC and Subsequent Meetings <ul style="list-style-type: none"> <li>• Notices</li> <li>• Invitation</li> <li>• Agenda</li> <li>• Meeting &amp; Video Meeting</li> <li>• Voting &amp; E-Voting</li> <li>• Minutes</li> </ul>	3
8	Appearance before Adjudicating/Appellate Authority	2
9	Witness the Proceedings before <ul style="list-style-type: none"> <li>• NCLT</li> <li>• NCLAT</li> </ul>	4
10	Detection and Filing for <ul style="list-style-type: none"> <li>• Preferential Transactions</li> <li>• Undervalued Transactions</li> <li>• Fraudulent Transactions</li> <li>• Extortionate Credit Transactions</li> <li>• Forensic Audit</li> </ul>	2
11	Moratorium <ul style="list-style-type: none"> <li>• Essential Services</li> <li>• Proceeding against Guarantor</li> <li>• Assets of Guarantor to Corporate Debtor</li> <li>• Case Laws</li> </ul>	1
12	Fees and Expenses <ul style="list-style-type: none"> <li>• Fee as IRP / RP</li> <li>• Insurance</li> <li>• Valuers and Other Professionals</li> <li>• Other Expenses</li> </ul>	2

13	Information Memorandum <ul style="list-style-type: none"> <li>• Preparation</li> <li>• Modification</li> <li>• Circulation</li> <li>• Access</li> </ul>	2
14	Invitation of Resolution Plans <ul style="list-style-type: none"> <li>• EoI</li> <li>• RFP</li> <li>• Data Room</li> <li>• Evaluation Matrix</li> </ul>	3
15	Eligibility for Resolution Applicants <ul style="list-style-type: none"> <li>• Commercial</li> <li>• Antecedents</li> <li>• Section 29A</li> </ul>	3
16	Resolution Plan <ul style="list-style-type: none"> <li>• Mandatory Content</li> <li>• Contravention of Other Laws</li> <li>• Dues of Stakeholders</li> <li>• Case Laws</li> <li>• Approval by CoC</li> <li>• Filing before Adjudicating Authority</li> <li>• Managing Corporate Debtor Post Approval of Plan</li> </ul>	3
17	Liquidation Process <ul style="list-style-type: none"> <li>• Initiation of Liquidation</li> <li>• Powers and Duties of Liquidator</li> <li>• Preparation of Liquidation Estate</li> <li>• Manner and Mode of Sale of Assets</li> <li>• Waterfall on Distribution of Assets</li> <li>• Dissolution of Corporate Debtor</li> </ul>	4

18	Disciplinary Aspects <ul style="list-style-type: none"><li>• IBBI (Inspection and Investigation) Regulations, 2017</li><li>• IBBI (Grievances and Complaint Handling Procedure) Regulations, 2017</li><li>• IBBI (Insolvency Professionals) Regulations, 2016</li></ul>	2
19	Governance <ul style="list-style-type: none"><li>• Code of Conduct</li><li>• Ethics</li><li>• Professional Standards</li><li>• Conflict Management</li><li>• Anti-Bribery and Anti-Corruption policies</li><li>• Disclosures</li></ul>	3
20	Management <ul style="list-style-type: none"><li>• Leadership</li><li>• Communication</li><li>• Negotiation</li><li>• Personality</li></ul>	3
	Total	50

3. The pre-registration educational course shall be delivered by the IPAs in not less than 50 hours either in class room sessions or in MOOCS environment. The participants must have opportunity to do the tasks themselves in a near-real environment with practical examples.
4. This pre-registration educational course will be reviewed on 31<sup>st</sup> March, 2019.
5. This circular is issued in exercise of powers under section 196 of the Insolvency and Bankruptcy Code, 2016 read with regulation 5(b) of the IBBI (Insolvency Professionals) Regulations, 2016.

Yours faithfully,  
 (Debjyoti Ray Chaudhuri)  
 Chief General Manager  
 Email: [dr.chaudhuri@ibbi.gov.in](mailto:dr.chaudhuri@ibbi.gov.in)

**Annexure III.9**

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

**CIRCULAR**

No: LA/010/2018

23rd April, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Commencement of Disciplinary Proceeding**

The Insolvency and Bankruptcy Code, 2016 (Code) envisages that an insolvency professional may be appointed as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee if no disciplinary proceeding is pending against him. Some of these provisions are extracted at Annexure A.

2. The Code, however, does not define 'disciplinary proceeding'. Section 219 envisages issue of show cause notice following an inspection or investigation and section 220 envisages constitution of a disciplinary committee for consideration of the inspection or investigation report. Various regulations made under the Code envisage issue of show cause notice based on findings of an inspection or investigation or on material otherwise available on record. They also envisage constitution of disciplinary committee for disposal of show cause notice.

3. A show cause notice is issued after application of mind to the material available on record or on consideration of the inspection or investigation report. The disciplinary committee disposes of the show cause notice by a reasoned order in adherence to principles of natural justice. The reasoned order carries the determination of contravention, if any, of the provisions of the Code, the rules and regulations, or guidelines, directions or orders issued by the Insolvency and Bankruptcy Board of India. Thus, a disciplinary proceeding commences with the issue of show cause notice and concludes with the disposal of show cause notice by a reasoned order.

4. It is, therefore, clarified that-

- (i) a disciplinary proceeding is considered as pending against an insolvency professional from the time he has been issued a show cause notice by the Insolvency and Bankruptcy Board of India till its disposal by the disciplinary committee; and
- (ii) an insolvency professional who has been issued a show cause notice shall not accept any fresh assignment as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee under the Code.

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

Yours faithfully,

-Sd-  
(K. R. Saji Kumar)  
Executive Director  
Email: krs.kumar@nic.in

#### **Annexure A**

#### **Disciplinary Proceedings against Insolvency Professionals**

**Section 7(5):** Where the Adjudicating Authority is satisfied that—

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

Provided that .....

**Section 9(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 .....

**Section 16(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.**

**Section 16(3):** Where the application for corporate insolvency resolution process is made by an operational creditor and—

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

**Section 16(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.**

**Section 27(5): Where any disciplinary proceedings are pending against the proposed resolution professional** under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

**Section 82(1):** Where an application under section 80 is filed by the debtor through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of receipt of the application and shall seek confirmation from the Board that **there are no disciplinary proceedings against the resolution professional** who has submitted such application.

**Section 89(3):** The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (2), recommend the name of an insolvency professional to the Adjudicating Authority **against whom no disciplinary proceedings are pending.**

**Section 97(1):** If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that **there are no disciplinary proceedings pending against resolution professional.**

**Section 98(3):** The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (2), recommend the name of the resolution professional to the Adjudicating Authority **against whom no disciplinary proceedings are pending.**

**Section 98(5):** Where the Adjudicating Authority admits an application made under sub-section (1) or sub-section (4), it shall direct the Board to confirm that **there are no disciplinary proceedings pending against the proposed resolution professional.**

**Section 125(1):** If an insolvency professional is proposed as the bankruptcy trustee in the application for bankruptcy under section 122 or section 123, the Adjudicating Authority shall direct the Board within seven days of receiving the application for bankruptcy to confirm that **there are no disciplinary proceedings pending against such professional.**

**Section 145(5):** The Board shall, within ten days of the direction of the Adjudicating Authority under sub-section (4), recommend a bankruptcy trustee for replacement **against whom no disciplinary proceedings are pending.**

**Annexure III.10**

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

**CIRCULAR**

No. IBBI/IP/013/2018

12th June, 2018

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Fee and other Expenses incurred for Corporate Insolvency Resolution Process**

When a corporate debtor undergoes corporate insolvency resolution process (CIRP), an Insolvency Professional (IP) is vested with the management of its affairs and he manages its operations as a going concern. He complies with the applicable laws on behalf of the corporate debtor. He conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. He needs to be compensated for his professional services commensurate to his ability, duties and responsibilities. He also needs to pay fee or incur other expenses for various goods and services required for conducting the CIRP and or managing the operations of the corporate debtor as a going concern.

2. The relevant provisions of the Insolvency and Bankruptcy Code, 2016 (Code) and regulations made thereunder having a bearing on fee and other expenses of CIRP are at **Annexure A**.

3. An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition. An illustrative list of factors considered in determination of what is reasonable is given in **Annexure B**.

4. Para 16 of the Code of Conduct for IPs in the Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

5. The IBBI had put out a discussion paper titled “Regulation of fee payable to insolvency professionals and other process costs under Corporate Insolvency Resolution Process” on its web site on 1st April, 2018 seeking comments thereon. The comments received from stakeholders have been considered in consultation with the Insolvency Professional Agencies.

6. Keeping the above in view, the IP is directed to ensure that:-

- (a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;
- (b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;
- (c) the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;
- (d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;
- (e) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;
- (f) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and
- (g) all CIRP related fee and other expenses are paid through banking channel.

7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-

- (a) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;
- (b) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and
- (c) only the IRPC, to the extent not paid during the CIRP from the internal

sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.

8. It is clarified that the IRPC shall not include:

- (a) any fee or other expense not directly related to CIRP;
- (b) any fee or other expense beyond the amount approved by CoC, where such approval is required;
- (c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;
- (d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;
- (e) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP;

**[Reference:** Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

- (f) any expense incurred by a member of CoC or a professional engaged by the CoC;
- (g) any expense incurred on travel and stay of a member of CoC; and
- (h) any expense incurred by the CoC directly;

**[Explanation:** Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]

- (i) any expense beyond the amount approved by the CoC, wherever such approval is required; and
- (j) any expense not related to CIRP.

9. Further, the IP is directed to disclose fee and other expenses in the relevant Form in **Annexure C** to the Insolvency Professional Agency of which he is a member:

- (a) for all concluded CIRPs by 15th July, 2018, and
- (b) for ongoing and subsequent CIRPs within the time as specified in the relevant Form.

10. An Insolvency Professional Agency shall -

- (a) disseminate the disclosures made by its IPs on an appropriate electronic platform within three working days of receipt of the same;
- (b) monitor disclosures made by its IPs and submit a monthly summary of non-compliance by its IPs with this circular to the IBBI by 7th of the succeeding month;
- (c) take appropriate measures to ensure compliance by its IPs.

11. This circular is issued in exercise of the powers conferred under clause (h) of sub-section (1) of section 196 read with regulation 34A of the IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in consultation with all the three registered Insolvency Professional Agencies.

Yours faithfully,

-Sd-  
(Dilip Arjun Khandale)  
Deputy General Manager  
Email: dilip.khandale@ibbi.gov.in

#### **Annexure A**

Provisions and Pronouncements having a bearing on Fee and other Expenses of CIRP

##### **I. The Insolvency and Bankruptcy Code, 2016**

Section 5(13) reads as under:

***“(13) Insolvency Resolution Process Costs” means –***

- (a) the amount of any interim finance and the costs incurred in raising such finance;*
- (b) the fees payable to any person acting as a resolution professional;*
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board;”*

Section 208(2) reads as under:

**"208. (2) Every insolvency professional shall abide by the following code of conduct: –**

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

## **II. The IBBI (Insolvency Professionals) Regulations, 2016**

Relevant Paras of the Code of Conduct under the Regulations read as under:

**"16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.**

**25. An Insolvency Professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations.**

**25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.**

**26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.**

**27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.”.**

**III. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

Chapter IX of the Regulations reads as under:

*“Chapter IX  
INSOLVENCY RESOLUTION PROCESS COSTS*

***Insolvency Resolution Process Costs***

31. “*Insolvency resolution process costs*” under Section 5(13)(e) shall mean-

- (a) *amounts due to suppliers of essential goods and services under Regulation 32;*
- (b) *amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) *expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) *expenses incurred on or by the resolution professional fixed under Regulation 34; and*
- (e) *other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

***Essential supplies.***

32. *The essential goods and services referred to in section 14(2) shall mean-*

- (1) *electricity;*
- (2) *water;*
- (3) *telecommunication services; and*
- (4) *information technology services,*

*to the extent these are not a direct input to the output produced or supplied by the corporate debtor.*

**Illustration-** Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

***Costs of the interim resolution professional.***

33. (1) *The applicant shall fix the expenses to be incurred on or by the interim resolution professional.*

(2) *The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).*

(3) *The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.*

(4) *The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.*

*Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.*

#### ***Resolution professional costs.***

34. *The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.*

*Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.*

#### ***Disclosure of Costs.***

34 A. *The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board.”*

### **IV. Circulars Issued by the IBBI**

The circular No. IP/004/2018 dated 16th January, 2018 provides as under:

“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.”*

*What is Reasonable ‘Cost’ and Reasonable ‘Fee’*

**Annexure B**

I. As regards reasonable costs, the Society for Insolvency Practitioners of India, in its statement of best practices on “PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS” observes:

*“Insolvency professionals must ensure that the costs incurred are reasonable. To determine the reasonability of these costs, they should consider if the costs are-*

- (a) *directly related to the insolvency resolution process,*
- (b) *necessary for meeting the objectives of the insolvency resolution process, and the Code,*
- (c) *proportional to the work required to be done and the assets of the corporate debtor, and*
- (d) *determined on an arms’ length basis, in consonance with the requirements of integrity and independence.”*

[[http://www.insolindia.com/uploads\\_insol/draft\\_best\\_practices/files/-1013.pdf](http://www.insolindia.com/uploads_insol/draft_best_practices/files/-1013.pdf)]

II. As regards reasonable fee, the Society for Insolvency Practitioners of India, in its statement of best practices on “PAYMENT OF FEE AND REIMBURSEMENT OF OUT-OF-POCKET EXPENSES” suggests:

***“Factors to be considered while charging fee***

- (i) *An insolvency professional may charge a fixed or variable fee to reasonably remunerate him/her for the work that he/she necessarily and properly undertakes for an appointment under the Code. In determining what is necessary and proper, the insolvency professional should consider if the work is-*
  - (a) *directly related to the insolvency resolution process,*
  - (b) *in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement, and*
  - (c) *in consonance with his/her duties under the Code and the Regulations thereunder.*
- (ii) *An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:*

- (a) *time based charging,*
- (b) *prospective fee (up to a cap),*
- (c) *fixed fee,*
- (d) *percentage based charging,*
- (e) *success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.*

*Illustration: X is appointed as an IRP. She can charge a cumulative of fixed fee to suspend the board of directors and have the public announcement made, fee per hour spent on collecting and verifying claims, and a fee based on the percentage of assets handled for running the business as a going concern.*

- (iii) *An insolvency professional should consider the following factors while determining the quantum of fee to charged:*
  - (a) *value and nature of the assets dealt with,*
  - (b) *time properly given by the insolvency professional and her staff in attending to the affairs of the debtor,*
  - (c) *the complexity of the case,*
  - (d) *exceptional responsibility falling on the insolvency professional,*
  - (e) *the effectiveness with which the insolvency professional carries out her duties.*

*Illustration: X, an insolvency professional, may choose to charge higher fee if-*

- (a) *the properties of the corporate debtor are in multiple locations all over the country (nature of property),*
- (b) *key trade suppliers are also unpaid creditors and thus hostile (complexity of the case), or*
- (c) *if the existing management is not capable which requires him to expend unusual effort to run the business as a going concern (exceptional responsibility).*
- (iv) *An insolvency professional should not increase the fee charged without the prior approval of the authority fixing his/her fee." [http://www.insolindia.com/uploads\_insol/draft\_best\_practices/files/-1008.pdf]*

III. Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct, which sets forth eight factors to determine what is reasonable fee in the context of lawyers, reads as under:

*"Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:*

- (1) *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- (2) *the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
- (3) *the fee customarily charged in the locality for similar legal services;*
- (4) *the amount involved and the results obtained;*
- (5) *the time limitations imposed by the client or by the circumstances;*
- (6) *the nature and length of the professional relationship with the client;*
- (7) *the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
- (8) *whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered."*

[<http://www.txcourts.gov/media/1343648/tdrpc-effective-may-1-2018.pdf>]

#### **Annexure C**

#### **Cost Sheet for Insolvency Resolution of Corporate Debtor .....**

#### **Form I: Details of Corporate Debtor Undergoing Insolvency Resolution Process**

(To be submitted by the IRP within **Seven Days** of his demitting<sup>1</sup> office as IRP)

<b>Sl. No.</b>	<b>Particulars</b>	<b>Description</b>
1	Name of the Corporate Debtor	
2	CIN of the Corporate Debtor	
3	Date of Commencement of CIRP	

---

1. Demitting means leaving office either on completion of term as IRP, resignation, removal, reappointment as RP, or otherwise.

4	Assets (Rs. crore) as on the last balance sheet date (write date here)	
5	Turnover (Rs. crore) in the last financial year (write year here)	
6	No. of Workmen as on the date of commencement of CIRP	
7	No. of Employees as on the date of Commencement of CIRP	
8	Number of Claimants	
9	Total Amount of Claims (Rs. crore) Admitted on the day of demitting office as IRP	
10	Date of demitting Office by IRP	
11	Name of IRP	
12	Registration No. of IRP	
13	Name of RP	
14	Registration No. of RP	

**Form II: Insolvency Resolution Process Cost of Corporate Debtor**  
**..... for the period under IRP**

(To be submitted by the IRP within **Seven Days** of his demitting<sup>1</sup> office as IRP)

Activity	Expense Head	Expense Sub- Head	Amount of Expense (Rs.)	Amount Ratified / Approved <sup>1</sup> by CoC (Rs.)
Running Process		Fee Payable to IRP		
		Cost of Insurance for IRP		

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1. Demitting means leaving office either on completion of term as IRP, resignation, removal, reappointment as RP, or otherwise

CHAPTER III – ELIGIBILITY, QUALIFICATIONS, DUTIES & LIABILITIES OF IPs **67**

	IRP	Other Expenses on / for IRP (travel, stay, security, etc. related to CIRP)		
	IPE	Fee Payable for Support Services to an IPE, if any		
Registered Valuer		Fee Payable to Valuer 1		
		Fee Payable to Valuer 2		
		Fee Payable to Valuer 3, if any		
		Other Expenses on / for Valuers(travel, stay, other out-of-pocket expenses)		
Other Professionals engaged for CIRP, not for Corporate Debtor		Fee Payable to Accounting and Finance Professionals		
		Fee Payable to Audit Professionals		
		Fee Payable to Legal Professionals		
		Fee Payable to any other Professionals		
		Other Expenses on / for Professionals (travel, stay, other out-of-pocket expenses related to CIRP)		

	CoC Meetings	Meeting Venue		
		Video Conferencing		
		Electronic Voting		
	Any other Expenses related to CoC			
	Other Expenses	Expenses on Public Announcement		
		Expenses on CIRP related Filings before Adjudicating Authority and Other Authorities		
		CIRP related Litigation		
	Running Business	Essential Services	Electricity	
			Water	
			Telecommunication Services	
			Information Technology Services	
			Other Essential Services, if any	
	Other Services		Other Supplies	
			Employees and Workmen	
			Security Personnel Services	
			Other Expenses, if any	
	Interim Finance		Amount of Interim Finance	
			Expenses for Raising Interim Finance	
			Interest Payable on Interim Finance	
Other Expenses, if any, directly related to CIRP				

**Form III: Insolvency Resolution Process Cost of Corporate Debtor**  
**..... for the period under RP**

(To be submitted by the RP within Seven Days of his demitting<sup>1</sup> office as RP)

Date of Joining as RP: ..... Date of Demitting Office as RP: .....

<b>Activity</b>	<b>Expense Head</b>	<b>Expense Sub-Head</b>	<b>Amount of Expense (Rs.)</b>	<b>Amount Ratified / Approved<sup>2</sup> by CoC (Rs.)</b>
Running Process	RP	Fee Payable to RP		
		Cost of Insurance for RP		
		Other Expenses on / for RP(travel, stay, security, etc related to CIRP.)		
	IPE	Fee Payable for Support Services to an IPE, if any		
Registered Valuer		Fee Payable to Valuer 1		
		Fee Payable to Valuer 2		
		Fee Payable to Valuer 3, if any		
		Other Expenses on / for Valuers(travel, stay, other out-of-pocket expenses)		
Other Professionals engaged for CIRP, not for Corporate Debtor		Fee Payable to Accounting and Finance Professionals		
		Fee Payable to Audit Professionals		
		Fee Payable to Legal Professionals		
		Fee Payable to any other Professionals		
		Other Expenses on / for Professionals (travel, stay, other out-of-pocket expenses related to CIRP)		

1 Demitting means leaving office either on completion of term as RP, resignation, removal, or otherwise.

		Data Room Service		
CoC Meetings	Meeting Venue			
	Video Conferencing			
	Electronic Voting			
	Expenses for or by Authorised Representative			
	Any other Expenses related to CoC			
Examination of Transactions	Preferential Transactions			
	Under/Over-valued Transactions			
	Extortionate Transactions			
	Fraudulent Transactions			
Other Expenses	Expenses on CIRP related Filings before Adjudicating Authority and Other Authorities			
Running Business	CIRP related Litigation			
	Electricity			
	Water			
	Telecommunication Services			
	Information Technology Services			
	Other Essential Services, if any			
	Other Supplies			
	Employees and Workmen			
	Security Personnel Services			
	Other Expenses			
Interim Finance	Amount of Interim Finance			
	Expenses for Raising Interim Finance			
	Interest Payable on Interim Finance			
Other Costs / Expenses, if any, directly related to CIRP				
Amount due to Prejudicially Affected Persons				

**Annexure III.11**

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

**CIRCULAR**

No. IBBI/IPE/014/2018

6th July, 2018

To

All Recognised Insolvency Professional Entities All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Empanelment of Insolvency Professional Entities.**

An Insolvency Professional Entity (IPE) is recognised in accordance with regulation 12(1) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, only if *its sole objective is to provide support services to the insolvency professionals, who are its partners or directors, as the case may be.* Thus, an IPE cannot provide any service to any person. It can provide only support services to the insolvency professionals who are its partners or directors. Thus, the role of IPE is clearly specified.

2. Section 206 of the Insolvency and Bankruptcy Code, 2016 (Code) prohibits a person from rendering services as an insolvency professional (IP) unless he is: (a) enrolled as a member of an Insolvency Professional Agency (IPA), and (b) registered with the Insolvency and Bankruptcy Board of India (IBBI). Thus, no person other than a person registered as an IP with the IBBI can render services as an IP. An IPE is neither enrolled as a member of an IPA nor registered as an IP with the IBBI. It cannot act as IP under the Code.

3. It has been observed that a few market participants are seeking empanelment of IPEs and a few IPEs are seeking empanelment with market participants. Given the role of an IPE, the IPEs are directed to refrain from seeking empanelment with or joining any panel of any market participant.

4. This circular is issued in exercise of the powers conferred under clause (aa) of sub-section (1) of section 196 of the Insolvency and Bankruptcy

Code 2016 read with regulation 12 of the IBBI (Insolvency Professional) Regulations, 2016.

Yours faithfully,  
(Debajyoti Ray Chaudhuri)  
Chief General Manager  
Email: dr.chaudhuri@ibbi.gov.in

**Annexure III.12**

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

**CIRCULAR**

No. IBBI/CIRP/015/2018

13th July, 2018

To

All Registered Insolvency Professionals  
All Recognised Insolvency Professional Entities  
All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Appointment of Authorised Representative for Classes of Creditors under section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016**

Section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 16A (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations) provide that where the corporate debtor has at least ten financial creditors in a class, the interim resolution professional shall offer a choice of three insolvency professionals and a creditor in the class may indicate its choice of an insolvency professional, from amongst the three, to act as its authorised representative. The insolvency professional, who is the choice of the highest number of creditors in the class, is appointed as the authorised representative of the creditors of the respective class. The authorised representative collects voting instructions from the respective class of creditors, attends the meetings of the committee of creditors (CoC) and casts vote in respect of the said class in accordance with the instructions he receives from the creditors.

2. Section 21 (6A) (b) of the Code read with regulation 16A of the Regulations provide for a simplified mechanism of representation of financial creditors through authorised representatives, as detailed in Para 1 above, and are, therefore, matters of procedure. It is necessary that an ongoing corporate insolvency resolution process, where creditors belonging to a class are otherwise not represented in the CoC, uses this simplified mechanism, irrespective of the stage of the process. The resolution professional, who exercises the powers and performs the duties as vested or conferred on

the interim resolution professional under section 23 (2) of the Code, shall facilitate representation through authorised representative(s).

3. It is, accordingly, clarified that wherever the approval of resolution plan under regulation 39(3) of the Regulations is at least 15 days away, the resolution professional shall expeditiously obtain, by electronic means, the choice of the insolvency professional from creditors in a class to act as the authorised representative of the class and proceed further in the manner as specified in regulation 16A of the Regulations.

4. This Circular is issued in exercise of powers under section 196 (1) (aa) of the Insolvency and Bankruptcy Code, 2016, in consultation with the Ministry of Corporate Affairs.

Yours faithfully,  
-Sd-  
(Ranjeeta Dubey)  
General Manager  
Email: ranjeta@ibbi.gov.in

**Annexure III.13**

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

**CIRCULAR**

No. IBBI/CIRP/016/2018

10th August, 2018

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Notice for Meetings of the Committee of Creditors under section 24 (3)(a) of the Insolvency and Bankruptcy Code, 2016 read with regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

The Insolvency and Bankruptcy Code, 2016 (Code) confers certain privileges on financial creditors on the premise, as reasoned by the Bankruptcy Law Reforms Committee:

*“The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.”*

2. As members of the committee of creditors (CoC), the financial creditors discharge several critical responsibilities, including invitation, receipt, consideration and approval of resolution plans under the Code. Their conduct has serious implications for continued business of a corporate debtor and consequently on the economy. The Hon'ble Adjudicating Authority has expressed concern about their conduct in a few matters.

3. By order dated 7th June, 2018 in the matter of SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd. (CP-659/2016), the Hon'ble Adjudicating Authority observed: “*.. An unenviable situation has been created by the conduct of the members of the CoC. Despite the fact that the Resolution Professional apprised the CoC that the period of 180 days is to expire on 12.02.2018 and sanction be granted for moving an application before the Adjudicating Authority for extension of the period. The CoC has behaved the way we have recorded in the preceding paras.*”. It further observed: “*A strange phenomena has developed in so far as the functioning of the CoC is concerned. In a number of cases it has now been seen that Members of the CoC are nominated by Financial Creditors like Banks without conferring upon them the authority to take decision on the spot which acts as a block in the time bound process contemplated by the Insolvency and Bankruptcy Code, 2016. Such like speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal of the CIR process.*”. It directed: “*In view of the above we direct the Resolution Professional to bring this order to the notice of the CoC so that appropriate steps be taken. A copy of this order be sent to the Insolvency and Bankruptcy Board of India for taking suitable action in respect of the conduct of the Members of CoC in the present matter as well as in the day to day functioning of the Members of CoC generally speaking.*”.

4. In the other matter of Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Private Limited (C.P. No. (IB)-84(PB)/2017), the Hon'ble Adjudicating Authority noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of interim resolution professional (IRP) as resolution professional (RP) since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. It observed: “*We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations.*”.

5. Section 24 (3) (a) of the Code requires the resolution professional to give notice of each meeting of the CoC to members of the CoC and other persons. Regulation 21 of the Insolvency and Bankruptcy Board of India

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 specifies the content of the notice for meetings of the CoC.

6. In view of the above, the interim resolution professional or the resolution professional, as the case may be, is directed that he shall, in every notice of meeting of the CoC and any other communication addressed to the financial creditors, other than creditors under section 21 (6A) (b), require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors.

7. This Circular is issued in exercise of powers under section 196 (1) (aa) read with 196 (1) (g) of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,  
-Sd-

(Ranjeeta Dubey) General Manager  
Email: ranjeeta@ibbi.gov.in

**Annexure III.14**

**Insolvency and Bankruptcy Board of India  
7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi-110001**

**CIRCULAR****No. IBBI/RV/019/2018****17<sup>th</sup> October, 2018**

To

All Registered Insolvency Professionals  
 All Recognised Insolvency Professional Entities  
 All Registered Insolvency Professional Agencies  
 All Registered Valuers, and  
 All Recognised Registered Valuer Organisations.  
 (By mail to registered email addresses and on website of the IBBI)

Dear Madam /Sir,

**Subject: Valuation under the Insolvency and Bankruptcy Code, 2016**

The Companies (Registered Valuers and Valuation) Rules, 2017 notified under the Companies Act, 2013 provides a comprehensive framework for development and regulation of the profession of valuers. Subject to meeting other requirements, an individual is eligible to be a registered valuer, if he (i) is a fit and proper person, (ii) has the necessary qualification and experience, (iii) is a valuer member of a Registered Valuer Organisation (RVO), (iv) has completed a recognised educational course as member of a RVO, and (v) has passed the valuation examination conducted by the Insolvency and Bankruptcy Board of India (IBBI), and (vi) is recommended by the RVO for registration as a valuer. A partnership entity or a company is also eligible for registration subject to meeting the requirements.

2. The Companies (Registered Valuers and Valuation) Rules, 2017, however, provides for a transitional arrangement as under:

*“11. Transitional Arrangement—Any person who may be rendering valuation services under the Act, on the date of commencement of these rules, may continue to render valuation services without a certificate of registration under these rules upto 31<sup>st</sup> January, 2019:*

*Provided that if a company has appointed any valuer before such date and the valuation or any part of it has not been completed before 31<sup>st</sup> January, 2019, the valuer shall complete such valuation or such part within three months thereafter.*

*Explanation.— It is hereby clarified that conduct of valuation by any person under any law other than the Act, or these rules shall not be effected by virtue of coming into effect of these rules unless the relevant other laws*

*or other regulatory bodies require valuation by such person in accordance with these rules in which case these rules shall apply for such valuation also from the date specified under the laws or by the regulatory bodies.”*

3. The IBBI performs the functions of the Authority under the Companies (Registered Valuers and Valuation) Rules, 2017. It conducts valuation examinations for all three asset classes, namely, Land and Building, Plant and Machinery, and Securities or Financial Assets. It also recognises RVOs and registers valuers. There are eight RVOs and 162 registered valuers as on date, the details of which are available at [www.ibbi.gov.in](http://www.ibbi.gov.in).

4. A key objective of the Insolvency and Bankruptcy Code, 2016 (Code) is maximisation of the value of assets of certain persons and consequently value for its stakeholders. A critical element towards achieving this objective is transparent and credible determination of value of the assets to facilitate comparison and informed decision making. The Code read with regulations made thereunder assign this responsibility to ‘Registered Valuers’.

5. The regulations made under the Code specify requirements of valuation and who can conduct such valuation. For example, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provide for valuation as under:

*“2(1)(m): “registered valuer” means a person registered as such in accordance with the Companies Act, 2013 (18 of 2013) and rules made thereunder*

*“27. The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:*

*Provided.....”.*

6. In view of the above, every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a ‘registered valuer’, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1<sup>st</sup> February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder.

7. This is issued in exercise of the powers under clauses (aa), (g), (p) and (t) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-  
(Amit Sahu)  
Deputy General Manager  
Email: [sahu.amit@ibbi.gov.in](mailto:sahu.amit@ibbi.gov.in)

**Annexure III.15****Insolvency and Bankruptcy Board of India**

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

**CIRCULAR**

No. IBBI/IP/020/2019

12th April, 2019

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities

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

**Subject: Compliance with regulations 7 (2) (ca) and 13 (2) (ca) of the  
Insolvency and Bankruptcy Board of India (Insolvency Professionals)  
Regulations, 2016.**

Dear Madam / Sir,

Regulation 7 (2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) specify the requirement and manner of payment of fees by an Insolvency Professional (IP) to the Insolvency and Bankruptcy Board of India (Board). It reads as under:

*“Certificate of registration.*

7. (1) ...

(2) The registration shall be subject to the conditions that the insolvency professional shall –

...

(ca) pay to the Board, a fee calculated at the rate of 0.25 percent of the professional fee earned for the services rendered by him as an insolvency professional in the preceding financial year, on or before the 30th of April every year, along with a statement in Form E of the Second Schedule;”

2. Regulations 13(2)(ca) of the IP Regulations specify the requirement and manner of payment of fees by an Insolvency Professional Entity (IPE) to the Board. It reads as under:

*“Recognition of Insolvency Professional Entities.*

13. (1) ...

(2) The recognition shall be subject to the conditions that the insolvency professional entity shall –

(ca) pay to the Board, a fee calculated at the rate of 0.25 percent of the turnover from the services rendered by it in the preceding financial year, on or before the 30th of April every year, along with a statement in Form G of the Second Schedule;”

3. The Board has enabled a facility for electronic submission of Form E or G, as the case may be, and details of login in this regard have already been shared with IPs and IPEs.

4. It is clarified that-

(a) Form E / Form G for the year 2018-19 shall be submitted electronically by an IP / IPE before 30th April, 2019; and

(b) Form E / Form G shall be submitted by every IP / IPE even if he has not earned any professional fee or does not have turnover during 2018-19.

5. This Circular is issued in exercise of powers under clauses (a), (aa) and (c) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016 read with sub-regulation (2) of regulation 7 and sub-regulation (2) of regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

Yours faithfully,

Sd/-

(Dilip Arjun Khandale)  
Deputy General Manager  
*dilip.khandale@ibbi.gov.in*

**Annexure III.16**

**Insolvency and Bankruptcy Board of India**  
7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi - 110001

**CIRCULAR**

No. IBBI/IP/021/2019

2<sup>nd</sup> May, 2019

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities

All Registered Insolvency Professional Agencies

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

Dear Madam / Sir,

**Sub: Temporary Surrender and Revival of Professional Membership of an Insolvency Professional.**

Regulation 10 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clause 26 of the Schedule to the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws Regulations) provide for temporary surrender and revival of professional membership by an Insolvency Professional (IP).

2. Temporary surrender of professional membership creates inconveniences where the IP is:

- (a) conducting a process - corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy - under the Code;
- (b) is acting as an authorised representative representing any class of financial creditors;
- (c) is included in the panel under 'Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2018' or similar Guidelines,
- (d) is included in the panel under 'the Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018' or similar Guidelines; or

- (e) is acting as an Administrator under ‘the Guidelines for Appointment of Insolvency Professionals as Administrators the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018’ or similar Guidelines.
3. It is, therefore, advised that the Insolvency Professional Agency (IPA) shall not ordinarily accept temporary surrender of professional membership of an IP in cases under Para 2.
4. It is further advised that the following forms may be used to process acceptance of temporary surrender and revival of professional membership of an IP:
- a. Form A: Application by an IP to IPA for temporary surrender;
  - b. Form B: Intimation to the Board on acceptance of temporary surrender by the IPA;
  - c. Form C: Letter of acceptance of temporary surrender by the IPA to IP;
  - d. Form D: Application by an IP for revival of his professional membership;
  - e. Form E: Intimation to the Board on revival of professional membership by the IPA; and
  - f. Form F: Letter of revival of professional membership by the IPA to IP.
5. This circular is issued in exercise of the powers conferred under clause (aa), (g) and (p) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016 in consultation with the Insolvency Professional Agencies.

Yours faithfully,  
-Sd-

(Dilip Arjun Khandale)  
Deputy General Manager  
*dilip.khandale@ibbi.gov.in*

**Encl.: Annexure I - VI for Form A - F**

**Annexure I****FORM A****(APPLICATION BY AN IP TO IPA FOR TEMPORARY SURRENDER)**

To

The Managing Director / Chief Executive Officer

..... (*Name of IPA*)

..... (*Address of IPA*)

**Subject- Application for temporary surrender of professional membership.**

Dear Sir/Madam,

I..... (*the name of the IP*), having Enrolment No. ..... and Registration No. ..... hereby request to surrender my professional membership on temporary basis.

2. I, hereby solemnly affirm, confirm and declare that -

- i. I do not have any pending assignments under the Code.
- ii. I have not been empanelled by the IBBI in accordance with 'Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) (Second) Guidelines, 2018,' or any such subsequent guidelines prevailing/pertaining to the empanelment of IPs, as on date.
- iii. I have not been empanelled by the IBBI in accordance with 'Guidelines for Appointment of IPs as Administrators under the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018,' or any such subsequent guidelines prevailing/pertaining to the empanelment of IPs, as on date.
- iv. I do not have any pending assignments in which I am acting as an Administrator under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 or any such subsequent guidelines prevailing/pertaining to the empanelment of IPs, as on date.
- v. There is no disciplinary proceedings pending against me before the IPA or IBBI.
- vi. I undertake to co-operate with the ..... (*name of IPA where the IP is enrolled*) and Insolvency and Bankruptcy Board of

India in case of any grievance, complaint, inspection, investigation or disciplinary proceeding, even if it arises after the temporary surrender of my membership.

- vii. I have not become non-resident in India.
- viii. I am not in any employment
- ix. I shall not engage in any business, except as specifically permitted under the Code of Conduct as given in the First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.
- x. I have paid the fee due to IBBI/IPA as on date.

3. Reason for Surrender : .....

- 4. I am eligible to temporarily surrender the membership.
- 5. I herewith attach my original certificate of membership and original certificate of registration.

Regards,

Date: (.....)

Place: (*Name and Signature of the Insolvency Professional*)

## **Annexure II**

### **FORM B**

#### **(INTIMATION TO THE BOARD ON ACCEPTANCE OF TEMPORARY SURRENDER BY THE IPA)**

To,

General Manager,

IP Division,

Insolvency and Bankruptcy Board of India.

**Subject- Intimation to the Board of acceptance of application for temporary surrender of professional membership of Mr/Mrs./Ms. ..... (name of IP) bearing (professional membership number) and having (IBBI registration number).**

Sir/ Madam,

Mr/Mrs./Ms. \_\_\_\_\_ (name of IP) bearing (professional membership

*number)* and having IBBI registration no \_\_\_\_\_ had applied for temporary surrender of his professional membership with us.

2. It is hereby confirmed that Mr/Mrs./Ms\_\_\_\_\_ (name of IP) has complied with Regulation 26 (1) and (2) of IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and that,

- i. IP do not have any pending assignments under the Code as per the disclosure/return filed by IP which has been duly verified by the IPA.
- ii. IP has not been empanelled by the IBBI in accordance with 'Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) (Second) Guidelines, 2018,' or any such subsequent guidelines prevailing/pertaining to the empanelment of IPs.
- iii. IP has not been empanelled by the IBBI in accordance with 'Guidelines for Appointment of IPs as Administrators under the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018,' or any such subsequent guidelines prevailing/pertaining to the empanelment of IPs.
- iv. IP does not have any pending assignments in which he is acting as an Administrator under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 as per the disclosure/return filed by IP which has been duly verified by the IPA.
- v. There is no disciplinary proceedings pending against IP before the IPA or the IBBI.

3. It is hereby intimated that the application of Mr/Mrs./Ms\_\_\_\_\_ (name of IP) for temporary surrender has been accepted and his professional membership has been temporarily struck down from the register of the Agency w.e.f. \_\_\_\_\_ ( write the date on which the membership was struck) in accordance with IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016

Regards,

Date: \_\_\_\_\_

Place: **Managing Director / Chief Executive Officer**

**Annexure III**

**FORM C**

**(LETTER OF ACCEPTANCE OF TEMPORARY SURRENDER BY THE IPA TO IP)**

To,

..... (*Name of the IP*)

..... Address

..... (*Membership number*)

..... (*Registration number*)

**Subject- Letter of acceptance of temporary surrender of professional membership.**

Dear Sir/Madam,

Please refer to your application for temporary surrender of your professional membership.

2. The application is accepted and your professional membership (no.....) has been temporarily struck off from the register of the Agency w.e.f. \_\_\_\_\_.

Regards,

Date: ( \_\_\_\_\_ )

Place: **Managing Director / Chief Executive Officer**

**Annexure IV**

**FORM D**

**(APPLICATION BY AN IP FOR REVIVAL OF PROFESSIONAL MEMBERSHIP)**

To,

Managing Director/Chief Executive Officer

.....(Name of IPA)

**Subject- Application for revival of professional membership.**

Dear Sir/Madam,

I \_\_\_\_\_ (write the name of the IP here), having Enrolment no. \_\_\_\_\_ (write the last held enrolment number) and Registration No. \_\_\_\_\_ (write the last held registration number) seek to apply under the applicable provisions of the IBBI (Insolvency Professional) Regulations, 2016 and the IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 for revival of my membership.

2. Being aware of the provisions of temporary surrender/revival of professional membership under the IBBI (Insolvency Professional) Regulations, 2016 and the IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, I hereby solemnly affirm that -

- i. I am a resident of India.
- ii. I am not in any employment.
- iii. I am not engaged in any business which is not permitted under the Code of Conduct as given in the First Schedule of the IBBI (Insolvency Professional) Regulations, 2016.
- iv. I confirm that I am in compliance of all the applicable provisions of IBBI (Insolvency Professional) Regulations, 2016 and the IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and any such provisions in force pertaining to revival of professional membership after temporary surrender as on the date of application.

3. I verify that the above certification is true and correct to the best of my knowledge and belief.

Regards,

Date: \_\_\_\_\_

Place: \_\_\_\_\_ Signature of the Individual

**Attachments to be provided:**

- (i) *Approval of temporary surrender as provided by the IPA;*
- (ii) *Proof of residence in India;*
- (iii) *Relieving Letter (in case of employment)*

**Annexure V**

**FORM E**

**(INTIMATION TO THE BOARD ON REVIVAL OF PROFESSIONAL  
MEMBERSHIP BY THE IPA)**

To,  
General Manager,  
IP Division,  
Insolvency and Bankruptcy Board of India

**Subject- Intimation to the Board on Revival of Professional Membership  
of Shri / Smt/ Ms.....(name of IP) by the IPA (name of IPA)**

Dear Sir/ Madam,

It is hereby informed that professional membership of Mr/Mrs/Ms. \_\_\_\_\_ (write the name of the IP here) having Enrolment no. \_\_\_\_\_ (write the last held enrolment number) and (IP) Registration No.(last held registration number)\_\_\_\_\_ has been revived and re-instated in the register of the Agency w.e.f. \_\_\_\_\_. (write the date on which the membership was re-store).

2. It is verified that the revival of professional of Mr/Mrs/Ms \_\_\_\_\_ (write the name of the IP here) has been granted on verification of the documents provided by the applicant and eligibility in accordance with applicable provision of the Code and Regulations.

Regards,

Date: \_\_\_\_\_ ( \_\_\_\_\_ )

Place: **Managing Director / Chief Executive Officer**

**Annexure-VI**

**FORM F**

**(LETTER OF REVIVAL OF PROFESSIONAL MEMBERSHIP BY THE  
IPA TO IP)**

To,  
..... (Name of Applicant)  
.....(Address)

.....(Membership number)

.....(*Registration number*)

**Subject- LETTER OF REVIVAL OF PROFESSIONAL MEMBERSHIP BY THE IPA TO IP.**

Dear Sir/Madam,

Please refer to your application dated \_\_\_\_\_ for revival of the membership. The application has been accepted on the basis of submission made by you.

2. Your name has been re-instated in the register of the Agency w.e.f.

\_\_\_\_\_ .

Regards,

Date: ( \_\_\_\_\_ )

Place: **Managing Director / Chief Executive Officer**

**Annexure III.17**

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

**CIRCULAR**

**No. IBBI/RV/022/2019**

**13th August, 2019**

To

All Registered Insolvency Professionals  
All Recognised Insolvency Professional Entities  
All Registered Insolvency Professional Agencies  
All Registered Valuers, and  
All Recognised Registered Valuer Organisations.

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

Dear Madam /Sir,

**Subject: Valuation under the Insolvency and Bankruptcy Code, 2016:  
Appointment of Registered Valuer.**

Para 6 of the Circular No. IBBI/RV/019/2018 dated 17th October, 2018 stipulates as under:

*“6..... every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a ‘registered valuer’, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder.”*

2. It is reiterated that-

- (i) appointment of any person, other than a ‘registered valuer’, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017, on or after 1st February, 2019, to conduct any valuation required under the Insolvency and Bankruptcy Code, 2016, or any regulations made thereunder, including the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, is illegal and amounts to violation of the Circular aforesaid; and
- (ii) payment, whether as fee or otherwise, to any person, other than a

'registered valuer' for any valuation referred to in paragraph (i), shall **not** form part of the insolvency resolution process costs or liquidation cost.

3. This is issued in exercise of the powers under clauses (aa), (g) and (p) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-  
(Amit Sahu)  
Deputy General Manager  
*Email: sahu.amit@ibbi.gov.in*

**Annexure III.18**

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

**CIRCULAR**

No. IBBI/CIRP/023/2019

14th August, 2019

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities, and

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on website of the IBBI).

Dear Madam / Sir,

**Subject: Filing of Forms for the purpose of monitoring corporate insolvency resolution processes and performance of insolvency professionals under the Insolvency and Bankruptcy Code, 2016 and the regulations made thereunder.**

The objective of the Insolvency and Bankruptcy Code, 2016 (Code) is time bound reorganisation and insolvency resolution of firms for maximisation of value of assets of the firm in distress to promote entrepreneurship and availability of credit and balance the interests of all its stakeholders. The first order objective of the Code is resolution. The second order objective is maximisation of value of assets of the firm and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests of stakeholders. This order of objectives is sacrosanct (*Judgement dated 14th November, 2018 of the NCLAT in the matter of Binani Industries Limited Vs. Bank of Baroda & Anr.*). The Code bifurcates and separates the interests of the firm from that of its promoters / management with primary focus to ensure revival and continuation of the firm by protecting it from its own management and from a death by liquidation (*Judgement dated 25th January, 2019 of the Supreme Court of India in the matter of Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.*).

2. The Code is a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts (*Judgement dated 31st August, 2017 of the Supreme Court in the matter of M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.*). The Code prevails over every other law in case of any inconsistency between the two

(*Judgement dated 9th August, 2019 of the Supreme Court in the matter of Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India & Ors.*). The Code is the mandate of the nation (*Order dated 10th April, 2017 of the NCLT in the matter of DF Deutsche Forfait AG and Anr. Vs. Uttam Galva Steel Ltd.*).

3. The Code provides a complete mechanism for its implementation. It assigns specific responsibilities to an insolvency professional (IP) for its implementation and realisation of its objectives. An IP plays an important role in resolution, liquidation and bankruptcy processes of companies, LLPs, partnership firms, proprietorship firms and individuals. He exercises the powers of the Board of Directors of the corporate debtor (CD) undergoing corporate insolvency resolution process (CIRP) and complies with applicable laws on its behalf. Section 20 of the Code requires him to make every endeavour to protect and preserve the value of the property of the CD and manage its operations as a going concern. Section 23 requires him to conduct the entire CIRP and manage the operations of the CD. A whole array of statutory and legal duties and powers is vested in him. He is the fulcrum of an insolvency proceeding and the link between the Adjudicating Authority (AA) and the stakeholders.

4. The Code facilitates and empowers the IP to discharge his responsibilities effectively. It obliges every officer of the CD to report to him. It also obliges the promoter of the CD to extend all assistance and cooperation to him. There is an assurance of supply of essential goods and services to, and a moratorium on proceedings against, the CD. The Code empowers the IP to appoint professionals to assist him. He can seek orders from the AA if he comes across any preferential, undervalued, extortionate, or fraudulent transaction. In order to ensure that an IP performs his role, the Code empowers the Insolvency and Bankruptcy Board of India (IBBI) and the Insolvency Professional Agency (IPA) to monitor his performance. It provides for appropriate sanctions for any kind of wrongdoing. Though a client proposes the name of an IP for appointment, he is appointed by the AA. He may be removed from a process by the AA if it is not satisfied with his performance. The appointment and removal by the AA secure and sanctify the position of the IP. He has protection of actions taken in good faith under the Code and the Regulations made thereunder. His conduct can only be inspected / investigated by the IBBI / IPA which has to follow due process for the purpose. There is a bar under the Code on trial of offences against an IP except on a complaint filed by the IBBI / Central Government, before the special court.

5. Keeping in view the responsibilities of the IPs, the Code provides for monitoring of their performances. It casts a duty on the IBBI and the IPA to monitor performance of IPs, and collect, maintain and disseminate information and records relating to insolvency and bankruptcy processes. It requires the IBBI to perform the following functions, among others, -

- (a) monitor the performance of IPs and pass any direction as may be required for compliance of the provisions of the Code and the regulations issued thereunder [section 196(1)(g)];
- (b) call for any information and records from the IPs [section 196(1)(h)];
- (c) collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases [section 196(1)(k)];
- (d) maintain websites and such other universally accessible repositories of electronic information [section 196(1)(n)];
- (e) issue necessary guidelines to the IPs [section 196(1)(p)]; and
- (f) conduct periodic study, research and audit of the functioning and performance of the IPs [section 196(1)(r)].

6. The Code casts obligations on IPs to forward/submit the following information and records relating to CIRP to the IBBI:

- (a) all records relating to the conduct of the CIRP and the resolution plan [section 31(3)(b)]; and
- (b) a copy of the records of every proceeding before the AA [section 208(2)(d)].

7. In order to facilitate submission of records and information by IPs to the IBBI as well as for monitoring of the processes and performance of IPs, a set of Forms were devised in consultation with stakeholders and the IPAs, in pursuance of the mandate and in synchronisation with the provisions in the Code. These Forms were put out in public domain on 27th April, 2018 and the comments received have been considered. These Forms have since been finalised in consultation with the IPAs. An overview of these Forms, as annexed to this

Circular, is as per the Table below:

Table

<b>Form No.</b>	<b>Period Covered and Scope</b>	<b>To be Filed by</b>	<b>Timeline</b>
<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>
IP 1	<b>Pre-Assignment:</b> This includes consent to accept assignment of an IP as IRP / RP / Liquidator / Bankruptcy Trustee, the details of IP and the Applicant, the details of the person which will undergo the process, terms of consent, terms of engagement, filing of application before AA and withdrawal before admission, etc.	IP	Within three days of the relevant date.
CIRP 1	<b>From Commencement of CIRP till Issue of Public Announcement:</b> This includes details of IRP, CD, and the Applicant, admission of application by AA, public announcement, details of suggested Authorised Representatives, non-compliances with the provisions of the Code and other laws applicable to the CD, etc.	IRP	Within seven days of making Public Announcement under section 13.
CIRP 2	<b>From Public Announcement till replacement of IRP:</b> This includes details of Authorised Representative selected by IRPs for a class of creditors, taking over management of the CD, receipt and verification of claims, constitution of Committee of Creditors (CoC), first meeting of CoC, confirmation / replacement of IRP, applications seeking co-operation of management (if any), expenses incurred on or by IRP, relationship of IRP with the CD, financial creditors and Professionals, support services sought from IPE, non-compliances with the provisions of the Code and other laws applicable to the CD, etc.	IRP	Within seven days of replacement of IRP.

CIRP 3	<b>From Appointment of RP till issue of Information Memorandum (IM) to Members of CoC:</b> This includes details of RP, details of registered valuers, handing over of records of CD by IRP to RP, taking over management of the CD, applications seeking co-operation of management (if any), details in IM, non-compliances with the provisions of the Code and other laws applicable to the CD, etc.	RP	Within seven days of issue of IM to members of CoC.
CIRP 4	<b>From Issue of IM till issue of Request for Resolution Plans (RFRP):</b> This includes expression of interest, request for resolution plans (RFRP) and modification thereof, evaluation matrix, non-compliances with the provisions of the Code and other laws applicable to the CD, if any, etc.	RP	Within seven days of the issue of RFRP.
CIRP 5	<b>From Issue of RFRP till completion of CIRP:</b> This includes updated list of claimants, updated CoC, details of the resolution applicants, details of resolution plans received, details of approval or rejection of resolution plans by CoC, application filed with AA for approval of resolution plan; details of resolution plan approved by the AA, initiation of liquidation, if applicable, expenses incurred on or by RP, appointment of professionals and the terms of appointment, relationship of the RP with the CD, financial creditors, and professionals, support services sought from IPE, non-compliances with the provisions of the Code and other laws applicable to the CD, if any, etc.	RP	Within seven days of the approval or rejection of the resolution plan or issue of order for liquidation, as the case may be, by the AA.

CIRP 6	<p><b>Event Specific:</b> This includes:</p> <ul style="list-style-type: none"> <li>a. Filing of application in respect of preferential transaction, undervalued transaction, fraudulent transaction, and extortionate transaction;</li> <li>b. Raising interim finance;</li> <li>c. Insolvency resolution process of guarantors;</li> <li>d. Extension of period of CIRP and exclusion of time;</li> <li>e. Premature closure of CIRP (appeal, settlement, withdrawal, etc.);</li> <li>f. Request for liquidation before completion of CIRP; and</li> <li>g. Non implementation of resolution plan as approved by the AA.</li> </ul>	IRP or RP, as the case may be.	Within seven days of the occurrence of event.
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8. The IBBI has developed, in consultation with the IPAs, an electronic platform for filing of the Forms above said. The said platform is hosted on the website of the IBBI at <https://www.ibbi.gov.in>. It is open for filings from 16th September, 2019. An IP shall access the said platform with the help of a unique **username** and **password** provided to him by the IBBI and upload / submit the Forms, along with relevant information and records, after affixing DSC or after e-signing.

9. It is directed that an IP shall file electronically -

- a. the Forms along with relevant information and records, which have become due on or before 15th September, 2019 in respect of all CIRPs, both closed and ongoing, conducted by him, by 30th September, 2019; and
- b. the Forms along with relevant information and records, which will become due on or after 16th September, 2019 in respect of CIRPs

conducted by him, by the timelines as specified in the Table under Para 7 above.

10. It is clarified that -

- (a) an IP shall be liable to action permissible under this Circular read with the applicable provisions of the Code and the Regulations made thereunder for:
  - (i) failure to file a Form along with relevant information and records,
  - (ii) inaccurate and incomplete information and/or records filed in or along with a Form, and
  - (iii) delay in filing;
- (b) the action under (a) includes refusal to issue or renew authorisation for assignment; and
- (c) timely filing of complete and accurate information along with information and records is the sole responsibility of the IP.

11. It is further directed that an IPA shall-

- (a) monitor filings by its members and, based on the same, take action against the member who fails to file a Form along with relevant information and records when it is due;
- (b) scrutinise at least 10% of Forms, filed by its members in a month, selected on random basis and, based on the same, take action against the member for any-
  - (i) inaccurate or incomplete information and records filed along with a Form, and
  - (ii) non-compliances with the Code and the Regulations made thereunder, as observed from the information and records filed along with a Form; and
- (c) submit a quarterly summary report in respect of (a) and (b) to the IBBI within 15 days of the close of quarter.

This is without prejudice to monitoring and scrutiny of filings and actions, as may be taken by the IBBI.

12. This is issued in exercise of the powers under clauses (aa), (g), (h), (k), (n), (p) and (r) of sub-section (1) of section 196 read with sections 31(2) (b) and 208(2)(d) of the Insolvency and Bankruptcy Code, 2016, and in consultation with the Insolvency Professional Agencies.

Yours faithfully,  
 Sd/-  
 (Methil Unnikrishnan)  
 General Manager  
 Email: m.unnikrishnan@ibbi.gov.in

**Encl.: Annexures: Forms IP 1 and CIRP 1 to CIRP 6.**

**Post-script:**

1. The filing of Forms on the platform on test basis will be available from 15th August, 2019 to 15th September, 2019. The regular filing will commence on 16th September, 2019.
2. The IPAs shall conduct workshops for its professional members, as may be required, to facilitate filings by them under this Circular and to migrate the data relating to costs and disclosures already filed by them.
3. Helpline will be available to assist the IPs in filing the Forms till 30th September, 2019. An IP may contact the helpline provided by the IPA, of which he is a member, at the first instance. If any difficulty of the IP is not fully addressed by the IPA, the IP may contact the helpline of the IBBI. The helpline details are as under:

Sl. No.	Agency	Name of Officer	E-mail id	Telephone Number
1	IIIP ICAI	CS Shivani Jasmatiya	iiipi.helpdesk@icai.in	8178995138
2	ICSI IIP	Shikha Sukhija	reporting@icsiiip.com	011-45341041
3	IPA ICMAI	Anchal Jindal	ra@ipaicmai.in	011-24666154
4	IBBI	Manpreet Kaur	manpreet.k92@ibbi.gov.in	011-23462947

Sd/-  
 (Methil Unnikrishnan)  
 General Manager

**Annexure-1****FORM – IP 1***(To be submitted to the Board within 3 days of relevant date)*

Date of filing application with the Adjudicating Authority	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

**A. Insolvency Professional**

1. Details as per IBBI records:

- a. I.P. Registration No.:
- b. Name:
- c. Address:
- d. Email Id:
- e. Mobile no.

2. Date on which consent to act as an IRP/RP/Liquidator/Bankruptcy Trustee given:

**B. Process for which IP is being engaged** (CIRP/Liquidation/Voluntary Liquidation/Individual Insolvency):**C. Initiated under Section (7/9/10/33/55/59):****D. In case of CIRP/Liquidation/Voluntary Liquidation****Corporate Debtor**

1. Name of the Corporate Debtor:
2. CIN/LLPIN of Corporate Debtor:
3. Industry/Sector:
4. Date of incorporation:
5. Address of the registered office of the Corporate Debtor:
6. Address of the principal office of the Corporate Debtor, if any:
7. Address of the corporate office of the Corporate Debtor, if any:
8. Registered email Id of the Corporate Debtor:

9. Names of promoters of Corporate Debtor:

**E. In case of CIRP, please furnish the details below**

1. Applicant (Financial Creditor/Operational Creditor/Corporate Debtor):
2. Details of applicant:
  - a. Name of the person(s):
  - b. Address:
  - c. Contact no.:

**F. In case of Liquidation, please furnish the details below:**

S. No	CoC member(s) – upto five based on voting share	Voting share (%)

**G. In case of Voluntary Liquidation, date of resolution of CD appointing  
IP as liquidator:**

**H. In case of Insolvency of Individuals and Partnership Firms, please  
furnish the details below:**

1. Applicant:
2. Details of person which will undergo the process:
  - a. Name of the person:
  - b. Address:
  - c. Contact no.:

**I. Terms of engagement of IP**

S. No	Date of appointment	Fee to be paid to IP	Other terms, if any

**J. Details of bench of AA**

S. No	Bench where Application filed	Date of filing	Application No.	Amount of initial default (wherever applicable)

**K. Details of withdrawal of application**

1. Date on which application for withdrawal made:
2. Date of order of the AA allowing withdrawal:
3. Amount of settlement (Rupees):
4. Details of settlement:

**Attachments:**

1. Copy of written consent given by IP to act as IRP/RP/Liquidator/  
Bankruptcy Trustee

**Declaration**

It is certified that the information given in Form- IP- 1 is true and correct and based on the petition filed with AA/ resolution passed by the CD, as the case may be.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**Annexure-2****FORM – CIRP 1**

*(To be submitted to the Board by the IRP online within 7 days of the Public Announcement)*

Date of Public Announcement	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

**A. Corporate Debtor**

1. Name of the Corporate Debtor:
2. CIN/LLPIN of Corporate Debtor:
3. Industry/Sector:
4. Date of incorporation:
5. Address of the registered office of the Corporate Debtor:
6. Address of the principal office of the Corporate Debtor, if any:
7. Address of the corporate office of the Corporate Debtor, if any:
8. Registered email Id of the Corporate Debtor:
9. Names of promoters of Corporate Debtor:
10. Whether going concern? (Yes/No)
11. Whether any proceedings were pending against the Corporate Debtor under Sick Industrial Companies (Special Provisions) Act, 1985? (Yes/No) If yes, date of admission under BIFR:
12. Whether any proceedings for winding up initiated under the Companies Act, 1956 or 2013? (Yes/No) If yes,
  - a. Section under which it was initiated:
  - b. Bench/Court:
  - c. Date of transfer to Adjudicating Authority (AA):

**B. Insolvency Resolution Professional**

1. Details as per IBBI records:
- f. I.P. Registration No.:

- g. Name:
  - h. Address:
  - i. Email Id:
  - j. Mobile no.
2. Whether IRP appointed is independent of CD, as per regulation 3(1) (Yes/No)
  3. Whether disclosure of relationship has been made to IPA as per disclosure circular (Yes/ No) If yes, date of submission of disclosure:
  4. Expenses agreed to be incurred on or by IRP fixed by (Applicant/ Adjudicating Authority):
  5. Whether IRP is a partner or a director of an IPE (Yes/No) If Yes,
    - a. Name of the IPE
    - b. Whether all directors and partners of the IPE are independent of CD, as per regulation 3(1) (Yes/No)
    - c. Whether disclosure of relationship of IPE has been made to IPA as per disclosure circular (Yes/No)

If yes, date of submission of disclosure:

**C. Admission of application by AA**

1. Application/Petition No.:
2. Date of filing to AA:
3. Bench:
4. Name of the Applicant/Petitioner:
5. Address of the Applicant/Petitioner:
6. Application filed under Section:
7. In case of section 9, whether the name of IRP is proposed by the operational creditor (applicant) (Yes/No)
8. Date of admission:
9. Date of AA Order appointing the IRP:
10. Date of receipt of order by IRP:
11. Amount of underlying default for which petition has been admitted (*Rupees*):

12. Since when the amount in default is outstanding:

#### **D. Public Announcement**

1. Date of issue:
2. Details of publication of Public Announcement:

Location	Language		Name of newspaper	Edition, if any	Date
Registered Office	English				
	Regional	Specify language			
Principal Office, if any	English				
	Regional	Specify language			
Any other place of operation Specify	English				
	Regional	Specify language			
Website of the Corporate Debtor					
Website designated by the Board					

3. Date of sending copy of PA to the Board:
4. Number of days taken for issuing PA:
5. Delay (days) in issuance of PA vis-à-vis timelines, if any:
6. Reasons for delay, if any:
7. Mode of sending PA to the Board (Hand delivery/Post/Email/others):
8. Estimated date of closure of insolvency resolution process:
9. Last date for submission of claims:
10. Number of days given for submission of claims:

11. Delay/Additional days for submission of claims vis-à-vis timelines, if any:
12. Reasons for delay, if any:
13. Whether the details indicated in PA same as IBBI records: (Yes / No) If no,
  - a. Address (for correspondence), if any:
  - b. Email Id (for correspondence), if any:
  - c. Mobile No. (for correspondence), if any:
14. Details of classes of creditors, if any, under section 21(6A)(b) and names of authorised representative (AR) identified for each class:
  - a. Number of class of creditors:
  - b. IPs identified to be selected as an AR for each class:

S. No.	Class of Creditors	IPs identified to be selected as AR	
		Name of IP	IP registration number
1.		Name of AR 1	
		Name of AR 2	
		Name of AR 3	
2.		Name of AR 1	
		Name of AR 2	
		Name of AR 3	

15. Cost incurred on Public Announcement (Rupees):
16. Details of Deviations/Non-Compliances of the provisions of Code, regulations, circulars or other laws applicable to the CD:

Legal Provisions	Deviation/ Non- compliance	Section/ Regulation/ Circular	Reasons	Period of non- compliance	Whether rectified or not
IBC					
CIRP Regulations					
IP Regulations					
Circulars					
Other laws applicable to the CD  [For example- Companies Act, SEBI Act, SCRA, Others (pls. specify)]					

17. Details of orders passed by Courts/ Tribunals:

Order (Interim/ Final)	Date of order	Authority passing the order	Abstract of order

18. Whether any application filed under the Section 12A (Yes/ No):

#### Attachments

1. Application filed with the AA.
2. AA order admitting the application.
3. AA order appointing the Interim Resolution Professional.
4. Form A (Public Announcement) under CIRP Regulations, 2016.
5. Form AB (Written consent to act as AR) under CIRP Regulations, 2016.
6. Cost and relationship disclosure made to IPA.
7. Form FA (Application for withdrawal of CIRP) under CIRP Regulations, 2016, if any.
8. Orders of the Court/Tribunal, if any.
9. Other documents, if any.

#### Declaration

1. I, [Name of IRP] having IP registration number [Registration no.], was appointed as an Interim Resolution Professional, vide NCLT order dated [mention date] in application number [mention application number] dated [ mention date of appointment of IRP], under section 16 of the Insolvency and Bankruptcy Code.
2. I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**Annexure-3****FORM – CIRP 2**

*(To be submitted to the Board by the IRP online within 7 days of replacement of IRP)*

Date of replacement of IRP	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

**A. Corporate Debtor**

1. Name of the Corporate Debtor:
2. CIN/LLPIN of Corporate Debtor:
3. Whether Corporate Debtor is listed (Yes/ No): If yes,
  - a. Primary Stock Exchange:
  - b. Whether suspended at stock exchange (Yes/No):
    - i. If yes, Date of suspension:
    - ii. Whether the suspension is restored (Yes/No):
    - iii. If yes, Date of restoration of suspension:
4. Date of the last audited balance sheet:

**B. Custody of Corporate Debtor**

1. Has IRP taken into custody all records and assets relating to CD? (Yes/ No) If no, whether application made u/s 19(2) of the Code, to the AA (Yes /No): If no, specify the reasons:

**C. Claims of Creditors**

1. Whether list of creditors prepared by IRP (Yes/ No): If yes, (please furnish the details below):

(Amount in Rupees)

O1							
O2							
..							
Total OCs							
Any other credit or							
C1							
C2..							
Total Creditors							

If no, state the reasons

2. Date of filing of list of creditors with the AA:
  3. Date of uploading the list of creditors on the website of the CD: If not uploaded, state the reasons

**D. Whether there are representatives of FCs (Yes/ No) If yes, (please furnish the details below):**

**E. Whether there are Authorised Representatives of FCs (Yes/ No) If yes, (please furnish the details below):**

S. No.	Appoint- ment under Section : 21(6A)(a) 21(6A)(b) 21(6A)(c)	Name of AR	Whether AR is an IP (Yes/ No)	If yes IP regis- tration number	Application and Order for appointment of AR		Number of days taken for filing appli- cation	Delay in number of days for filing	Reasons for delay
					Date of appli- cation to AA	Date of Order ap- pointing AR			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

**F. Whether there are representative(s) of OCs in CoC (Yes / No)**

If yes, (please furnish the details below):

S. No.	Appointment under Section/ Regulation:  Section 24(3) (c ) / Reg. 16(2)(b) /Reg. 16(2)(c)	Name of Rep- resentative	Number of OCs repre- sented.	Percentage of debt of OCs, if any	Total Voting Share
(1)	(2)	(3)	(4)	(5)	(6)

**G. Constitution of CoC**

Date of constitution:	
Total members .....	
Financial Creditors	Operational Creditors (if all FCs are related parties of CD or there is no FC)

Status	Name of FC	Number of FCs in class of creditor	Voting Share (%)	Status	Name of OC	Number of OCs in class of cred- itor	Voting Share (%)
FC1				OC1			
FC2....				OC2 ...OC 18			

Class 1				W o r k - men			
Class 2				Employ-ees			
Class 3....				Others			
Total				Total			

1. Date of submission of report on constitution of CoC to AA:
2. Number of days taken for submission of report to AA :
3. Delay in number of days vis-à-vis timelines, if any:
4. Reason for delay, if any:

#### **H. First Meeting of the CoC**

1. Date of meeting:
2. Number of days taken for conducting first CoC meeting:
3. Delay in number of days vis-à-vis timelines, if any:
4. Reason for delay, if any:
5. Date of service of notice of meeting:
6. Whether minimum 5 days' notice period given for meeting under Regulation 19(1) (Yes/No)
 

If no, Approval from CoC to serve the notice for shorter period taken? (Yes/No) If approval not taken, specify reasons:
7. Whether Notice sent to:
  - a. CoC members (yes/ no)
  - b. Suspended Board of Directors/Partners (LLP) (yes/ no)
  - c. OCs where value of debt is more than 10 % of total debts, if any (yes/ no)
  - d. AR of Class of creditors, if any (yes/ no)
  - e. IP for any FC u/s 24(5), if any (yes/ no)
  - f. Representative(s) of FCs, if any (yes/ no)
  - g. Representative(s) of OC(s), if any (yes/ no)
  - h. Others, if any (yes/ no)

**I. Confirmation/Replacement of IRP**

1. Whether the IRP is confirmed as RP (Yes/No) If yes, date of confirmation:

If no, whether IRP is replaced (Yes/No)

If yes, please furnish the details of RP:

- a. IP Registration Number b. Name of the RP
- c. Email Address
- d. Mobile Number

If no, whether IRP was performing functions of RP as per Regulation 17(3) (Yes/ No)

**J. Whether application seeking Cooperation of Management u/s 19(2) made to AA (Yes/ No)**

1. If yes, furnish the details below:
  - a. Application Number
  - b. Date of filing
  - c. Date of Order
2. Whether appeal, if any filed against the order (Yes/ No) If yes, furnish the details below:
  - a. Name of Appellate Authority b. Appeal No.
  - c. Date of filing of appeal d. Date of order
3. Whether appeal, if any filed against order of first Appellate Authority (Yes/ No) If yes, furnish the details below:
  - a. Name of Appellate Authority
  - b. Appeal No.
  - c. Date of filing of appeal
  - d. Date of order

**K. Application filed seeking assistance of local district administration under Regulation 30 (Yes/ No)**

1. If yes, furnish the details below:
  - a. Application Number:

- b. Date of filing:
  - c. Date of Order:
2. Whether appeal, if any filed against the order (Yes/ No) If yes, furnish the details below:
- a. Name of Appellate Authority:
  - b. Appeal No.:
  - c. Date of filing of appeal:
  - d. Date of order:
3. Whether appeal, if any filed against order of first Appellate Authority (Yes/ No) If yes, furnish the details below:
- a. Name of Appellate Authority:
  - b. Appeal No.:
  - c. Date of filing of appeal:
  - d. Date of order:

#### **L. Expenses incurred by or on Interim Resolution Professional**

Expense Head	Expenses	Expenses paid or agreed to be paid		Approved by COC (Yes/ No)
		Amount incurred	Amount paid	
<b>IRP</b>	Fee payable to IRP			
	Cost of insurance for IRP			
	Other Expenses on/ for IRP (travel, stay, security etc. related expenses)			
<b>IPE</b>	Fee, if any, payable to an IPE for support services			
<b>Regis-tered Valuer</b>	Fee payable to Valuer 1			
	Fee payable to Valuer 2			
	Fee payable to Valuer 3, if any			
	Other Expenses on/ for IRP (travel, stay, out of pocket expenses etc.)			

<b>Other Professional</b>	Fee Payable to accounting and finance professional			
	Fee Payable to audit professional			
	Fee payable to legal professional/ attorney			
	Fee payable to any other professional			
	Fee payable to authorised representative			
	Other expenses on/for professionals			
<b>CoC</b>	Expense for meeting venue			
	Expense for electronic voting			
	Expense for video conferencing			
	Any other expense related to CoC			
<b>Other Expenses</b>	Expenses on Public Announcement			
	Expenses for filings before Adjudicating Authority including Court fee			
	Expenses for verification of claims			
	CIRP related litigation			
	Other expenses, if any			
<b>Essential Services</b>	Electricity			
	Water			
	Telecommunication services			
	Information Technology services			
	Other essential services, if any			
<b>Other Services</b>	Other supplies			
	Employees and workmen			
	Security Personnel Services			
	Other expenses, if any			

**M. Disclosure of relationship of the interim resolution professional, if any**

<b>Relationship of the Interim Resolution Professional with</b>	<b>Name</b>	<b>Nature of relationship</b>	<b>Description of relationship</b>
Corporate Debtor			
Financial Creditor			
FC1			
FC2..			
Authorised Representative(s)			
AR1			
AR 2			
Corporate			
Guarantor, if any			
Operational			
Creditor, if any			
OC1			
OC2			
.....			
Interim Finance			
Provider, if any			
Accountant(s)			
Legal Professional(s)			
Other Professional(s)			
Firm of auditors of Corporate Debtor (in the last 3 financial years)			
Secretarial auditors in practice of the Corporate Debtor (in the last three financial years)			
Cost Auditors of Corporate Debtor (in the last three financial years)			

Legal Firm <sup>1</sup> (in the last three financial years)			
Consulting Firm <sup>2</sup> (in the last three financial years)			

**N. Support services sought from IPE, if any. (Yes/No) If yes, Provide details of IPE**

- a. Name of IPE:
- b. Relationship with IPE, if any:
- c. Nature of relationship:
- d. Whether appointed at arms' length relationship (yes/no):

**O. Are you a partner or a director of an IPE? (Yes/No)**

If yes, furnish the details:

- a. Name of the IPE:
- b. Whether all directors and partners of the IPE are independent of CD, as per regulation 3(1) (Yes/No)
- c. Whether disclosure of relationship of IPE has been made to IPA as per disclosure circular (Yes/No)

If yes, date of submission of disclosure:

- d. Disclosure of relationship of IPE

Relationship of all the Partners and Directors of IPE with	Name	Nature of relationship	Description of Relationship
Corporate Debtor			
Firm of auditors of Corporate Debtor (in the last 3 financial years)			
Secretarial auditors in practice of the Corporate Debtor (in the last three financial years)			
Cost Auditors of Corporate Debtor (in the last three financial years)			

---

1 Legal firm that has any or had any transaction with the Corporate Debtor amounting to five percent or more of the gross turnover of such firm in the last three financial years.

2 Consulting firm that has any or had any transaction with the Corporate Debtor amounting to five percent or more of the gross turnover of such firm in the last three financial years.

Legal Firm <sup>1</sup> (in the last three financial years)			
Consulting Firm <sup>2</sup> (in the last three financial years)			

**P. Support sought from any professional(s)? (Yes/ No)**

S. No.	Name of Professional	Nature of profession	Date of appointment	Term of appointment From to	Scope of engagement	Professional fees paid/agreed to be paid (Rupees)	Other expenses, if any, paid/agreed to be paid (Rupees)	Whether appointed at arms' length relationship? (Yes/ No)
						Quantum	Basis (hourly/daily etc.)	

**Q. Disclosure of relationship of the professional**

Disclosure of relationship of Mr./ Ms/Mrs..... , with:

Relationship of the Professional with		Name	Nature of Relationship	Description of relationship
1.	Corporate Debtor			
2.	Corporate Guarantor, if any			
3.	Insolvency Professional			
4.	Insolvency Professional Entity (If associated with, any)			
5.	Financial Creditor(s)			
6.	Interim Finance Provider(s)			

**R. Details of orders passed by Courts/ Tribunals:**

Order (Interim/Final)	Date of order	Authority passing the order	Abstract of order

1. Legal firm that has any or had any transaction with the Corporate Debtor amounting to ten percent or more of the gross turnover of such firm in the last three financial years.

2. Consulting firm that has any or had any transaction with the Corporate Debtor amounting to ten percent or more of the gross turnover of such firm in the last three financial years.

**S. Details of Deviations/Non-Compliances of the provisions of Code, regulations, circulars or other laws applicable to the CD:**

Legal Provisions	Deviation/ Non-compliance	Section/ Regulation/ Circular	Reasons	Period of non-compliance	Whether rectified or not
IBC					
CIRP Regulations					
IP Regulations					
Circulars					
Other laws applicable to the CD  [For example- Companies Act, SEBI Act, SCRA, Others (pls. specify)]					

**T. Other details**

Whether resolution under the Section (12A/ 33(2)/others) was passed by CoC (yes/no)

**U. Remarks, if any**

--

**Attachments**

1. List of creditors along with the details of the claims submitted with the AA.
2. Report certifying constitution of the committee of creditors.
3. Latest Audited financial statements of CD.
4. Minutes of all COC meetings.
5. AA's order admitting application for CIRP.
6. AA's order for Section 19(2) application, if any.
7. AA's order for application under Regulation 30, if any.
8. AA order for replacement of IRP by RP, if any.
9. All the applications filed before AA, if any.
10. All the orders passed by AA, if any.
11. All the applications filed before courts, if any.

12. All the orders passed by courts, if any.
13. Progress Reports filed to Adjudicating Authority by the IRP.
14. Cost Sheet prepared by IRP.
15. Cost and relationship disclosure made to IPA.
16. Other relevant documents, if any.

**Declaration**

I, [Name of IRP] having IP registration number [Registration no.], was appointed as an Interim Resolution Professional vide NCLT order dated [Insert date] in application number [ Insert application number] dated [ Date of appointment of IRP], under section 16 of the Insolvency and Bankruptcy Code.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**Annexure-4****FORM – CIRP 3**

(To be submitted to the Board by the RP online within 7 days of issue of IM to the members of CoC)

Date of submission of IM to members of CoC	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

**A. Corporate Debtor**

1. Name of the Corporate Debtor:
2. CIN/LLPIN of Corporate Debtor:

**B. Appointment of Resolution Professional**

1. Date of passing resolution by CoC:
2. Number of days taken to pass the resolution:
3. Delay in number of days vis a vis timelines, if any:
4. Reasons for delay, if any:
5. Date of order of AA appointing RP:
6. Whether IRP is appointed as RP (Yes/ No): If no, please furnish details of RP
  - a. I.P. Registration No.:
  - b. Name:
  - c. Address:
  - d. Email Id:
  - e. Phone Number
7. Alternative Contact details of the RP: Yes/ No  
If yes, please furnish details:
  - a. Address (for correspondence):
  - b. Email Id (for correspondence):
8. Whether RP is independent of CD, as per regulation 3(1) (Yes/No)

9. Whether disclosure of relationship has been made to IPA as per disclosure circular? (Yes/No)

If yes, date of submission of disclosure: If No, reasons for non-submission

10. Whether RP is a partner or a director of an IPE (Yes/ No) If Yes, provide the details below:

- Name of the IPE:
- Whether all directors and partners of the IPE are independent of CD, as per regulation 3(1)(Yes/ No)
- Whether disclosure of relationship of IPE is made to IPA as per disclosure circular (Yes/No)

If yes, date of submission of disclosure: If No, reasons for non-submission

### **C. Appointment of registered valuers**

S. No.	Name of Valuer	Registration number of Valuer	Date of appointment	Class of assets (Land and Building/ Plant and machinery/ Securities and Financial Assets/others)	Estimates (Rupees)	
					Fair Value	Liquidation Value
Average Values						

- Number of days taken for appointment of valuer:
- Delay in number of days for appointment vis a vis timelines, if any:
- Reasons for delay, if any:
- Whether Registered Valuer(s) is disqualified to be appointed as per Regulation 27 (Yes/ No)

If yes, under which sub regulation (choose one or more from options below):

- a relative of the resolution professional

- (b) a related party of the CD
- (c) an auditor of the CD at any time during the five years preceding the insolvency commencement date
- (d) a partner or director of the IPE of which the resolution professional is a partner or director

**D. Details of handover of records of Corporate Debtor by IRP to RP**

S. No	Description of records	Remarks, if any

**E. Custody of assets of Corporate Debtor**

1. Whether RP has taken over the custody of assets of CD (Yes/ No)  
If no, whether application made u/s 19(2) of the Code, to the AA (Yes/ No) If no, specify the reasons

**F. Application Filed with AA seeking Cooperation of Management (Yes/ No)**

1. If yes, furnish the details below:
  - d. Application Number:
  - e. Date of filing :
  - f. Date of Order:
2. Whether appeal, if any filed against the order (Yes/ No) If yes, furnish the details below:
  - e. Name of Appellate Authority:
  - f. Appeal No.:
  - g. Date of filing of appeal:
  - h. Date of order:
3. Whether appeal, if any filed against order of Appellate Authority (Yes/ No) If yes, furnish the details below:
  - e. Name of Appellate Authority:
  - f. Appeal No.:
  - g. Date of filing of appeal:
  - h. Date of order:

**G. Details of application filed with the AA for Assistance of local district administration**

1. If yes, furnish the details below:
  - a. Application Number:
  - b. Date of filing:
  - c. Date of Order:
2. Whether appeal, if any filed against the order (Yes/ No) If yes, furnish the details below:
  - a. Name of Appellate Authority:
  - b. Appeal No.:
  - c. Date of filing of appeal:
  - d. Date of order:
3. Whether appeal, if any filed against order of Appellate Authority (Yes/ No) If yes, furnish the details below:
  - a. Name of Appellate Authority:
  - b. Appeal No.:
  - c. Date of filing of appeal:
  - d. Date of order:

**H. Information memorandum (IM)**

1. Date of submission of IM to CoC:
2. Number of days taken for submission of IM:
3. Delay in number of days for submission vis a vis timeline, if any:
4. Reasons for delay, if any:
5. Details of assets and liabilities as per latest audited balance sheet and latest provisional balance sheet:
  - a. Date of the latest audited balance sheet:
  - b. Date of the provisional balance sheet:
6. Whether IM contains the details as per requirements of Regulation 36(2) (Yes/ No) If no, list the details not captured in the IM

S. No	Details not provided in IM

Reasons for not including the specified details:

7. Whether undertaking of confidentiality is obtained from Members of CoC and resolution applicants:

If no, furnish the details of persons who did not give undertaking

S. No.	Category <b>(Member of CoC/ Resolution applicant)</b>	Name	Reasons

**I. Details of Deviations/Non-Compliances of the provisions of Code, regulations, circulars or other laws applicable to the CD:**

Legal Provisions	Deviation/ Non- compliance	Section/ Regulation/Circular	Rea- sons	Period of non- com- pliance	Whether rectified or not
IBC					
CIRP Regulations					
IP Regulations					
Circulars					
Other laws applicable to the CD  [For example- Companies Act, SEBI Act, SCRA, Others (pls. specify)]					

**J. Details of orders passed by Courts/ Tribunals:**

<b>Order (Interim/ Final)</b>	<b>Date of order</b>	<b>Authority passing the order</b>	<b>Abstract of order</b>

**K. Whether resolution under Section (12A/ 33(2)/others) was passed by CoC (Yes/ No):**

**Attachments [*to be uploaded in pdf*]**

1. AA order for appointment of RP
2. Latest Audited Financial Statements
3. Provisional Financial Statements for the current year
4. Information Memorandum
5. Valuation reports
6. Appeal/application filed before AA/NCLAT/High court/Supreme court/ Others.
7. Orders of AA/NCLAT/High court/Supreme court /Others.
8. Progress Reports filed to AA by the RP
9. Cost and relationship disclosure made to IPA
10. Any other attachment

**Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**Annexure-5****FORM – CIRP 4**

(to be submitted to the Board by RP online within 7 days of the issue of Request for Resolution Plans)

Date of issue of RFRP	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

**A. Details of Corporate Debtor**

1. Name of the Corporate Debtor:
2. CIN/LLPIN of Corporate Debtor:

**B. Expression of interest (EOI) to invite Prospective Resolution Applicants (PRA)**

1. Whether EOI issued (Yes/No) If no, state the reasons:
2. Date of issue of EOI:
3. Number of days taken for issue of EOI:
4. Delay in number of days taken for issuance of EOI vis a vis timeline, if any:
5. Reasons for delay, if any:
6. Details of publishing EOI:

Location	Language		Name of newspaper	Edition, if any	Date
Registered Office	English				
	Regional	Specify language			
Principal Office, if any	English				
	Regional	Specify language			
Any other place of operation Specify:....	English				
	Regional	Specify language			

Website of the Corporate Debtor				
Website designated by the Board				

7. Date, when it was sent to the Board:
8. Mode of sending it to the Board (i.e. by Speed Post/ Regd. Post/ E-mail/By Hand/others):
9. Whether EOI re-issued (Yes/No)

If yes, number of times EOI re-issued:

10. Details of publication of latest EOI

Location	Language		Name of news-paper/ website	Edition, if any	Date of issue
Registered Office	English				
	Regional	Specify language			
Principal Office, if any	English				
	Regional	Specify language			
Any other place of operation Specify:....	English				
	Regional	Specify language			
Website of the Corporate Debtor					
Website designated by the Board					

11. Last date to submit EOI:
12. Number of days given for submission of EOI:
13. If minimum days for submission of EOI vis a vis timeline is not given, deficit number of days, if any:

14. Reasons for not giving minimum number of days, if any:
15. Number of persons who expressed their interest:
16. Number of persons who were ineligible as per:
  - a. Section 29 (A):
  - b. Section 25(2)(h):
  - c. Other:
17. Whether due diligence on PRAs conducted by RP as per Regulation 36A (Yes/No) If no, reasons:
18. Date of issue of provisional list of eligible PRAs:
19. Number of days taken to issue provisional list of eligible PRAs:
20. Delay in number of days taken to issue provisional list of eligible PRAs, if any:
21. Reasons for delay, if any:
22. Date of Issue of final list of PRAs:
23. Delay in number of days taken to issue final list of PRAs, if any:
24. Reasons for delay, if any:
25. Final list of PRAs (including joint applicants, if any)

S. No.	Name of PRAs

#### C. Request for Resolution Plans (RFRP)

1. Whether the following was approved by the committee of creditors):
  - a. RFRP (Yes/ No)
 

If no, state the reasons
  - b. Evaluation Matrix (Yes/ No) If no, state the reasons
2. Date of issue of evaluation matrix:

3. Date of issue of RFRP:
4. Last date for submission of resolution plans:
5. Whether RFRP was issued atleast 30 days before the last date of the submission of the resolution plans? (Yes/No)
 

If no, provide the reason for the same.
6. Details of Evaluation Matrix :
7. Whether RFRP requires any non-refundable deposit for submission of or along with resolution plan (Yes/No)
 

If yes, please specify.

#### **D. Modification of RFRP and Evaluation Matrix**

1. Whether details with respect to RFRP modified (Yes/ No) If yes, Number of times RFRP modified:
2. Whether details with respect to Evaluation matrix modified (Yes/ No) If Yes, Number of times Evaluation matrix modified:

S. No.	Modification done in respect of (RFRP/ Evaluation Matrix)	Date of issue of modified request	Whether atleast 30 days given for submission of resolution plan from date of modification (Yes/No)	If no, reasons	Revised Last date for submission of resolution plan

3. Whether the RFRP was re-issued (Yes/No) If yes,
  - (i) Date of re-issue of RFRP :
  - (ii) Last Date for submission of Resolution Plan:

**E. Details of Deviations/Non-Compliances of the provisions of Code, regulations, circulars or other laws applicable to the CD:**

Legal Provisions	Deviation/ Non-compliance	Section/ Regulation/ Circular	Reasons	Period of non-compliance	Whether rectified or not
IBC					
CIRP Regulations					
IP Regulations					
Circulars					
Other laws applicable to the CD  [For example- Companies Act, SEBI Act, SCRA, Others (pls. specify)]					

**F. Details of orders passed by Courts/ Tribunals:**

Order (Interim/Final)	Date of order	Authority passing the order	Abstract of order

**G. Whether resolution under Section (12A/ 33(2)/others) was passed by CoC ( Yes/No)**

**Attachments**

1. Expression of interest (first issue and latest issue).
2. Evaluation Matrix including modified, if any.
3. Request for resolution plan including modified, re-issued, if any.
4. Minutes of the Meetings of COC approving the RFRP .
5. All applications filed before courts, if any.
6. All orders passed by courts, if any.
7. Progress reports filed to AA by the RP.
8. Other documents, if any.

**Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [ mention date] in application number [mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

## **Annexure 6**

FORM- CIRP 5

*(To be submitted to the Board online within 7 days of the approval or rejection of resolution plan by the Adjudicating Authority)*

Date of the approval or rejection of resolution plan by the AA	Due date of Form	Delay in submission of Form (Number of days)	Reasons for delay

#### **A. Corporate Debtor**

1. Name of the Corporate Debtor:
  2. CIN/LLPIN of Corporate Debtor:

### **B. Claims of creditors**

Whether any change in list of claimants as uploaded by IRP in Form CIRP-2  
(Yes/ No) If yes, please furnish the revised list of claimants below:



1. Total claims as on date of meeting of CoC where resolution plan was approved (*Rupees*):
2. Date of filing of list of creditors with the AA:
3. Is list of creditors prepared and uploaded by RP on the website of the Corporate Debtor. (Yes/ No)

If no, state the reasons:

**C. Re-constitution of CoC, if any:**

Date of constitution:							
Total members .....							
<b>Financial Creditors</b>				<b>Operational Creditors (if all FCs are related parties of CD or there is no FC)</b>			
Status	Name of FC	Number of FCs in class of creditor	Voting Share (%)	Status	Name of OC	Number of OCs in class of creditor	Voting Share (%)
FC1				OC1			
FC2....				OC2.....			
Class 1				W o r k - men			
Class 2				Employ-ees			
Class 3...				Others			
Total				Total			

Remarks, if any

**D. Whether any resolution plan received? (Yes/ No) E. Final Resolution Applicant(s)**

S. No.	Resolution plan submitted (Individually/ Jointly)	Name of Resolution Applicants	Whether Resolution Applicant is an FC	Nature of resolution (Merger/ acquisition/ amalgamation/ Take over/ others)	Number of plans submitted	Group to which it belongs	Industry	Details of performance security provided (Please specify the nature, value, duration and source, as specified in request for resolution plan)	Resolution plans compliant with section 30(2). (Yes/ No)	Reason for non-compliance of plan with Section 30(2)

1. Whether the resolution plan rejected by CoC? (Yes/ No) If yes,
  - a. Date of CoC meeting wherein the plan was rejected:
  - b. Reasons for rejection:
2. Whether resolution for liquidation u/s 33(2) passed by CoC (Yes/ No) If no, way forward in CIRP process as decided by CoC:
3. Date of the meeting of CoC approving the resolution plan:
4. Whether resolution plan was approved by the CoC within 180 days from ICD (Yes/No) If no, whether extension of CIRP time granted (Yes/ No)

If yes, number of days granted:

**F. Meeting of the Committee of Creditors where resolution plan was approved:**

Date of service of notice of the meeting	Whether the notice of the meeting was served by giving not less than 5 days' notice? (Yes/No)	If no, whether the approval of CoC sought (Yes/ No)	Date of the meeting of the Committee of Creditors	Number of days from ICD, meeting of the CoC was held	Matters put forth for voting at the meeting (Approval for resolution plan/ liquidation/other matters)	Voting Percentage	Remarks, if any
(Ye s/ No)	If yes, timeline for service of notice. If no, reasons.						

**G. Application filed with AA for approval of resolution plan**

Date of the application	Whether application for approval of resolution plan filed as per model timelines (Yes/ No)	If No, state reasons for delay.	Whether the resolution plan accepted/ rejected by AA (accepted/ rejected)	Date of order of acceptance/ rejection by AA

**H. Members of CoC and distribution of voting share**

S. No	Name of Creditor	Voting Share (%)	Voting for Resolution Plan (Voted for/Dissented/ Abstained)

## I. Resolution plan

1. Details of stakeholders, claims and realisation under resolution plan.

(Amount in Rupees)

S. No.	Category of stakeholder*	Amount claimed	Amount admitted	Realisable by Stakeholders	
				Amount#	Percent age
1.	Secured Financial Creditors				
2.	Unsecured Financial Creditors				
3.	Operational Creditors				
	Government				
	Workmen				
	Employees				
	.....				
4.	Other Debts and Dues				
Total					

\*If there are sub-categories in a category (like real estate allottees, debenture holders etc.), please add rows for each sub-category.

#Amount provided over time under the Resolution Plan and includes estimated value of non- cash components. It is not NPV.]

- ## 2. Interests of existing shareholders under resolution plan:

### 3. Settlement Amounts

Stakeholder category	Mode of Settlement	Amount (Rupees)	Time of Payment/ Issue/ Conversion	Remarks, if any

### 4. The compliance of the Resolution Plan is as under:

Section of the Code / Regulation No.	Requirement with respect to Resolution Plan	Clause of Resolution Plan	Compliance (Yes / No)
Section 25(2) (h)	Whether the Resolution Applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD		
Section 29A	Whether the Resolution Applicant is eligible to submit resolution plan as per final list of Resolution Professional or Order, if any, of the Adjudicating Authority		
Section 30(1)	Whether the Resolution Applicant has submitted an affidavit stating that it is eligible		
Section 30(2)	Whether the Resolution Plan: (a) provides for the payment of insolvency resolution process costs? (b) provides for the payment of the debts of operational creditors? (c) provides for the management of the affairs of the Corporate debtor? (d) provides for the implementation and supervision of the resolution plan? (e) contravenes any of the provisions of the law for the time being in force?		

Section 30(4)	Whether the Resolution Plan: (a) is feasible and viable, according to the CoC? (b) has been approved by the CoC with 66% voting share?		
Section 31(1)	Whether the Resolution Plan has provisions for its effective implementation plan, according to the CoC		
Regulation 35A	Where the resolution professional made a determination if the corporate debtor has been subjected to any transaction of the nature covered under sections 43, 45, 50 or 66, before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board		
Regulation 38 (1)	Whether the amount due to the operational creditors under the resolution plan has been given priority in payment over financial creditors		
Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders		
[Regulation 38(1B)]	(a) Whether the Resolution Applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any resolution plan approved under the Code.  (b) If so, whether the Resolution Applicant has submitted the statement giving details of such non-implementation?		
Regulation 38(2)	Whether the Resolution Plan provides:  (a) the term of the plan and its implementation schedule?  (b) for the management and control of the business of the corporate debtor during its term?  (c) adequate means for supervising its implementation?		

38(3)	Whether the resolution plan demonstrates that: (a) it addresses the cause of default? (b) it is feasible and viable? (c) it has provisions for its effective implementation? (d) it has provisions for approvals required and the timeline for the same? (e) the resolution applicant has the capability to implement the resolution plan?		
39(2)	Whether the RP has filed applications in respect of transactions observed, found or determined by him		
Regulation 39(4)	Provide details of performance security received, as referred to in sub-regulation (4A) of regulation 36B		

5. Terms and conditions of Resolution Plan, if any (Such as escrow, Performance Bank guarantee, infusion of equity, capital commitments etc, sources of funds along with timelines)
6. Approvals required from other regulators/ authorities, if any:

S. No.	Nature of Approval	Name of applicable law	Approving authority	When to be obtained

7. The Resolution Plan is subject to any contingency (Yes/ No)

If yes, please furnish details of contingencies:

8. Deviations/non-compliances of the provisions of the Code, regulations made or circulars issued or other laws applicable to the CD :

Sl. No.	Deviation/Non-compliance observed	Section of the Code/ Regulation No./ Circular No./other laws applicable to the CD	Reasons	Whether rectified or not

9. Whether the CoC has approved a plan providing for contribution under regulation 39B: (Yes/No)

If yes, furnish the details below

- Estimated liquidation cost: (Rupees).....
- Estimated liquid assets available: (Rupees).....
- Contributions required to be made: (Rupees).....
- Financial creditor wise contribution as under:

Sl. No.	Name of financial creditor	Amount to be contributed (Rupees)

10. Whether the CoC has recommended sale as a going concern under regulation 39C - (Yes/No)

If yes, furnish the details below:

- Whether sale of corporate debtor as a going concern: (Yes / No)
- Whether sale of business of corporate debtor as a going concern: (Yes / No)
- Whether the details of recommendation are available with the resolution professional: (Yes/No)

11. Whether the CoC has fixed, in consultation with the resolution professional, the fee payable to the liquidator during the liquidation period under regulation 39D: (Yes/No) If yes, furnish the details of fee payable to liquidator:

- 12 . Implementing Agency/ Monitoring Committee, if any:

- Number of persons responsible for implementation of resolution plan:
- Name:
- Address:
- Designation:
- Email ID:

vi. Mobile No:

13. Whether RP is part of Implementing Agency/ Monitoring Committee? (Yes/ No) If Yes, give details about the period and fee fixed by CoC/ AA

#### J. Liquidation

1. Reason for liquidation of the CD (No value in the assets/ company was a shell company/Non- receipt of resolution plan/Rejection of resolution plan by CoC/ Rejection of resolution plan by AA/others)
2. Meeting of CoC passing resolution for liquidation

Date of service of notice of the meeting	Whether the notice of the meeting was served by giving not less than 5 days' notice? (Yes/ No)	If no, whether the approval of CoC sought (Yes/ No)		Date of the meeting of the Committee of Creditors	Number of days from ICD, meeting of the CoC held	Matters put forth for voting at the meeting	Voting Percentage	Remarks, if any
		(Yes/ No)	If yes, timeline for service of notice. If no, reasons.					

3. Date of filing application before AA
4. Date of AA approving liquidation

#### K. Expenses incurred by or on Resolution Professional:

Expense Head	Expenses – Sub Head	Expenses paid or agreed to be paid		Approved by COC (Yes/ No)
		Amount incurred	Amount paid	
RP	Fee payable to RP			
	Cost of insurance for RP			
	Other Expenses on/ for RP (travel, stay, security etc. related expenses)			
IPE	Fee, if any, payable to an IPE for support services			

CHAPTER III – ELIGIBILITY, QUALIFICATIONS, DUTIES & LIABILITIES OF IPs **145**

<b>Regis- tered Valuer</b>	Fee payable to Valuer 1			
	Fee payable to Valuer 2			
	Fee payable to Valuer 3, if any			
	Other Expenses on/ for IRP (travel, stay, out of pocket expenses etc.)			
<b>Other Pro- fessional</b>	Fee Payable to accounting and finance professional			
	Fee Payable to audit professional			
	Fee payable to legal professional/ attorney			
	Fee payable to any other professional			
	Fee payable to authorised representative			
	Other expenses on /for professionals			
<b>COC</b>	Expense for meeting venue			
	Expense for electronic voting			
	Expense for video conferencing			
	Any other expense related to CoC			
<b>Other Expenses</b>	Expenses on Public Announcement			
	Expenses for filings before Adjudicating Authority including Court fee			
	Expenses for verification of claims			
	CIRP related litigation			
	Other expenses, if any			

<b>Essential Services</b>	Electricity			
	Water			
	Telecommunication services			
	Information Technology services			
	Other essential services, if any			
<b>Other Services</b>	Other supplies			
	Employees and workmen			
	Security Personnel Services			
	Other expenses, if any			
<b>Interim Finance</b>	Amount of interim finance			
	Expenses for raising interim finance			
	Interest payable on interim finance			
<b>Other expenses</b>	Other matters			
	Penalties, if any, payable for non-compliance			

**L. Disclosure of relationship of the interim resolution professional, if any**

<b>Relationship of the Interim Resolution Professional with</b>	<b>Name</b>	<b>Nature of relationship</b>	<b>Description of relationship</b>
Corporate Debtor			
Financial Creditor			
FC1			
FC2..			
Authorised Representative(s)			
AR1			
AR 2			
Corporate Guarantor, if any			
Operational Creditor, if any			
OC1			
OC2			

....			
Interim Finance Provider, if any			
Prospective Resolution Applicant			
Accountant(s)			
Legal Professional(s)			
Other Professional(s)			
Firm of auditors of Corporate Debtor (in the last 3 financial years)			
Secretarial auditors in practice of the Corporate Debtor (in the last three financial years)			
Cost Auditors of Corporate Debtor (in the last three financial years)			
Legal Firm <sup>1</sup> (in the last three financial years)			
Consulting Firm <sup>2</sup> (in the last three financial years)			

**M. Services sought from IPE, if any. (Yes/No) If yes, Provide details of IPE**

- a. Name of IPE
- b. Relationship with IPE, if any:
- c. Nature of relationship:
- d. Whether appointed at arms' length relationship?

**N. Are you a partner or a director of an IPE? (Yes/No)**

If yes, furnish the details:

- a. Name of the IPE:
- b. Whether all directors and partners of the IPE are independent of CD, as per regulation 3(1)? Yes/No
- c. Whether disclosure of relationship of IPE has been made to IPA as per disclosure circular? Yes/No

If yes, date of submission of disclosure: If no, reasons (specify)

---

1. Legal firm that has any or had any transaction with the Corporate Debtor amounting to five percent or more of the gross turnover of such firm in the last three financial years.

2. Consulting firm that has any or had any transaction with the Corporate Debtor amounting to five percent or more of the gross turnover of such firm in the last three financial years.

d. Disclosure of relationship of IPE

<b>Relationship of all the Partners and Directors of IPE with</b>	<b>Name</b>	<b>Nature of relationship</b>	<b>Description of Relationship</b>
Corporate Debtor			
Firm of auditors of Corporate Debtor (in the last 3 financial years)			
Secretarial auditors in practice of the Corporate Debtor (in the last three financial years)			
Cost Auditors of Corporate Debtor (in the last three financial years)			
Legal Firm <sup>1</sup> (in the last three financial years)			
Consulting Firm <sup>2</sup> (in the last three financial years)			
Prospective Resolution Applicant			

**O. Support sought from any professional(s)? (Yes/ No)**

S. No.	Name of Professional	Nature of profession	Date of appointment	Term of appointment From to	Scope of engagement	Professional fees paid/agreed to be paid (Rupees)	Other expenses, if any, paid/agreed to be paid (Rupees)	Whether appointed at arms' length relationship? (Yes/ No)
						Quantum	Basis (hourly/daily etc.)	

**P. Disclosure of relationship of the professional**

Disclosure of relationship of Mr./ Ms/Mrs. ...., with :

- 
1. Legal firm that has any or had any transaction with the Corporate Debtor amounting to ten percent or more of the gross turnover of such firm in the last three financial years.
  2. Consulting firm that has any or had any transaction with the Corporate Debtor amounting to ten percent or more of the gross turnover of such firm in the last three financial years.

<b>Relationship of the Professional with</b>		<b>Name</b>	<b>Nature of Relationship</b>	<b>Description of relationship</b>
7.	Corporate Debtor			
8.	Corporate Guarantor, if any			
9.	Insolvency Professional			
10.	Insolvency Professional Entity (If associated with, any)			
11.	Financial Creditor(s)			
12.	Interim Finance Provider(s)			
13.	Prospective Resolution Applicant			

**Q. Details of Deviations/Non-Compliances of the provisions of Code, regulations, circulars or other laws applicable to the CD:**

<b>Legal Provi- sions</b>	<b>Deviation/ Non- com- pliance</b>	<b>Section/ Regula- tion/Circu- lar</b>	<b>Reasons</b>	<b>Period of non- com- pliance</b>	<b>Whether rectified or not</b>
IBC					
CIRP Regula- tions					
IP Regulations					
Circulars					
Other laws applicable to the CD  [For example- Companies Act, SEBI Act, SCRA, Others (pls. specify)]					

**R. Details of orders passed by Courts/ Tribunals:**

<b>Order (Interim/ Final)</b>	<b>Date of order</b>	<b>Authority passing the order</b>	<b>Abstract of order</b>

**Attachments**

1. Minutes of all CoC meetings.
2. Copy of Resolution Plan.
3. Disclosure of cost and relationship made to IPA.
4. All the applications filed before AA, if any.
5. All the orders passed by AA, if any.
6. All the applications filed before courts, if any.
7. All the orders passed by courts, if any.
8. Compliance Certificate – Form H.
9. Progress Reports filed to Adjudicating Authority by the RP.
10. Any other attachment related to resolution process (say Process document, Bid documents etc.).
11. Cost Sheets prepared by RP.
12. Other documents, if any.

**Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order dated [ Insert date] and Application number [ Insert application number] dated [ Date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**Annexure-7****FORM – CIRP 6***(to be filed with the Board within 7 days of the occurrence of event)*

This Form is filed for intimation of

- I. Filing of application in respect of:
  - a. Preferential transaction
  - b. Undervalued transaction
  - c. Extortionate transaction
  - d. Fraudulent Transaction
- II. Raising of Interim Finance
- III. Insolvency resolution process for guarantors
- IV. Extension of period of CIRP
- V. Exclusion of period of CIRP
- VI. Premature closure of CIRP (appeal, settlement, withdrawal etc.)
- VII. Request for liquidation before completion of CIRP
- VIII. Non implementation of resolution plan as approved by AA

**A. Corporate Debtor**

- a. Name of the Corporate Debtor:
- b. CIN/LLPIN of Corporate Debtor:

**I. Filing of application in respect of****(a) Preferential transaction**

Date of filing application of preferential transactions	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Whether the RP formed an opinion on preferential transaction (Yes/no)
2. Date of forming opinion:
3. Number of days taken for forming opinion:

4. Delay in number of days for forming opinion *vis a vis* timelines, if any:
5. Reasons for delay, if any:
6. Whether RP has made a determination on preferential transaction (Yes/ No):
7. Date of determination:
8. Number of days taken for determination of transactions:
9. Delay in number of days for determination of transactions *vis a vis* timelines, if any:
10. Reasons for delay *vis a vis* timelines, if any
11. Date of intimation to the Board:
12. Date of filing of application with Adjudicating Authority:
13. Number of days taken for filing application:
14. Delay in number of days for filing the application *vis a vis* timelines, if any:
15. Total transaction value reported (Rupees):

*(Amount in Rupees)*

Parties to the transaction	Relationship with the CD (Related Party/ Other than Related party)	Nature of Preferential transaction	Date of such transaction	Underlying Amount	Status of application at the time of approval of resolution by AA	Any Amount clawed back	Authority to whom the application has been handed over to for further follow up	Remarks

16. Date when order was passed by the Adjudicating Authority, if any
17. Whether the AA order is challenged (Yes/No)
18. If Yes, Authority Name and outcome/order in brief

### **Attachments**

1. Determination of preferential transaction intimated to the Board.
2. Copy of forensic audit report, if any
3. Copy of transaction audit report, if any
4. Application filed with the Adjudicating Authority.
5. Order passed by the Adjudicating Authority.
6. Order passed by other courts.
7. Other document, if any.

### **Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

#### **\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

#### **(b) Undervalued transaction**

Date of filing of undervalued transactions	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Whether the RP formed an opinion on undervalued transaction (Yes/ no)
2. Date of forming opinion:
3. Number of days taken for forming opinion:
4. Delay in number of days for forming opinion *vis a vis* timelines, if any:
5. Reasons for delay, if any:
6. Whether RP has made a determination on undervalued transaction (Yes/ No):
7. Date of determination:

8. Number of days taken for determination of transactions:
9. Delay in number of days for determination of transactions *vis a vis* timelines, if any:
10. Reasons for delay *vis a vis* timelines, if any
11. Date of intimation to the Board:
12. Date of filing of application with Adjudicating Authority:
13. Number of days taken for filing application:
14. Delay in number of days for filing the application *vis a vis* timelines, if any:
15. Total transaction value reported (Rupees)

*(Amount in Rupees)*

Parties to the transaction	Relationship with the CD (Related Party/ Other than Related party)	Nature of Under valued transaction	Date of such transaction	Under-lying Amount	Status of application at the time of approval of resolution by AA	Any Amount clawed back	Authority to whom the application has been handed over to for further follow up	Re-marks

16. Date when order was passed by the Adjudicating Authority, if any:
17. Whether the AA order is challenged (Yes/No):
18. If Yes -Authority Name and outcome/order in brief:

**Attachments:**

- a. Copy of the determination of the undervalued transaction sent to the Board
- b. Copy of forensic audit report, if any
- c. Copy of transaction audit report, if any
- d. Application filed with the Adjudicating Authority
- e. Order passed by the Adjudicating Authority

- f. Order passed by other courts g. Any other attachment

### **Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [mention date] in application number [mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

### **\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

### **(c) Extortionate credit transaction**

Date of filing of extortionate transactions	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Whether the RP formed an opinion on extortionate transaction (Yes/no)
2. Date of forming opinion:
3. Number of days taken for forming opinion:
4. Delay in number of days for forming opinion *vis a vis* timelines, if any:
5. Reasons for delay, if any:
6. Whether RP has made a determination on extortionate transaction (Yes/ No):
7. Date of determination:
8. Number of days taken for determination of transactions:
9. Delay in number of days for determination of transactions *vis a vis* timelines, if any:
10. Reasons for delay *vis a vis* timelines, if any

11. Date of intimation to the Board:
12. Date of filing of application with Adjudicating Authority:
13. Number of days taken for filing application:
14. Delay in number of days for filing the application *vis a vis* timelines, if any:
15. Total transaction value reported (Rupees)

*(Amount in Rupees)*

Parties to the transaction	Relationship with the CD (Related Party Other than Related party)	Nature of Extortionate transaction	Date of such transaction	Underlying Amount (Rupees)	Status of application at the time of approval of resolution by AA	Any Amount clawed back (Rupees)	Authority to whom the application has been handed over to for further follow up	Remarks

16. Date when order was passed by the Adjudicating Authority, if any:
17. Whether the AA order is challenged (Yes/No):
18. If Yes -Authority Name and outcome/order in brief:

#### Attachments

1. Copy of the determination of the extortionate transaction sent to the Board
2. Copy of forensic audit report, if any
3. Copy of transaction audit report, if any
4. Application filed with the Adjudicating Authority
5. Order passed by the Adjudicating Authority
6. Order passed by other courts
7. Other document, if any

**Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**(d) Fraudulent transaction**

Date of filing of fraudulent transactions	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Whether the RP formed an opinion on fraudulent transaction (Yes/no)
2. Date of forming opinion
3. Number of days taken for forming opinion:
4. Delay in number of days for forming opinion *vis a vis* timelines, if any
5. Reasons for delay, if any:
6. Whether RP has made a determination on fraudulent transaction (Yes/ No)
7. Date of determination:
8. Number of days taken for determination of transactions:
9. Delay in number of days *vis a vis* timelines:
10. Reasons for delay *vis a vis* timelines, if any
11. Date of intimation to the Board:
12. Date of filing of application with Adjudicating Authority:

13. Number of days taken for filing application
14. Delay in number of days *vis a vis* timelines, if any
15. Total transaction value reported (Rupees):

*(Amount in Rupees)*

Parties to the transaction	Relationship with the CD (Related Party/ Other than Related party)	Nature of Fraudulent transaction	Date of such transaction	Underlying Amount	Status of application at the time of approval of resolution by AA	Any Amount clawed back	Authority to whom the application has been handed over to for further follow up	Remarks

16. Date when order was passed by the Adjudicating Authority, if any  
:
17. Whether the AA order is challenged (Yes/No):
18. If Yes -Authority Name and outcome/order in brief:

#### Attachments

1. Copy of determination of fraudulent transaction sent to the Board
2. Copy of forensic audit report, if any
3. Copy of transaction audit report, if any
4. Application filed with the Adjudicating Authority
5. Order passed by the Adjudicating Authority
6. Order passed by other courts
7. Any other attachment

#### Declaration

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**II. Interim finance**

Date of raising interim finance	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

(Amount in Rupees)

Name of Interim financier	Address of Interim Financier	Date of raising interim finance	Amount of interim finance taken	Whether security interest created (Yes/ No)	If yes, provide details of asset on which security interest is created

**Declaration**

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

### III. Insolvency resolution process for guarantors

S. No	Name of guarantor	Guarantee issued in favour of	Amount of guaranteee	Date of invocation of guaranteee	Date of default by guarantor	Date of initiation of process against guarantor under the Code	Petition No.	NCLT Bench

#### Declaration

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

#### \*To be digitally signed/ e-signed by IP

\*IP registration number: Date:

Place:

### IV. (a) Extension of period of CIRP

Date of granting extension by Authority	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Number of times applied for extension of CIRP period:

S. No.	Date of meeting of CoC	Date of filing of application	Application/ Petition No.	Extension applied (No. of days)	Extension granted (No. of days)	Date of order passed	Abstract of order

2. Number of days taken to pass the resolution by CoC, for seeking extension of CIRP:

3. Number of days taken to file the application with AA:
4. Number of days taken for the order of NCLT:
5. Whether any period excluded from CIRP period by any Authority?  
If yes – Authority and new date of closure of CIRP:

### **Declaration**

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

### **\*To be digitally signed/ e-signed by IP**

\*IP registration number:

Date:

Place:

### **IV. (b) Exclusion of Period of CIRP**

<b>Stage of CIRP (please specify one or more from below)</b>	<b>Number of days excluded</b>	<b>Author-ity</b>	<b>Reason for exclusion</b>
(Pre EOI/Post EOI before issue of RFRP/ Post issue of RFRP before submission of resolution plan to AA/Post submission of resolution plan to AA/Others)			(Litigation period/Directions of AA to reconsider the plan/ Delay in appointment of RP by CoC/Delay in receipt of order of appointment/ Time taken for approving the Resolution Plan by AA/ Others)

### **Declaration**

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number: Date:

Place:

**V. Premature closure of CIRP (appeal, settlement, withdrawal etc.)**

Date of application of withdrawal to AA	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

A. Premature closure is by (appeal/settlement), specify details as below:

1. Application/Petition No.:
2. Bench:
3. Name of the Applicant/Petitioner:
4. Application filed under Section:
5. Date of admission:
6. In case of appeal,
  - a. Date of order appealed against:
  - b. Abstract of the order appealed against:
  - c. Date of order disposing the appeal:
  - d. Authority passing the order in appeal:
  - e. Abstract of the order disposing the appeal:
7. In case of settlement,
  - a. Date of making application for disposal of CIRP on the basis of settlement:
  - b. Details of settlement:
  - c. Amount involved in the settlement:
  - d. Date of order closing the CIRP based on settlement:
  - e. Abstract of the order: B. Stage of 12A withdrawal

Description (please specify one from below)	Specify
Resolution Plan / Liquidation filed by RP with AA for approval, yet to be approved	
Resolution Plan / Liquidation Approved by CoC, yet to be filed with AA for approval	
Resolution Plans / Liquidation under Consideration of CoC	
Resolution Plans, if any, under Examination of RP but yet to be submitted to CoC	
Request for Resolution Plan (Re)issued but Last Date for Receipt for Resolution Plans is not yet over	
Invitation for EoI (Re)Issued but Request for Resolution Plan yet to be Issued	
Invitation for EoI yet to be Issued Others	

1. Date of CoC approval:
2. Number of days taken for approval of CoC:
3. Date of application to AA:
4. Number of days taken for submission of application:
5. Whether the application accompanies Bank Guarantee? Yes No

If yes, provide terms of Bank Guarantee

6. Grounds for withdrawal (please select one below)

Grounds of withdrawal

- Full settlement with applicant
- Full settlement with other creditors
- Agreement to settle in future
- Other settlements with creditors
- CD not traceable
- CD struck off the register
- Applicant not pursuing due to high cost
- Other

7. Whether withdrawal approved by the Adjudicating Authority? Yes/

No If yes, Date of the Order passed by the Adjudicating Authority:  
 If no, reasons for rejection:

8. Any Settlement amount agreed /received by Stakeholders (FC/OC/ others) pursuant to 12A withdrawal along with timelines:

Nature of stakeholder	Name	Amount (Rupees)	Timelines for payments, if any

### Attachments

1. Copy of the minutes of the CoC where resolution for withdrawal of application was approved by CoC
2. Form FA submitted to the resolution professional by the Applicant
3. Copy of the Application filed with the Adjudicating Authority
4. Order passed by AA/NCLAT/HC/Supreme Court
5. Any other attachment

### Declaration

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

#### \*To be digitally signed/ e-signed by IP

\*IP registration number: Date:

Place:

### VI. Request for liquidation before completion of CIRP

Date of filing application for liquidation before CIRP completion	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Application/Petition No. initiating CIRP:
2. Bench:
3. Name of the Applicant/Petitioner:
4. Application filed under Section(7/9/10):
5. Date of admission:
6. Stage of CIRP (please specify one from below):

Resolution Plans, if any, under Examination of RP but yet to be submitted to CoC
Request for Resolution Plan (Re)issued but Last Date for Receipt for Resolution Plans is not yet over
Invitation for EoI (Re)Issued but Request for Resolution Plan yet to be Issued
Invitation for EoI yet to be Issued
Others

7. Date of passing resolution by CoC to liquidate the CD:
8. Resolution passed by CoC in which meeting of CoC( 1st , 2nd...):
9. Reasons for request for liquidation before completion of CIRP:
10. Voting share of CoC approving liquidation:

S. No	Voting share (%) – in favor	Voting share (%) - against	Voting share (%) - abstained

11. Date of filing application before AA for liquidation of CD:
12. Date of order of AA to liquidate CD:
13. Abstract of order:
14. Appeals, if any against order of liquidation

#### **Attachments**

1. Copy of the minutes of the CoC where liquidation was considered
2. Copy of the Application filed with the Adjudicating Authority
3. Order passed by AA/NCLAT/HC/Supreme Court

4. Any other attachment

**Declaration**

I, [Name of IRP/RP] having IP registration number [Registration no.], was appointed as an Insolvency Resolution Professional/ Resolution Professional vide NCLT order, dated [ mention date] in application number [ mention application number] dated [mention date of appointment of RP], under section 16/22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number:

Date:

Place:

**VII. Non implementation of resolution plan as approved by AA**

Date of default of implementation of resolution plan	Due date of Form	Delay in submission of Form (number of days)	Reasons for delay

1. Duration of implementation of plan
2. Is there any contravention(s) of terms and conditions of implementation of resolution plan by RA/ CD? (Yes/ no)

If yes,

Grounds of Contravention(s)	Specific clauses of the resolution plan	period of delay in implementation

3. Application filed with AA? (Yes/ No) If yes, please furnish the details below:
  - a. Date of filing the application:
  - b. Date of order of AA:

**Attachments**

1. Copy of the Application filed with the AA
2. Order passed by AA
3. Any other attachment

**Declaration**

I, [Name of RP] having IP registration number [Registration no.], was appointed as an Resolution Professional vide NCLT order, dated [mention date] in application number [mention application number] dated [mention date of appointment of RP], under section 22 of the Insolvency and Bankruptcy Code, 2016.

I declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

**\*To be digitally signed/ e-signed by IP**

\*IP registration number:

Date:

Place :

**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 or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred”.

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.

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. Provided that the Central Government may by NOTification specify the minimum amount of default of higher value which shall not be more than one crore rupees.

**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(1) of the Adjudicating Authority Rules provides that a financial creditor either by itself or jointly make application for initiating the corporate insolvency resolution process against corporate debtor shall make the application in **Form 1** and shall be accompanied with documents and records as specified in CIRP Regulations.

Regulation 8(2) 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 paid; 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).*

*[Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.]*

**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**

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

*[Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority.]*

**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; [i.e. to admit the application]*
  - (b) *the order under clause (b) of sub-section (5) to the financial creditor, [i.e. to reject the application]*
- 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  
1<sup>st</sup> 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 <sup>st</sup> 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 <sup>th</sup> FLOOR, PMM BUILDING, STREET NO.1, DELHI-110044

<p><b>6. DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55(2) OF THE CODE</b></p> <p>(I) ASSETS INCOME</p> <p>(II) CLASS OF CREDITORS ON AMOUNT TO DEBT</p> <p>(III) CATEGORY OF CORPORATE DEBTOR (WHERE APPLICATION IS UNDER CH. IV OF PART II OF THE CODE)</p>	NA
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**PART-III**  
**PARTICULARS OF THE PROPOSED**  
**INTERIM RESOLUTION PROFESSIONAL**

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

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

<b>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)</b>	<p>Security Held:</p> <ol style="list-style-type: none"> <li>1. Deed of Hypothecation of movables dated 15.01.2011 for a value of Rs. 50 crores. (EXHIBIT-1)</li> <li>2. Equitable Mortgage of immovable property vide mortgage deed dated 15.01.2011 for a value of Rs. 50,53,000 (EXHIBIT-2)</li> <li>3. Term Loan Agreement dated 15 January, 2011</li> <li>4. Term Loan Agreement dated 15 July, 2011</li> <li>5. Term Loan Agreement dated 15 December, 2011 (EXHIBIT-3)</li> </ol>
<b>2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)</b>	NA
<b>3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)</b>	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 CRICL 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 Institute of Insolvency Professionals 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 Instituted of Insolvency Professionals ;
- (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.

**[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)

*Note:*

There have been orders of Adjudicating Authority wherein they have advised insolvency professionals not to certify (optional certification) Form 2 stating that application is true, accurate, and complete and default has occurred as it will hamper the independent fair play of an IP. The IP shall not fill up such Performa as it should be wholly alien as per the principle to act fairly. IBBI was directed to relook on this part. Petitioner was directed to name another IRP. (NCLT order dated 16.01.2018 in the matter of *ICICI Bank Limited v/s Essar Power Jharkhand Ltd*)

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

**Annexure IV: Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicant along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.**

**AFFIDAVIT**

**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 say 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. I believe them to be true.

**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 payment 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], or 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 [payment] 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 the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 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. Provided that the 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, if available;] and*
  - (d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and*
  - (e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]*

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 contract for supply of goods & services with corporate debtor.
  - (ii) an invoice demand payment for the goods & services supplied to the corporate debtor.

- (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 provides that a person shall be considered independent of the corporate debtor, if he:

- (1) (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 five per cent or more of the gross turnover of such firm, in the last three financial years.

[(1A) Where the committee decides to appoint the interim resolution professional as resolution professional or replace the interim resolution professional under section 22 or replace the resolution professional under section 27, it shall obtain the written consent of the proposed resolution professional in Form AA of the Schedule.]

- (2) A Resolution Professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.
- (3) 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 [payment] 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 [payment] 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.

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

Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed 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  
1<sup>st</sup> 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 <sup>st</sup> 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	V2929G-F2001PTC0024152
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	
6. NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF OPERATIONAL CREDITOR.	NA
7. NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF	NA
8. DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55 (2) OF THE CODE :  (i) ASSETS AND INCOME (ii) CLASS OF CREDITORS OR AMOUNT OF DEBT (iii) CATEGORY OF CORPORATE PERSON (WHERE APPLICATION IS UNDER CHAPTER IV OF PART II OF THE CODE)]	NA

**Part-III**

**PARTICULARS OF THE PROPOSED INTERIM RESOLUTION  
PROFESSIONAL [IF PROPOSED]**

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

**Part-IV**

**PARTICULARS OF OPERATIONAL DEBT**

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

	<p>2. Default in respect of Rs. 52,532 occurred on June 07, 2017</p> <p>3. Default in respect of Rs. 52,532 occurred on July 07, 2017</p>
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**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 CREDITOR <b>(ATTACH A COPY OF CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)</b>	NA
2. DETAILS OF RESERVATION/RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	NA
3. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)	NA
4. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)	NA
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) <b>(ATTACH A COPY)</b>	NA
6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH	“Contract of Employment with XYZ Limited dated

<b>OPERATIONAL DEBT HAS BECOME DUE</b>	January 15, 2001" Copy of the said contract has been enclosed herewith and marked as exhibit 1
<b>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)</b>	Bank certificate in original has been enclosed herewith and marked as exhibit 2
<b>8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT.</b>	<ol style="list-style-type: none"> <li>1. E-mail dated May 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited.</li> <li>2. E-mail dated June 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited</li> <li>3. E-mail dated July 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited</li> <li>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</li> <li>5. Reply of Mr. DEF to the demand notice expressing their inability to make the payment</li> </ol>

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 <sup>st</sup> 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  
1<sup>st</sup> 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.**

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

<b>ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)</b>	
<b>4. DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS</b>	NA
<b>5. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY</b>	NA
<b>6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE</b>	<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>
<b>7. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT</b>	<ol style="list-style-type: none"> <li>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.</li> <li>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</li> <li>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</li> </ol>

	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 <sup>st</sup> 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

1<sup>st</sup> 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 1<sup>st</sup> 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 12<sup>th</sup> 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 1<sup>st</sup> 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 12<sup>th</sup> 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. XXXXXX, an insolvency professional registered with ICSI Institute of Insolvency Professionals 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/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 Institute of Insolvency Professionals;
- (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)

**Note:**

There have been orders of Adjudicating Authority wherein they have advised insolvency professionals not to certify (optional certification) Form 2 stating that application is true, accurate, and complete and default has occurred as it will hamper the independent fair play of an IP. The IP shall not fill up such Performa as it should be wholly alien as per the principle to act fairly. IBBI was directed to relook on this part. Petitioner was directed to name another IRP. (NCLT order dated 16.01.2018 in the matter of *ICICI Bank Limited v/s Essar Power Jharkhand Ltd*)

**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 1<sup>st</sup> 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 statement made are based on the information received by me. I believe them to be true

**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; and no disciplinary proceedings is pending against the proposed RP or*
- (b) reject the application, if it is incomplete or any disciplinary proceedings is pending against the proposed RP:*

*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  
6<sup>TH</sup> 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 THE REGISTERED OFFICE OF CORPORATE DEBTOR.	M/s ABC Pvt. Ltd. Uxxxxxxxxx220122 House no. --, Building --- 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
9.	DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION SECTION 55(2) OF THE CODE :  (i) ASSETS AND INCOME (ii) CLASS OF CREDITORS OR AMOUNT OF DEBT (iii) CATEGORY OF CORPORATE PERSON (WHERE APPLICATION IS UNDER CHAPTER IV OF PART II OF THE CODE)]	

**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
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**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, Solitaire, 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 <sup>st</sup> 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 <sup>st</sup> 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.

Your 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, Malad (West) Branch, Mumbai 4000xx.**

Under instructions from my Clients, bank, 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 your 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. xxxxxxxxx dated xx/xx/yyyy.
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/yyyy
  8. My clients state that as on xx/xxx/yyyy 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/yyyy 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,xxx 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/yyyy 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/yyyy

To

The National Company Law Tribunal  
6<sup>TH</sup> 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 Institute of Insolvency of Professionals 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 IPA-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 Institute of Insolvency Professionals;
- (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)

**Note:**

There have been orders of Adjudicating Authority wherein they have advised insolvency professionals not to certify (optional certification) Form 2 stating that application is true, accurate, and complete and default has occurred as it will hamper the independent fair play of an IP. The IP shall not fill up such Performa as it should be wholly alien as per the principle to act fairly. IBBI was directed to relook on this part. Petitioner was directed to name another IRP. (NCLT order dated 16.01.2018 in the matter of *ICICI Bank Limited v/s Essar Power Jharkhand Ltd*)

**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 10<sup>TH</sup> 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 10<sup>th</sup> 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/yyyy, 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 therefrom, 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 under 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 these 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*

<b>Sl. No.</b>	<b>To be Ascertained</b>	<b>Yes/No</b>	<b>Reference Page No.</b>
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?		

CHAPTER V – CHECKLIST FOR SCRUTINY OF PETITION/APPEAL/REPLY **211**

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, <b>e.g., under sections 241 and 242 of the Companies Act, 2013 in accordance with section 244 of the Act</b> & 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, <i>viz.</i> , 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 party, date, address and in case a party sues or is 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?		

CHAPTER V – CHECKLIST FOR SCRUTINY OF PETITION/APPEAL/REPLY**213**

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?		
25.	Whether soft copy of complete application/petition/appeal/reply etc., in pen drive (pdf. format) along with 2 complete sets (legal size) in hard copy is filed before NCLT, New Delhi?		

**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

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

<b>Sl. No.</b>	<b>Title of the Bench</b>	<b>Location and Postal Address</b>
(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.	Zydus Hospital Corporate Bhawan, 1st and 2nd Floor, Sarkhej, Gandhinagar Hwy, Bhaikanagar, Sola Ahmedabad, Gujarat 380055
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), IIInd Floor, No. 29 Rajaji Salai, Chennai - 600001
7.	National Company Law Tribunal, Cuttack Bench	Dagar Poda, CDA Area, Cuttack Odisha 753002
8.	National Company Law Tribunal, Guwahati Bench.	GS Road, South Sarania, Lachit Nagar Guwahati, Assam 781003
9.	National Company Law Tribunal, Hyderabad Bench	Corporate Bhawan, Bandlaguda, Lattianaram Village, Hayatnagar Mandal, Rangareddy District, Hyderabad 500068
10.	National Company Law Tribunal, Kolkata Bench	5, Esplanade Row (West), Town Hall Ground and First Floor, Kolkata - 700001.
11.	National Company Law Tribunal, Mumbai Bench	6th Floor, Fountain Telecom Building No.1, Near Central Telegraph, M G Road, Mumbai - 400001
12.	National Company Law Tribunal, Jaipur Bench	Corporate Bhawan, Residency Area, Civil Line, Jaipur-302001

## *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. The Code casts a duty on IRP to ensure that during corporate insolvency resolution process corporate debtor, every endeavor 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 sixty-six per cent 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. However, if resolution professional is not appointed in the first meeting of the committee, Interim Resolution Professional will function till the appointment of resolution professional.

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 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 IBBI (CIRP) Regulations, 2016.

#### 1. Action to be taken on initiation of CIRP

As per Section 13(1) of the Code the Adjudicating Authority i.e. the NCLT (National Company Law Tribunal), after admission of the application under Section 7 or Section 9 or Section 10 by an order has been initiated 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 IBBI (CIRP) Regulations, 2016 whereby "immediately" means not later than three days from the date of appointment of the interim resolution professional.

#### 2. Who makes the Public Announcement?

Chapter III, Regulation 6 of the IBBI (CIRP) Regulations, 2016 stipulates that public announcement by an interim resolution professional pertaining to his/her appointment shall be made within three (3) days of such appointment.

#### 3. Format of Public Announcement

The Public Announcement shall be made in the manner specified in Form A of the Schedule of the IBBI (CIRP) Regulations, 2016.

The prescribed format is placed as **Annexure VII.1**.

#### Intimation of initiation of CIRP and appointment of Interim Resolution Professional

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 placed as **Annexure VII.2.**

#### **4. 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, as may be specified;
- (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, which shall be the one hundred and eightieth day from the date of the admission of the application under Sections 7, 9 or Section 10, as the case may be.

The public announcement shall state from where claim forms can be downloaded or obtained.

#### **Public Anoucement to mention choice of insolvency professionals for class of creditors**

As per Regulation 6(2)(bb) of IBBI (Insolvency Resolution For Corporate Persons) Regulations, 2016, the public announcement shall offer choice of three insolvency professionals identified under regulation 4A to act as authorized representatives of creditors in each class. The three choices isare to be made with respect to each class of creditors.

### **Choice of authorised representative**

- (1) On an examination of books of account and other relevant records of the corporate debtor, the interim resolution professional shall ascertain class(es) of creditors, if any.
- (2) For representation of creditors in a class ascertained under sub-regulation (1) in the committee, the interim resolution professional shall identify three insolvency professionals who are- (a) not his relatives or related parties; (b) eligible to be insolvency professionals under regulation 3; and (c) willing to act as authorised representative of creditors in the class.
- (3) The interim resolution professional shall obtain the consent of each insolvency professional identified under sub-regulation (2) to act as the authorised representative of creditors in the class in **Form AB** which is placed as **Annexure VII.3**.

### **5. Where is the Public Announcement to be made?**

In terms of Chapter III, Regulation 6 of the IBBI (CIRP) Regulations, 2016 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.

The IBBI has designated its own website **www.ibbi.gov.in** for the purpose of publishing Public Announcement. It also monitors the IRPs to ensure that they made the due Announcements on the designated website.

An Interim Resolution Professional shall send copy of Public Announcement in Form A under regulation 6 (2)(b)(iii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in PDF format by mail from his e-mail address registered with the Board to **public.ann@ibbi.gov.in** for getting it published on IBBI's website.

As per Regulation 6, the Public Announcement shall invite creditors for submission of claim with proofs and give them fourteen (14) days to submit the same from the date of appointment of the interim resolution professional.

Regulation 12(2) states that a Creditor who fails to submit claim with proof within time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional as the case may be on or before 90<sup>th</sup> day of insolvency commencement date.

### **Expenses of Public Announcement**

As per Regulation (3) 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.

## **II. CLAIMS AND CONSTITUTION OF COMMITTEE OF CREDITORS**

After issuance of 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. Appointment of authorised representative for class of creditors
5. Constitution of Creditors Committee
6. Calling of first Meeting of Creditors Committee
6. Claims of class of creditors
7. Manner of Selection of Authorised representative for class of creditors.

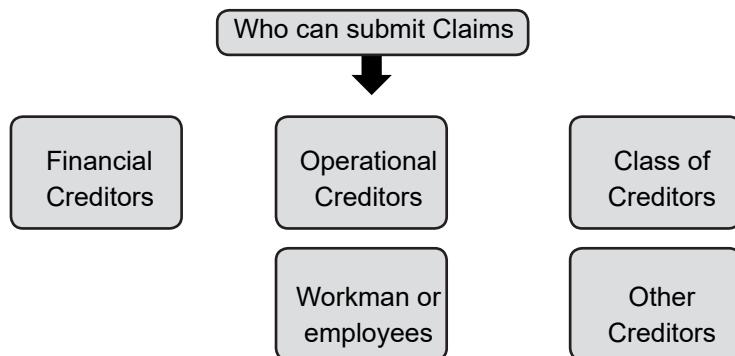
In the aforesaid context, CIRP Regulations prescribe for:-

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.

### **Who can submit claims?**

1. Financial Creditor
2. Operational Creditor (Other than workmen & employees)
3. Claims by Creditors in a class
4. Claims by Workmen & Employees
5. Claims by other Creditors



### **Claims by Operational Creditors**

#### **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 ‘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 payment 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.

#### ***(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 claim with proof to the interim resolution professional in person, by post or by electronic means in **Form B** of the Schedule.

Format placed as **Annexure VII.4**

***(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**

#### **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 ‘Financial Debt’**

As per section 5(8) of the Code “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;

*[Explanation. - For the purposes of this sub-clause,- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

*(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

- (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;

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

As per Regulation 8 (1) person claiming to be a financial creditor, other than financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in **Form C** of the Schedule.

Format placed as **Annexure VII.5**

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

### **Claims by Creditors in a Class**

#### **The Definition of Class of Creditors**

As per Regulation 2(1)(aa) of IBBI (CIRP) Regulations, 2016, Class of Creditors' means a class with atleast ten financial creditors under Clause (b) of sub-section (6A) of Section 21 and the expression creditors in a class' shall be construed accordingly.

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

A person claiming to be a creditor in a class shall submit claim with proof to the interim resolution professional in electronic form in **Form CA** of the Schedule. Format placed as **Annexure VII.6**

#### ***(iii) Basis of proof of claims***

The existence of debt due to a creditor in a class may be proved on the basis of- (a) the records available with an information utility, if any; or (b) other relevant documents, including any- (i) agreement for sale; (ii) letter of allotment; (iii) receipt of payment made; or (iv) such other document, evidencing existence of debt.

#### ***(iii) All supplementary documents in support of claims to be submitted before Class of Creditor***

The class of creditors may submits supplementary documents or clarifications in support of the claim before the constitution of the committee.

A creditor in a class may indicate its choice of an insolvency professional, from amongst the three choices provided by the interim resolution professional in the public announcement, to act as its authorized representative.

## Claims by workmen and employees

### 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).

#### *(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 claim with proof to the interim resolution professional in person, by post or by electronic means in **Form D** of the Schedule.

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

Formats of the claim are placed as **Annexure VII.7 and Annexure VII.8**.

#### *(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.

**Claim by other creditor*****(i) Mode and manner of submission of proof of claims***

A person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit its claim with proof to the interim resolution professional or resolution professional in person, by post or by electronic means in **Form F** of the Schedule. Formats of the claim are placed as **Annexure VII.9.**

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

The class of creditors may submits supplementary documents or clarifications in support of the claim before the constitution of the committee.

***(iii) Basis of Proof of claims***

The existence of the claim of the creditor referred to in sub-section (1) 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.

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

**Submission of claims by Creditors on or before the ninetieth day of Insolvency Commencement date**

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, **on or before ninetieth day of Insolvency commencement date.**

***Financial creditor who has submitted claims after public announcement and before ninetieth day from Insolvency commencement date 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.

In the recent orders/judgements, the Hon'ble Tribunals/Appellate Tribunal have condoned the delay even after the time period of ninety days is elapsed, citing that the amended Regulation 12 (2) is directory.

**In the matter of Edelweiss Asset Reconstruction Co. Pvt. Ltd. v/s Adel Landmarks Ltd. The Principal Bench of the NCLT, New Delhi, held as follows:**

*"The rejection of claim on the ground of delay is not sustainable because the provisions has been held to be directory....We wish to make it clear that all the Resolution Professionals shall make a note of these repeated orders passed by NCLT clarifying that claim of an applicant, like the present one, could not be rejected on the ground of delay as the provision has been held to be directory."*

Additionally one more order by NCLT, Principal Bench dated 20th May 2019 in the matter of 21st Century Vs Wire Roads Limited also supports the same.

**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.

### **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.

### **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.

### **Debt 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.*

Many Insolvency Professional face difficulties in verifying the claims. In order to bring clarity and harmonization.

### 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 or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of Section 24 shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

However, if the financial creditor is regulated a financial sector regulator and it is a related party of the Corporate Debtor only on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date, then it shall not be prohibited on representing 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.

Related party in relation to an individual, means -

- (a) a person who is a relative of the individual or a relative of the spouse of the individual;
- (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

- (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;
- (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;
- (e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual
- (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;
- (h) a person on whose advice, directions or instructions, the individual is accustomed to act;
- (i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

*Explanation.-* For the purposes of this clause, –

- (a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely:-
  - I. members of a Hindu Undivided Family,
  - II. husband,
  - III. wife,
  - IV. father,
  - V. mother,
  - VI. son,
  - VII. daughter,
  - VIII. son’s daughter and son,
  - IX. daughter’s daughter and son,
  - X. grandson’s daughter and son,

- XI. granddaughter's daughter and son,
  - XII. brother,
  - XIII. sister,
  - XIV. brother's son and daughter,
  - XV. sister's son and daughter,
  - XVI. father's father and mother
  - XVII. mother's father and mother,
  - XVIII. father's brother and sister,
  - XIX. mother's brother and sister; and
- (b) Wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included.

### **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.

Some other important points w.r.t committee of creditors:

- ***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.
- ***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***
- ***Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-***
  - (c) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
  - (d) represent himself in the committee of creditors to the extent of his voting share;
  - (e) 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
  - (f) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally

### **Authorised Representative**

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 introduced the concept of Authorised Representatives for the Financial Creditors.

Section 21 (6A) (b) of the Code read with regulation 16A of the Regulations provide for a simplified mechanism of representation of financial creditors through authorised representatives. It is necessary that an ongoing corporate insolvency resolution process, where creditors belonging to a class are otherwise not represented in the CoC, uses this simplified mechanism, irrespective of the stage of the process. The resolution professional shall facilitate representation through authorised representative(s)

As per Section 21(6A) of the Code where a financial debt

- (a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, ***such trustee or agent shall act on behalf of such financial creditors;***
- (b) is owed to a class of creditors exceeding *the number\** as may be specified, other than the creditors covered under clause (a), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority ***prior to the first meeting of the committee of creditors;***

\*IBBI prescribed ten Creditors vide circular dated 13<sup>th</sup> July, 2018

- (c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors

Who shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

However, It has been clarified that any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee

As per IBBI circular dated 13<sup>th</sup> July, 2018 it was clarified that wherever the approval of resolution plan under regulation 39 (3) of the Regulations is at least 15 days away, the resolution professional shall expeditiously obtain, by

electronic means, the choice of the insolvency professional from creditors in a class to act as the authorised representative of the class and proceed further in the manner as specified in regulation 16A of the Regulations.

### **Manner of appointment of Authorised Representative**

- (1) The appointment of Authorised Representatives with regard to clauses (a) and (c) of sub-section (6A) of Section 21 of the Code will be by the Financial Creditors.
- (2) Though, for the authorised representative under clause (b) the interim resolution professional shall offer a choice of three insolvency professionals and a creditor in a class may indicate its choice of an insolvency professional, from amongst the three, to act as its authorised representative. The Insolvency Professional, who is the choice of highest number of creditors in the class, is appointed as the authorised representative subject to the approval of Adjudicating Authority.

As per Regulation 16A of CIRP regulations, the choice of Financial Creditors can be submitted to the Insolvency Professional in Form CA received under sub-regulation (2) of regulation 12 of CIRP Regulations. However, the Insolvency Professional itself cannot act as the Authorised representative.

### **Remuneration of Authorised Representative**

As per Section 21(6B) of the Code, following remuneration shall be payable to the authorised representative:

- (1) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation
- (2) under clause (b) of sub-section (6A) shall be as specified\* which shall be form part of the insolvency resolution process costs.

\*As per sub regulation (8) of regulation 16A of CIRP Regulations, the authorized representative of creditors in a class shall be entitled to receive fees for every meeting of the committee attended by him in the following manner:

<i>Number of creditors in the class</i>	<i>Fee per meeting of the committee (Rs.)</i>
10-100	15,000'
101-1000	20,000
More than 1000	25,000

**Duties of Authorised representative**

As per Section 6A of the Code read with regulation 16(A)(9) of CIRP regulations, the authorised representatives collects voting instructions from the respective class of creditors, attends the meetings of the committee of creditors (CoC) and casts vote in respect of the said class in accordance with the instructions he receives from the creditors. The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

**Rights of Authorised representative**

The authorised representative for any class of creditors are vested with certain rights during the Corporate Insolvency Resolution process which includes receiving the list of creditors as and when updated by the Insolvency Professional, access for electronic means of communication between the authorised representative and the creditors in the class.

*Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.*

**Constitution of Committee of Creditors**

Section 21 of the Code states that the Interim Resolution Professional 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 which shall comprise of Financial Creditors.

Regulation 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 within two days of the verification of claims received under sub-regulation (1) of regulation 12. Accordingly, 14 days (i.e. last date for receipt of claims, which is 14 days from the appointment of Interim Resolution professional + 7 days (claims re to be verified within 7 days from last date for submission of claims + within 2 days from verification of claims , the report certifying the constitution of committee of creditors is to be filed with Adjudicating Authority within 23 days of his appointment.

The following table may clarify the time lines

<b>Timeline mandates</b>	<b>Particulars</b>	<b>Days</b>
Date of appointment of IRP	Date of order of NCLT appointing an IRP	0
Last date for Receipt of claims	Claims to be received within 14 days of his appointment	0+14(14 days)
Last date of verification of claims	Claims to be verified within 7 days from the last date of receipt of claims	0+14+7 (21 days)
Application for appointment of AR	Within 2 days from verification of claim received under Regulation 12(1)	0+14+7+2 (23 days)
Last date for filing report constituting the committee of Creditors with NCLT	Report constituting the committee of creditors to be filed with NCLT within 2 days of verification of claims	0+14+7+2 (23 days)
First meeting of Committee of Creditors	First meeting is to be conducted within seven days of filing report constituting Committee of Creditors with NCLT	0+14+7+2+7 (30 days)

Regulation 17(2) of the CIRP regulations states that the interim resolution professional shall hold 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 interim Resolution Professional shall continue till the appointment of resolution professional under Section 22.

Interim Professional to perform the functions of Resolution Professional from the fortieth day of Insolvency Commencement date.

Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed under Section 22.

Specimen Report Certifying the Constitution of Committee of Creditors is enclosed as **Annexure VII.10**

**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 all deeds, receipts and other documents;
- (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.
- (e) be responsible for complying with the requirements under any law for the time being in force on behalf of corporate debtor

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) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to - (i) business operations for the previous two years; (ii) financial and operational payments for the previous two years; (iii) list of assets and liabilities as on the initiation date; and (iv) such other matters as may be specified;
- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
- (c) constitution of the committee of creditors;
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
- (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.
- (g) to perform such other duties as may be specified by board

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>
• Assets over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor including	• Assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

<ul style="list-style-type: none"> <li>(i) Assets over which the corporate debtor has ownership rights which may be located in a foreign country;</li> <li>(ii) Assets that may or may not be in possession of the corporate debtor;</li> <li>(iii) Tangible assets, whether movable or immovable</li> <li>(iv) Intangible assets including intellectual property</li> <li>(v) Securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;</li> <li>(vi) Assets subject to the determination of ownership by a court or authority</li> </ul>	<ul style="list-style-type: none"> <li>• Assets of any Indian or foreign subsidiary of the corporate debtor;</li> <li>Such other assets as may be notified by the Central Government in consultation with any financial sector regulator.</li> </ul>
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### **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 by vote 66% of voting share of the members.

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.**

### **Withdrawal of Application**

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 introduced the concept of Withdrawal of Application.

Section 12A of the code states that Adjudicating Authority may allow the withdrawal of application admitted under section 7, 9 or 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in a manner as specified.

The Insolvency and Bankruptcy Board of India vide notification dated 3rd July, 2018 inserted Regulation 30A. Sub-regulation (1) of Reg 30A states that application made for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.

The Format enclosed as **Annexure VII.13**

Regulation 30A (2) states that the application shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.

The committee shall consider the application within seven days of:

- (i) its constitution or
- (ii) receipt of the application,

whichever is later as per sub-regulation (3).

As per sub-regulation (4) approved application under Section 12A shall be submitted within three days of such approval which may be approved by Adjudicating Authority by order.

### **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 after 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 five 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 forty eight hours, if there is any authorise representative.

### **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, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];
- (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.
  - (c) mention that the authorized representatives (other than representative of the creditors under Section 21(6A)(b) shall be such person who are competent and are authorized to take decision on the spot.
- (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.14)*

### **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.

## **VI. VOTING BY THE COMMITTEE**

### **Voting by the committee**

As per Section 21(8) of the Coee, save as otherwise provided in the Code, all decision of the Committee of Creditors shall be taken by a vote of not less than 51% of voting share of the financial creditors.

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) The resolution professional shall take a vote of the members of the committee present in the meeting, 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) 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.”
- (6) The authorised representative shall circulate the minutes of the meeting received under sub-regulation (5) to creditors in a class and

announce the voting window at least twenty four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.]

### **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.

(1A) The authorised representative shall exercise the votes either by electronic means or through electronic voting system as per the voting instructions received by him from the creditors in the class pursuant to sub-regulation (6) of regulation 25.

(2) \*\*\*

\*\*\*

\*\*\*

(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****<sup>1</sup>[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 No. / Limited Liability Identification No. 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.	Name and registration number of the insolvency professional acting as interim resolution professional	
9.	Address and e-mail 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	
11.	Last date for submission of claims	
12.	Classes of creditors, if any, under clause (b) of sub-section (6A) of section 21, ascertained by the interim resolution professional	Name the class(es)

1. Substituted by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 4-7-2018).

13.	Names of Insolvency Professionals identified to act as Authorised Representative of creditors in a class (Three names for each class)	1. 2. 3.
14.	(a) Relevant Forms and  (b) Details of authorized representatives are available at:	Web link:  Physical Address:

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

The creditors of [name of the corporate debtor], are hereby called upon to submit their claims with proof 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 entry No. 10.

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

A financial creditor belonging to a class, as listed against the entry No. 12, shall indicate its choice of authorised representative from among the three insolvency professionals listed against entry No. 13 to act as authorised representative of the class [specify class] in Form CA.

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

Name and Signature of Interim Resolution Professional :

Date and Place :

**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 Securitization 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.3****FORM AB****WRITTEN CONSENT TO ACT AS AUTHORISED REPRESENTATIVE**

(Under Regulation 4A(3) of the Insolvency and Bankruptcy Board of India  
(Insolvency Resolution Process for Corporate Persons) Regulations,  
2016)

[Date]

From

[Name of the insolvency professional]

[Registration number of the insolvency professional]

[Registered address of the insolvency professional]

To

The Interim Resolution Professional

[name of corporate debtor]

**Subject: Written Consent to act as authorized representative.**

I ..... [name], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board, note that you have proposed to appoint me as the authorized representative of financial creditors in a class [specify class] in the corporate insolvency resolution process of [name of the corporate debtor],

2. In accordance with regulation 4(A) of the IBB1 (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, I hereby give my consent to the proposed appointment.

**3. I declare and affirm as under: -**

- a. I am registered with the Board as an insolvency professional.
- b. I am not subject to any disciplinary proceedings initiated by the Board or the Insolvency Professional Agency.
- c. I do not suffer from any disability to act as an authorized representative.
- d. I shall not canvass with the creditors to indicate their choice in my favour in Form CA.
- e. I am having the following processes in hand:

<b>Sl. No.</b>	<b>Role as</b>	<b>No. of Processes on the date of Consent</b>
1	Interim Resolution Professional	
2	Resolution Professional of <ul style="list-style-type: none"> <li>a. Corporate Debtors</li> <li>b. Individuals</li> </ul>	
3	Liquidator of <ul style="list-style-type: none"> <li>a. Liquidation Processes</li> <li>b. Voluntary Liquidation Processes</li> </ul>	
4	Bankruptcy Trustee	
5	Authorised Representative	
6	Any other (Please state)	

Date: \_\_\_\_\_ (Signature of the insolvency professional)

Place: \_\_\_\_\_ Registration No .....]

**ANNEXURE VII.4****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:

<b>Particulars</b>	
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

<sup>1</sup>[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.

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

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].]*

**ANNEXURE VII.5****SCHEDULE****<sup>1</sup>[FORM C****Submission 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]

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional / Resolution Professional,  
 [Name of the Insolvency Resolution Professional / Resolution Professional]

[Address as set out in public announcement]

**Subject: Submission of claim and proof of claim.**

Madam/Sir,

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

<b>Relevant Particulars</b>	
1.	Name of the financial creditor
2.	Identification number of the 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 the financial creditor for correspondence

<sup>1</sup> Substituted by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04-07-2018).

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 claim in order to prove the existence and non-payment of claim due to the financial creditor	
(Signature of financial creditor or person authorised to act on his behalf) [Please enclose the authority if this is being submitted on behalf of the financial 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.

#### *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 for a 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 of the corporate debtor, as defined under section 5 (24) of the Code.
6. I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.

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)

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

**ANNEXURE VII.6****FORM CA****SUBMISSION OF CLAIM BY FINANCIAL CREDITORS IN A CLASS**

*(Under Regulation 8A of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

[Date]

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional / Resolution Professional  
 [Name of the Insolvency Resolution Professional / Resolution Professional]

[Address as set out in public announcement]

**Subject: Submission of claim and proof of claim.**

Madam/Sir,

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

RELEVANT PARTICULARS		
1.	Name of the financial creditor	
2.	Identification number of the 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 e-mail address of the financial creditor for correspondence.	
4.	Total amount of claim (in Rs.)	
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 claim in order to prove the existence and non-payment of claim due	
11.	Name of the insolvency professional who will act as the Authorised representative of creditors of the class	
<p>Signature of financial creditor or person authorised to act on its behalf            [Please enclose the authority if this is being submitted on behalf of the financial creditor]</p>		
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.

#### *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 for a 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 of the corporate debtor, as defined under section 5 (24) of the Code.
6. I am eligible to give voting instruction to the authorized representative by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.

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)*

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

**ANNEXURE VII.7****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 <small>[Please enclose the authority if this is being submitted on behalf of an operational creditor]</small>		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

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

*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*).]

**ANNEXURE VII.8****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**

<i>Sl. No.</i>	<i>Name of Employee/ workman</i>	<i>Identification number (pan number, passport or aadhaar card)</i>	<i>Total amount due (Rs.)</i>	<i>Period over which amount due</i>
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:**

*<sup>1</sup>[Documents relied as evidence as proof of debt and as proofs of non-payment of debt.]*

#### *<sup>2</sup>[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

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

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

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)]

**ANNEXURE VII.9****<sup>1</sup>[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

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

4.	Description of the claim (Including the amount of the claim as at the insolvency commencement date)	
	64 <sup>Inserted by Notification No. IBBI/2017-18/ GN/ REG013, dated 16th August, 2017 (w.e.f. 16-8-2017).</sup>	
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: <ul style="list-style-type: none"> <li>a. any security held, the value of security and its date, or</li> <li>b. retention title arrangement in respect of goods or properties to which the claim refers</li> </ul>	
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 (Please enclose the authority if this is being submitted signed on behalf of the creditor)		
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.

***<sup>1</sup>[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].*

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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.10****SUGGESTED FORMAT OF REPORT CONSTITUTING COMMITTEE  
OF CREDITORS BY IRP**

**Before the Hon'ble national Company Law Tribunal,**

**\_\_\_\_\_ Bench**

**Company Petition No. \_\_\_\_\_**

**In the matter of:**

\_\_\_\_\_

**Applicant/Financial  
Creditor**

**Versus**

\_\_\_\_\_

**Respondent/Corporate  
Debtor**

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	<b>Annexure – A</b> Report certifying constitution of the committee of creditors	
	<b>Annexure – B</b> Report certifying list of creditors	

\_\_\_\_\_  
\_\_\_\_\_  
**(name)**  
**Interim Resolution professional**

**(IP registration number: \_\_\_\_\_)**

**Place:**

**Date:**

**Before the Hon'ble national Company Law Tribunal,  
\_\_\_\_\_ Bench  
Company Petition No. \_\_\_\_\_**

**In the matter of:**

**\_\_\_\_\_  
Applicant/Financial  
Creditor**

**Versus**

**\_\_\_\_\_  
Respondent/Corporate Debtor**

**Intimation under regulation 13(2)(d) and 17(1) of insolvency and  
bankruptcy board of India (insolvency resolution process for corporate  
persons) Regulations, 2016 ("CIRP Regulations").**

1. The Application for the Corporate Insolvency Resolution Process ("CIRP") of \_\_\_\_\_ ("Corporate Debtor"), filed by \_\_\_\_\_ under Section \_\_\_ of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule \_\_\_ of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, was admitted by the Hon'ble National Company Law Tribunal, \_\_\_\_\_ Bench, vide its order dated \_\_\_\_\_ ("Order"), and the undersigned was appointed as the Interim Resolution Professional ("RP"), with direction to take all necessary action(s) under the provisions of the IBC.
2. It is respectfully submitted that, based on the claims received by me till \_\_\_\_\_ and supporting documents received till \_\_\_\_\_, the claimants mentioned in Annexure- B below (enclosing report on constitution of Committee of creditors) have been found to be eligible under Section 21 of the IBC, to be a part of the committee of creditors of the Corporate Debtor ("Committee of Creditors"). I certify that for the CIRP, I have constituted this committee of creditors as per Section 21 of the IBC.
3. In compliance with the provisions of the IBC read with Regulation 17(1) of the CIRP regulations, please find enclosed, in quadruplicate, a report certifying constitution of the Committee of Creditors of the Corporate Debtor. (**Annexure-A**)
4. In compliance with the provisions of the IBC read with Regulation 13(2)(d) of CIRP regulations, please find enclosed, the requisite list of creditors of \_\_\_\_\_ along with relevant details. (**Annexure- B**)

\_\_\_\_\_ (name)

Interim Resolution professional

(IP registration number: \_\_\_\_\_)

Place:

Date:

**Before the Hon'ble national Company Law Tribunal,**  
\_\_\_\_ Bench  
**Company Petition No. \_\_\_\_\_**

**In the matter of:**

\_\_\_\_\_

**Applicant/Financial  
Creditor**

**Versus**

\_\_\_\_\_

**Respondent/Corporate**

**Debtor**

**AFFIDAVIT**

I, \_\_\_\_\_, son of \_\_\_\_\_, aged about \_\_\_\_ years,  
residing at \_\_\_\_\_, do solemnly affirm and say  
as follows:

1. That, I am acting as Interim Resolution Professional in respect of the corporate insolvency resolution process (“**CIRP**”) of M/s \_\_\_\_\_ (“**Corporate Debtor**”), duly appointed by this Hon’ble Tribunal vide order dated \_\_\_\_\_, whereby, I was directed to take all the necessary actions under the provisions of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”).
2. That, I am filing the requisite report certifying constitution of committee of creditors in respect of CIRP of Corporate Debtor along with relevant details in accordance with the Regulation 17(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.
3. That, I am filing the requisite list of creditors of Corporate Debtor along with relevant details in accordance with the Regulation 134(2) (d) of CIRP Regulations.

That the facts stated are based on the informations documents provided by the creditors of Corporate Debtor and the Corporate Debtor itself, and are true to best of my knowledge, information and belief.

**Verification**

I above name deponent do hereby verify that the paras 1 to 4 of the instant affidavit are true and correct to my knowledge. No part of it is false and nothing material is concealed therefrom.

Verified at \_\_\_\_\_ on this \_\_ day of \_\_\_\_\_,

**DEPONENT**

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

1. The Application for the Corporate Insolvency Resolution Process (“CIRP”) of \_\_\_\_\_ (“Corporate Debtor”), filed by \_\_\_\_\_ under Section \_\_\_ of the Insolvency and Bankruptcy Code, 2016 (“IBC”) read with Rule \_\_\_ of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, was admitted by the Hon’ble National Company Law Tribunal, \_\_\_\_\_ Bench, vide its order dated \_\_\_\_\_ (“Order”), and the undersigned was appointed as the Interim Resolution Professional (“RP”), with direction to take all necessary action(s) under the provisions of the IBC.
2. In compliance with the above, the undersigned made a public announcement in Form A on \_\_\_\_\_ intimating the public regarding the initiation of CIRP, which announcement was published in following:
  - a. Newspapers:

S. No	Region	Newspaper	Language	Date of publishing
1				
2				

  - b. On the website of Corporate Debtor on \_\_\_\_\_.
  - c. Was sent to Insolvency and Bankruptcy Board of India for publication on its website on \_\_\_\_\_.
3. Through the public announcement, the undersigned invited claims from the creditor the Corporate Debtor in the specified forms and it was stated that the last date of submission of proof of claims was \_\_\_\_\_. Till the expiry of last date of submission of claims, the undersigned has received proof of claims from various financial creditors of the Corporate Debtor. Apart from the said financial creditors, various operational creditors have also filed their claims till \_\_\_\_\_.
4. Post receipt of claims from the creditors, the process of verification of claims was carried out and pursuant thereto certain additional information was sought from the Creditor(s).

5. Based on the forms filed by each of the creditors/authorised representatives in accordance with the CIRP regulations and as per further/additional information furnished by them, if any, the claims filed by respective creditors have been duly verified by the undersigned and a list of creditors has been prepared accordingly.
6. Pursuant thereto, the undersigned has duly constituted a committee of creditors, being \_\_\_\_\_ creditors, in accordance with Section 21(1) of IBC based on the claims received till \_\_\_\_\_ and supporting documents received and verified till \_\_\_\_\_. As and when any further claims are received and admitted from any person eligible to be part of this Committee of Creditors under Section 21 of the IBC read with regulation 12(3) of CIRP regulations, such person shall be included in the committee of creditors from the date of admission of its claim.
7. The undersigned is in process of calling and convening the first meeting of committee of creditors of \_\_\_\_\_ in compliance with Regulation 17 of the CIRP Regulations.
8. In view of the aforesaid, I hereby, through this report certify constitution of the committee of creditors of \_\_\_\_\_ which comprises of \_\_\_\_\_, details of whom are listed out herein below:

**COMMITTEE OF CREDITORS OF THE CORPORATE DEBTOR**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted	Voting share
--------	-----------------------------	----------------	-----------------	--------------

Interim Resolution professional

(IP registration number: \_\_\_\_\_)

Place:

Date:

**ANNEXURE-B****REPORT CERTIFYING LIST OF CREDITORS**

1. That, I am acting as Interim Resolution Professional in respect of the corporate insolvency resolution process (“CIRP”) of M/s \_\_\_\_\_ (“Corporate Debtor”), duly appointed by this Hon’ble Tribunal vide order dated \_\_\_\_\_, whereby, I was directed to take all the necessary actions under the provisions of the Insolvency and Bankruptcy Code, 2016 (“IBC”).
2. That, I am filing the requisite list of creditors of the Corporate Debtor along with the relevant details in accordance with the Regulation 13(2)(d) of the CIRP Regulations.
3. In view of the aforesaid and in compliance with Regulation 13(2)(d) of the CIRP Regulations, I hereby, through this report certify the list of creditors of \_\_\_\_\_, details of whom are listed out herein below:

**Financial Creditors**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted	Voting share
-----------	--------------------------------	-------------------	--------------------	--------------

**List of unsecured financial creditors**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted
--------	--------------------------------	-------------------	--------------------

**Statutory Creditors**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted
-----------	--------------------------------	-------------------	--------------------

**Workmen and employees**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted
-----------	--------------------------------	-------------------	--------------------

**Operational creditors**

S. No.	Particulars of the claimant	Amount claimed	Amount admitted
-----------	--------------------------------	-------------------	--------------------

\_\_\_\_\_  
\_\_\_\_\_  
(name)  
Interim Resolution professional  
(IP registration number: \_\_\_\_\_)

Place:

Date:

**ANNEXURE VII.11****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.12****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.13**

**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.

**ANNEXURE VII.14****<sup>1</sup>[FORM FA]****APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY  
RESOLUTION PROCESS**

(Under Regulation 30A of the Insolvency and Bankruptcy Board of India  
(Insolvency Resolution Process for Corporate Persons) Regulations,  
2016)

[Date]

To

The Adjudicating Authority  
[Through the Interim Resolution Professional / Resolution Professional]  
[name of corporate debtor]

Subject: **Withdrawal of Application admitted for corporate insolvency  
resolution process of [name of corporate debtor]**

1. [name of applicant], had filed an application bearing [particulars of application, i.e, diary number/ case number] on [Date of filing] before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].
2. I hereby withdraw the application bearing [particulars of application i.e, diary number/ case number] filed by me before the Adjudicating Authority under [Section 7 / Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016.
3. I request the Committee of Creditors to approve my application for withdrawal.
4. I authorize the resolution professional to file this application of withdrawal with the Adjudicating Authority on my behalf, if it is approved by the Committee of Creditors with ninety percent voting power.
5. I attach the required bank guarantee towards estimated cost incurred for purposes of regulation 31(c) and (d) till the date of application.

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1. Inserted by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04-07-2018).

(Signature of the applicant)

Date:

Place:

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

**ANNEXURE VII.15****SPECIMEN NOTICE OF FIRST MEETING OF THE COMMITTEE OF CREDITORS**

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.

To discuss the steps taken by the Interim Resolution Professional as apart of the corporate Insolvency Resolution Process and progress report being filed in relation thereto.

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 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:**

As per Regulation 13(2) of IBBI (CIRP) Regulations, 2016, the list of creditors will be available for inspection

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. However, the authorized representatives (other than representatives creditors under section 21(6A)(b) shall be such person who are competent and are authorized to take decision on the spot without deferring for want of any internal approval from the financial creditors).

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 present in the meeting shall be taken and the Resolution Professional shall announce the decision along with the names of the Members for the Committee who voted for or against the decisions or abstained from voting.
4. The Resolution Professional shall seek vote of the members who did not vote at the meeting by electronic voting system where the voting shall be kept open for twenty four hours from the circulation of minutes (the minutes shall be circulated within forty eight hours of the conclusion of the meeting).
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**

During the Corporate Insolvency Resolution Process, when a Resolution Professional is appointed, he has to perform various duties as per Section 29 of the Code including the preparation of Information Memorandum.

‘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 each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.”

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: -

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 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 along with an affidavit stating that he is eligible under Section 29A to the resolution professional prepared on the basis of the information memorandum.

Section 5(25) “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 subsection (2) of Section 25;

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

**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 each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.

(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.

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

#### **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

A model information memorandum containing a specimen application form for receiving information memorandum and undertaking to be given by prospective applicant is enclosed as **Annexure VIII.1**

**Annexure VIII.1****MODEL INFORMATION MEMORANDUM****Specimen application form for receiving Information Memorandum**

(Name and address of the Corporate Debtor)

(Phone No. of the Corporate Debtor)

(Contact details of the resolution professional)

1. Name of the person seeking information memorandum :

.....  
.....

2. Status of the person:

Individual                                    Company  
 Partnership firms/LLP                            Any other entity

3. Correspondence address of the person seeking information memorandum:

.....  
.....  
.....

4. PAN of the person seeking information memorandum (please enclose a copy):

.....  
.....

5. E-mail ID of the person seeking information memorandum:

.....  
.....

6. Phone No.:

.....

7. Relationship of the person with the Corporate Debtor, if any:

.....

**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 RESOLUTION  
PROFESSIONAL)

**INDEX**

S. No.	Particulars	Annexure No.
1.	About the Corporate Debtor	A
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4.	Assets and liabilities Statement as on ..... (insolvency commencement date)	D
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7.	List of creditors	G
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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 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 31<sup>st</sup> 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.)
<b>Shareholders' funds:</b>  (a) Share Capital (b) Reserve and surplus (c) Money received against warrants		
<b>Share application money pending allotment</b>		
<b>Non-current liabilities:</b>  (a) Long term borrowings (b) Deferred tax liabilities (net) (c) Other Long term liabilities (d) Long-term provisions		
<b>Current Liabilities:</b>  (a) Short-term borrowings (b) Trade payables (c) Other current liabilities (d) Short-term provisions		
<b>TOTAL</b>		

<b>ASSETS</b>	<b>Notes</b>	<b>As on</b> <hr style="width: 100%; border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> <b>(Rs.)</b>
<b>Non-current assets:</b>		
(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		
<b>Current Assets:</b>		
(a) Current Investments (b) Inventories (c) Trade receivables (d) Cash and cash equivalents (e) Short term loans and advances (f) Other current assets		
<b>TOTAL</b>		

#### ANNEXURE-E

##### 5. Latest Annual Financial Statements

Annual Financial Statements for the year ended 31<sup>st</sup> March, .....

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

---

\*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 - 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. which	Name of the Government or statutory authority 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 RP)

(Name & address of the RP)

(IP Registration No. with IBBI: .....)

**Date:**

**Place:**

## **CHAPTER IX**

# **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 for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code. It has been further clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

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. The Resolution Process is carried out in a series of steps performed in a sequential manner within a specified time frame.

Resolution Procedure involves series of steps has been depicted through tabular representation:

<b>S. No.</b>	<b>Particulars</b>	<b>Time- lines</b>	<b>Conditions</b>
1.	Submission of Information memorandum before CoC	T+54	<ul style="list-style-type: none"><li>• Resolution Professional to submit IM within two weeks of his appointment but not later than 54<sup>th</sup> day from Insolvency Commencement date.</li></ul>

			<ul style="list-style-type: none"> <li>● IM to contain certain specific disclosures prescribed under Regulation 36(2) of CIRP Regulations, 2016.</li> <li>● Non Disclosure undertaking from members of Committee of Creditors / Resolution Applicants</li> </ul>
2.	Invitation for Expression of Interest (EOI) in Form G	T+75	<ul style="list-style-type: none"> <li>● Brief Particulars of EOI in Form G to be published not later than 75<sup>th</sup> Day of Insolvency Commencement Date.</li> <li>● Form G to state from where detailed EOI can be downloaded.</li> <li>● Detailed EOI to include information such as criteria for Prospective Resolution Applicants.</li> </ul>
3.	Submission of EOI by Resolution Applicants	T+90	<ul style="list-style-type: none"> <li>● Last date of submission of EOI shall not be less than 15 days from the date of issue.</li> </ul>
4.	Provisional List of Resolution Applicants	T+100	<ul style="list-style-type: none"> <li>● Resolution Professional shall issue Provisional List within 10 days of the last date for submission of EOI to CoC and all prospective applicants.</li> </ul>

5.	Receipt of objections	T+105	<ul style="list-style-type: none"> <li>● Objections if any on inclusion or exclusion of Prospective Resolution Applicants in the Provisional List may be made within 5 days from the date of issue of Provisional List.</li> </ul>
6.	Final List of Resolution Applicants	T+115	<ul style="list-style-type: none"> <li>● Issue of Final List to CoC within 10 days from the last date of receipt for objections</li> </ul>
7.	Issue of Evaluation Matrix (EM) and Information Memorandum (IM) to Resolution Applicants requesting Resolution Plans	T+105	<ul style="list-style-type: none"> <li>● Resolution Professional shall issue IM, EM and request for resolution plan within 5 days of the date of issue of the Provisional List to every prospective Resolution applicant in the list and every applicant who has contested the decision of RP for non inclusion of his name in the list.</li> </ul>
8.	Receipt of Resolution Plans	T+135	<ul style="list-style-type: none"> <li>● Prospective Resolution Applicants shall be allowed a minimum of 30 days to submit the Resolution Plan.</li> <li>● The request for Resolution Plan shall not require any non refundable deposit for submission of or along with resolution plan.</li> </ul>

9.	Submission of COC approved Resolution Plan to Adjudicating Authority (AA)	T+165	<ul style="list-style-type: none"> <li>● Resolution Professional shall aim to submit the Resolution Plan approved by COC at least 15 days before the maximum period for completion of CIRP process.</li> <li>● The Resolution Plan shall be submitted along with Compliance Certificate in Form H and the Evidence of receipt of performance security required as per Regulation 36B(4A) of CIRP Regulations</li> </ul>
10.	Approval of Resolution Plan	T+180	<ul style="list-style-type: none"> <li>● Adjudicating Authority on being satisfied that Resolution Plan has been approved as per Section 30(4) and meets the requirements referred in Section 30(2) of the code, it shall approve the Resolution Plan.</li> </ul>

#### **Submission of Information Memorandum before Committee of Creditors**

Pursuant to Regulation 36 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.

Information Memorandum shall contain all the mandatory information as specified in Regulation 36 (2) of the CIRP Regulations. 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.

The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee 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.

### **Invitation for Expression of Interest (EOI) in Form G**

Section 25(1)(h) of the Code envisages an RP to invite prospective resolution applicants, who fulfil 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 by issuing Expression Of Interest (EOI) to invite prospective resolution applicants to submit viable resolution plans for the insolvency resolution of the Corporate Debtor.

Section 36A of CIRP Regulations provides that:

- (1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.
- (2) The resolution professional shall publish Form G- (i) in one English 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 resolution professional, the corporate debtor conducts material business operations; (ii) on the website, if any, of the corporate debtor; (iii) on the website, if any, designated by the Board for the purpose; and (iv) in any other manner as may be decided by the committee.
- (3) The Form G in the Schedule shall - (a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and (b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.
- (4) The detailed invitation referred to in sub-regulation shall-
  - (a) specify the criteria for prospective resolution applicants, as

- approved by the committee in accordance with clause (h) of sub-section (2) of section 25;
- (b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;
  - (c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and
  - (d) not require payment of any fee or any non-refundable deposit for submission of expression of interest.
- (4) A specimen EOI has been annexed as **Annexure IX.1**
- (5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).
- (6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.
- (7) An expression of interest shall be unconditional and be accompanied by-
- (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25;
  - (b) relevant records in evidence of meeting the criteria under clause (a);
  - (c) an under taking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;
  - (d) relevant information and records to enable an assessment of ineligibility under clause (c);
  - (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forth with if it becomes ineligible at any time during the corporate insolvency resolution process;
  - (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false

- information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and
- (g) an undertaking by the prospective resolution applicant to the effect that it 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.
- (8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-
- (a) the provisions of clause (h) of sub-section (2) of section 25;
  - (b) the applicable provisions of section 29A, and
  - (c) other requirements, as specified in the invitation for expression of interest.
- (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub regulation (8).

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.

### **1. Submission of Expression of Interest (EOI) by Resolution Applicant**

Pursuant to Regulation 36A(3)(b) of CIRP Regulations, 2016 Form G shall provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.

### **2. Provisional List of Resolution Applicants**

Pursuant to Regulation 36A(10) of CIRP Regulations the resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

### **3. Receipt of Objections**

Resolution professional shall issue a provisional list of eligible prospective resolution applicants to the committee and to all prospective resolution applicants who submitted the expression of interest. Pursuant to Regulation 36A(11) of CIRP Regulations any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

### **4. Final List of Resolution Applicants**

As per CIRP Regulation 36A (11) any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation 36A (10) may be made with supporting documents within five days from the date of issue of the provisional list.

On considering the objections received under sub-regulation (11), the resolution professional in pursuance of Regulation 36A (11) of CIRP Regulations shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.

### **5. Issue of Evaluation Matrix and Information Memorandum to Resolution Applicants requesting Resolution Plans**

Section 36B of CIRP Regulations provides that:

(1) The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to –

- (a) every prospective resolution applicant in the provisional list; and
- (b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.

(2) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.

(3) The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).

(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.

(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

Explanation I. – For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.

(5) Any modification in the request for resolution plan or the evaluation matrix issued under sub-regulation (1), shall be deemed to be a fresh issue and shall be subject to timeline under sub-regulation (3).

(6) The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans.

(7) The resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list:

Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-regulation.

‘Evaluation matrix’ has been inserted as clause (ha) 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.’

Pursuant to Section 30(3) of Code a Resolution Professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in Section 30(2).

The committee of creditors as per Section 30(4) of the code may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share

of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.

#### **6. Receipt of Resolution Plans**

Pursuant to Regulation 36B(6) of CIRP Regulations, 2016 prospective resolution applicants shall be given a minimum of thirty days to submit the resolution plan.

If required as per The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans.

#### **7. Submission of COC approved Resolution Plan to Adjudicating Authority (AA)**

Pursuant to Section 30(6) of the Code resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Further as Regulations 39(4) of CIRP Regulations, 2016 The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in Form H of the Schedule and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B.

#### **8. Approval of Resolution Plan**

Pursuant to Section 31(1) if the Resolution Plan as approved by committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, Adjudicating Authority (AA) shall by order approve the same.

The approved Resolution Plan shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that before passing an order under section 31(1), adjudicating authority shall satisfy that the resolution plan has provisions for its effective implementation.

**Mandatory contents of the Resolution Plan**

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

- (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.
- (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.
- (1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.
- (2) A resolution plan shall provide:
  - (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 demonstrate that –
  - (a) it addresses the cause of default;
  - (b) it is feasible and viable;
  - (c) it has provisions for its effective implementation;
  - (d) it has provisions for approvals required and the timeline for the same; and
  - (e) the resolution applicant has the capability to implement the resolution plan

**Measures required for the implementation of the Resolution Plan**

Regulation 37(1) for the CIRP Regulations provides that a resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including 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;
- (ca) cancellation or delisting of any shares of the corporate debtor, if applicable;
- (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;
- (j) change in portfolio of goods or services produced or rendered by the corporate debtor;
- (k) change in technology used by the corporate debtor; and
- (l) 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.”

**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 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]
- shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.
- 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]
  - 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 Code, 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 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]

### **Time-frame for submission of Resolution Plan by an applicant**

As per Regulation 36(B)(3) the request for resolution plans shall allow prospective resolution applicants a minimum of 30 days to submit the resolution plans.

However, the resolution professional may with the approval of the committee, extend the timelines for the submission of resolution plan.

### **Eligibility of resolution applicants**

Section 29A 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 wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (c) at the time of submission of the resolution plan 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 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, 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 nonperforming asset accounts before submission of resolution plan

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.- For the purposes of this clause, where a resolution applicant 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 and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment –

- (i) for two years or more under any Act specified under the Twelfth Schedule; or
- (ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

- (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:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

- (h) has executed a 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 3 and such guarantee has been invoked by the creditor and remains unpaid in full or part
- (i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or has a connected person not eligible under clauses (a) to (i).

Explanation[I]. — 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 Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

**Explanation II**— For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);
- (d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (e) an Alternate Investment Fund registered with Securities and Exchange Board of India;
- (f) such categories of persons as may be notified by the Central Government.

#### **Disclosure of fair value and liquidation value**

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

*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 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 sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor, 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.

**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.

#### **Who can submit a Resolution Plan?**

Section 5(25) 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.

#### **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.

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****<sup>1</sup>[Form G****INVITATION FOR EXPRESSION OF INTEREST**

(Under Regulation 36A (1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

**RELEVANT PARTICULARS**

1.	Name of the corporate debtor
2.	Date of incorporation of corporate debtor
3.	Authority under which corporate debtor is incorporated / registered “Inserted by Notification No. IBBI/2018-19/GN/REG031, dated 3 <sup>rd</sup> July, 2018 (w.e.f. 04-07-2018). “Substituted by Notification No. IBBI/2018-19/ GN/ REG031, dated 3 <sup>rd</sup> July, 2018 (w.e.f. 04-07-2018).
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 of the corporate debtor
7.	Date of invitation of expression of interest
8.	Eligibility for resolution applicants under section 25(2)(h) of the Code is available at:
9.	Norms of ineligibility applicable under section 29A are available at:
10.	Last date for receipt of expression of interest
11.	Date of issue of provisional list of prospective resolution applicants
12.	Last date for submission of objections to provisional list
13.	Date of issue of final list of prospective resolution applicants
14.	Date of issue of information memorandum, evaluation matrix and request for resolution plans to prospective resolution applicants
15.	Manner of obtaining request for resolution plan, evaluation matrix, information memorandum and further information

16.	Last date for submission of resolution plans
17.	Manner of submitting resolution plans to resolution professional
18.	Estimated date for submission of resolution plan to the Adjudicating Authority for approval
19.	Name and registration number of the resolution professional
20.	Name, Address and e-mail of the resolution professional, as registered with the Board
21.	Address and email to be used for correspondence with the resolution professional
22.	Further Details are available at or with
23.	Date of publication of Form G

Signature of the Resolution Professional  
Registration Number of the Resolution Professional  
Registered Address of the Resolution Professional  
For (Name of the 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:

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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 (180<sup>th</sup>/ 270<sup>th</sup> 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. Ernest 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 PVof 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)

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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 persons<sup>9</sup>

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****PRIVILEGED AND CONFIDENTIAL**

\_\_\_\_\_ (DATE)

RESOLUTION PLAN FOR

\_\_\_\_\_ (NAME OF

THE CORPORATE DEBTOR)

CIN: \_\_\_\_\_

*(Pursuant to Insolvency and Bankruptcy Code, 2016)*

BY RESOLUTION APPLICANT

\_\_\_\_\_ (NAME)

Submitted to:

\_\_\_\_\_ (Name)

Resolution Professional

IBBI registration No:

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**I. DEFINITIONS AND INTERPRETATIONS**

(All the definitions and interpretations can be covered here)

**II. OVERVIEW OF THE CORPORATE DEBTOR AND CORPORATE INSOLVENCY RESOLUTION PROCESS**

This resolution plan is submitted by the resolution applicant pursuant to the Code, for the corporate insolvency resolution of the Company.

The corporate insolvency process involving the Company was initiated pursuant to a petition under Section \_\_\_\_\_ of the Code filed by \_\_\_\_\_ Ltd. as one of the \_\_\_\_\_ creditors for initiation of the Corporate Insolvency Resolution process (CIRP) against the Company which was admitted by the Hon'ble National Law Tribunal (Adjudicating Authority), \_\_\_\_\_ Bench vide its order dated \_\_\_\_\_.

The adjudicating Authority appointed \_\_\_\_\_, Insolvency professional, Registration Number: \_\_\_\_\_ as the interim resolution professional and subsequently appointed and confirmed as the Resolution professional in the first meeting of CoC held on \_\_\_\_\_.

The Resolution professional made available the Information memorandum to the Resolution applicant.

**2.1 General information about the company:**

S.NO	ITEM	PARTICULARS
1.	Name of the Company	
2.	Registered Office of the Company	
3.	Date of incorporation	
4.	Website	
5.	Date of initiation of CIRP	
6.	Name and contact details of Resolution Professional	
7.	Date of submission of Resolution Plan to Resolution Professional	
8.	Directors	
9.	Shareholding (Authorized/Paid up/top 5 shareholders)	
10.	Industry Segment	
11.	Business Activity of the Company	

## **2.2 Details about past performance of the Company:**

Summarised performance of the Corporate Debtor in the last 3 financial years (including the balance sheet, profit & loss account, cash flow statement)

Any remarks by the resolution applicant:

## **2.3 Brief background of CIRP and timelines**

Details of application filed with National Company Law Tribunal for insolvency resolution process, details of creditors and amount of credit therein etc

## **2.4 Details of litigations (prior to commencement of IBC) by or against the Corporate Debtor with respect to payment of debts**

Details of all the litigations may be covered here.

## **III. PROJECT BACKGROUND AND PRIME REASONS OF INSOLVENCY**

S.NO	ITEM	PARTICULARS
3.1	Brief details about the project	
3.2	Manufacturing facilities and Infrastructure available with the Company	
3.3	Manpower and employee strength of the Company	
3.4	Estimated reasons for insolvency of the Company	

## **IV. INFORMATION ABOUT THE RESOLUTION APPLICANT**

S.NO	ITEM	PARTICULARS
1.	Name of the resolution Applicant	
2.	Constitution of the resolution Applicant	
3.	Address for correspondence of the Resolution Applicant	
4.	PAN	
5.	Email Id	
6.	Phone No	

7.	Date of incorporation	
8.	Name of Directors & KMPs	
9.	Name of the person (s) who is authorized by the company to submit Resolution Plan and their designation, contact no.	
10.	Shareholding (Authorized/Paid up/top 5 shareholders)	
11.	Details of subsidiaries and associate companies	
12.	Main activities and Products	
13.	List of major customers and suppliers	
14.	Details of manufacturing facilities (Location etc)	
15.	Past performance and financials as per last three years Audited Financials	Annexure- .....
16.	Relationship if any with Corporate Borrower	

#### **V. DETAILS OF THE 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:

The Resolution plan, as detailed in the following table envisages the following:

- (i) “**Cut-off date**” for the purpose of determining the liability to be settled under the proposed resolution plan has been considered as \_\_\_\_\_, which is also the Insolvency Commencement date.
- (ii) “**Effective date**” for the purpose of implementation of this plan means the date on which the resolution plan is approved by the Adjudicating Authority.
- (iii) **Assumptions:** Key assumptions used for preparation of resolution plan may be indicated.

S. NO	ITEM	PARTICULARS
5.1.	Main strategy proposed in the Resolution Plan <i>(Strategy may include takeover, merger, sale of assets etc)</i>  Proposed Operation plan may be specified, Changes in technology, product mix etc. may be provided.	<b>Annexure- .....</b>
5.2	Proposed Governance Structure including Board of directors, key management, Promoters and members  Adequacy regarding licences, permissions, manpower etc. to operate at projected level may also be specified	<b>Annexure- .....</b>
5.3	Cost of Resolution Plan and Means of Finance  Sources of funds that will be used to pay cost of CIRP, dues to operational creditors& dissenting financial creditors as per provisions of section 30(2)(b) of the code, may be provided.	<b>Annexure- .....</b>
5.4	Specify procedure for payment of dues towards resolution process costs/ financial creditors/ operational creditors/ government dues/ disputed claims/dissenting financial creditors etc. along with the details of payment made in relation to actual debts including the sources of funds that will be used to pay the dues.  <i>(With reference &amp; confirmation that amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.)</i>	<b>Annexure- .....</b>
5.5	Proposal for capital and Financial Restructuring  a) Details of the creditors along with details of such debt and amount of debt.  b) The structure and method of payment to each of the creditor.	<b>Annexure- .....</b>

	c) Transfer of shares/merger, amalgamation, delisting or other corporate restructuring plans  d) Details on satisfaction/modification of security interest  e) Sale/disposal of assets, if any	
5.6	Proposal for operating restructuring  a) The operating restructuring/turnaround strategy that may be adopted by the Company (changes in technology etc.).  b) The benefits of adoption of such strategy to various stakeholders	<b>Annexure- .....</b>
5.7	Financial Projections  <i>(Reasonableness of Financial Projections i.e. Sales, EBITDA, EBIT etc./Certainty/Likelihood/Feasibility/Eventuality of honoring proposed commitments may be provided)</i>	<b>Annexure- .....</b>
5.8	If resolution plan has any Tax implication, the same may be indicated	
5.9	Details of parties that will infuse the capital  a) Details of the amount of capital infused  b) Time period within which capital will be raised  c) Source of such capital infusion  d) Utilization of such capital	<b>Annexure- .....</b>
5.10	Availment of credit facilities  a) Improving operations  b) Capital Expenditure  c) Working Capital facilities  d) Any other purpose, shall be clearly specified along with timelines for such infusion	<b>Annexure- .....</b>
5.11	Term of the resolution plan and its implementation schedule	<b>Annexure- .....</b>

5.12	Proposal relating to adequate means for supervising its implementation	<b>Annexure- .....</b>
5.13	Strategy to deal with transactions covered under Section 43, Section 45, Section 50, Section 66 etc.	<b>Annexure- .....</b>
5.14	Ability of Resolution Applicant to turnaround distressed companies;  a) Turnaround strategy  b) Managerial competence and technical abilities  c) track record in implementing turnaround of stressed assets  d) Technology advancement/ Reduction cost	<b>Annexure- .....</b>
5.15	Standing of Resolution Applicant  a) experience in sector  b) external rating  c) adherence to financial discipline  d) record of regulatory compliance  e) whether NPA, including Group Companies, <12 months  f) Others	<b>Annexure- .....</b>
5.16	Details of dealing with the interest of all stakeholders, including financial creditors and operational creditors, of the Corporate Debtor.	
5.17	Details whether a resolution Applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.	
5.18	Recovery Indicators  Specify recovery indicators of resolution plan, assessment techniques and mile stones	

**VI. ELIGIBILITY DETAILS IN RELATION OF RESOLUTION APPLICANT AND CONNECTED PERSONS ARE PROVIDED BELOW:**

SECTION	ITEM	PARTICULARS
29(A)(a)	is an undischarged insolvent	
29(A)(b)	is a willful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949	
29(A)(c)	<p>at the time of submission of the resolution plan 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 or the guidelines of a financial sector regulator issued under any other law for the time being in force, 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:</p> <p>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 nonperforming asset accounts before submission of resolution plan:</p> <p>Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.</p>	

29(A)(d)	<p>has been convicted for any offence punishable with imprisonment:</p> <ul style="list-style-type: none"> <li>(i) for two years or more under any act specified under the Twelfth Schedule; or</li> <li>(ii) for seven years or more under any other law for the time being in force.</li> </ul> <p>Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:</p> <p>Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I</p>	
29(A)(e)	is disqualified to act as a director under the Companies Act, 2013	
29(A)(f)	is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;	
29(A)(g)	<p>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.</p> <p>Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution</p>	

	applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction	
29(A)(h)	has executed a 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 and such guarantee has been invoked by the creditor and remains unpaid in full or part	
29(A)(i)	is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or	
29(A)(j)	has a connected person not eligible under clauses (a) to (i)	

"Connected persons" means-

- a) *Persons who are promoters or in the management or control of the resolution applicant;*
- b) *The Persons who will be promoters or in management or control of the business of Company during the implementation of the Resolution Plan;*
- c) *Holding company, subsidiary company, associate company and related party of the persons referred to it in terms (a) and (b).*

An Affidavit in this connection is enclosed as Annexure-.....

#### **VII. DETAILS AS PER REGULATION 38 OF INSOLVENCY & BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016:**

S.NO.	ITEM	REFERENCES
a)	it addresses the cause of default	
b)	it is feasible and viable	
c)	it has provisions for its effective implementation	
d)	it has provisions for approvals required and the timeline for the same	

e)	the resolution applicant has the capability to implement the resolution plan	
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### **VIII. ELIGIBILITY NORMS AS PROPOSED IN THE EVALUATION MATRIX**

S.NO.	ITEM	PARTICULARS
1.	Condition No. 1	Reference/ proof of complying
2.	Condition No. 1	Reference/ proof of complying

### **IX. APPROVALS/WAIVERS/ SPECIFIC ORDERS BY/FROM NCLT**

The resolution applicant seeks for the following approvals/waivers/specific orders from the Hon'ble NCLT:

- a) Request approval from NCLT for:
- b) Request waiver of liabilities from NCLT for:
- c) Request waiver of liabilities from NCLT for:

### **X. INDICATIVE TIMELINE OF EVENTS FOR IMPLEMENTATION OF PROPOSED RESOLUTION PLAN:**

Key action points of resolution plan alongwith implementation schedule and milestones may be highlighted in the resolution plan.

### **XI. PERFORMANCE SECURITY :**

**“Performance Security”** means security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

The resolution applicant is required to provide a performance security within the time specified therein in case its resolution plan is approved and such performance security shall stand forfeited if the resolution applicant fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

*Accordingly the resolution plan should specify a performance security as specified with approval of CoC, time period within which it shall be provided.*

### **XII. OTHER TERMS AND CONDITIONS**

#### **Governing Law**

The Company and the new management shall abide and be governed by the laws of India giving effect to Adjudicating Authority order approving the

resolution plan and any agreements, documents and instruments executed in connection with the resolution plan.

### **Binding effect**

This resolution plan once approved by the CoC and then by the Adjudicating Authority, along with such conditions as may be stipulated by the Adjudicating Authority, shall be binding on the Company, all holders of claims, creditors, members, promoter and all other parties in interest and each of their respective successors and assigns in accordance with Section 31(1) and 238 of the Code. The resolution plan does not contravene any of the provisions of the law for the time being in force. All requisite approvals and requirements of law required to give effect to the resolution plan shall be undertaken by the resolution applicant.

### **Severability and right to modify**

- (a) In the event it is determined that any provisions of the resolution plan is unenforceable either on its face or as applied to any claims or transactions and/or in the event any provision of the resolution plan becomes invalid for reasons other than by breach of any party, the new management of the Company may apply to Adjudicating Authority for appropriate modifications of such provisions of the resolution plan, to satisfaction of the Adjudicating Authority, and such invalidity and/or unenforceability of the provision of the resolution plan shall not render the whole resolution plan ineffective, unless otherwise directed by the Adjudicating Authority by order.
- (b) In case any such modification is required in the resolution plan after the receipt of Adjudicating authority approval, to comply with any laws currently in force or to apply for certain approvals as required under the resolution plan or for any requirements, not jeopardising the rights of the creditors under the current plan, the new management of the company can do so only after approval of National Company law Appellate Tribunal (NCLAT)

### **Assignment of Interest**

Any creditor may assign its rights under this resolution plan, subject to the transferee unconditionally agreeing to be bound by the terms of this resolution plan.

### **Consequences of revocation**

In the event the resolution plan fails, the existing facilities of the creditors, the rights and remedies of the creditors under their respective existing financing documents including all securities and guarantees shall continue

as if they had not been waived, amended, modified, released, superseded or replaced by the resolution plan and the creditors shall be entitled to enforce such rights and remedies under the existing financing documents, as if the same had not been waived and/or modified pursuant to this resolution plan and the other relevant documents executed thereof. In the event of failure of resolution plan any amount paid to the financial creditor will be adjusted towards the outstanding dues of the company. Provided; however, that the obligations of the company under the resolution plan shall continue to be binding on the Company and its co-obligators and the creditors shall be entitled to exercise all the rights and remedies conferred on them pursuant to this resolution plan.

### **DECLARATION**

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 the resolution plan is not in contravention of provisions of the Applicable Law and conforms to other requirements as may be specified by the Insolvency and Bankruptcy Board of India.

We also hereby declare that any confidential information of the Company that has come to our knowledge or might come to our knowledge during the insolvency resolution process shall not be divulged by us.

We hereby agree to invest the funds as proposed in the Resolution Plan. We understand that the Resolution Professional and/or the CoC have further right to renegotiate the terms of this Resolution Plan and the decision of the Resolution Professional and/or the CoC in selection of the Successful Resolution Applicant shall be final and binding on us. We acknowledge that the Resolution Plan submitted is irrevocable and once the Resolution Plan is received and accepted, it shall not be transferable/ assignable.

We undertake to provide the Resolution Professional, the CoC and the CoC's Advisor with any further information as may be requested by them.

In case any of the provisions of this resolution plan are in contradiction to the Request for Resolution Plan (Process Memorandum) and Evaluation Matrix issued by the Resolution Professional, then the terms of this resolution plan shall prevail.

Yours faithfully

..... (Name of the applicant)

Place

Date:

## *CHAPTER – X*

### **CRITICAL ISSUES SETTLED THROUGH LANDMARK JUDGEMENTS**

#### **A. MEANING OF 'DISPUTE'**

**(I) M/s One Coat Plaster v. 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) Uttam Galva Steels Ltd. v. DF Deutsche Forfait AG and Anr. [28.07.2017]**, NCLAT, held that:

- i. The expression used in subsection (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’.
- ii. for the purpose of sub-section (2) of Section 8 and Section 9W ‘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.
- iii. 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.
- iv. While relying upon *Smart Timing* judgment (supra) NCLAT 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.2]**

**(III) Kirusu Software Private Ltd. v. 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]**

**(IV) Philips India Ltd. v. 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]**

**(V) M/s MCL Global Steel Pvt. Ltd. v. 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. v. 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]**

**(VI) M/s Annapurna Infrastructure Pvt. Ltd. & Anr. v. 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]**

**(VII) Mobilox Innovations Private Limited v. 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. v. 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 v. 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 v. 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 Innovative 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 v. 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 v. 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 cause 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. v. 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 **Macquarie Bank Limited v. 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.14]**

**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**

**Applicability of Limitation Act for Insolvency Proceedings**

With the amendment in Insolvency and Bankruptcy Code w.e.f 6<sup>th</sup> June, 2018, a new section 238A came into effect which states that provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

**I. Mr. Brijesh Kumar Agarwal v/s Punjab National Bank & Anr.**

[05.07.2018], NCLAT has observed that Article 137 of Part II of the Limitation Act will be applicable where under three years' period from the date of right to apply accrued will be applicable and the right to apply under Section 7 accrued on 1<sup>st</sup> December, 2016, when 'I&B Code' came into force. Before the same, it had no right to apply under Section 7 of the 'I&B Code'.

**[Annexure-X.15]**

**II. In Jignesh Shah & Anr. v. Union of India & Anr., WP(C) No.**

455/2019 ([25.09.2019]), an order passed by Hon'ble NCLAT was challenged wherein the NCLAT, while dismissing an appeal filed against an admission order passed by the AA, agreed with the finding of AA that, in this case, bar of limitation would not be attracted as the petition was filed within three years of the date on which the Code came into force. Hon'ble SC, however, disagreed with the said concurrent finding of AA and NCLAT and held that "With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition." Accordingly, upon finding that the winding up petition in this matter was filed beyond a period of three-years (as mentioned in Article 137 of the Limitation Act), the same was held to be time-barred.

**(Annexure-X.16)**

**(III) In Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. & Anr., Civil Appeal No. 4952/2019 [18.09.2019]**, an order passed by Hon'ble NCLAT, wherein AA's order, applying Article 62 of the Limitation Act, 1963 to an application filed u/s 7, IBC and thus allowing a limitation period of 12 years from the date on which the money suit has become due, was challenged before Hon'ble SC. The SC, while setting aside orders passed by both AA and the NCLAT, held that "...what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary article 137".

#### [Annexure-X.17]

**(IV) In Committee of Creditors of Amtek Auto Limited through Corporation Bank v. Dinkar T. Venkatasubramanian & Ors., Civil Appeal No. 6707/2019 [24.09.2019]**, Hon'ble SC noted that the recent Amendment Act permits resolution process to be completed within 90 days from the date of the commencement of the Amendment Act. Thus, while the resolution plan, which had consumed the time available under section 12 of the Code failed owing to non-fulfillment of the commitment by the Resolution Applicant, the SC permitted RP to invite fresh offers within a period of 21 days.

#### [Annexure-X.18]

**(V) In Sagar Sharma & Anr. v. Phoenix ARC Pvt. Ltd. & Anr., Civil Appeal No. 7673/2019 [30.09.2019]**, Hon'ble SC, reiterated that the date of coming into force of IBC is wholly irrelevant for triggering any limitation period for the purposes of IBC. It observed that since applications under section 7 are petitions filed under IBC and do not purport to be an application to enforce any mortgage liability, Article 137 of the Limitation Act would apply to such applications.

#### [Annexure-X.19]

#### 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.20]**

**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.21]**

### I. STATUS OF “ALLOTTEES” AS “FINANCIAL CREDITORS”

(I) In Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors., WP(C) No.43/2019 [09.08.2019], while dismissing various petitions filed by different builder groups challenging constitutional validity of the explanation added to s. 5(8)(f) (vide Insolvency and Bankruptcy Code (second amendment) Act, 2018) whereby an explanation was added to the provision clarifying that “any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.” Thus, vide the said amendment the allottees in a real estate project were clarified as occupying the position of a financial creditor for the purposes of IBC. Vide its judgment, Hon’ble SC has made following important rulings:

- (i) In real estate projects, money is raised from the allottees, against consideration for the time value of money. The amounts raised from allottees is subsumed within section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act. The deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are regarded as FCs. The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen.
- (ii) The provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force. Further, Parliament was aware of RERA when it added explanation to section 5(8)(f) of the th Code which came into force on 6 June 2018. Therefore, the Code as amended, must be given precedence over RERA. Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. The Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the CD by means of a resolution plan, so that the CD may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. On the other hand, RERA protects the interests of the

individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions.

- (iii) The remedies under RERA to allottees are additional and not exclusive remedies. The allottees have concurrent remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

**[Annexure - X.22]**

**J. 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.

**K. 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.”*
- L. **WHETHER NCLAT HAS POWER TO ORDER WITHDRAWAL OF AN APPLICATION THAT HAS BEEN ADMITTED, UPON SETTLEMENT BETWEEN THE PARTIES?**
- Also refer Section 12A pertaining to withdrawal of application after admission as introduced by the Insolvency and Bankruptcy (Amendment) Act, 2018.
- (I) **Lokhandwala Kataria Construction Private Limited v. 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.23]**

- iv. The appellant filed statutory appeal before the Hon’ble Supreme Court of India vide Civil Appeal No. 9279/2017 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) Hon’ble Supreme Court in **Uttara Foods and Feeds Private Limited v. 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. 24]**

**M. 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 Innovative Industries Ltd. v. 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. 25]**

**N. 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. v. 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.26]**

**O. 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 Gummidi poondi Factory, which was submitted by Gummidi poondi 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.27]**

**P. WHETHER THE ORDER OF MORATORIUM WILL COVER CRIMINAL PROCEEDINGS UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT?**

NCLAT on **31.07.2018** in the matter of **Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj & Ors** set aside the order of NCLT, Chennai Bench dated 24<sup>th</sup> May, 2018 vide MA/102/IB/2018 in CP/507/IB/2017 and directed that Section 138 of the Negotiable Instrument Act is a penal provision which empowers the Court of competent jurisdiction to pass order of imprisonment or fine and imposition of file cannot be held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the preview of Section 14. **In fact no criminal proceeding is covered under Section 14 of Insolvency and Bankruptcy Code.**

**[Annexure-X.28]**

- Q. WHETHER THE AA CAN PASS ORDER RESTRAINING CD (AND ITS DIRECTORS) FROM ALIENATING, ENCUMBERING OR CREATING ANY THIRD-PARTY INTEREST ON THE ASSETS OF THE CD, BEFORE ADMISSION OF APPLICATION UNDER SECTION 7 OR 9?**

This issue fell for consideration before Hon'ble NCLAT in the matter of **NUI Pulp and Paper Industries Pvt. Ltd. v. M/s. Roxcel Trading GMBH**, CA (AT) (Ins) No. 664/2019 [17.07.2019], wherein the Appellate Authority clarified that the AA can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal and that it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of 'Moratorium' under Section 14 of the 'I&B Code'.

**[Annexure – X.29]**

- R. WHETHER BEING ON THE EMPANELLED LIST OF FINANCIAL CREDITORS CAN BE A GROUND TO REJECT THE APPOINTMENT OF RESOLUTION PROFESSIONAL IN A CORPORATE DEBTOR?**

There were similar orders by various benches of NCLT wherein the Resolution Professional was considered ineligible because he was on the panel of Financial Creditor. NCLT was of the view that such Resolution professional will not be able to act as an independent umpire while conducting the CIR process.

NCLAT on **16.07.2018** crystallized the issue and passed an order in the matter of **State Bank of India v/s Ram Dev International Ltd. (Through Resolution Professional)** set aside the order of NCLT, Principal Bench, New Delhi in Company Petition No. (IB)178(PB)/2017 and directed that except for pendency of a disciplinary proceeding or ineligibility in terms of provisions of the I&B Code, there is no bar for appointment of a person as Resolution Professional. A Resolution Professional if empanelled as an Advocate or Company Secretary or Chartered Accountant with one or other 'Financial Creditor' that cannot be a ground to reject the proposal, if otherwise there is no disciplinary proceeding is pending or it is shown that the person is an interested person being employee or in the payroll of the 'Financial Creditor'.

**[Annexure-X.30]**

**S. WHETHER COMMITTEE OF CREDITORS HAS TO BE RECONSTITUTED IN RESPECT TO CORPORATE DEBTOR HAVING HOME BUYERS AS A CLASS OF CREDITORS?**

In a landmark judgement delivered by Hon'ble Supreme Court in **Chitra Sharma & Others v. Union of India [09.08.2018]**, Supreme Court held that

- a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly as per the the amended definition of the expression “**financial creditors**” which now includes home buyers as well;
- IRP can invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered.

With the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 coming into effect, retail consumers in the real estate industry such as homebuyers will now have the right to initiate insolvency against real estate developers and the right to be represented in the committee of creditors (CoC) bringing them at par with other Financial creditors in real estate projects.

**[Annexure-X.31]**

**T. WHETHER APPLICATION FOR RECOVERY CAN BE FILED AGAINST THE SURETY IN A CONTRACT OF GUARANTEE TO A CORPORATE DEBTOR DURING THE MORATORIUM PERIOD?**

With the amendment in Insolvency and Bankruptcy Code w.e.f 6<sup>th</sup> June, 2018, Section 14 of the Code was amended to exclude “*a surety in a contract of guarantee to a corporate debtor*” which means moratorium for prohibiting the institution of suits, transferring the assets, recovery of property etc will not be applicable to a surety in a contract of guarantee to a Corporate Debtor.

The same was deliberated in detail by Hon'ble Supreme Court in the matter of **State Bank of India v/s V. Ramakrishnan & Anr. [14.08.2018]** and it was held that exclusion of surety from Section 14 of the Insolvency and Bankruptcy Code, 2016 will have retrospective effect. Guarantors can proceed under SARFAESI

Act. As part III of code not yet notified (relating to individuals) individuals can proceed under existing Insolvency Acts and not in Debt Recovery Tribunals.

**[Annexure-X.32]**

**U. WHETHER THE SUSPENDED BOARD OF DIRECTORS HAVE THE RIGHT OF REPRESENTATION IN THE COC MEETINGS?**

NCLAT on **15.05.2018** in the matter of **Rajputana Properties Pvt. Ltd v/s Ultra Tech Cement Ltd. & Ors.** clarified that views of suspended Board of Directors or its partners, Operational Creditors of its representatives and Resolution Applicant(s), are required to be taken into consideration by the CoC before approving/rejecting resolution plan which should be recorded also (in short).

Moreover, it was also clarified in the order that that the resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.

**[Annexure-X.33]**

**V WHETHER IRP SHALL CERTIFY THE FORM 2 WHEREIN IT IS MENTIONED THAT APPLICATION IS TRUE, ACCURATE AND COMPLETE AND DEFAULT HAS OCCURRED IN RESPECT OF THE RELEVANT CORPORATE DEBTOR?**

NCLT, Principal Bench, New Delhi on **16.01.2018** passed an interim order in the matter of **ICICI Bank Limited v/s Essar Power Jharkhand Limited** and stated that IRP shall not certify in Form 2 as it will hamper the independent fair play of an IP and he shall not fill up such a proforma as it is wholly alien to principles to act fairly. Moreover, there is no whisper in the Code or in the rules requiring an IRP to furnish such a certificate which is optional. NCLAT also directed the rule making authority to have re-look on this part of the proforma and may consider appropriate to delete it.

**[Annexure-X.34]**

**W Extent of application of IBC to MSME.**- In *Saravana Global Holdings Ltd. & Anr. v. Bafna Pharmaceuticals Ltd. & Ors.*, Civil Appeal No(s). 5344/2019, while dealing with the question of extent of applicability of IBC provisions to an MSME, Hon'ble NCLAT (*vide* its order dt. [04.07.2019] had held that "*in exceptional circumstances, if the*

*'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'." In an appeal filed against the NCLAT's order, Hon'ble SC (referring to the facts of the case) held that, *admittedly, the 'Corporate Debtor' is an 'MSME' and the promoters are not ineligible in terms of Section 29A of the 'I&B Code'*. Therefore, it is not necessary for the 'Committee of Creditors' to find out whether the 'Resolution Applicant' is ineligible in terms of Section 29A or not... Therefore, in exceptional circumstances, if the 'Corporate Debtor' is an MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'."*

**[Annexure – X.35]**

**X Admissibility of a Foreign Decree for initiating CIRP against CD:**

In *Peter Johnson John (Employee) v. M/s KEC International Limited*, CA (AT) (Ins) No. 188/2019 [03.07.2019], the issue for consideration before NCLAT was whether in absence of an adjudication of a foreign decree passed by a court in a non-reciprocating territory, the appellant was legally justified in seeking initiation of CIRP under section 9 of the Code against the CD. While dismissing the appeal, the NCLAT observed: "It is not disputed that such ex-parte decree of a foreign court would not be executable in India until adjudicated upon by a Civil Court in India within the ambit of Section 13 of CPC and having regard for the same, the Appellant has chosen to file suit before Hon'ble High Court of Bombay, which is still subjudice. Unless the decretal amount is adjudicated upon by the Hon'ble High Court of Bombay as a legally payable claim, the same would not constitute a "Debt" in the hands of Appellant - Operational Creditor and unless the debt is crystallized and payable in law, the issue of default would not be attracted."

**[Annexure – X.36]**

**Y Extent of power of AA vis-a-vis disciplinary proceedings pending before IBBI:**

In *Insolvency and Bankruptcy Board of India (IBBI) v. Shri Rishi Prakash Vats & Ors.*, CA (AT) (Ins) No. 324/2019 [11.07.2019], the issue for consideration before Hon'ble NCLAT was whether the AA has jurisdiction to quash disciplinary proceedings initiated by IBBI. Deciding on the issue, NCLAT held: "...once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the Disciplinary Authority, i.e., IBBI to close the

*proceeding or pass appropriate orders in accordance with law. Such power having been vested with IBBI and in absence of any power with the Adjudicating Authority/ (National Company Law Tribunal), the Adjudicating Authority cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority/ National Company Law Tribunal."*

**[Annexure – X.37]**

- Z. Extent of AA's power of interference in CoC's decision for removal of RP:** The NCLAT in the matter of *Punjab National Bank v. Mr. Kiran Shah, IRP of ORG Informatics Ltd.*, CA (AT) (Ins) No. 749/2019 [06.08.2019], has clarified the legal position that the CoC is not required to record any reason or ground for replacing the RP, which may otherwise call for proceedings against such RP and that the CoC having decided to remove the RP with the required voting share, the Adjudicating Authority cannot interfere with such decision, till it is shown that the decision of the CoC is perverse or without jurisdiction.

**[Annexure – X.38]**

- AA. Promoter's right to file application u/s 12A:** In *Sukhbeer Singh v. Dinesh Chandra Agarwal (Resolution Professional), Maple Realcon Pvt. Ltd. & Ors.*, CA (AT) (Ins) No. 259/2019 (07.08.2019), a proposal made by promoters was not placed by the RP before CoC on the ground that u/s 12A, they, not being applicants, cannot file such an application. While rejecting the said objection, NCLAT held that it is the promoter who can settle the matter with creditors and submit such proposal to RP and that he is bound to place it before the CoC which is supposed to consider such application in the light of section 12A, IBC.

**[Annexure – X.39]**

- AB. AA cannot, without giving an opportunity of being heard to the RP, issue directions to IBBI to examine actions of an RP and take suitable action:** In the matter of *Ilam Chand Kamboj v. M/s ANG Industries Ltd.*, CA (AT) (Ins) No. 253/2019 and I.A. No. 995/2019 (02.08.2019), wherein an RP filed an appeal against AA's order whereby it directed: "*We are persuaded that, it would be appropriate to refer the matter to the IBBI, the body for regulating the functioning of the Resolution Professionals, to examine the actions of the Resolution Professional and taking suitable action.*", the NCLAT observed that

normally, the AA is not supposed to pass any adverse observations, even *prima facie*, against the RP, without giving an opportunity to him as to why in view of certain Act, the matter be not referred to IBBI. The NCLAT held that “*the IBBI cannot treat observations as made by the AA, as referred to above, as final decision against the Appellant, as the observation made, without granting any opportunity to the Appellant. Therefore, the ‘IBBI’ will hear the proceedings and decide on merit after hearing the ‘Resolution Professional’ and taking into consideration reply as may be submitted by the Appellant, uninfluenced by the observations made by the Adjudicating Authority as referred to above.*”

**[Annexure – X.40]**

- AC. Exemption of ‘Provident Fund Dues’, ‘Pension Fund Dues’ and ‘Gratuity Fund Dues’ from application of section 53, IBC:** In the matter of *State Bank of India v. Moser Baer Karamchari Union & Anr.*, CA (AT) (Ins) No. 396/2019 (19.08.2019), the NCLAT while upholding the impugned order held, “*In terms of subsection (4) (a) (iii) of Section 36, as all sums due to any workman or employees from the provident fund, the pension fund and the gratuity fund, do not form part of the liquidation estate/ liquidation assets of the ‘Corporate Debtor’, the question of distribution of the provident fund or the pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1), does not arise...”*

**[Annexure – X.41]**

- AD. Non-applicability of exclusive jurisdiction clause in a contract vis-à-vis proceedings under IBC:** In the case of *Excel Metal Processors Limited v. Benteler Trading International GMBH & Anr.*, CA(AT) (Ins) No.782/2019 (21.08.2019), the question before Hon’ble NCLAT was whether the AA has jurisdiction to entertain an application filed u/s 9, IBC, where, as per the terms of an agreement between the parties, any suit or case was maintainable only in the court at Germany. Clarifying on the legal position, the NCLAT held that a CIRP is neither a suit, nor a litigation, or even a ‘money claim’, for any litigation and no one is selling or buying the CD. It is also not a recovery or liquidation proceeding. It is a resolution process so that the CD does not default on dues. Accordingly, the Appellant was held to be incapable of deriving any advantage of the terms of the agreement executed *inter se* the parties for the purposes of conferring

exclusive jurisdiction on the courts of a particular country as far as the proceedings under IBC are concerned.

**[Annexure – X.42]**

- AE. Right of an FC to challenge CIRP proceedings initiated by another FC on the ground of having a superior claim than the applicant FC:** In *L&T Infrastructure Finance Company Ltd. v. Gwalior Bypass Project Ltd. & Ors.*, CA (AT) (Ins) No. 676 & 677/2019 (19.08.2019), the issue for consideration before the NCLAT was whether an FC can challenge the insolvency proceeding initiated by another FC on the ground that it has a superior claim. The NCLAT, while clearing the air around the said issue, held that the appellant as an FC of the CD has no right to intervene to oppose admission of the application u/s 7 preferred by another FC. After admission of the application, if the appellant claims that it is one of the FCs, it can file claim before the RP, but it cannot challenge the order of admission on the ground that it has first charge on the asset of the CD or has superior claim over the claim of the other FCs.

**[Annexure – X.43]**

- AF. Right of AA to refer a matter to the Central Government for investigation into the affairs of a CD:** In an appeal matter titled as *Mr. M. Srinivas v. Ramanathan Bhuvaneshwari & Ors.*, CA (AT) (Ins) No. 498/2019 (24.07.2019), the facts were that the RP brought to the notice of AA that the promoters of CD had defrauded many creditors. Pursuant to it, the AA issued certain directions, including a direction to the Central Government to refer the matter to the SFIO for further investigation into the affairs of CD, exercising its powers u/s 213 of the Companies Act, 2013. Thus, the question before the NCLAT was whether the AA has jurisdiction under section 213 of the Companies Act, 2013. The NCLAT clarified the legal position as, the AA, which is the NCLT, has dual and interwoven role and power to pass order under section 213 of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016. It observed that if the AA is satisfied that there are circumstances suggesting that business of a company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, and that the affairs of the company ought to be investigated, after giving a reasonable opportunity of being heard to the parties concerned, it

may refer the matter to the Central Government for investigation into the affairs of the company.

**[Annexure – X.44]**

- AG. Requirements of section 29A application not applicable to a section 12A application:** In *Andhra Bank v. Sterling Biotech Ltd. (Through the Liquidator) & Ors.*, CA (AT) (Ins) No. 612/2019 (28.08.2019), while entertaining a challenge to an order passed by AA wherein a Resolution Plan, though passed by a 90% majority voting of CoC, was rejected on the ground that the promoter was not eligible to file the resolution plan under section 29A, the NCLAT held that application under section 12A having been approved by the CoC with more than 90% of the voting share, it was not open to the AA to reject the same and that too on a ground of ineligibility under section 29A, which is not applicable.

**[Annexure – X.45]**

- AH. Maintainability of a CIRP application against a CD whose name has been struck-off from register of Registrar of Companies:** In *Mr. Hemang Phopalia v. The Greater Bombay Co-operative Bank Limited & Anr.*, CA (AT) (Ins) No. 765/2019 (05.09.2019), while dealing with the question of maintainability of a CIRP application against a CD whose name has been struck-off from records of Registrar of Companies, the NCLAT held that “... the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of ‘Corporate Insolvency Resolution Process’ under Sections 7 and 9 of the I&B Code based on the application, if filed by the ‘Creditor’ (‘Financial Creditor’ or ‘Operational Creditor’) or workman within twenty years from the date the name of the Company is struck off under sub-section (5) of Section 248.”

**[Annexure – X.46]**

**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:**

<b>1. M/s.One Coat Plaster</b> 182/183, Indra Bhawan, V.P.O. Sikhrali, Sector-17a, Gurgaon-122 001	<b>Operational Creditor/ Applicant</b>
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<b>2. M/s.Ambience Private Limited</b> Company registered under the Companies Act, 1956 Having Registered Office at: L-4, Green Park Extension, New Delhi-110016 CIN: U51503DL1986PTC023886	<b>Corporate Debtor</b>
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AND

**In the matter of:**

<b>1. M/s.Shivam Construction Company</b> Plot No.SO-110, Khasra No.1965 Iqbal Colony, Garima Garden, Ghaziabad-201 005	<b>Operational Creditor/ Applicant</b>
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<b>2. M/s.Ambience Private Limited</b> Company registered under the Companies Act, 1956 Having Registered Office at: L-4, Green Park Extension,	
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**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****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) 39 of 2017**

(arising out of order dated 10<sup>th</sup> April, 2017 passed by National Company Law Tribunal, Mumbai Bench in CP No. 45/Mah/2017 of 2017)

IN THE MATTER OF:

**Uttam Galva Steels Limited** ...Appellant

v.

**DF Deutsche Forfait AG & Anr.** ...Respondents

Present: **For Appellant** : - Mr Sudipto 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, Advocates.

**For Respondents** : - Mr Vivek Sibal, Senior Advocate, Ms Pooja M Saigal, Mr Akshay Gupta, Advocates and Mr Sahil Bhatia, POA for the Respondent.

**JUDGMENT****S.J. Mukhopadhyaya, J. (Chairperson)**

**1.** The Respondents - both of whom claim to be Operational Creditor (s) filed a joint application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 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 & Bankruptcy Board of India to recommend name of Interim Resolution Professional for his appointment.

**2.** Ld. Counsel for the Appellant - Corporate Debtor challenged the impugned order on different count. It was submitted that there is a pre-existing bonafide 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 Ld. Counsel for the Appellant referred to an e-mail dated 10.4.2014 forwarded by one of the Respondent to demonstrate existence of bona fide dispute between the parties and submitted that in view of bonafide 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 28.2.17 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 & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 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 Ld. 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 Ld. Counsel for the Respondents a joint petition by ‘Operational Creditors’ is maintainable. Joint petition per say 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 Limited) 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 and 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. Ld. Counsel for the Respondents submitted that in terms of Rule 10 of the ‘Adjudicating Authority Rules, 2016’, Rule 20, 21, 22, 23, 24 and 25 of the ‘NCLT Rules 2016’ stands adopted. Reliance was also placed on notification dated 20.12.2016 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) Limited" 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. Ld. 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 Limited v. National Steel and Agro Industries Limited*", 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. Ld. 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) Limited" 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 question 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 'certificate 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 Section 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 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. 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 Section 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 clause (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 Section 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, 2016, the Rule 23A is not applicable to the application under Section 9 of the I & B Code, 2016. For the reasons aforesaid, we hold that a joint application 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 Limited v. National Steel and Agro Industries Limited”*. 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 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 (hereinafter referred to as Adjudicating Authority Rules 2016' for short) 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 dispatch 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, 9 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* MANU/SC/0005/1954 : (1955) 1 SCR 108, the Hon'ble Apex Court held that where statute itself provide consequences of breach or noncompliance, 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* MANU/SC/0429/1975 : (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."

**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 genuinity 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, 2016 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 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. 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.** Clause (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) & (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,
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

**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 C.P.C. 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 2016 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 Private Ltd. v. Mobilox Innovations Private 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:-

“17. For the purposes of Part II only of the Code, some terms/words have been defined. S. 12 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.

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 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 14 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. 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 16 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'.

29. The definition of 'dispute' for the purpose of Section 9 must be read alongwith 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;" S. 18 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 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 Subsection (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.

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 qualify 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 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.

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."

37. In view of the decision of "*Kirusa Software Pvt. Ltd. v. MobiloX Innovations Pvt. Ltd.*", 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 Ld. 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, 2016 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.

**(Mr. Balvinder Singh)**  
**Member (Technical)**

**(Justice S.J. Mukhopadhyaya)**  
**Chairperson**

NEW DELHI

28<sup>th</sup> July, 2017

**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/MAHI20 17)

**IN THE MATTER OF:**

<b>Kirusa Software Private Ltd.</b>	<b>Appellant</b>
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**Vs**

<b>Mobilox Innovations Private Ltd.</b>	<b>Respondent</b>
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**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 debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

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

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt –

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

- (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

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

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 is 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 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 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 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, 2016.

**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](http://kirusal.pairserver.com/?page_id=34) and <https://in.linkedin.com/pub/vikram-agarwal/7/3a1/83b>.*

*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. Mukhopadhyaya)  
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:**

<b>Philips India Limited</b>	<b>Appellant</b>
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**Vs**

<b>Goodwill Hospital &amp; Research Centre Ltd.</b>	<b>Respondent</b>
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**Along with Company Appeal (AT) (Insolvency) No. 15 of 2017**

<b>Philips India Limited</b>	<b>Appellant</b>
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**Vs.**

<b>Karma Healthcare Private Limited</b>	<b>Respondent</b>
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**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.) Limited.

**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) itiose.

### **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 being “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 itiose 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. Mukhopadhyaya)  
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 Pty. 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 respondents-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 premised 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. Fetter 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 dispatch 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. Innovative 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 dispatch forthwith a copy of the application filed with the Adjudicating Authority to the corporate debtor as quoted below :*

*“4. (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.”*

*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 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 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.*

*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. Mukhopadhyaya)  
Chairperson

New Delhi

31st May, 2017

**ANNEXURE X.6****IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL****Company Appeal (AT) (Insolvency) No. 32 of 2017**

[arising out of Order dated 24th March, 2017 by NCLT, Principal Bench, New Delhi in C.P. No. (IB)-22(PB)/2017]

M/s. Annapurna Infrastructure Pvt. Ltd. and anr. Appellants

Vs.

M/s. SORIL Infra Resources Ltd. Respondent

**Present:**

**For Appellants -** Shri Vijay Nair, Shri Prashant Jam, Ms. Aparna Malhotra and Ms. Sanyogita Jam, Advocates.

**For Respondent-** Shri Chetan Sharma, Shri Abhishek Swaroop and Shri Rudreshwar Singh, Advocates.

**JUDGMENT****SUDHANSU JYOTI MUKHOPADHAYA, J**

This appeal has been preferred by the appellants against order dated 24th March, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi whereby the application preferred by the appellant under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code') for initiation the Corporate Insolvency Resolution Process against the 'Corporate Debtor' has been rejected on the ground that there is an existence of dispute pending adjudication between the parties.

2. In order to decide the controversy in its proper perspective, it will be necessary to notice the material facts.
3. Appellants rented the premises, rent of which was payable by respondent - Corporate Debtor pursuant to Lease Deed dated 23rd November, 2005 but having not paid, the parties invoked arbitration clause. Pursuant to the order passed by the Hon'ble High Court of Delhi, Hon'ble Justice (Dr.) Mukundakam Sharma (Retired) was appointed as a Sole Arbitrator to

adjudicate all disputes 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 rend 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 rend 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 1912.206, 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. Mukhopadhyaya]  
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.<sup>1</sup>”

11. The legislative history of legislation relating to indebtedness goes back to the year 1964 when the 24th Law Commission recommended amendments to the Provincial Insolvency Act of 1920. This was followed by the Tiwari Committee of 1981, which introduced the Sick Industrial Companies Act, 1985. Following economic liberalization in the 1990s, two Narsimham Committee reports led to the Recovery of Debts and Bankruptcy Act, 1993

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<sup>1</sup> 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).

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 Zwieten states that courts in India have recognised a wide discretion that enabled it to give time to the debtor to make payment or even dismiss the petition. This is in stark contrast with the position in the UK (from where the law was transplanted) where once the company's inability to pay debts has been proven, the petitioning creditor is ordinarily held to be entitled to a winding up order (although it should be noted that there is an alternative corporate rescue procedure, 'administration', which a debtor may be entitled to enter).

The effect of these abovementioned judicial developments has been to add significant delays in the liquidation process under Companies Act, 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.

xxxx

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	
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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 *[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**

<b>PARTICULARS OF APPLICANT</b>	
1.	NAME OF OPERATIONAL CREDITOR
2.	IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR (IF ANY)
3.	ADDRESS FOR CORRESPONDENCE OF THE OPERATIONAL CREDITOR

**Part - II**

<b>PARTICULARS OF CORPORATE DEBTOR</b>	
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**

	<b>PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]</b>	
1.	NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL	

**Part-IV**

	<b>PARTICULARS OF OPERATIONAL DEBT</b>	
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**

	<b>PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]</b>	
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 MAYBE 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	
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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:

<b>PARTICULARS</b>	
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 TITLEARRANGEMENTS 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 disjunctively. 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 “bonafide suit or arbitration proceedings...”. In its present avatar, Section 5(6) excludes the expression “bonafide” 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.

xxxx

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 doing 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 be 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. Fretters 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.

**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
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Vs

ICICI Bank & Anr.	...Respondents
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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 *nemojudex 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 <sup>a</sup>.... *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 advertizing 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 intent 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 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.
- (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 premised 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. Fetter 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 is 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 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 III 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 whereto 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, 1979, 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 Jaishwal 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 petition 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.

**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. Mukhopadhyaya)  
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 Srividhani 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 Innovative 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 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.”*

**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 petition 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 a 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.Mukhopadhyaya)  
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-I

**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. Learned 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 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.Mukhopadhyaya)  
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 COMPANY** .....APPELLANT(S)

**VERSUS**

**M/S. JUGGILAL KAMLAPAT JUTE MILLS COMPANY  
LIMITED AND OTHERS** .....RESPONDENT(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 16<sup>th</sup> 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. Sanghania 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 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."

xxx

xxx

xxx

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 command 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 cause 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. Nanhu [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. Mukhopadhyaya)  
Chairperson

NEW DELHI

19th May, 2017

**ANNEXURE X.14****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 ladings 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 debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

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

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

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

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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 :

<b>PARTICULARS OF OPERATIONAL DEBT</b>	
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**

	<b>PARTICULARS OF CORPORATE DEBTOR</b>	
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**

<b>PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]</b>	
1.	NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL

**Part-IV**

<b>PARTICULARS OF OPERATIONAL DEBT</b>	
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**

<b>PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]</b>	
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. Raghbir 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 **Innoventive 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**.<sup>1</sup>

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.”

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‘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 Kamlapat 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 refilling the application after removing the objections, file an application in writing showing sufficient cause as to why the applicant could not remove the objections within seven days. When such an application comes 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.

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#### **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.**

**ANNEXURE X.15****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 312 of 2018****IN THE MATTER OF:****Mr. Brijesh Kumar Agarwal ...Appellant****Vs.****Punjab National Bank & Anr. ...Respondents****Present: For Appellant: - Mr. Sanchit Garga and Mr. Harsh Chopra,  
Advocates.****ORDER**

**05.07.2018** – This appeal has been preferred by the Director and Shareholder of M/s. Kunj Forgings (P) Ltd.- ('Corporate Debtor') against the order dated 17<sup>th</sup> May, 2018, whereby and whereunder the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") preferred by the Punjab National Bank- ('Financial Creditor') has been admitted.

**2.** Learned counsel for the Appellant submitted that the Bank has neither acted in terms of circular and guidelines issued by the Reserve Bank of India nor in terms of the Reserve Bank of India Act, but such ground cannot be accepted to reject the application preferred by the 'Financial Creditor' under Section 7 of the 'I&B Code', there being admitted default.

**3.** Next, it was contended that the amount due is barred by 'limitation' but such submission cannot be accepted in view of the fact that there is a continuous cause of action. Even if it is accepted that Limitation Act is applicable, in such case Article 137 of Part II of the Limitation Act will be applicable whereunder three years' period from the date of right to apply accrued will be applicable. In the present case, the right to apply under Section 7 accrued to 'Punjab National Bank' on 1<sup>st</sup> December, 2016, when 'I&B Code' came into force. Before the same, it had no right to apply under Section 7 of the 'I&B Code'. Therefore, even if the Limitation Act is made applicable, the application being not barred by limitation, interference is not called for.

**4.** There being no merit, the appeal is dismissed. No costs.

(Justice S.J. Mukhopadhyaya)  
Chairperson

(Justice Bansi Lal Bhat) Member  
(Judicial)

**ANNEXURE X.16**

**IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL/APPELLATE JURISDICTION  
WRIT PETITION (CIVIL) NO.455 OF 2019**

Jignesh Shah & Anr. ....Petitioners

Versus

Union of India & Anr. ....Respondents

**WITH**

**CIVIL APPEAL NO. OF 2019  
(Arising out of Special Leave Petition (Civil) No. of 2019)  
(D. No.13468 of 2019)**

**WITH**

**TRANSFER PETITION (CIVIL) NO.817 OF 2019**

**WITH**

**CIVIL APPEAL NO. 7618-19 OF 2019  
(D. No.16521 of 2019)**

**WITH**

**WRIT PETITION (CIVIL) NO.645 OF 2019**

**J U D G M E N T**

**R.F. Nariman, J.**

**W.P.(C) No. 645 OF 2019**

1. The issues involved in Writ Petition (Civil) No. 645 of 2019 are entirely different from the Writ Petition (Civil) No. 455 of 2019 and its other connected matters. This writ petition is accordingly de-tagged from Writ Petition (Civil) No. 455 of 2019. The Registry is directed to list this writ petition separately.

**W.P.(C) No. 455 of 2019 & Civil Appeal (Diary No. 16521 of 2019)**

2. Delay is condoned. Civil Appeal (Diary No. 16521 of 2019) is admitted.
3. Writ Petition (Civil) No. 455 of 2019 and Civil Appeal (Diary No. 16521 of 2019) have been filed by Shri Jignesh Shah and Smt. Pushpa Shah respectively, both of whom are shareholders of La-Fin Financial Services Pvt. Ltd. (hereinafter "La-Fin") assailing the order of the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the "NCLT")

admitting a winding up petition that was filed by IL & FS Financial Services Ltd. (hereinafter referred to as “IL & FS”) against La-Fin before the High Court of Judicature at Bombay (hereinafter referred to as the “Bombay High Court”), which was transferred to the NCLT and then heard as a Section 7 application under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “the Code”).

4. The brief facts necessary to appreciate the narrow controversy that arises in Writ Petition (Civil) No. 455 of 2019 and its connected matters are as follows:

- (i) On 20th August, 2009, a share purchase agreement was executed between Multi-Commodity Exchange India Limited (hereinafter referred to as “MCX”), MCX Stock Exchange Limited (hereinafter referred to as “MCX-SX”) and IL & FS, whereby IL & FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX.
- (ii) Pursuant to this agreement, La-Fin, as a group company of MCX, issued a ‘Letter of Undertaking’ to IL & FS on 20th August, 2009 (hereinafter referred to as the “Letter of Undertaking”) stating that La-Fin or its appointed nominees would offer to purchase from IL & FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. On facts, this period of three years expired in August, 2012.
- (iii) IL & FS, therefore, by its letter dated 3rd August, 2012, exercised its option to sell its entire holding of shares in MCX-SX, and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. On 16th August, 2012, La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares.
- (iv) Thereafter, correspondence between the parties continued, until finally, on 19th June, 2013, IL & FS filed a Suit No. 449 of 2013 in the Bombay High Court for specific performance of the Letter of Undertaking by La-Fin or, in the alternative, for damages. It is important to note that the cause of action for the suit-as stated in the plaint-arose on 16th August, 2012, i.e. the day La-Fin purportedly refused to honour its obligation under the Letter of Undertaking.
- (v) On 13th October, 2014, a learned Single Judge of the Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit, subject to attachments of La-Fin’s properties that had been made by the Economic Offences Wing of the Mumbai Police (hereinafter referred to as the “EOW”)

during the pendency of the suit. An appeal against this order was dismissed by a Division Bench of the Bombay High Court on 11th September, 2015.

- (vi) On 3rd November, 2015, a statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL & FS to La-Fin, referring to the attachment by the EOW, and stating that La-Fin was obviously in no financial position to pay the sum of INR 2,32,50,00,000/- which, according to IL & FS, was owing to them as of 31st October, 2015. On 18th November, 2015, a reply was promptly given by La-Fin to the aforesaid notice referring to the pending suit, and stoutly disputing the fact that any amount was due and payable. The reply went on to state that La-Fin was otherwise commercially sound and that the statutory notice issued under Sections 433 and 434 of the Companies Act, 1956 was only a pressure tactic.
- (vii) On 21st October, 2016, a winding up petition (hereinafter referred to as the "Winding up Petition") was then filed by IL & FS against La-Fin in the Bombay High Court under Section 433(e) of the Companies Act, 1956.
- (viii) The Code came into force on 1st December, 2016, and as a result, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Winding up Petition was transferred to the NCLT as a Section 7 application under the Code. The statutory form under these Rules, namely, Form-1 was filled up by IL & FS indicating that the date of default was 19th August, 2012.
- (ix) On 28th August, 2018, the said Winding up Petition was admitted by the NCLT as an application under Section 7 of the Code, stating on a reading of the share purchase agreement and the Letter of Undertaking that a financial debt had, in fact, been incurred by La-Fin. The National Company Law Appellate Tribunal (hereinafter referred to as the "NCLAT") by an order dated 21st January, 2019 dismissed the appeal filed by Shri Jignesh Shah against the aforesaid admission order, agreeing with the NCLT that the aforesaid transaction would fall within the meaning of "financial debt" under the Code, and that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, viz., 1st December, 2016.
- (x) A Writ Petition was filed by Smt. Pushpa Shah against these orders in the Bombay High Court, challenging certain provisions of the Code, with which we are not directly concerned. Writ Petition (Civil) No. 455

of 2019 was then filed in this Court on 4th April, 2019 challenging the constitutionality of certain provisions of the Code, as well as the NCLT and NCLAT orders, after which the Civil Appeal (Diary No. 16521 of 2019) was also filed against the NCLAT order under Section 62 of the Code.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Petitioners/Appellants, did not go into the merits of the case, but has raised only the statutory bar of limitation against IL & FS. According to the learned Senior Advocate, after this Court's judgment in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates**, it is clear that the Limitation Act, 1963 (hereinafter referred to as the "Limitation Act") would apply to all Section 7 applications that are filed under the Code and that the residuary Article, i.e., Article 137 of the Limitation Act would be attracted to the facts of this case. Inasmuch as the Winding up Petition that has been transferred to the NCLT was filed on 21st October, 2016, i.e., beyond the period of three years prescribed (as the cause of action had arisen in August, 2012), it is clear that a time-barred winding up petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the Code filed within time, by virtue of the transfer of such petition. He relied heavily on **B.K. Educational Services Pvt. Ltd.** (supra) which, according to him, covered this case on all fours. In addition, he relied upon High Court judgments, Judgments from the United States of America, and one English judgment to buttress the proposition that the mere filing of a suit for specific performance would not in any manner impact the limitation period for a winding up petition, which as a separate and independent remedy, must fall or stand on its own legs. He also painstakingly took us through the statutory notice under Sections 433 and 434 sent by IL & FS, as well as the Winding up Petition filed by IL & FS, and relied heavily on the fact that the Form-1 (which was filled by IL & FS in order to transfer the aforesaid Winding up Petition to the NCLT) itself stated that the date of default was 19th August, 2012, clearly indicating that the Winding up Petition, being beyond three years of the cause of action, was time-barred.

6. On the other hand, Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of the Respondents IL & FS, argued that the cause of action for the suit and the cause of action for the Winding up Petition filed were separate and distinct. He argued that it is well-settled that a winding up petition cannot be filed in order to recover a debt, but is a proceeding 'in rem', which involves commercial insolvency of the company sought to be wound up. Therefore, according to the learned Senior Advocate, the cause of action for filing the Winding up Petition arose only in 2015/2016, after

Shri Jignesh Shah (the Petitioner before us) was arrested; after attachment of the assets of La-Fin; and as stated in the Winding up Petition, after La-Fin's assets had fallen from being worth around INR 1000 crores in 2013, to only being worth around INR 200 crores in October, 2016. He relied on several judgments to support this argument. According to him, the suit that was filed by IL & FS for specific performance of the Letter of Undertaking on 19th June, 2013 kept alive the debt that was owed to his client and, therefore, in any event, the Winding up Petition filed after such debt was kept alive would be in time, notwithstanding that it was filed at a subsequent period after the suit. According to him, in any event, limitation being a mixed question of fact and law, at best the matter ought to be remanded to the NCLT for a determination on this mixed question.

7. Having heard the learned Senior Counsel for the parties, it is important to first advert to this Court's decision in **B.K. Educational Services Pvt. Ltd.** (*supra*) in which Section 238A of the Code was referred to, which states as follows:

238A. Limitation.-- The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

8. In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:

7. Having heard the learned Counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

## **28. APPLICATION OF LIMITATION ACT, 1963**

**28.1** The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in

winding up proceedings cannot be time-barred, and there appears to be no rationale to exclude the extension of this principle of law to the Code.

**28.2** Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the 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*”. Though the Code is not a debt recovery law, the trigger being ‘default in payment of debt’ renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30(4) of the Code.

**28.3** Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific Section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor’s remedy.

(emphasis supplied)

9. After referring to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the Court extracted passages from the judgment in **M.P. Steel Corporation v. CCE** (2015) 7 SCC 58 and then concluded:

**20.** A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

**21.** In **State of Kerala v. V.R. Kallianikutty**, (1999) 3 SCC 657, ("V.R. Kallianikutty"), this Court dealt with whether a time-barred debt can be recovered by resorting to recovery proceedings under the Kerala Revenue Recovery Act of 1968. In stating that the said Act cannot extend to recovery of a time-barred debt, this Court stated in paragraph 8,

8. .... In every case the exact meaning of the word "due" will depend upon the context in which that word appears.

**22.** It was held in that case that Section 17(3) of the Kerala Revenue Recovery Act, 1968 made it clear that a person making payment under protest will have a right to institute a suit for refund of the whole or part of the sum paid by him under protest. It was thus held that when the right to file such a suit is expressly preserved, there is a necessary implication that the shield of limitation available to a debtor in a suit is also preserved, as a result of which, a wide interpretation of the expression "amount due" to include time-barred debts would destroy an important defence available to a debtor in a suit against him by the creditor, and may fall foul of Article 14 of the Constitution of India.

**23.** Another judgment referred to by learned Counsel for the Appellants is contained in **Union of India v. Uttam Steels Ltd.**, (2015) 13 SCC 209. Here the question was whether Section 11-B of the Central Excise Act as amended on 12.05.2000 would apply to the fact situation in that case. Section 11-B provided a longer period of limitation by substituting "six months" with "one year". Since the rebate application was filed within a period of one year, the Respondent contended that they were within time. This Court held, in paragraph 10, that limitation, being procedural law, would ordinarily be retrospective in nature. This is however with one proviso superadded, which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time-barred before the amending Act came into force, bringing a larger period of limitation with it. On the facts of that case, it was held that since the claim for rebate was made beyond the period of six months but within the extended period of one year, such extended period would not avail the Respondent in that case.

**24.** In **Allied Motors (P) Ltd. v. CIT**, (1997) 3 SCC 472, this Court took the view that the amendment made to Section 43-B in the Income Tax Act was retrospective, holding:

14. .... As observed by G.P. Singh in his *Principles of Statutory Interpretation*, 4th Edn. at p. 291: "It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation

is generally intended.” In fact the amendment would not serve its object in such a situation unless it is construed as retrospective.....

**25.** In the present case also, it is clear that the amendment of Section 238A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.

The Court then held:

**38.** This case is most apposite. As in the present case, and as is reflected in the Insolvency Law Committee Report of March, 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time-barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression “debt due” in the definition Sections of the Code would obviously only refer to debts that are “due and payable” in law, i.e., the debts that are not time-barred.

Finally, the Court held:

**48.** It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred Under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

10. This judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the Winding up Petition was filed beyond

three years from August, 2012 which is when, even according to IL & FS, default in repayment had occurred, it is barred by time.

11. Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act, 1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding up proceeding was concerned. Thus, in **Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd.** (1999) 96 Comp Cas 349, a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding up petition being filed, opined:

8...To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the Respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted.

12. Likewise, a Single Judge of the Patna High Court in **Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd.** (2000) Comp Cas 426 also held:

12....In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the Petitioner-company against opposite party No. 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that court cannot enure for the benefit of the present winding up proceeding. The debt having become time-barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding up proceedings because the same cannot legally be proved

under Section 520 of the Act. It would have been altogether a different matter if the Petitioner-company approached this Court for winding up of opposite party No. 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in Clause (b) of Sub-section (1) of Section 434. Therefore, since the debt of the Petitioner-company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of opposite party No. 1 cannot be ordered due to non-payment of the said debt.

**13.** In **Rameswar Prasad Kejriwal & Sons Ltd. v. M/s. Garodia Hardware Stores** (2002) 108 Comp Cas 187, a money suit that was filed in 1994 was decreed in 1997, after which a winding up petition under Section 433 of the Companies Act, 1956 was filed in 2001. In this fact situation, the learned Single Judge held:

**13.** It is an admitted position that the cause of action of the company arose in 1992. The suit was filed in 1994 and the decree was obtained in 1997. But on the basis of the said debt which is said to be merged in the decree, the winding up petition cannot be filed after the period of limitation that means after a period of three years.

**14.** It is not in dispute that in the instant case, the period of limitation is covered by residuary Article namely Article 137 of Limitation Act. A special Bench of this Court, in the case of **Hari Mohan Dalai v. Parmeshwar Shau**, reported in 56 Indian Law Reports, 61, has made certain observations on how the residuary Article is to be construed.

**15.** Construing the provisions of Article 181 the residuary Article under the old Act, Chief Justice Rankin, speaking for the Special Bench, held that “In Article 181 the legislature makes provisions not for any definite type of cases but for an unknown number of cases of all kinds. The provision which it makes specific as regard the period of limitation, but as regarded the terminus a quo it is content to state in general language and quite simply the fundamental principle that, for the purposes of any particular application, time is to run from the moment at which the applicant first had the right to make it.”

**16.** This Court goes by the same principle and holds that period of limitation should be counted from 1992. But assuming it is not counted from 1992, it has to be counted from 1997. Therefore, considering the matter from all possible angles, this Court is of the view that instant winding up petition has become barred on the date on which it is presented. It cannot be held that in case of winding up petition, limitation

period will be 12 years which may be the case in matters of execution of a decree.

**17.** Therefore, this winding up petition is, therefore, dismissed but in the facts of this case, there will be no order as to costs.

**14.** In **Dr. Dipankar Chakraborty v. Allahabad Bank and Ors.**, the fact situation was that a suit had been filed by the Petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:

**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such Section permits a Plaintiff to present the same suit, if the Court of the first instance, returns a plaint from defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in **Transcore** (*supra*), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section 36 of the Act

of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

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**25.** The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice.

15. In **Indo Alusys Industries v. Assotech Contracts (India) Ltd.** 2009 (110) DRJ 384, a learned Single Judge of the Delhi High Court opined that a suit for recovery and a winding up proceeding are distinct and independent remedies, as follows:

12. So far as the objection that the Petitioner has filed a suit disentitling it to maintain the present petition is concerned, it is well settled that the right to bring a winding up action is statutory conferred under Section 433 of the Companies Act, 1956. However, no person has a statutory right to winding up of a company incorporated under the Companies Act, 1956. Action to recover amounts and to winding up of the company are two wholly distinct and independent remedies. It is not necessary that every petition under Section 433 of the Companies Act, 1956 ends up in an order of winding up. Several essential factors as public interest, justice and convenience enter into the consideration before the prayed for order results. The nature of the defence and extent of dispute raised by the Respondent also impact adjudication in winding up action. At the same time, limitation for seeking the remedy of recovery against the company continues to run. The two remedies are not alternative remedies. More often than not, as a matter of abundant caution, parties do not wait for final decision in one remedy before invoking the other.

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**14.** In view of the above, mere filing of the suit by the Petitioner in order

to protect its right and by way of abundant caution certainly would not prohibit filing of the winding up petition or preclude the Petitioner from maintaining the same.

16. In **Board of Regents of the University of the State of New York et. al. v. Mary Tomanio** 100 S. Ct. 1790, the Supreme Court of the United States of America held that a federal action under the Civil Rights Act of 1871 was barred by the application of a three-year New York statute of limitations. What was argued was that the federal remedy became available only as a consequence of the State remedy being denied, as the Respondent had commenced a proceeding in the New York states courts attacking a decision of the Board of Regents not to grant a waiver of a licence to practice as a chiropractor. By November 1975, the appeals in the State proceedings being exhausted, and the Respondent being denied any relief, the Respondent instituted an action in the Federal District Court on 25th June, 1976. The Supreme Court of the United States of America held that the second action was clearly barred by the law of limitation, being filed three years after the cause of action had arisen. It was held that once the limitation period started running, it did not stop because a separate and independent remedy had been pursued in the meanwhile. The Court held:

No Section of the law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action.

17. In **Martiza Alamo-Hornedo v. Juan Carlos Puig and Jose Perez-Riera** 745 F. 3d 578, the US Court of Appeals, First Circuit held on the facts of the case, that a separate and independent action which was otherwise barred by limitation could not be brought within limitation merely because a prior suit had been filed. The Court held:

4. The Plaintiff also suggests that her prior suit in the Court of First Instance somehow tolled the statute of limitations. This suggestion is fanciful.

5. To begin, exhaustion of state remedies is not a condition precedent to the maintenance of a Section 1983 action. See **Patsy v. Bd. of Regents**, 457 U.S. 496, 516 : 102 S. Ct. 2557 : 73 L. Ed. 2d 172 (1982); **Rogers v. Okin**, 738 F. 2d 1, 5 (1st Cir. 1984). Thus, the commencement and pendency of a state proceeding ordinarily does not toll the limitations period for a parallel action under Section 1983. See, e.g., **Rodriguez-Garcia v. Municipality of Caguas**, 354 F. 3d 91, 93 (1st Cir. 2004); **Ramirez de Arellano v. Alvarez de Choudens**, 575 F. 2d 315, 319 (1st Cir. 1978). The Plaintiff attempts to parry his thrust by noting that, under Puerto Rico law, the statute of limitations can be “interrupted” by, among

other things, suing on the relevant claim. P.R. Laws Ann. tit. 31, 5303. Once the court action “comes to a definite end,” the “statute of limitations begins to run anew.” Rodriguez-Gracia, 354 F. 3d at 97 (internal quotation marks omitted).

\*582. The Plaintiff’s reliance on this principle elevates hope over reason. In order to have the tolling effect desired by the Plaintiff, the complaint in the first action “must assert causes of action identical to” those asserted in the second action. *Id.* (internal quotation marks omitted).

**6.** The identicity requirement has three facets. The two actions “must seek the same form of relief”; they “must be based on the same substantive claims”; and they “must be asserted against the same Defendants in the same capacities.” *Id.* at 98. The Plaintiff offers no developed argumentation sufficient to show that she satisfies these conditions.

In all events, it is readily apparent that the Plaintiff has not satisfied the identicity requirement. The first action, brought in the Court of First Instance, sought the equitable remedies of reinstatement and back pay; the second action, brought in the federal district court, sought the legal remedies of compensatory and punitive damages. Thus, it is nose-on-the-face plain that the two actions did not seek the “same form of relief.”

We hasten to add that this conclusion breaks no new ground. This Court has held, squarely and repeatedly, that under Puerto Rico law, “seeking only equitable relief does not toll the statute of limitations where the subsequent complaint... seeks damages.” **Nieves-Vega v. Ortiz-Quinones**, 443 F. 3d 134, 137 (1st Cir. 2006) (collecting cases).

In view of the Plaintiff’s failure to satisfy the first facet of the identicity requirement, we need not inquire into the other two facets. Puerto Rico law is pellucid that a Plaintiff who seeks to interrupt the running of a statute of limitations on this basis must satisfy all three facets of the identicity requirement. See, e.g., **Santana-Castro v. Toledo-Davila**, 579 F. 3d 109, 116 (1st Cir. 2009); Nieves-Vega, 443 F. 3d at 137-38.

That ends this aspect of the matter. When all is said and done, the Plaintiff’s decision to sit idly by while the proceedings in the Court of First Instance unfolded dooms her tardy attempt to assert a federal claim. Although waiting for the Commonwealth court’s ruling may have served to strengthen the Plaintiff’s belief that her firing was illegal, there is no requirement that a period who wishes to pursue a Section 1983 claim premised on an allegedly wrongly termination of employment await an

independent finding that her dismissal was unlawful. Consequently, the Plaintiff's election to await a ruling by the Court of First Instance does not justify her failure to bring her federal claim within the time allotted by statute.

18. In **Re Karnos Property Co. Ltd.** (1989) 5 B.C.C. 14, a learned Single Judge of the Chancery Division (Companies Court) held that a local authority's petition to wind up a company for non-payment of rates was barred by the law of limitation, being presented more than six years after the cause of action arose. The fact that the rate demanded had been the subject of distress warrants did not in any manner impact the limitation period for the winding up petition. It was thus held:

Applying those words to the petition proceedings now in train it seems that the cause of the proceedings arose at the latest when the company failed to pay the latest rate demand on 1 April 1981. That is more than six years before the presentation of the petition. Accordingly I conclude that the petition must be dismissed because it is founded on rates unpaid for more than six years. In other words a local authority petition for non-payment of rates is subject to the provisions of the Limitation Act.

Mr. Acton for the local authority conceded, as I understand, that rates unpaid for six years and never the subject of a distress warrant were irrecoverable in any way; so that the local authority ceases to be a creditor and thus may not petition. But, said Mr. Acton, once a distress warrant has been obtained it remains always available for execution and thus preserves the local authority its character as a creditor and ever able to petition. I do not accept this submission. If one assumes that the two distress warrants issued in this case remain available to the local authority, I do not think it follows that the provisions of the Limitation Act that I have mentioned do not operate to stop the presentation of a petition. The effect of Section 2(1) of the 1939 Act (or Section 9(1) of the 1980 Act) is that a petition may not be presented if six years have passed since the rates were demanded. There is nothing there to qualify the position if a distress warrant happens to be current. A petition lies not because a distress warrant has been or may be issued but because a local authority is a "creditor" as that word is and has been used in the Companies Acts (see the North Bucks case).

The remedies by way of distress and petition are separate and distinct.

19. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law,

when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding.

20. Shri Kaul, however, relied heavily on the judgment of a Single Judge of the Bombay High Court reported as **Re: Messrs: Bhimji Nanji and Co.** (1969) Mh. L.J. 827. That case arose under the Presidency-towns Insolvency Act, 1909, the question raised being as follows:

**4.** Whether the debt on the basis of which the petition for adjudication is presented and an adjudication order is sought should be a subsisting debt at the date of the hearing of the petition or is it enough that it subsisted at the date of the presentation of the petition?

Section 13 of the Presidency-towns Insolvency Act, 1909 laid down what factors are required to be proved by a petitioning-creditor at the hearing of the petition before the Court. Section 13(2) of the said Act, which fell for consideration before the Bombay High Court, is set out hereinbelow:

At the hearing the Court shall require proof of -

- (a) the debt of the petitioning creditor, and
- (b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency.

The observation that was made by the Court which is relied upon heavily by Shri Kaul is contained in paragraph 9, which is set out hereinbelow:

**9.** Mr. Shah urged that if this view were accepted by the Court it would cause great hardship to the creditor. Once an insolvency petition is presented by a creditor, he normally expects that the adjudication order would be passed at the hearing of his petition and simply because the hearing of the petition is delayed not for any default on his part but say on account of the exigencies of the Court work the creditor will have to meet the fate which he may not have thought of or contemplated, if in the meantime the debt becomes barred by limitation. I do not see any hardship arising to the creditor as suggested by Mr. Shah, for it would be open to the creditor or rather it would be his duty to see that he keeps the debt alive either by means of an acknowledgement or part payment or by filing a suit in respect thereof in a proper court well within the

period of limitation, but to my mind, it is clear that mere pendency of an insolvency petition without anything more cannot have the effect of saving the limitation prescribed by the Indian Limitation Act.

The context in which the learned Single Judge made an observation that the filing of a suit within limitation would keep the debt alive, is in the context of Section 13 of the Presidency-towns Insolvency Act, 1909 - which requires that the debt of the petitioning creditor should be alive even at the hearing of the insolvency petition. Obviously, if at the hearing of the petition, the debt was time-barred, the stringent result of insolvency of the individual concerned would not follow. It is in this context that the learned Single Judge held that a debt would be subsisting at the date of hearing of the insolvency petition if a suit was filed to recover it within the period of limitation. The context of Section 13 of the Presidency-towns Insolvency Act, 1909 is far removed from the present context, in which what has to be seen is whether a winding up proceeding has been filed within the limitation period provided. In the facts of the present case, no question as to subsistence of a live debt at the hearing of a winding up petition is at all involved. This case is, therefore, wholly distinguishable.

21. Shri Kaul then relied strongly on the rationale for laws of limitation generally, which was set out in **Rajender Singh and Ors. v. Santa Singh and Ors.** (1973) 2 SCC 705 as follows:

17. The policy underlying statutes of limitation, spoken of as statutes of "repose", or of "peace" has been thus stated in Halsbury's Laws of England Vol. 24, p. 181 (para 330):

**330. Policy of Limitation Acts.**--The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely: (1) that long dormant claims have more of cruelty than justice in them, (2) that a Defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence.

**18.** The object of the 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.

These observations are apposite in the context of the facts of the present case. It is clear that IL & FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has

been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL & FS, in repayment of which default has taken place.

22. At this stage, it is necessary to set out Section 433(e) and Section 434 of the Companies Act, 1956, which read as follows:

**433. Circumstances in which company may be wound up by Tribunal.-** A company may be wound up by the Tribunal,-

xxx xxx xxx

(e) if the company is unable to pay its debts;

**434. Company when deemed unable to pay its debts.-**(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order if any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

(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.

A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a Company shall be deemed to be “unable to pay its debts” under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due,

requiring the company to pay the sum so due, and the company has for three weeks thereafter “neglected to pay the sum”, or to secure or compound for it to the reasonable satisfaction of the creditor. “Neglected to pay” would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any Court or Tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the “satisfaction of the Tribunal” that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434.

23. Shri Kaul relied upon several well-known judgments, which lay down the law under Section 433 and 434 of the Companies Act, 1956. He relied upon **M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.** (1971) 3 SCC 632, wherein in a case of a winding up petition filed under Section 433(e), the High Court had rejected the claim of the Appellant to wind up the Company as creditors of the Company. Unlike the present case, the Appellant therein gave no statutory notice to raise any presumption of inability to pay debts. In this context, this Court held:

**20.** Two Rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See **London and Paris Banking Corporation** [(1874) LR 19 Eq 444]) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. (See **Re. Brighton Club and Horfold Hotel Co. Ltd.** [(1865) 35 Beav 204])

**21.** Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses

not to pay that particular debt, see **Re. A Company.** [94 SJ 369] Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See **Re Tweeds Garages Ltd.** [1962 Ch 406] The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces *prima facie* proof of the facts on which the defence depends.

The Court then stated that as the making of a winding up order is discretionary, the Court will ordinarily consider the wishes of all the creditors, and if they are opposed to winding up the company, the Court may, in its discretion, refuse such order. What was relied upon strongly by Shri Kaul was paragraph 29, in which the Court held:

**29...**In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the company alleged that with the proceeds of sale the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect. (See **Re Suburban Hotel Co.** [(1867) 2 Ch App 737] and **Davis and Co. v. Brunswick (Australia) Ltd.** [(1936) 1 AER 299])...The company has not abandoned objects of business. There is no such allegation or proof. It cannot in the facts and circumstances of the present case be held that the substratum of the company is gone. Nor can it be held in the facts and circumstances of the present case that the company is unable to meet the outstanding of any of its admitted creditors. The company has deposited in court the disputed claims of the Appellants. The company has not ceased carrying on its business. Therefore, the company will meet the dues as and when they fall due. The company has reasonable prospect of business and resources.

24. According to Shri Kaul, it was not possible for his client to approach the High Court with a winding up petition as on the date on which he filed the suit for specific performance, because La-Fin (i.e. the Company sought to be wound up), could not be said to have lost its substratum as on such date. It was for this reason that he approached the winding up Court in 2016, when the assets of La-Fin, which, as of 2013 were worth over INR 1000 crores, had in 2016 become only worth INR 200 crores.

25. This judgment does not take Shri Kaul's argument any further. Nowhere in the Winding up Petition is it alleged that the company sought to be wound-up has lost its substratum, in the sense that there is no reasonable prospect of it ever making a profit in the future, nor can it be said that the company had abandoned its business and is, therefore, unable to meet the outstandings owed by it. On the other hand, what emerges from this judgment (and paragraph 21 therein in particular), is that it is not open for a company to say that a debt is undisputed, that it has ability to pay the debt, but will not pay the debt. Equally, where a debt is clearly owed, but the exact amount of debt is disputed, the company will be held to be unable to pay its debts. What has to be seen in each case is whether the debt is bona fide disputed. If so, without more, a winding up petition would then be dismissed. One other thing must be noticed at this stage. The trigger for limitation is the inability of a company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering limitation for the filing of a winding up petition. Though it is clear that a winding up proceeding is a proceeding 'in rem' and not a recovery proceeding, the trigger of limitation, so far as the winding up petition is concerned, would be the date of default. Questions as to commercial solvency arise in cases covered by Sections 434(1) (c) of the Companies Act, 1956, where the debt has first to be proved, after which the Court will then look to the wishes of the other creditors and commercial solvency of the company as a whole. The stage at which the Court, therefore, examines whether the company is commercially insolvent is once it begins to hear the winding up petition for admission on merits. Limitation attaches insofar as petitions filed under Section 433(e) are concerned at the stage that default occurs for, it is at this stage that the debt becomes payable. For this reason, it is difficult to accept Shri Kaul's submission that the cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company.

26. The next judgment referred to and relied upon by **Shri Kaul is Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd. and Anr.** (1994) 3 SCC 348. In this case, it was found that Dalmia Industries had resorted to arbitration proceedings, in which there was a substantial dispute raised on the amount claimed. The passage strongly relied upon by Shri Kaul is set out hereinbelow:

**27.** What then is inability when the Section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and

commercially insolvent -- that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain -- as to make the Court feel satisfied -- that the existing and probable assets would be insufficient to meet the existing liabilities". (In **European Life Assurance Society, Re** [LR (1869) 9 Eq 122]; **V.V. Krishna Iyer & Sons v. New Era Mfg. Co. Ltd.** [(1965) 35 Comp Cas 410 : (1965) 1 Comp LJ 179 (Ker)])

This passage is in the context of an order under 433(e) of the Companies Act, 1956 being discretionary, which is referred to in the preceding paragraph 25. As stated hereinabove, the facts as to commercial insolvency are to be pleaded and proved at the admission stage of the winding up petition; the trigger for the winding up proceeding for limitation purposes, as has been stated hereinabove, being the date of default.

27. Shri Kaul then relied upon **Mediquip Systems (P) Ltd. v. Proxima Medical System GMBH** (2005) 7 SCC 42 and in particular, paragraphs 18 and 23 thereof, which state as follows:

**18.** This Court in a catena of decisions has held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this Section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company.

xxx xxx xxx

**23.** The Bombay High Court has laid down the following principles in **Softsule (P) Ltd., Re** [(1977) 47 Comp Cas 438 (Bom)]: (Comp Cas pp. 443-44)

Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

28. The Bombay High Court judgment referred to in paragraph 23 of the judgment above states the law on winding up petitions filed under Section 433(a) of the Companies Act, 1956 correctly. The primary test is set out in paragraph 1, which is that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the Company. Absent such dispute, the petition may be admitted. Equally, where the debt is bona fide disputed, there cannot be 'neglect to pay' within the meaning of Section 434(1)(a) of the Companies Act, 1956 so that the deeming provision then does not come into play. Also, the moment there is a bona fide dispute, the debt is then not 'due'. The High Court also correctly appreciates that whether the company is commercially solvent is one of the considerations in order to determine whether the company is able to pay its debts or not.

29. Even on the facts of this case, the Winding up Petition alleges that the ultimatum to the Respondent company asserting that the Respondent company was legally obliged to purchase the requisite shares in accordance with the terms of the Letter of Undertaking was on 7th January, 2013. By this date at the very latest, the cause of action for filing a petition under Section 433(e) certainly arose. Also, as has been correctly pointed out by Dr. Singhvi, the statutory notice given on 3rd November, 2015 does not refer to any facts as to the commercial insolvency of La-Fin. The statutory notice only refers to the suit proceedings and attachment by the EOW which had taken place long before in December 2013. Factually, therefore, no basis is laid for the legal contentions argued before us by Shri Kaul.

30. In the Winding up Petition itself, what is referred to is the fall in the assets of La-Fin to being worth approximately INR 200 crores as of October, 2016, which again does not correlate with 3rd November, 2015, being the date on which the statutory notice was itself issued. This again is only for the purpose

of appointing an Officer of the Court as Official Liquidator in order to manage the day-to-day affairs and otherwise secure and safeguard the assets of the Respondent company. There is no averment in the petition that thanks to these or other facts the Company's substratum has disappeared, or that the Company is otherwise commercially insolvent. It is clear therefore that even on facts, the company's substratum disappearing or the commercial insolvency of the company has not been pleaded. Whereas, in Form-1, upon transfer of the winding up proceedings to the NCLT, what is correctly stated is that the date of default is 19th August, 2012; making it clear that three-years from that date had long since elapsed when the Winding up Petition under Section 433(e) was filed on 21st October, 2016.

31. We therefore allow Civil Appeal (Diary No. 16521 of 2019) and dispose of the Writ Petition (Civil) No. 455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.

**SLP(C) (Diary No. 13468 of 2019) & T.P. (C) No. 817 of 2019**

32. In view of the aforesaid, nothing survives insofar as Special Leave Petition (Diary No. 13468 of 2019) and Transfer Petition (Civil) No. 817 of 2019 are concerned, and they are accordingly disposed of as having become infructuous.

(R.F. Nariman)

..... J.

(R. Subhash Reddy)

..... J.

(Surya Kant)

New Delhi:

September 25, 2019.

**ANNEXURE X.17****REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4952 OF 2019

GAURAV HARGOVINDBHAI DAVE

Appellant(s)

VERSUS

ASSET RECONSTRUCTION COMPANY (INDIA)LTD.& ANR.

Respondent(s)

**JUDGMENT**

**R.F. Nariman, J.**

1. In the present case, the Respondent No. 2 was declared NPA on 21.07.2011. At that point of time, the State Bank of India filed two O. As in the Debt Recovery Tribunal in 2012 in order to recover a total debt of 50 Crores of rupees. In the meanwhile, by an assignment dated 28.03.2014, the State Bank of India assigned the aforesaid debt to Respondent No. 1. The Debt Recovery Tribunal proceedings reached judgment on 10.06.2016, the Tribunal holding that the O. As filed before it were not maintainable for the reasons given therein.
2. As against the aforesaid judgment, Special Civil Application Nos. 10621-10622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a Special Leave Petition was dismissed on 25.03.2017.
3. An independent proceeding was then begun by Respondent No. 1 on 03.10.2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 Crores of rupees. In the Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21.07.2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	Twelve years	When the money sued for becomes due

Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The NCLAT vide the impugned judgment held, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 01.12.2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr. Aditya Parolia, learned Counsel appearing on behalf of the Appellant has argued that Article 137 being a residuary Article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in **B.K. Educational Services Private Limited v. Parag Gupta and Associates**, MANU/SC/1160/2018 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr. Debal Banerjee, learned Senior Counsel, appearing on behalf of the Respondents, countered this by stressing, in particular, para 7 of the **B.K. Educational Services Private Limited** (supra) and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned Counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed Under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned Counsel appearing on behalf of the Appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed Under Section 7 would clearly be time-barred. So far as Mr. Banerjee’s reliance on para 7 of **B.K. Educational Services Private Limited** (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the Respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular Article gets attracted. It is well settled that there is no equity about limitation-judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.

8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside.

..... J.

**(ROHINTON FALI NARIMAN)**

..... J.

**(R. SUBHASH REDDY)**

..... J.

**(SURYA KANT)**

New Delhi;

September 18, 2019.

**ANNEXURE X.18**

ITEM NO. 5 + 7

COURT NO.4

SECTION XVII

**S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS****Civil Appeal No(s). 6707/2019****COMMITTEE OF CREDITORS OF AMTEK AUTO LIMITED  
THROUGH CORPORATION BANK****Appellant(s)****VERSUS****DINKAR T. VENKATSUBRAMANIAN & ORS.****Respondent(s)****(FOR ADMISSION and IA No.132027/2019-EX-PARTE STAY and IA  
No.132530/2019-PERMISSION TO FILE ADDITIONAL DOCUMENTS/  
FACTS/ ANNEXURES)****with****Civil Appeal No. 7567-7569 of 2019**

(exemption from filing c/c of the impugned Judgment and stay application and intervention/impleadment and permission to file Appeal and permission to file additional documents/facts/annexures)

Date : 24-09-2019 These appeals were called on for hearing today.

CORAM :    HON'BLE MR. JUSTICE ARUN MISHRA  
                  HON'BLE MR. JUSTICE VINEET SARAN  
                  HON'BLE MR. JUSTICE S. RAVINDRA BHAT

Counsel for the parties

Mr. Tushar Mehta, Solicitor General Ms. Misha, Adv.

Mr. Sidhant Kant, Adv.

Mr. Kanu Agrawal, Adv.

Ms. Charu Bansal, Adv.

Mr. S. S. Shroff, AOR

Mr. Mukul Rohatgi, Sr. Adv.

Mr. K. V. Vishwanathan, Sr. Adv.

Mr. Arvind Kumar Gupta, Adv.

Mr. Purti Marwaha Gupta, Adv.

Ms. Henna George, Adv.

Mr. Prateek Kumar, Adv.

Ms. V. S. Lakshmi, Adv.  
 Ms. Pragati Bansal, Adv.  
 Mr. Mayank Pandey, Adv.

Ms. Madhavi Divan, ASG  
 Mr. Vikas Mehta, Adv.  
 Ms. Anushree Menon, Adv.  
 Ms. Nidhi Khanna, Adv.  
 Mr. Anupam Lal Dass, Sr. Adv.  
 Mr. Sanjay Bhatt, Adv.  
 Ms. Srishti Kapoor, Adv.

Mr. Huzeifa Ahmadi, Sr. Adv.  
 Ms. Ishita Jain, Adv.  
 Mr. Anurag Tandon, Adv.  
 Ms. Soman Gupta, Adv.

Mr. Prashanto Sen, Sr. Adv.  
 Mr. Vikas Kumar, Adv.  
 Mr. Dheeraj Singh, Adv.  
 for M/S Corporate Legal Partners

Mr. Sumesh Dhawan, Adv.  
 Mr. Vatsala Kak, Adv.  
 Mr. E. C. Agrawala, Adv.

UPON hearing the counsel the Court made the following

### O R D E R

#### Civil Appeal No. 6707 OF 2019

Heard the learned senior counsel appearing for the parties.

It is submitted by the learned Solicitor General appearing on behalf of the Committee of the Creditors of Amitek Auto Limited that a resolution plan was prepared that has failed owing to non-fulfillment of the commitment by Liberty House. That has consumed the time which was available as per the provisions contained in Section 12 of the Insolvency and Bankruptcy Code, 2016. Our attention has also been drawn to the third proviso by virtue of the Amendment Bill, 2019 with effect from 16.08.2019, by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act. The said period is available upto 15th November, 2019. Reliance has also been placed on a decision of this Court in "*Arcelormittal India Pvt. Ltd Vs. Satish Kumar Gupta and Ors.*", reported in (2019) 2 SCC 1. Without deciding the aforesaid issue finally, the

learned counsel for the parties have agreed that one more effort should be made to resolve the issue. It was also pointed out that expression of interest have already been indicated by eight other parties.

The learned Solicitor General has also submitted that the Resolution Professional may be permitted to invite the fresh offers within a period of 21 days as an earlier offer had been invited and considering the time limit of 15.11.2019, 21 days may be fixed instead of 30 days for submission of the offer. We permit the Resolution Professional to invite fresh offers within a period of 21 days. Let steps be taken by the Resolution Professional by tomorrow i.e. by 25.09.2019 for invitation of the fresh offers in accordance with the rules. Within 2 weeks thereafter, the Committee of Creditors shall take a final call in the matter and the decision of the Committee of Creditors and the offers received be placed before this Court on the next date of hearing for consideration.

List the matter on 05.11.2019.

Written submissions may be filed on or before 04.11.2019.

.....

**Civil Appeal No. 7567-7569 of 2019**

Detagged.

List on 03.10.2019.

Written submissions may be filed on or before 30.09.2019.

(JAYANT KUMAR ARORA)  
COURT MASTER

(JAGDISH CHANDER)  
BRANCH OFFICER

**ANNEXURE X.19**REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 7673 OF 2019****SAGAR SHARMA & ANR.****VERSUS****PHOENIX ARC PVT. LTD. & ANR.****JUDGMENT****R. F. Nariman. J.**

1. By our judgment dated 11.10.2018 in B.K. Educational Services Private Limited v. Parag Gupta and Associates (2018 SC Online SC 1921 in paragraph 2, 20, 38, 43, 48 and 49) we had made it clear that the Insolvency and Bankruptcy Code's coming into force on 01.12.2016 is wholly irrelevant to the triggering of any limitation period for the purposes of the Code. However, we find that in the impugned judgment the following statement is made:

**13.** Admittedly, 'I & B Code' has come into force since 1st December, 2016, therefore, the right to apply accrued to 1st Respondent on 1st December, 2016. Therefore, we hold that the application Under Section 7 was not barred by limitation.

2. We had also made it clear beyond any doubt that for applications that will be filed Under Section 7 of the Code, Article 137 of the Limitation Act will apply. However, we find in the impugned judgment that Article 62 (erroneously stated to be Article 61) was stated to be attracted to the facts of the present case, considering that there was a deed of mortgage which was executed between the parties in this case. We may point out that an application Under Section 7 of the Code does not purport to be an application to enforce any mortgage liability. It is an application made by a financial creditor stating that a default, as defined under the Code, has been made, which default amounts to Rs. 1,00,000/- (one lakh) or more which then triggers the application of the Code on settled principles that have been laid down by several judgments of this Court.

3. Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit. The date of coming into force of the IBC Code

does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since “applications” are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.

4. Accordingly, we set aside the judgment under appeal and direct that the matter be determined afresh. It will be open for both sides to argue the case on facts on the footing that Article 137 of the Limitation Act alone will apply.

5. The appeal is allowed in the aforesaid terms.

6. The NCLT order dated 29.01.2019 shall remain stayed until further orders from the NCLAT.

7. Mr. Rakesh Dwivedi, learned Senior Counsel, wishes to raise a plea based on Section 22 of the Limitation Act before the NCLAT. We record this statement.

..... J.

**(ROHINTON FALI NARIMAN)**

..... J.

**(V. RAMASUBRAMANIAN)**

**New Delhi;**

**September 30, 2019.**

**ANNEXURE X.20****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 12<sup>th</sup> 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 12<sup>th</sup> 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 8& 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 8& 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 12<sup>th</sup> 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. Mukhopadhyaya)  
Chairperson  
(Mr. Balvinder Singh)  
Member (Technical)

**ANNEXURE X.21****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI  
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) No. 07 of 2017**

(arising out of Order dated 23<sup>RD</sup> 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 financer 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 financer. (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 stopped or delayed 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 Lacs 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:—

<b>Summary of Payment</b>			
<b>Amount paid/ credited (Rs.)</b>	<b>Nature of Payment credit</b>	<b>Date of payment/ (dd/mm/yyyy)</b>	<b>Status of Booking</b>
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

<b>Summary of Tax Deducted at Source in respect of deductee</b>			
<b>Quarter</b>	<b>Receipt Numbers of original quarterly statements of TDS under sub-section (3) of section 200</b>	<b>Amount of tax deducted in respect of the deductee (Rs.)</b>	<b>Amount of tax deposited/ remitted in respect of deductee (Rs.)</b>
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. Mukhopadhyaya)  
Chairperson

NEW DELHI

21st July, 2017

**ANNEXURE X.22**

REPORTABLE

**IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL/APPELLATE JURISDICTION  
WRIT PETITION (CIVIL) NO. 43 OF 2019**

Pioneer Urban Land and Infrastructure Limited & Anr. ....Petitioners

Versus

Union of India & Ors. ....Respondents

WITH

WRIT PETITION (CIVIL) NO.99 OF 2019

WITH

WRIT PETITION (CIVIL) NO.124 OF 2019

WITH

WRIT PETITION (CIVIL) NO.121 OF 2019

WITH

WRIT PETITION (CIVIL) NO.129 OF 2019

WITH

CIVIL APPEAL NO.1486 OF 2019

WITH

WRIT PETITION (CIVIL) NO.130 OF 2019

WITH

WRIT PETITION (CIVIL) NO.135 OF 2019

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WRIT PETITION (CIVIL) NO.201 OF 2019

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WRIT PETITION (CIVIL) NO.147 OF 2019

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WRIT PETITION (CIVIL) NO.193 OF 2019

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WRIT PETITION (CIVIL) NO.156 OF 2019

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WRIT PETITION (CIVIL) NO.183 OF 2019

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WRIT PETITION (CIVIL) NO.166 OF 2019

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WRIT PETITION (CIVIL) NO.163 OF 2019

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WRIT PETITION (CIVIL) NO.194 OF 2019

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WRIT PETITION (CIVIL) NO.176 OF 2019

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WRIT PETITION (CIVIL) NO.205 OF 2019

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WRIT PETITION (CIVIL) NO.173 OF 2019

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WRIT PETITION (CIVIL) NO.189 OF 2019

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WRIT PETITION (CIVIL) NO.188 OF 2019

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WRIT PETITION (CIVIL) NO.185 OF 2019

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WRIT PETITION (CIVIL) NO.177 OF 2019

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WRIT PETITION (CIVIL) NO.214 OF 2019

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WRIT PETITION (CIVIL) NO.303 OF 2019

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WRIT PETITION (CIVIL) NO.941 OF 2019

## **JUDGMENT**

**R.F. Nariman, J.**

1. The large number of writ petitions that have been filed in this Court challenge the constitutional validity of amendments made to the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”), pursuant to a report prepared by the Insolvency Law Committee dated 26th March, 2018 (hereinafter referred to as the “Insolvency Committee Report”). The amendments so made deem allottees of real estate projects to be “financial creditors” so that they may trigger the Code, Under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorised representatives. The amendments so made to the Code are as follows:

### **PROVISIONS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 BEING CHALLENGED**

#### **1. Explanation to Section 5(8)(f):**

#### **5. Definitions**

In this part, unless the context otherwise requires,-

(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-

(f) any amount raised under any other transaction, including any forward

sale or purchase agreement, having the commercial effect of a borrowing;

Explanation.-For the purposes of this sub-clause,-

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in Clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

## **2. Section 21(6A)(b)**

### **21. Committee of creditors**

#### **(6A) Where a financial debt-**

- (b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under Clause (a) or Sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors; [...]

and such authorised representative under Clause (a) or Clause (b) or Clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

## **3. Section 25A**

### **A. Rights and duties of authorized representatives of financial creditors-**

- (1) The authorised representative Under Sub-section (6) or Sub-section (6A) of Section 21 or Sub-section (5) of Section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
- (2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

- (3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

- (4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

**Explanation**-For the purposes of this section, the “electronic means” shall be such as may be specified.

2. The Code was passed by the Parliament on 28th May, 2016. Several petitions were then filed against real estate developers under the Code by allottees who had entered into “assured returns/committed returns” agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of the agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of the agreement till the date of handing over of possession to the allottees. The National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”) on 21st July, 2017 in **Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.** (Company Appeal (AT) (Insolvency) No. 07 of 2017) held that amounts raised by developers under assured return schemes had the “commercial effect of a borrowing”, which became clear from the developer’s annual returns in which the amount raised was shown as “commitment charges” under the head “financial costs”. As a result, such allottees were held to be “financial creditors” within the meaning of Section 5(7) of the Code.

3. On 9th August, 2017, proceedings were initiated by IDBI Bank against a large real estate developer, Jaypee Infratech Ltd. Under Section 7 of the

Code before the National Company Law Tribunal (hereinafter referred to as "NCLT") Allahabad Bench, alleging that Jaypee had defaulted on a loan of Rs. 526.11 crores. On 11th September, 2017, an order was passed by this Hon'ble Court in **Chitra Sharma and Ors. v. Union of India** (Writ Petition (Civil) No. 744 of 2017) in the case of Jaypee Infratech Ltd. appointing a representative of the home buyers, i.e. the allottees, to participate in meetings of the Committee of Creditors in order that their interests be protected.

4. While this order was passed in **Chitra Sharma** (supra), qua another group of builders, namely, the Amrapali group, an order was passed on 22nd November, 2017 by this Court in **Bikram Chatterji v. Union of India** (Writ Petition (Civil) No. 940 of 2017) substantially on the same lines as the order passed in **Chitra Sharma** (supra). During proceedings before this Hon'ble Court in **Chitra Sharma** (supra), this Court, vide order dated 21st March, 2018, recorded that it was only concerned with those home buyers who intend to obtain a refund of amounts advanced by them, being 8% of the total home buyers/allottees in **Jaypee's** case. Given these orders by this Court, the Insolvency Committee Report suggested that amendments be made in the Code seeking to clarify, as a matter of law, that allottees of real estate projects are financial creditors. It may be noted that three members of the Insolvency Law Committee, namely, Shri Shardul Shroff, Shri S. Sen and Shri B. Sriram, dissented with the rest of the Insolvency Law Committee on the proposed amendments. On 6th June, 2018, pursuant to this Report, the Insolvency and Bankruptcy Code Amendment Ordinance, 2018 (hereinafter referred to as the "Amendment Ordinance") was promulgated by which the three amendments (supra) to the Code were inserted. On 17th August, 2018, the Parliament passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (hereinafter referred to as the "Amendment Act") incorporating the aforesaid amendments as were provided for by the Amendment Ordinance.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate, leading the charge on behalf of the real estate developers, has argued that the treatment of allottees as financial creditors violates two facets of Article 14. One, that the amendment is discriminatory inasmuch as it treats unequals equally, and equals unequally, having no intelligible differentia; and two, that there is no nexus with the objects sought to be achieved by the Code. In fact, according to the learned senior Counsel the amendments fly in the face of the objects sought to be achieved by the Code, i.e. to maximise value of assets so that the shareholders of a corporate debtor do not suffer from bad management or poor management. In the facts of the present cases, according to Dr.

Singhvi, the “bad eggs” alone have been looked at, and entities like his client and many others before us, who have completed building projects in time and are in every way compliant with the law, can yet be jeopardised by Section 7 petitions filed under the Code to blackmail them into making payments which would divert funds which are otherwise to be used for the purpose of the project. According to the learned senior Counsel, a perfectly good management which has several projects on its hands can be removed at the instance of one allottee and either replaced-in which case the massive funds infused by the developer himself would be set at naught-or worse still, lead to commercial death, in that, if there are no resolution plans or all resolution plans are rejected either by the Committee of Creditors or by the authorities under the Code, a perfectly solvent company would then be wound up, which would not be in the interest of anybody, least of all the bulk of allottees themselves, who would want possession of flats/apartments. According to him, therefore, these amendments are manifestly arbitrary, being excessive, disproportionate, irrational and without determining principle. For the same reason, the Petitioners’ fundamental right Under Article 19(1)(g) of the Constitution of India is infracted, and the amendments, not being a reasonable restriction in the public interest Under Article 19(6) would, therefore, have to be struck down. Equally, according to the learned senior Counsel, the deeming fiction in the explanation to Section 5(8)(f) of the Code is inconsistent with the objects sought to be achieved by the Code and has been stretched to absurd limits, making it manifestly arbitrary. Also, the amendments made to Section 21 and the insertion of Section 25A of the Code do away with the collegiality and commercial wisdom of the Committee of Creditors, and are manifestly arbitrary on this count. He made an impassioned plea that it was surprising that these amendments were even made, in view of the fact that there is a specific legislation, namely, the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as “RERA”), which deals in detail with the real estate sector, and provides for adjudication of disputes between allottees and the developer, together with a large number of safeguards in favour of the allottee, including agreements in statutory form, which would replace the agreements entered into between the developer and the allottees. According to him, therefore, a reading of RERA would show that all concerns of the allottees would be addressed by this sector-specific legislation and that the enactment of a sledgehammer to kill a gnat would render the impugned amendments excessive, disproportionate and violative of Articles 14 and 19(1)(g) of the Constitution on this score also. In addition, the learned senior Counsel scoffed at the Union’s stand, in their counter affidavit before this Court, that the amendments made are clarificatory in nature. According to Dr. Singhvi,

by no stretch of imagination could allottees who have parted with money as sale consideration for an apartment be included within the definition of "financial creditor" as originally enacted by Section 5(7). In fact, the very need for a deeming fiction is so that Parliament brings in persons who are not financial creditors, by forcibly inserting a square peg in a round hole. He read to us this Court's judgment in **Swiss Ribbons v. Union of India** MANU/SC/0079/2019 : (2019) 4 SCC 17, in copious detail, in order to drive home the point that not a single one of several characteristics of financial creditors stated in that judgment would apply to allottees/home buyers. On the contrary, if at all they could be assimilated to anybody, it would be to operational creditors, in which event it would be enough to state that there is a pre-existing dispute between the parties, as a result of which the Code cannot get triggered. According to him, including allottees of real estate projects-a huge amorphous and disparate lot-as financial creditors, would not only be unworkable, as thousands of petitions would flood the NCLT, but would also be both arbitrary and unworkable when this large number of disparate persons is represented on the Committee of Creditors, many of whom would speak in different voices, being concerned only with their own investment, and having no concern whatsoever for the financial betterment of the corporate debtor.

6. Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of some of the Petitioners, has adopted the submissions of Dr. Singhvi. He cited judgments to buttress the Article 14 arguments made by Dr. Singhvi, and added that an explanation cannot in any way interfere with or change the enactment or any part thereof. He also argued that it would be wholly arbitrary to include allottees as financial creditors when, in fact, they possess none of the characteristics pointed out in **Chitra Sharma** (supra) of banks and financial institutions.

7. Shri Shyam Divan, learned Senior Advocate appearing on behalf of some of the real estate developers, made an impassioned plea that in one of the writ petitions in which he appears, the real estate developer has infused over Rs. 100 crores in a particular project, through funds that are obtained from abroad. If in the case of entities like this developer, who complete projects on time and who have never defaulted, a single allottee can knock at the doors of the NCLT and obtain an admission order, the management of the corporate debtor would be removed and replaced by either somebody else, or, if not possible, the company would be wound up. According to him, not only would this be highly arbitrary and excessive, impacting the fundamental rights Under Article 19(1)(g) and 300-A, but would also have the indirect effect of dissuading foreigners from investing in this country. He also argued

that Article 14 interdicts legislation whose object is itself discriminatory, and cited judgments to prove his point. He argued with great vehemence, citing judgments to buttress the proposition that a deeming fiction cannot do away with what are the essentials of being a financial creditor. According to him, there is no “debt” as defined under the Code; there is no “borrowing” as there is no temporary handing over of money which has then to be returned; there is no “disbursal” and no “sum raised” which has then to be handed back. Equally, the commercial effect of a borrowing must be qua transactions in which money is later replaced by money. According to him, in the present case, at the time that the agreement is made between the allottee and the real estate developer, what is agreed is that in return for money paid by the allottee, a flat/apartment would be allotted. It is only in the event of breach of the agreement on the part of the real estate developer that monies are to be refunded, which does not bring allottees within the definition of “financial creditor”. He also argued, adopting Dr. Singhvi’s arguments, that all other categories of financial creditors would involve these elements, and if read noscitur a sociis with the other clauses, Section 5(8) of the Code would also make it clear that persons can only be included if there is a borrowing, at the end of which the borrowing is returned-with or without interest. He thus agreed with Dr. Singhvi’s argument that what was sought to be inserted by the amendment is a square peg in a round hole.

8. Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of some of the Petitioners, then followed. He stressed the facts of Writ Petition No. 357 of 2019 to show that huge sums have been infused into a large number of projects by the developers themselves, all such projects being constructed in accordance with RERA. According to him, if the amendments pass muster, as many as 5000 workers engaged across these real estate projects together with 600 employees would be directly impacted. NCLT applications have been filed by allottees of only 14 units out of 19,062 units sold. According to him, his client has never defaulted in repayment of amounts borrowed from banks/financial institutions and, in fact, upon initiation of the insolvency process, on account of one petition filed by one allottee, IDFC invoked a standby letter of credit and thereby recovered the entire amount due to them being approximately Rs. 100 crores prematurely. Therefore, large solvent real estate developers would be crippled if the Code were to be applied in this fashion to them. Apart from buttressing arguments already made on Articles 14 and 19(1)(g), he relied on judgments to show that a claim for unliquidated damages becomes a debt only on adjudication, which does not take place when a Section 7 application is heard. According to him, since the NCLT can only go into “default” and as the definition of

"default" itself is vague and ambiguous, the said definition should be struck down as being manifestly arbitrary. He also added, citing the same judgment as Shri Neeraj Kaul, namely, **S. Sundaram Pillai v. V.R. Pattabiraman** MANU/SC/0387/1985 : (1985) 1 SCC 591, that an explanation cannot enlarge the scope of the original provision. He also made a without-prejudice argument that even if allottees are not permitted to trigger the Code, they may still be protected by making suitable amendments for their inclusion in the Committee of Creditors, so that they may have a voice in the future of the corporate debtor, which will impact the flats/apartments to be given to them or refunds to be made, as the case may be.

9. Shri Gopal Sankaranarayanan, learned Senior Advocate, followed Shri Bhushan and argued on the various facets of Articles 14 and 19(1)(g). He also sought directions to recalcitrant States to immediately set up the requisite authorities under RERA and made an impassioned plea that the words "claims as may be specified" in Section 15(1)(c) of the Code be struck down. According to him, real estate developers and borrowers are treated as equals when they are, in fact, unequal. Also, real estate developers are discriminated against when compared with other entities supplying goods or services. The amendments made are, therefore, excessive and disproportionate being manifestly arbitrary. He also buttressed Dr. Singhvi's argument that a square peg is fitted into a round hole as none of the identifying traits of financial creditors as explained in **Chitra Sharma** (supra) are present insofar as allottees are concerned. He added that, in any case, RERA looks after all possible difficulties of allottees, who may in addition, invoke the arbitration Clause for resolution of disputes with the real estate developer contained in most agreements.

10. Shri Krishnan Venugopal, learned Senior Advocate, who followed Shri Gopal Sankaranarayanan, placed before us the Global Derivatives Study Group and extracts from Philip Wood's Project Finance, Subordinated Debt and State Loans; and Principles of International Insolvency by the same author. He then relied on 'The ACT Borrower's Guide to the LMA's Investment Grade Agreements' produced by Slaughter & May to explain the genesis of Section 5(8) generally and 5(8)(f) of the Code in particular. He then relied upon a number of judgments, which according to him made it clear that a deeming fiction is enacted when the position in reality is completely different, and hence, a deeming fiction is introduced when something is not otherwise covered under the main provision. On this basis, he contended that the amendment to Section 5(8)(f) of the Code was prospective in nature. He also cited judgments to show that time for completion of a project can never be said to be of the essence of the

agreement between the builder and the allottee, and this being so, a builder cannot be said to be in default when he does not deliver a flat/apartment within the time specified, but later. According to him, since Section 5(8) of the Code is a “means and includes” definition clause, it is exhaustive and therefore, to then introduce by way of amendment something extra by means of a deeming fiction would thus not be permissible in law. Shri Krishnan Venugopal also referred to extracts from various authorities to demonstrate that even qua credit and conditional sale agreements, ultimately Section 5(8) is concerned only with transactions in which finance is involved. He also pointed out, with reference to Chapter 11 Bankruptcy Proceedings in the United States, that once a company has been stigmatised as being bankrupt or having gone into bankruptcy, several persons who earlier dealt with the company disengaged themselves, as a result of which the Company’s power to do business gets severely hampered.

11. The tail of the arguments on behalf of the Petitioners then wagged in the persona of several other counsel who added titbits here and there. Shri Bhandari, appearing for one of the writ Petitioners, gave a chart of a comparative analysis between the ‘UNCITRAL Legislative Guide on Insolvency Law’ (2005) (hereinafter referred to as the “UNCITRAL Legislative Guide”), which forms the basis of the Code, and the Bankruptcy Law Reforms Committee Report (2015), argued that the impugned amendments went against several features of this UNCITRAL Legislative Guide. He contended that, first and foremost, the fundamental difference between financial and operational creditors was ignored. Secondly, he contended that by treating home buyers, who are in substance operational creditors, as financial creditors, infracts the principle of equitable treatment of similarly situated creditors. Further, the UNCITRAL Legislative Guide states that recognition of existing creditor’s rights before the commencement of the insolvency proceedings by the insolvency law is important. He contended that by treating a home buyer as a financial creditor, the Code creates rights which such home buyer never had earlier. He further contended that by involving such persons in the negotiation process by putting them on the Committee of Creditors would infract the principle that, given their number and the diverse interests that they have, coupled with no knowledge or any commercial expertise of the corporate debtor, they should not and ought not to be allowed to participate in the Committee of Creditors. Also, insolvency law and other laws should be harmoniously construed, which harmony is disrupted when the Code is applied to cases which should really fall under RERA. Shri Bhandari was followed by Shri J. Gupta, who argued that instead of deeming that allottees/home buyers be regarded

as financial creditors, they ought to be regarded as operational creditors in which case, defences available in such cases would then be available. Shri Pukit Deora then showed us accounting standards in which it became clear that advances received from home buyers by developers cannot, from an accounting perspective, be treated as financial liabilities and the amendments in doing so, therefore, violate the aforesaid standards and become manifestly arbitrary. Also, after going into the definition of "claim", "financial debt" and "operational debt", he argued that a financial debt is a crystallised claim which is due, as opposed to an operational debt which may simply be a claim upon breach of contract that may be disputed and therefore not due. On this basis he contended that to put home buyers in the financial creditor category, instead of the operational creditor category, would then blur this distinction and do away with a vital defence available to the real estate developer in the case of operational debts. Shri Rana Mukherjee, appearing through Shri K. Poddar, argued that home buyers would not fall within the category of either financial or operational creditors and should therefore be subsumed only within RERA, which is a complete code dealing with the real estate industry. He further argued that RERA is a special Act as opposed to the Code, which is a general Act and ought, therefore, to prevail. Also, as the adjudication process envisaged under RERA would be done away with if the Code is to be applied, the application of the Code to home buyers would be manifestly arbitrary. M/s. Kejriwal and P. Aggarwal have argued that on the facts of their cases, force majeure events occurred as a result of which possession could not be handed over. They also pointed out that, from a practical point of view, the NCLT in such cases does not go into defences which would demonstrate that delays in handing over possession cannot be attributed to the developer, and being a summary proceeding, merely goes ahead and admits a Section 7 petition despite the fact that the developer is not at fault in not handing over the flat/apartment in time. Shri S. Malhotra repeated some of the submissions that have already been noted hereinabove. Shri P.S. Bindra argued that we should apply the Amendment Act only prospectively, either from 2018 itself or at the very earliest from 1st December, 2016. He also argued that if this Court were to uphold the vires of the Amendment Act, his clients ought to be at liberty to take various defences under the agreement between his client and allottees, which this Court should make clear in the event of allottees knocking at the doors of the NCLT.

12. Mrs. Madhavi Divan, learned Additional Solicitor General, relying strongly upon **Chitra Sharma** (supra), argued that the Amendment Act would clearly be covered by the ratio laid down by this Court in **Chitra Sharma** (supra),

which is that sufficient play in the joints must be given to the legislature when it comes to economic legislation, and every experiment that the legislature bona fide undertakes should not be interfered with by the Court. She referred copiously to the Insolvency Committee Report which led to the enactment of the Amendment Act, and stated that the real reason for including allottees as financial creditors is because, in substance, they finance the project in which they will ultimately be given flats/apartments. She contended that a cursory look at the agreement between developers and such allottees would show that at every stage in the building process, certain amounts have to be paid which are then supposed to be utilised in constructing the apartments/flats. This is what makes them different from other operational creditors. Also, in the case of operational creditors, it is the person who stands in the place of the developer, who either sells goods or renders service for which he is to be paid. The exact opposite obtains in the case of home buyers/allottees who in fact fund their own flats/apartments. She was at great pains to point out that it must never be forgotten that the Code is not a recovery mechanism. When a home buyer approaches the NCLT, if his petition is admitted, he does not get his money back in the near foreseeable future and has to stand in line and await either the vagaries of a resolution plan which gives him some percentage of the monies owed to him, and/or completes the project for him. In the event of winding up, he has then to stand in line and receive whatever is available. As opposed to this, home buyers/allottees can and do approach the authorities under RERA in which, upon showing breach on the part of the real estate developer, they would be able to claim whatever has been paid by them in full together with interest thereon. This being the case it is wholly incorrect to paint a picture, as was done by learned senior Counsel appearing on behalf of the Petitioners, that trigger-happy allottees mala fide invoke the Code to put pressure on developers to refund their money given as advances. Also, it is wholly incorrect to say that highly solvent companies would go in the red and then be wound up under the Code. If in fact such companies are solvent, the Committee of Creditors may decide to continue the same management or may decide to accept resolution plans from other developers so that the real estate development company continues as a going concern. Winding up is only a last resort, which will never really occur in the case of well managed corporate entities. She referred in copious detail to NCLT and NCLAT judgments in which it was held that, save and except allottees who had agreements in which a fixed monthly return was guaranteed by the developer, allottees were held to be neither operational nor financial creditors, resulting in great hardship to them. She took us through the various Sections of the Code afresh and argued that Section

5(8)(f), even read without the explanation, would, on its plain language, include real estate development agreements. For this purpose, she relied upon the definition of “payment” which would include “recompense” and on the definition in Collin’s English dictionary of “borrow” which is “to obtain or receive money on loan for temporary use intending to give either money or something equivalent back to the lender”. In the facts of these cases, she contended that the “something equivalent” would be the flat/apartment. She also relied upon the definition of “commercial” to show that the profit element is important. She stressed the fact that the “time value of money” is present qua both allottee and builder as the allottee would pay less than he would have to for a complete flat/apartment, in which case the entire consideration for the flat/apartment would have to be paid upfront; as against instalments while it is being completed. Qua the builder, she contended that the time value of money would be the money paid by way of advances by allottees which would be used to finance the building of the flats/apartments in the project. She also relied strongly upon Section 18 of RERA to show that in order to be a financial creditor, it is enough that a right recognised by Section 18 in favour of the allottee to payment would exist, and therefore, would be included within the definition of “financial debt” read with “debt” contained in Section 5(8) and Section 3(11) of the Code respectively. She also referred to and relied upon Section 4(2)(I)(D) of RERA to show that 70% of advances received by the developer from allottees must be put into an escrow account, which can only be used for the project at hand, showing therefore that even statutorily, monies paid by way of advance are in the nature of a financing transaction. She then cited judgments to show how the *noscitur a sociis* principle cannot be used when express wider language is used in one of the sub-clauses of a particular provision, making it clear that it is meant to be read by itself, and not in conjunction with what precedes and succeeds it. She also cited judgments to show that the expression “deemed” is also to put a certain matter beyond doubt and argued that an explanation can be inserted by the legislature as additional support to what is already contained in the main provision. She added that deeming fictions put in explanations are not something unknown to the law, and cited judgments to buttress her contention. She also cited judgments to show that when “means” is used separately from “includes”, the definition Clause would be inclusive, as opposed to when “means and includes” is used, and therefore argued that since Section 5(8) is not exhaustive, the category of home buyers could be added therein. Also, according to her, “means” and “includes” when interpreted by courts, is different from the legislature itself amending the provision so as to add something therein. Legislative activity cannot be confused with interpretational activity by the courts. She then

argued, referring to the provisions of RERA in some detail, that a complete information bank is provided by RERA, which is provided by the real estate developer himself, from which, like information utilities under the Code, information, *inter alia*, as to defaults made by the real estate developer would be available. According to her, therefore, all that the NCLT would have to be supplied with by the allottee in his Section 7 petition would be this information, and, after receiving a reply from the real estate developer, would then easily be able to decide whether a real estate developer owes money in the form of compensation payable for late completion of the project, and/or refund of money paid by the allottee. It would be open for the real estate developer in its defence to say that no amount is due and payable from the allottee, in that, the allottee is himself in breach of conditions laid down by the agreement read with the RERA, and Rules and Regulations made thereunder. According to her, therefore, the NCLT would be able to decide such applications in the same manner as would be decided in the case of banks and financial institutions. She also rebutted the argument that the collegiality of creditors will be affected by inserting home buyers into their committee by stating that home buyers, like banks and financial institutions, and unlike other operational creditors, are vitally concerned with the well-being of the corporate debtor, as otherwise the real estate project would never come to fruition. In rebutting the challenge to Section 21(6A) and Section 25A, she said there may be teething problems with regard to how an authorised representative is to vote on the Committee of Creditors, but stated that the legislature is in the process of ironing out these creases and referred to the recent Insolvency and Bankruptcy Code (Amendment) Bill, 2019 which has just been passed by Parliament. She also argued that home buyers may themselves finance up to 100% of a project, and in case they finance a project by 100%, the Code would not work unless they were recognised as financial creditors as, not being financial or operational creditors, no Committee of Creditors could be set up at all; and for this purpose she relied upon the proviso to Section 21(8) of the Code, read with Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. She argued, therefore, that on point of fact, if allottees of real estate projects were to be kept out of the Committee of Creditors, that itself would be manifestly arbitrary as in most cases they finance the project to the tune of at least 50%, going up to 100%. She also stated that each project was usually carried out by a ‘special purpose vehicle’, being a corporate entity on its own, and therefore, the bogey of destabilisation of a management which has brought in large funds for many projects, and which would be replaced for all projects, would not be correct.

13. Shri Tushar Mehta, learned Solicitor General of India broadly supported the detailed arguments of Mrs. Madhavi Divan, learned Additional Solicitor General, by buttressing the same by citing various judgments and authorities. According to him also, given the fact that **Chitra Sharma** (*supra*) gives the legislature free play in the joints when it comes to economic legislation and experimentation in this sphere, **Chitra Sharma** (*supra*) itself is more or less a complete answer to all constitutional challenges that may be made to the Amendment Act.

14. A number of counsel then appeared for allottees in individual cases. These counsel argued, by referring copiously to NCLT and NCLAT orders, consumer forum judgments and High Court judgments, that the consumer fora, and the authorities under RERA are not meaningful remedies for allottees at all. According to them, loopholes made in the Rules by various States still allow one-sided agreements by real estate developers to continue to govern the relationship between allottee and real estate developer long after RERA has come into force. This has been done, for example, by defining 'Completion Certificate' to include partial completion certificates of projects (or parts of projects), so that such partial certificates given to the real estate developer before coming into force of RERA would make the provisions of RERA inapplicable. Also, it has been pointed out that real estate developers have been successful in arguing that RERA has now shut out the consumer fora so far as allottees are concerned, and referred to stay orders by which consumer fora for a long period of time were unable to proceed with cases filed by allottees before them, until the National Consumer Disputes Redressal Commission finally decided that the Consumer Protection Act, 1986 was an additional remedy and continued to be an additional remedy to the remedies provided under RERA. They also pointed out that the authorities themselves under RERA jostled the allottees about, as when an allottee went to the Real Estate Regulatory Authority and obtained orders against developers, such orders were nullified by some Appellate Tribunal orders, stating that they should be sent to the adjudicating officer who alone could decide disputes between allottees and real estate developers. Separately, in answer to the argument that the admission of a Section 7 application would be fatal to the management of the corporate debtor, and that one single allottee could destabilise the management of the corporate debtor and not just the project undertaken by the corporate debtor, they pointed out that there were 5 stages at which it would be open for the real estate developer to compromise with the allottee in question, before the sledgehammer under the Code comes down on the erstwhile management. They pointed out that settlements have taken

place at: (i) the stage of the Section 7 notice itself before replies were filed by the real estate developer; (ii) after the NCLT issues notice on a Section 7 application and before admission; (iii) after the hearing and before the order admitting the matter; (iv) post-admission, and before appointment of the Committee of Creditors where both the NCLT and NCLAT use their inherent power to permit settlements; and (v) even post setting-up of the Committee of Creditors, whereby settlements can be arrived at Under Section 12A of the Code with the concurrence of 90% of the creditors. On this basis, they pointed out that long before the chopper comes down on the management of the corporate debtor, all these opportunities are given to the management of the corporate debtor to settle with the individual allottee, showing thereby that there is no real infraction of Article 14, 19(1) (g) or 300-A of the Constitution. They also argued that the provisions of Section 7(4) of the Code giving the NCLT 14 days within which to ascertain the existence of a default is directory as has been held in **Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors.** MANU/SC/1248/2017 : 2017 (16) SCC 143. They made an impassioned plea, relying upon the background to RERA, to argue that if these beneficial amendments were to be struck down, they would be back in the same position as they were before enactment of other measures, which have not really worked to afford them relief.

The Legislature's right to experiment in matters economic

15. In **Chitra Sharma** (supra), this Court was at pains to point out, referring, inter alia, to various American decisions in paragraphs 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. In paragraph 120 of the said judgment, this Court held:

**120.** The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, “trial” having led to repeated “errors”, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the Petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the

working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the Petitioners.

It is in this background that the constitutional challenge to the Amendment Act will have to be decided.

#### Raison d'etre for the Insolvency Code (Second Amendment) Act of 2018

16. The Insolvency Committee Report is of crucial importance in understanding why the legislature thought it fit to categorise home buyers as financial creditors under the Code. The recommendations made by the said Insolvency Law Committee are set out hereinbelow in extenso:

#### RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CODE AND RELEVANT SUBORDINATE LEGISLATION

##### 1. DEFINITIONS

###### Financial debt

1.1 Section 5(8) of the Code defines 'financial debt' to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and *inter alia* includes money borrowed against payment of interest, etc. The Committee's attention was drawn to the significant confusion regarding the status of buyers of under-construction apartments ("**home buyers**") as creditors under the Code. Multiple judgments have categorised them as neither fitting within the definition of 'financial' nor 'operational' creditors. In one particular case, they have been classified as 'financial creditors' due to the assured return scheme in the contract, in which there was an arrangement wherein it was agreed that the seller of the apartments would pay 'assured returns' to the home buyers till possession of property was given. It was held that such a transaction was in the nature of a loan and constituted a 'financial debt' within the Code. A similar judgment was given in *Anil Mahindroo and Anr. v. Earth Organics Infrastructure*. But it must be noted that these judgments were given considering the terms of the contracts between the home buyers and the seller and are fact specific. Further, the IBBI issued a claim form for "creditors other than financial or operational creditors", which gave an indication that home buyers are neither financial nor operational creditors.

1.2 Non-inclusion of home buyers within either the definition of ‘financial’ or ‘operational’ creditors may be a cause for worry since it deprives them of, first, the right to initiate the corporate insolvency resolution process (“**CIRP**”), second, the right to be on the committee of creditors (“**CoC**”) and third, the guarantee of receiving at least the liquidation value under the resolution plan. Recent cases like *Chitra Sharma v. Union of India* and *Bikram Chatterji v. Union of India* have evidenced the stance of the Hon’ble Supreme Court in safeguarding the rights of home buyers under the Code due to their current disadvantageous position.

1.3 To completely understand the issue, it is imperative that the peculiarity of the Indian real estate sector is highlighted. Delay in completion of under-construction apartments has become a common phenomenon and the records indicate that out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed with the time over-run ranging from 1 to 261 months. Another study released by the Associated Chambers of Commerce and Industry of India, revealed that 826 housing projects are running behind Schedule across 14 states as of December 2016. Further, the Committee agreed that it is well understood that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of construction of an asset in the future.

1.4 The current definition of ‘financial debt’ Under Section 5(8) of the Code uses the words “*includes*”, thus the kinds of financial debts illustrated are not exhaustive. The phrase “*disbursed against the consideration for the time value of money*” has been the subject of interpretation only in a handful of cases under the Code. The words “time value” have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.

1.5 On a review of various financial terms of agreements between home buyers and builders and the manner of utilisation of the disbursements made by home buyers to the builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. The Committee deliberated that the amounts so raised are used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. On a plain reading of Section 5(8)(f), it is

clear that it is a residuary entry to cover debt transactions not covered under any other entry, and the essence of the entry is that “amount should have been raised under a transaction having the commercial effect of a borrowing.” An example has been mentioned in the entry itself i.e. forward sale or purchase agreement. The interpretation to be accorded to a forward sale or purchase agreement to have the texture of a financial contract may be drawn from an observation made in the case of *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.*:

*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 financer 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 financer.*

(emphasis supplied)

**1.6** Thus, not all forward sale or purchase are financial transactions, but if they are structured as a tool or means for raising finance, there is no doubt that the amount raised may be classified as financial debt Under Section 5(8)(f). Drawing an analogy, **in the case of home buyers, the amounts raised under the contracts of home buyers are in effect for the purposes of raising finance, and are a means of raising finance.** Thus, the Committee deemed it prudent to clarify that such amounts raised under a real estate project from a home buyer fall within entry (f) of Section 5(8).

**1.7** Further, it may be noted that the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. For example, in *Chitra Sharma v. Union of India* the amount of debts owed to home buyers, which was paid by them as advances, was claimed to be INR Fifteen Thousand Crore, more than what was due to banks. Despite this, banks are in a more favourable position under the Code since they are financial creditors. Moreover, the general practice is that these contracts are structured unilaterally by construction companies with little or no say of the home buyers. A denial of the right of a class of creditors based on technicalities within a contract that such creditor may not have had the power to negotiate, may not be aligned with the spirit of the Code.

**1.8** The Committee also discussed that Section 30(2)(e) of the Code

provides that all proposed resolution plans must not contravene any provisions of law in force, and thus, the provisions of Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) will need to be complied with and resolution plans under the Code should be compliant with the said law.

**1.9.** Finally, the Committee concluded that the current definition of ‘financial debt’ is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. However, given the confusion and multiple interpretations being taken, at this stage, it may be prudent to explicitly clarify that such creditors fall within the definition of financial creditor, by inserting an explanation to Section 5(8)(f) of the Code. Accordingly, in CIRP, they will be a part of the CoC and will be represented in the manner specified in paragraph 10 of this report, and in the event of liquidation, they will fall within the relevant entry in the liquidation waterfall Under Section 53. The Committee also agreed that resolution plans under the Code must be compliant with applicable laws, like RERA, which may be interpreted through Section 30(2)(e) of the Code. It may be noted that there was majority support in the Committee for the abovementioned treatment of home buyers. However, certain members of the Committee, namely Sh. Shardul Shroff, Sh. Sudarshan Sen and Sh. B. Sriram, differed on this matter.

(emphasis supplied)

17. When it came to devising a mechanism by which several persons may be represented by one authorised representative, the Insolvency Law Committee concluded:

**10.8** In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security holders, deposit holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by the NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised

representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through Regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time.

18. It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments. This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code Under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

19. Shri Shardul Shroff, whose dissent was provided to us in the form of an e-mail, after finding that self-financed home buyers may be financial creditors, but a home buyer who is a borrower is not, then went on to state:

**8.** If the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors.

**9.** Our report ought to be altered to the extent that home buyers financiers should be treated as unsecured financial creditors and they should be representatives of the home buyers. There should be no direct right given to home buyers to be on the CoC.

Even the dissent of Shri Shroff recognises that in the case of home buyers, who have taken loans from banks, such banks ought to be on the Committee of Creditors. If such banks ought to be on the Committee of Creditors as representatives of the home buyers, and they are to vote only in accordance with the home buyer's instructions, why should the home buyer himself then not be on the Committee of Creditors, and why should it make any difference as to whether he has borrowed money from banks in order to pay instalments under the agreement for sale or whether he does it from his own finances? These matters have not been addressed by the dissenting view which in principle, as we have seen, supports home buyers who have taken loans as against home buyers who have used their own finances. Perhaps the real reason for Shri Shroff's dissent is the fact

that unsecured, as opposed to secured, financial creditors are being put on the Committee of Creditors. If there is otherwise good reason as to why this particular group of unsecured creditors, like deposit holders, should be part of the Committee of Creditors, it is difficult to appreciate how such a group can be excluded.

The Real Estate (Regulation and Development) Act, 2016 (RERA) and its impact on the real estate sector

20. The Statement of Objects and Reasons of RERA reads as follows:

#### STATEMENT OF OBJECTS AND REASONS

**1.** The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While the sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.

**2.** In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for Regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

**3.** The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardisation in the

sector, thus paving the way for accelerated growth and investments in the long run.

21. It may be stated that Sections 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92 of this statute were brought into force on 1st May, 2016. Sections 3 to 19 which deal with registration of real estate projects and real estate agents; functions and duties of promoters; rights and duties of allottees, together with Section 40 which deals with recovery of interest or penalty or compensation and enforcement of orders qua the same; the Sections dealing with offences and penalties, viz., Sections 59 to 70 and Sections 79 and 80 which bar the jurisdiction of Civil Courts and deal with cognizance of offences under the RERA were all brought into force one year later i.e. on the 1st day of May, 2017. This was for the reason that the “appropriate Government” as defined in Section 2(g), which means the various State Governments and Union Territories, were given a period of one year to establish/appoint the Real Estate Regulatory Authority, the adjudicating officer and the Appellate Tribunal, consequent upon which the aforesaid Sections were brought into force one year later-in the hope and expectation that the appropriate Government would set up the aforesaid authorities within the period of one year from 1st May, 2016. The relevant provisions of RERA are set out hereunder:

**2. Definitions.--**In this Act, unless the context otherwise requires,--

- (a) “adjudicating officer” means the adjudicating officer appointed Under Sub-section (1) of Section 71;
- xxx xxx xxx
- (d) “allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;
- (e) “apartment” whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or

godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;

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(g) “appropriate Government” means in respect of matters relating to, --

(i) the Union territory without Legislature, the Central Government;

(ii) the Union territory of Puducherry, the Union territory Government;

(iii) the Union territory of Delhi, the Central Ministry of Urban Development;

(iv) the State, the State Government;

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(i) “Authority” means the Real Estate Regulatory Authority established Under Sub-section (1) of Section 20;

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(s) “development” with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;

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(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

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3. Prior registration of real estate project with Real Estate Regulatory Authority.--(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the Rules and Regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in Sub-section (1), no registration of the real estate project shall be required--

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or redevelopment which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation. --For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

**4. Application for registration of real estate projects.--**(1) Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed by the Regulations made by the Authority.

(2) The promoter shall enclose the following documents along with the application referred to in Sub-section (1), namely: --

- (a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;
- (b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;
- (c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;
- (d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;
- (e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including firefighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;
- (f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;
- (g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;
- (h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;
- (i) the number and areas of garage for sale in the project;
- (j) the names and addresses of his real estate agents, if any, for the proposed project;
- (k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;

- (I) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:
- (A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;
  - (B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;
  - (C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;
  - (D) that seventy per cent of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:

Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:

Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:

Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Explanation.-- For the purpose of this clause, the term "schedule bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;

- (E) that he shall take all the pending approvals on time, from the competent authorities;

- (F) that he has furnished such other documents as may be prescribed by the Rules or Regulations made under this Act; and
- (m) such other information and documents as may be prescribed.
- (3) The Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.
- 5. Grant of registration.--** On receipt of the application Under Sub-section (1) of Section 4, the Authority shall within a period of thirty days.
- (a) grant registration subject to the provisions of this Act and the Rules and Regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or
  - (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the Rules or Regulations made thereunder:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided Under Sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified Under Sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

(3) The registration granted under this Section shall be valid for a period declared by the promoter Under Sub-clause (C) of Clause (1) of Sub-section (2) of Section 4 for completion of the project or phase thereof, as the case may be.

**6. Extension of registration.--**The registration granted Under Section 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be prescribed:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and

for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

Explanation.-- For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

**7. Revocation of registration.**--(1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted Under Section 5, after being satisfied that--

- (a) the promoter makes default in doing anything required by or under this Act or the Rules or the Regulations made thereunder;
- (b) the promoter violates any of the terms or conditions of the approval given by the competent authority;
- (c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation.--For the purposes of this clause, the term "unfair practice" means a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:

- (A) the practice of making any statement, whether in writing or by visible representation which,--
  - (i) falsely represents that the services are of a particular standard or grade;
  - (ii) represents that the promoter has approval or affiliation which such promoter does not have;
  - (iii) makes a false or misleading representation concerning the services;
- (B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;

- (d) the promoter indulges in any fraudulent practices.
- (2) The registration granted to the promoter Under Section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.
- (3) The Authority may, instead of revoking the registration Under Sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.
- (4) The Authority, upon the revocation of the registration,--
- (a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;
  - (b) shall facilitate the remaining development works to be carried out in accordance with the provisions of Section 8;
  - (c) shall direct the bank holding the project back account, specified under sub Clause (D) of Clause (I) of Sub-section (2) of Section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of Section 8;
  - (d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

**8. Obligation of Authority consequent upon lapse of or on revocation of registration.--**Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority:

Provided that no direction, decision or order of the Authority under this Section shall take effect until the expiry of the period of appeal provided under the provisions of this Act:

Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

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**11. Functions and duties of promoter.--**(1) The promoter shall, upon receiving his Login Id and password under Clause (a) of Sub-section (1) or Under Sub-section (2) of Section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided Under Sub-section (2) of Section 4, in all the fields as provided, for public viewing, including--

- (a) details of the registration granted by the Authority;
- (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
- (c) quarterly up-to-date the list of number of garages booked;
- (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;
- (e) quarterly up-to-date status of the project; and
- (f) such other information and documents as may be specified by the Regulations made by the Authority.

(2) The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

(3) The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:

- (a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the Regulations made by the Authority;
- (b) the stage wise time Schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

(4) The promoter shall--

- (a) be responsible for all obligations, responsibilities and functions

under the provisions of this Act or the Rules and Regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in Sub-section (3) of Section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

- (b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;
- (c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;
- (d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;
- (e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

- (f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided Under Section 17 of this Act;

- (g) pay all outgoings until he transfers the physical possession of the

real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

- (h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;
- (5) The promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

- (6) The promoter shall prepare and maintain all such other details as may be specified, from time to time, by Regulations made by the Authority.

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- 13. No deposit or advance to be taken by promoter without first entering into agreement for sale.** (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person

without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

(2) The agreement for sale referred to in Sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

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**18. Return of amount and compensation--**(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,--

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this Sub-section shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on

him under this Act or the Rules or Regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

**19.** Rights and duties of allottees--(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the Rules and Regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time Schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter Under Sub-clause (C) of Clause (I) of Sub-section (2) of Section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the Rules or Regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, Under Section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid Under Sub-section (6).

(8) The obligations of the allottee Under Sub-section (6) and the liability towards interest Under Sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided Under Sub-section (1) of Section 17 of this Act.

**20. Establishment and incorporation of Real Estate Regulatory Authority--**(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act:

Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority:

Provided further that, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be:

Provided also that until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under this Act:

Provided also that after the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

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**31. Filing of complaints with the Authority or the adjudicating officer.--(1)** Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the Rules and Regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation.--For the purpose of this Sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint Under Sub-section (1) shall be such as may be prescribed.

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**34. Functions of Authority--**The functions of the Authority shall include--

- (a) to register and regulate real estate projects and real estate agents registered under this Act;
- (b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
- (c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;
- (d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;
- (e) to fix through Regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;

- (f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the Rules and Regulations made thereunder;
- (g) to ensure compliance of its Regulations or orders or directions made in exercise of its powers under this Act;
- (h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act.

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**36.** Power to issue interim orders.--Where during an inquiry, the Authority is satisfied that an act in contravention of this Act, or the Rules and Regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary.

**37.** Powers of Authority to issue directions.--The Authority may, for the purpose of discharging its functions under the provisions of this Act or Rules or Regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

**38.** Powers of Authority.--(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the Rules and the Regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the Rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that--

- (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or
- (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely,

then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

**39.** Rectification of orders.--The Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act:

Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

**40.** Recovery of interest or penalty or compensation and enforcement of order, etc.-

(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the Rules and Regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the Rules or Regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

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**43.** Establishment of Real Estate Appellate Tribunal--(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the -- (name of the State/Union territory) Real Estate Appellate Tribunal.

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**44.** Application for settlement of disputes and appeals to Appellate Tribunal--(1) The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

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**58.** Appeal to High Court.--(1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the Appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.--The expression “High Court” means the High Court of a State or Union territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

**59.** Punishment for non-registration Under Section 3.--(1) If any promoter contravenes the provisions of Section 3, he shall be liable to a penalty which may extend up to ten per cent of the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions or directions issued Under Sub-section (1) or continues to violate the provisions of Section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent of the estimated cost of the real estate project, or with both.

**60.** Penalty for contravention of Section 4.--If any promoter provides false information or contravenes the provisions of Section 4, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project, as determined by the Authority.

**61.** Penalty for contravention of other provisions of this Act.--If any promoter contravenes any other provisions of this Act, other than that provided Under Section 3 or Section 4, or the Rules or Regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project as determined by the Authority.

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**71.** Power to adjudicate.--(1) For the purpose of adjudging compensation Under Sections 12, 14, 18 and Section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer

as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered Under Sections 12, 14, 18 and Section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established Under Section 9 of the Consumer Protection Act, 1986, (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation Under Sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the Sections specified in Sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

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**72.** Factors to be taken into account by the adjudicating officer.--While adjudging the quantum of compensation or interest, as the case may be, Under Section 71, the adjudicating officer shall have due regard to the following factors, namely:

- (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
- (b) the amount of loss caused as a result of the default;
- (c) the repetitive nature of the default;

- (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

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**79.** Bar of jurisdiction.--No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

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**88.** Application of other laws not barred--The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

**89.** Act to have overriding effect.--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

22. A perusal of the aforesaid provisions would show that, on and from the coming into force of the RERA, all real estate projects (as defined) would first have to be registered with the Real Estate Regulatory Authority, which, before registering such projects, would look into all relevant details, including delay in completion of other projects by the developer. Importantly, the promoter is now to make a declaration supported by an affidavit, that he undertakes to complete the project within a certain time period, and that 70% of the amounts realised for the project from allottees, from time to time, shall be deposited in a separate account, which would be spent only to defray the cost of construction and land cost for that particular project. Registration is granted by the authority only when it is satisfied that the promoter is a bona fide promoter who is likely to perform his part of the bargain satisfactorily. Registration of the project enures only for a certain period and can only be extended due to force majeure events for a maximum period of one year by the authority, on being satisfied that such events have, in fact, taken place. Registration once granted, may be revoked if it is found that the promoter defaults in complying with the various statutory requirements or indulges in unfair practices or irregularities. Importantly, upon revocation of registration, the authority is to facilitate the remaining development work, which can then be carried out either by the “competent authority” as defined by the RERA or by the association of allottees or otherwise. The promoter at the time of booking and issue of allotment letters has to make available to the allottees

information, inter alia, as to the stage-wise time Schedule of completion of the project. Deposits or advances beyond 10% of the estimated cost as advance payment cannot be taken without first entering into an agreement for sale. Importantly, the agreement for sale will now no longer be a one-sided contract of adhesion, but in such form as may be prescribed, which balances the rights and obligations of both the promoter and the allottees. Importantly, Under Section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment etc. with such interest as may be prescribed and must, in addition, compensate the allottee in case of any loss caused to him. Under Section 19, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale. In addition, all allottees are to be responsible for making necessary payments in instalments within the time specified in the agreement for sale and shall be liable to pay interest at such rate as may be prescribed for any delay in such payment. Under Section 31, any aggrieved person may file a complaint with the authority or the adjudicating officers set up by such authority against any promoter, allottee or real estate agent, as the case may be, for violation or contravention of the RERA, and Rules and Regulations made thereunder. Also, if after adjudication a promoter, allottee or real estate agent fails to pay interest, penalty or compensation imposed on him by the authorities under the RERA, the same shall be recoverable as arrears of land revenue. Appeals may be filed to the Real Estate Appellate Tribunal against decisions or orders of the authority or the adjudicating officer. From orders of the Appellate Tribunal, appeals may thereafter be filed to the High Court. Stiff penalties are to be awarded for breach and/or contravention of the provisions of the RERA. Importantly, Under Section 72, the adjudicating officer must first determine that the complainant has established "default" on the part of the Respondent, after which consequential orders may then follow. Under Section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force and Under Section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

The Insolvency and Bankruptcy Code, 2016 vis-a-vis the Real Estate (Regulation and Development) Act, 2016

23. Section 238 of the Code reads 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.

24. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned. Also, the non-obstante Clause of RERA came into force on 1st May, 2016, as opposed to the non-obstante Clause of the Code which came into force on 1st December, 2016. Further, the amendment with which we are concerned has come into force only on 6th June, 2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of learned senior Counsel for the Petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1st May, 2016, remedies before those authorities would come into effect only on and from 1st May, 2017 making it clear that the provisions of the Code, which came into force on 1st December, 2016, would apply in addition to the RERA.

25. In **KSL & Industries Ltd. v. Arihant Threads Ltd.** MANU/SC/0961/2014 : (2015) 1 SCC 166, a Three Judge Bench of this Court held that the Sick Industries Companies (Special Provisions) Act, 1985 (hereinafter referred to as the “Sick Act”) would prevail over the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the “Recovery Act”)-both statutes containing non-obstante clauses. After going into the scheme of both the statutes, this Court referred in particular to Section 34(2) of the Recovery Act and then held as follows:

**35.** This special law, which deals with the recovery of debts due to banks and financial institutions, makes the procedure for recovery of such debts exclusive and even unique. The non obstante Clause in Sub-section (1) confers an overriding effect on the provisions of the RDDB Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Sub-section (2), however, makes

the RDDB Act additional to and not in derogation or annulment of the five Acts mentioned therein i.e. the Industrial Finance Corporation Act, 1948; the State Financial Corporations Act, 1951; the Unit Trust of India Act, 1963; the Industrial Reconstruction Bank of India Act, 1984 and the Sick Industrial Companies (Special Provisions) Act, 1985.

**36.** Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term “in derogation of” means “in abrogation or repeal of”. The Black’s Law Dictionary sets forth the following meaning for “derogation”:

derogation.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force.

It is clear that Sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law.

**37.** The effect of Sub-section (2) must necessarily be to preserve the powers of the authorities under SICA and save the proceedings from being overridden by the later Act i.e. the RDDB Act.

**38.** We, thus, find a harmonious scheme in relation to the proceedings for reconstruction of the company under SICA, which includes the reconstruction of debts and even the sale or lease of the sick company's properties for the purpose, which may or may not be a part of the security executed by the sick company in favour of a bank or a financial institution on the one hand, and the provisions of the RDDB Act, which deal with recovery of debts due to banks or financial institutions, if necessary by enforcing the security charged with the bank or financial institution, on the other.

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**48.** In view of the observations of this Court in the decisions referred to and relied on by the learned Counsel for the parties we find that, the purpose of the two enactments is entirely different. As observed earlier, the purpose of one is to provide ameliorative measures for reconstruction

of sick companies, and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions. Both the Acts are “special” in this sense. However, with reference to the specific purpose of reconstruction of sick companies, SICA must be held to be a special law, though it may be considered to be a general law in relation to the recovery of debts. Whereas, the RDDB Act may be considered to be a special law in relation to the recovery of debts and SICA may be considered to be a general law in this regard. For this purpose we rely on the decision in **LIC v. Vijay Bahadur** [MANU/SC/0305/1980 : (1981) 1 SCC 315: 1981 SCC (L&S) 111]. Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause. In this case, however, the express intendment of Parliament in the non obstante Clause of the RDDB Act does not permit us to take that view. Though the RDDB Act is the later enactment, Sub-section (2) of Section 34 thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws mentioned therein including SICA.

**49.** The term “not in derogation” clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings against the company and its properties should be stayed pending the process of reconstruction. While the term “proceedings” Under Section 22 of SICA did not originally include the RDDB Act, which was not there in existence. Section 22 covers proceedings under the RDDB Act.

26. In view of Section 34(2) of the Recovery Act, this Court held that despite the fact that the non-obstante Clause contained in the Recovery Act is later in time than the non-obstante Clause contained in the Sick Act, in the event of a conflict, the Recovery Act i.e. the later Act must give way to the Sick Act i.e. the earlier Act. Several judgments were referred to in which ordinarily a later Act containing a non-obstante Clause must be held to have primacy over an earlier Act containing a non-obstante clause, as Parliament must be deemed to be aware of the fact that the later Act is intended to override all earlier statutes including those which contained non-obstante clauses. This statement of the law was departed from in **KSL & Industries** (supra) only because of the presence of a Section like Section 88 of RERA contained in the Recovery Act, which makes it clear that the Act is meant to be in addition to and not in derogation of other statutes. In the present case, it

is clear that both tests are satisfied, namely, that the Code as amended, is both later in point of time than RERA, and must be given precedence over RERA, given Section 88 of RERA.

27. In fact, in **Bank of India v. Ketan Parekh** MANU/SC/2700/2008 : (2008) 8 SCC 148, this Court held that Section 9A of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the "Special Court Act") must be considered to be legislation that is subsequent to the Recovery Act, since Section 9A was introduced by amendment, into the Special Court Act after the Recovery Act. Needless to add, both statutes contained non-obstante clauses. This Court held:

**28.** In the present case, both the two Acts i.e. the Act of 1992 and the Act of 1993 start with the non obstante clause. Section 34 of the Act of 1993 starts with non obstante clause, likewise Section 9-A (sic 13) of the Act of 1992. But incidentally, in this case Section 9-A came subsequently i.e. it came on 25-1-1994. Therefore, it is a subsequent legislation which will have the overriding effect over the Act of 1993. But cases might arise where both the enactments have the non obstante Clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons. However, so far as the present case is concerned, it is more than clear that Section 9-A of the Act of 1992 was amended on 25-1-1994 whereas the Act of 1993 came in 1993. Therefore, the Act of 1992 as amended to include Section 9-A in 1994 being subsequent legislation will prevail and not the provisions of the Act of 1993.

(emphasis supplied)

28. It is clear, therefore, that even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, viz. the Code.

29. As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor. This is to take place by replacing the management of the corporate debtor by means of a resolution plan which must be accepted by 66% of the Committee of Creditors, which is now put at the helm of affairs, in deciding the fate of the corporate debtor. Such

resolution plan then puts the same or another management in the saddle, subject to the provisions of the Code, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefiting all stakeholders involved. It is only as a last resort that winding up of the corporate debtor is resorted to, so that its assets may be liquidated and paid out in the manner provided by Section 53 of the Code. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. At the same time, recalcitrant allottees are not to be tolerated, as they must also perform their part of the bargain, namely, to pay instalments as and when they become due and payable. Given the different spheres within which these two enactments operate, different parallel remedies are given to allottees under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88. In similar circumstances, this Court in **Swaraj Infrastructure Private Limited v. Kotak Mahindra Bank Limited** MANU/SC/0095/2019 : (2019) 3 SCC 620 has held that Debt Recovery Tribunal proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and winding up proceedings under the Companies Act, 1956 can carry on in parallel streams (see paragraphs 21 and 22 therein).

#### Financial and Operational Creditors

30. In **Innoventive Industries v. ICICI Bank and Anr.** MANU/SC/1063/2017 : (2018) 1 SCC 407, this Court after setting out some of the Sections of the Code, laid down the Scheme of the Code when it came to financial and operational creditors triggering the Code against a Corporate debtor. This Court held:

**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 nonpayment 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 or 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 dispatch 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.

(emphasis supplied)

31. Likewise, in **Chitra Sharma** (supra), this Court while repelling a challenge to the constitutional validity of the Code based on a purported infraction of Article 14, differentiated between financial and operational creditors. In so doing, it made it clear that the context of the decision dealt with banks and financial institutions as financial creditors as opposed to operational creditors who could be corporations or individuals to whom monies were owed for goods and/or services. In certain circumstances, financial creditors could also be individuals, such as debenture holders and fixed deposit holders, who were then spoken of as follows:

**42.** A perusal of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an “operational debt” would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

**43.** A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a “default” occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and Under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, Under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

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**46.** However, the Insolvency Law Committee (ILC), in its Report of March 2018 dealt with debenture-holders and fixed deposit-holders, who are also financial creditors, and are numerous. The Report then went on to state:

**10.6.** For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures are issued [Rule 18(1)(c), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be represented through such pre-appointed trustees

or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security-holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than IRP) shall be appointed by NCLT on the request of IRP. It is to be noted that as the agent or trustee or insolvency professional i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in Para 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to Section 21(2).

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**10.8.** In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security-holders, deposit-holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditors to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through Regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time.

**47.** Given this Report, the Code was amended and Sections 21(6-A) and 21(6-B) were added, which are set out hereinbelow:

**21. Committee of Creditors. --**

(1)-(6) \* \* \*

(6-A) Where a financial debt--

- (a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised

representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

- (b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under Clause (a) or Sub-section (6), the interim resolution professional shall make an application to the adjudicating authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the adjudicating authority prior to the first meeting of the Committee of Creditors;
- (c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under Clause (a) or Clause (b) or Clause (c) shall attend the meetings of the Committee of Creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative--

- (i) under Clauses (a) and (c) of Sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and
- (ii) under Clause (b) of Sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

**48.** Also, Regulations 16-A and 16-B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP Regulations) were added, with effect from 4-7-2018, as follows:

-A. Authorised representative.--(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received Under Sub-Regulation (1) of Regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received Under Sub-Regulation (2) of Regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the adjudicating authority for appointment of the authorised representatives selected Under Sub-Regulation (1) within two days of the verification of claims received Under Sub-Regulation (1) of Regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the adjudicating authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely:

<i>Number of creditors in the class</i>	<i>Fee per meeting of the committee (Rs.)</i>
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

-B. Committee with only creditors in a class. -- Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).

**49.** It is obvious that debenture-holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However,

as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

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**61.** Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way-- amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority Under Section 60.

#### The Article 14 Challenge (I): Discrimination

32. Learned Counsel for the Petitioners have emphasised that treating allottees to be financial creditors is discriminatory inasmuch as unequals are treated equally, equals are treated unequally, and both are without any intelligible differentia having any nexus with the objects of the Code. It is argued that discrimination arises, equals being treated as unequal, as real estate developers are differentiated from other entities who supply goods or services and would, therefore, be discriminated against as, in the case of real estate developers, all that an allottee would have to show is that a debt is due to him, whereas in the cases of persons supplying goods or services if there exists any preexisting dispute between the operational debtor and the person who purchases the goods or avails of the services, the operational debtor would be outside the clutches of the Code. It was also argued that unequals are treated as equals as banks and financial institutions are completely different from real estate developers, as has been recognised in **Chitra Sharma** (supra), and to treat these unequals as equals by making real estate developers financial debtors, again infracts Article 14.

33. When Article 14 is alleged to have been infacted by legislation which is economic in nature, it is important to first restate a few fundamental principles. In **Ram Krishna Dalmia v. Justice S.R. Tendolkar** MANU/SC/0024/1958 : (1959) SCR 279, this Court laid down the oft quoted principles that apply when challenges on the ground of discrimination are made to statutes. This Court held:

...The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish--

(a) that a law may be constitutional even though it relates to a single

individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

- (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
- (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
- (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
- (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
- (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. (at page 297, 298)

34. This principle has been re-iterated by this Court in **State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd.** MANU/SC/0036/2005 : (2005) 2 SCC 762 at 783 and more recently in **Karnataka Live Band Restaurants Assn. v. State of Karnataka** MANU/SC/0037/2018 : (2018) 4 SCC 372 at 393 where this Court re-iterated the principles to test legislation on the touchstone of Article 14 as laid down by this Court in **Ram Krishna Dalmia** (*supra*), wherein as extracted above, this Court held that the legislature is free to recognise degrees of harm and confine its application to those cases where the need is deemed to be the clearest.

35. In **State of Gujarat and Anr. v. Shri Ambica Mills Ltd., Ahmedabad, etc.** MANU/SC/0092/1974 : (1974) 4 SCC 656, this Court dealt with classifications that are under-inclusive and held, particularly with regard

to economic legislation, that such under-inclusion would not result in the death-knell of such laws on the anvil of Article 14. This Court put it thus:

**53.** The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. [See Joseph Tussman and Jacobusten Brook The Equal Protection of the Law, 37 California Rev 341]

**54.** A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

**55.** A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would someday bring about his downfall employed such a classification.

**56.** The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the

classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate -- difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to reshape -- and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. [**Missouri, K&T Rly v. May**, 194 US 267, 269] What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?

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**66.** That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adaption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner [See “General Theory of Law and State”, p. 161].

**67.** In the utilities, tax and economic Regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic Regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events -- self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. [See “General Theory of Law and State”, p. 161]

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**71.** The Court must be aware of its own remoteness and lack of familiarity with local problems. Classification is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of facts and opinions beyond the

easy ken of the Court [See "General Theory of Law and State", p. 161]. It depends to a great extent upon an assessment of the local condition of these concerns which the legislature alone was competent to make.

36. In **V.C. Shukla v. State (Delhi Administration)** MANU/SC/0545/1980 : 1980 Supp. SCC 249, this Court further elaborated:

11. In a diverse society and a large democracy such as ours where the expanding needs of the nation change with the temper of the times, it is extremely difficult for any legislation to make laws applicable to all persons alike. Some amount of classification is, therefore, necessary to administer various spheres of the activities of the State. It is well settled that in applying Article 14 mathematical precision or nicety or perfect equanimity are not required. Similarity rather than identity of treatment is enough. The courts should not make a doctrinaire approach in construing Article 14 so as to destroy or frustrate any beneficial legislation. What Article 14 prohibits is hostile discrimination and not reasonable classification for the purpose of legislation. Furthermore, the legislature which is in the best position to understand the needs and requirements of the people must be given sufficient latitude for making selection or differentiation and so long as such a selection is not arbitrary and has a rational basis having regard to the object of the Act, Article 14 would not be attracted. That is why this Court has laid down that presumption is always in favour of the constitutionality of an enactment and the onus lies upon the person who attacks the statute to show that there has been an infraction of the constitutional concept of equality. It has also been held that in order to sustain the presumption of constitutionality, the court is entitled to take into consideration matters of common knowledge, common report, the history of the times and all other facts which may be existing at the time of the legislation. Similarly, it cannot be presumed that the administration of a particular law would be done with an "evil eye and an unequal hand". Finally, any person invoking Article 14 of the Constitution must show that there has been discrimination against a person who is similarly situate or equally circumstanced. In the case of **State of U.P. v. Deoman Upadhyaya** [MANU/SC/0060/1960 : AIR 1960 SC 1125 : (1961) 1 SCR 14 : (1961) 2 SCJ 334] Subba Rao, J., observed as follows:

No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well-nigh impossible to make laws suitable in their application to all the persons

alike. So, a reasonable classification is not only permitted but is necessary if society should progress.

37. Equally, it is important to note that classification need not be perfect. In **Venkateshwara Theatre v. State of A.P.** MANU/SC/0306/1993 : (1993) 3 SCC 677 this Court held:

**20.** Article 14 enjoins the State not to deny to any person equality before the law or the equal protection of the laws. The phrase “equality before the law” contains the declaration of equality of the civil rights of all persons within the territories of India. It is a basic principle of republicanism. The phrase “equal protection of laws” is adopted from the Fourteenth Amendment to the U.S. Constitution. The right conferred by Article 14 postulates that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Since the State, in exercise of its governmental power, has, of necessity, to make laws operating differently on different groups of persons within its territory to attain particular ends in giving effect to its policies, it is recognised that the State must possess the power of distinguishing and classifying persons or things to be subjected to such laws. It is, however, required that the classification must satisfy two conditions, namely, (i) it is founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational relation to the object sought to be achieved by the Act. It is not the requirement that the classification should be scientifically perfect or logically complete. Classification would be justified if it is not palpably arbitrary. (See: *Re, Special Courts Bill, 1978* [MANU/SC/0039/1978 : (1979) 1 SCC 380: (1979) 2 SCR 476, 534-36].) If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. (See: *Khandige Sham Bhat v. Agricultural I.T.O.* MANU/SC/0189/1962 : [(1963) 3 SCR 809, 817: AIR 1963 SC 591: (1963) 48 ITR 21])

(emphasis supplied)

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**23.** Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequal, i.e. differently placed, are treated similarly. In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the

differences, brings about the same consequence as in a case where the law makes a distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

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**29.** In the instant case, we find that the legislature has prescribed different rates of tax by classifying theatres into different classes, namely, air-conditioned, air-cooled, ordinary (other than air-conditioned and air-cooled), permanent and semi-permanent and touring and temporary. The theatres have further been categorised on the basis of the type of the local area in which they are situate. It cannot, therefore, be said that there has been no attempt on the part of the legislature to classify the cinema theatres taking into consideration the differentiating circumstances for the purpose of imposition of tax. The grievance of the Appellants is that the classification is not perfect. What they want is that there should have been further classification amongst the theatres falling in the same class on the basis of the location of the theatre in each local area. We do not think that such a contention is well founded.

38. Also, in **Mardia Chemicals Ltd. v. Union of India** MANU/SC/0323/2004 : (2004) 4 SCC 311, this Court held that Parliamentary intent cannot be thwarted even if it operates a bit harshly on a small Section of the public, if otherwise made in the larger public interest. This Court said:

**74.** A reference has also been made for similar observations in **Srinivasa Enterprises v. Union of India** [MANU/SC/0042/1980 : (1980) 4 SCC 507] at SCC pp. 513-14 and in **Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha** [MANU/SC/0185/1966 : AIR 1967 SC 691: (1967) 1 SCR 15] at SCR p. 36. While referring to the observations made in **Collector of Customs v. Nathella Sampathu Chetty** [MANU/SC/0089/1961 : AIR 1962 SC 316: (1962) 3 SCR 786: (1962) 1 Cri. LJ 364] at SCR pp. 829-30 it is submitted that the intent of Parliament shall not be defeated merely for the reason that it may operate a bit harshly on a small Section of public where it may be necessary to make such provisions of achieving the desired objectives to ensure that the nefarious activities of smuggling, etc. had to be necessarily curbed. In **Fatehchand Himmatlal** [MANU/SC/0041/1977 : (1977) 2 SCC 670] where debts of the agriculturists were wiped off, this Court observed:

**44.** Every cause claims its martyr and if the law, necessitated by practical considerations, makes generalizations which hurt a few, it cannot be helped by the Court. Otherwise, the enforcement of the Debt Relief Act will turn into an enquiry into scrupulous and unscrupulous creditors, frustrating through endless litigation, the instant relief to the indebted which is the promise of the legislature. (SCC p. 689, para 44)

The principle contained in **Chitra Sharma** (supra), that far greater deference is accorded to economic legislation, as the legislature is given free play in the joints and is at liberty to conduct economic experiments in public interest, finds an early application in Shri Ambica Mills (supra), and applies on all fours in this case. Sub-paras (b), (c), (d) and (f) of Ram Krishna Dalmia (supra) are all also attracted in the present case.

39. It is also important to remember that the Code is not meant to be a debt recovery mechanism [see paragraph 28 of **Chitra Sharma** (supra)]. It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application Under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted Under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i.e. that it must be approved by at least 66% of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. Thus, given the bona fides of the allottee who moves an application Under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT under the

Code hoping that some other developer takes over and completes the project, while always taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i.e. failure of the project itself, and given the state of facts which was existing at the time of the legislation, as adverted to by the Insolvency Committee Report, it is clear that any alleged discrimination has to meet the tests laid down in **Ram Krishna Dalmia** (supra), **V.C. Shukla** (supra), **Shri Ambica Mills** (supra), **Venkateshwara Theatre** (supra) and **Mardia Chemicals** (supra).

40. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by learned Counsel on behalf of the Petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-a-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money-the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are

not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-a-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving “exchange”, i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for home buyers/allottees to approach the NCLT Under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws.

41. Shri Shyam Divan relying upon **Nagpur Improvement Trust and Anr. v. Vithal Rao and Ors.** MANU/SC/0518/1972 : (1973) 1 SCC 500 at paragraph 26 and **Subramanian Swamy v. Director, Central Bureau of Investigation and Anr.** MANU/SC/0417/2014 : (2014) 8 SCC 682 at paragraphs 44, 58 and 68 argued that the object of the amendment is itself discriminatory in that it seeks to insert into a “means and includes” definition a category which does not fit therein, namely, real estate developers who do not, in the classical sense, borrow monies like banks and financial institutions. According to him, therefore, the object itself being discriminatory, the inclusion of real estate developers as financial debtors should be struck down. We have already pointed out how real estate developers are, in substance, persons who avail

finance from allottees who then fund the real estate development project. The object of dividing debts into two categories under the Code, namely, financial and operational debts, is broadly to sub-divide debts into those in which money is lent and those where debts are incurred on account of goods being sold or services being rendered. We have no doubt that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors, as has been pointed out hereinabove. So far as unequals being treated as equals is concerned, home buyers/allottees can be assimilated with other individual financial creditors like debenture holders and fixed deposit holders, who have advanced certain amounts to the corporate debtor. For example, fixed deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors. Financial contracts in the case of these individuals need not involve large sums of money. Debenture holders and fixed deposit holders, unlike real estate holders, are involved in seeing that they recover the amounts that are lent and are thus not directly involved or interested in assessing the viability of the corporate debtors. Though not having the expertise or information to be in a position to evaluate feasibility and viability of resolution plans, such individuals, by virtue of being financial creditors, have a right to be on the Committee of Creditors to safeguard their interest. Also, the question that is to be asked when a debenture holder or fixed deposit holder prefers a Section 7 application under the Code will be asked in the case of allottees of real estate developers—is a debt due in fact or in law? Thus, allottees, being individual financial creditors like debenture holders and fixed deposit holders and classified as such, show that they within the larger class of financial creditors, there being no infraction of Article 14 on this score.

42. The presumption that the legislature has understood and correctly appreciated the need of its people and that the amendment to the Code is directed to problems made manifest by experience, as was pointed out by the Insolvency Law Committee findings (*supra*) demonstrates that the presumption of constitutionality that attaches to the Amendment Act has not been displaced by the Petitioners.

43. It was also argued with reference to Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that home buyers would really fall within “other creditors” as a residuary class, who would have to stand in line with their claims which would be made to the resolution professional once the Code is triggered. Regulation 9A reads as follows:

A. Claims by other creditors.

- (1) 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.
- (2) The existence of the claim of the creditor referred to in Sub-section (1) 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.

We have already held that given the fact that home buyers/allottees give advances to the real estate developer and thereby finance the real estate project at hand, are really financial creditors. Given this finding, this plea of the Petitioners must also be rejected. This challenge must also, therefore, fail.

The Article 14 Challenge (II): Manifest arbitrariness; Article 19(1)(g) and Article 300-A

44. Counsel for the Petitioners argued that a square peg has been fitted in a round hole and have thus stated that doing so would not only be contrary to the objects sought to be achieved by the Code, but would be directly contrary to **Chitra Sharma** (*supra*) in that every characteristic of financial creditors vis-a-vis operational creditors would show that real estate developers are assimilated to operational and not financial debtors. For this purpose, in the written argument presented by Dr. Singhvi, relying upon **Chitra Sharma** (*supra*) it is stated that:

**FINDINGS IN SWISS RIBBONS P. LTD. v. UOI, MANU/SC/0079/2019 :  
(2019) 4 SCC 17 ON NATURE OF OPERATIONAL CREDITORS (OCs)/  
FINANCIAL CREDITORS (FCs) VIS-A-VIS ALLOTTEES**

S. No.	FINDINGS IN SWISS RIBBONS W.R.T. RATIONALE BEHIND DISTINCTION BETWEEN FINANCIAL AND OPERATIONAL CREDITORS	REASON FOR NON-APPLICABILITY OF DISTINCTION BETWEEN FCs and OCs (AS EXPLAINED IN SWISS RIBBONS) IN CASE OF HOMEBUYERS/ ALLOTTEES
1.	Nature of security:	
	<p>“it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like.”</p> <p>[Para 44]</p>	Real estate allottees/homebuyers are unsecured creditors and are therefore more akin to OCs rather than FCs
2.	<p>“The nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services.</p> <p>Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business.</p> <p>Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less.</p>	<p>Real estate allottees make payments to the corporate debtors in lieu of services rendered-i.e., construction of apartments. In several cases, payments are also made on a construction-linked payment basis.</p> <p>Each individual allottee will be owed a sum that is often much smaller than the amount owed to a single bank/financial institution.</p> <p>Real estate allottees are large in number-often hundreds or thousands, depending on the size of the developer and the number of development projects.</p>

	<p>In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. It is obvious that debenture holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.</p> <p>Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations.</p> <p>Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable."</p> <p>[Para 43, 44]</p>	<p>There are no repayment schedules in apartment buyer agreements-as the payments have been made by allottees towards grant of possession of their units in a project-and the date of possession is further subject to force majeure and other circumstances. Refund of money by the developer only arises in the event that the allottee validly terminates/cancels the agreement and not otherwise.</p> <p>Agreements between allottees and developers have arbitration clauses. Further, there is often the possibility of a genuine dispute in case of allottees' claims-e.g., where date of possession stands extended on account of force majeure circumstances and therefore allottees' right to receive refund has not yet arisen, where there has been delay on part of allottees in making payments to the developer, where termination/cancellation of the agreement is not as per terms of the agreement, etc. These are not easily verifiable/available and are required to be examined by a court of law/during an arbitration.</p>
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3.	<p>Regarding role and involvement of FCs vis-`-vis OCs:</p> <p>"financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."</p> <p>[Para 45]</p>	<p>Allottees are interested in securing their single time investment, and not the financial well-being of, or ensuring the continuity of, the corporate debtor as a going-concern. Further, allottees in different real estate projects of a corporate debtor, may have different interests confined only to that particular development, with no interest in the overall well-being or rearrangement or viability of the Company. If such allottees are vested with decision making powers concerning the business of the enterprise as a whole, it is unlikely that sound financial decisions will be taken having regard to the overall status of the entity which will undoubtedly defeat the very purpose and objective of the CIRP process.</p>
4.	<p>Regarding participation in the COC meetings:</p> <p>"Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability."</p> <p>"Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks</p>	<p>Allottees do not have the expertise or information to be in a position to evaluate the feasibility and viability of resolution plans keeping in mind the business of the corporate debtor as a whole. Expecting allottees to carry out such a function and role is entirely impractical.</p> <p>Allottees are interested in securing their single time investment, and not the financial well-being of, or ensuring the continuity of, the corporate debtor as a going-concern.</p> <p>Allottees in different real estate projects of a corporate debtor, may have different interests confined only to that particular development, with no interest in overall well-being or rearrangement or viability of the Company. If such allottees are vested with decision making</p>

	<p>and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business.”</p> <p>[Para 67, 69]</p>	<p>powers concerning the business of the enterprise as a whole, it is unlikely that sound financial decisions will be taken having regard to the overall status of the entity which will undoubtedly defeat the very purpose and objective of the CIRP process. Interests of other stakeholders, including other financial creditors, suppliers, small creditors, labour, etc. are unlikely to be considered appropriately.</p>
5.	<p>Regarding process for initiation of corporate insolvency resolution process:</p> <p>Information with respect to debt incurred by financial debtors:</p> <p>“It is clear from these Sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 [“Information Utilities Regulations”], are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.</p> <p>Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other</p>	<p>In practice, real estate allottees do not upload information in respect of amounts owed to them by developers with the Information Utilities.</p> <p>Most of the sources evidencing a financial debt as listed do not apply to real-estate allottees.</p> <p>In the case of real estate allottees, amounts are also due and payable by the allottees to the developer-i.e., payments owed to the developer as per the schedule under the Apartment Buyer’s Agreement, interest on delayed payments. Set-off of amounts is therefore quite common in the case of allottees.</p> <p>In the case of real estate allottees, in most cases, the default has not yet occurred since the date of possession is often extended on account of force majeure and other circumstances. As a result, in such a case, the right of the allottees to terminate/cancel their agreement</p>

	<p>sources which evidence a financial debt:</p> <ul style="list-style-type: none"> <li>(a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;</li> <li>(b) Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);</li> <li>(c) Order of a court, tribunal or arbitral panel adjudicating on the default;</li> <li>(d) Record of default with the information utility;</li> <li>(e) 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;</li> <li>(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;</li> <li>(g) A record of default as available with any credit information company;</li> <li>(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.”</li> </ul> <p>[Para 48, 49]</p> <p>With respect to set-offs:</p> <p>“a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way—amounts lent have to be repaid.”</p> <p>[Para 55]</p> <p>Requirement of proving ‘default’ in case of Section 7 applications:</p>	<p>with the developer and seek a refund of amounts paid would not have arisen in the first place.</p>
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	<p>Whereas a “claim” gives rise to a “debt” only when it becomes “due”, a “default” occurs only when a “debt” becomes “due and payable” and is not paid by the debtor. It is for this reason that a financial creditor has to prove “default” as opposed to an operational creditor who merely “claims” a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear.</p> <p>[Para 59]</p>	
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45. As has been pointed out by us hereinabove, it is clear that the context of **Chitra Sharma** (supra) was a challenge Under Article 14 stating that financial creditors have been discriminated against because there is no real difference between financial and operational creditors, and that such artificial distinction made by the Code, not having been made anywhere else in the world, would be discriminatory, having no rational relation with the object sought to be achieved by the Code and would have, therefore, to be struck down Under Article 14. As has been pointed out by us hereinabove, the context of this argument was financial institutions and banks on the one hand vis-a-vis operational creditors i.e. those who supply goods and services, on the other. It is in this context that the various differences that have been pointed out hereinabove were made. However, the judgment itself recognises-as has been pointed out by us hereinabove-in paragraphs 46 to 49, that it was not dealing with individual financial creditors, such as debenture holders, fixed deposit holders and home buyers. To apply a judgment rendered in a wholly different context to the facts in the present cases would itself be an arbitrary exercise. What has been stated hereinabove as to allottees being individual financial creditors like deposit holders and debenture holders, applies on all fours to repel this argument based on another facet of Article 14. In fact, the object of the Code, as originally set out in paragraphs 27 and 28 of **Chitra Sharma** (supra) is as follows:

**27.** As is discernible, the Preamble gives an insight into what is sought

to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme-workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See **ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta**, MANU/SC/1123/2018 : (2019) 2 SCC 1] at para 83, fn 3).

**28.** It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and

also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

A reading of these paragraphs will show these very objects are sub-served by treating allottees as financial creditors. The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees, who are vitally interested in the financial health of the corporate debtor, so that a replaced management may then carry out the real estate project as originally envisaged and deliver the flat/apartment as soon as possible and/or pay compensation in the event of late delivery, or non-delivery, or refund amounts advanced together with interest. Thus, applying the **Shayara Bano v. Union of India** MANU/SC/1031/2017 : (2017) 9 SCC 1 test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle. For the same reason, it cannot be said that Article 19(1)(g) has been infracted and not saved by Article 19(6) as the Amendment Act is made in public interest, and it cannot be said to be an unreasonable restriction on the Petitioner's fundamental right Under Article 19(1)(g). Also, there is no infraction of Article 300-A as no person is deprived of its property without authority of a constitutionally valid law.

46. It was also argued that the UNCITRAL Legislative Guide, from which most of the provisions of the Code derive their succour, have also been breached. This is for the reason that financial contracts being different from operational contracts, the one should not be confused with the other. Also, treatment of similarly situated creditors should be the same, and as allottees are like operational creditors, they should not be treated as financial creditors. We have already answered these questions in the context of discrimination and manifest arbitrariness and have found that, in point of fact, real estate allottees are really in the nature of financial creditors, and thus the UNCITRAL Legislative Guide has been followed, and not breached. Equally, it was argued that creating new creditors' rights in Insolvency Law, as opposed to recognising existing creditors' rights, will infract the UNCITRAL Legislative Guide. As will be pointed out hereinbelow, since allottees of real estate projects have always been subsumed within Section 5(8)(f), no new rights or claims have been created. It was also contended that since allottees are then said to have no expertise or knowledge in the working of the corporate debtor, they cannot participate effectively in the Committee of Creditors, and should therefore be kept out. The same

answer as has been given hereinabove, i.e. that allottees, like individual financial creditors who are already on the Committee of Creditors, are to have a voice in determining the corporate debtor and their own future. This contention, therefore, also fails.

47. One other argument that is made on behalf of the counsel for the Petitioners is that allottees of flats/apartments who do not want refunds, but who want their flats/apartments constructed so that they may occupy and live in their flats/apartments, will be jeopardised, as a single allottee who does not want the flat/apartments, but wants a refund of amounts paid for reasons best known to him, can trigger the Code and upset the construction and handing over of such flats/apartments to the vast bulk of allottees of a project who may be genuine buyers who wish to occupy such flats/apartments as roofs over their heads. Another facet of this argument is that the bulk of such persons will never be on the Committee of Creditors, as they may not be persons who trigger the Code at all. These arguments are met by the fact that all the allottees of the project in question can either join together under the explanation to Section 7(1) of the Code, or file their own individual petitions after the Code gets triggered by a single allottee, stating that in addition to the construction of their flat/apartment, they are also entitled to compensation under RERA and/or under the general law, and would thus be persons who have a "claim", i.e. a right to remedy for breach of contract which gives rise to a right to compensation, whether or not such right is reduced to judgment, and would therefore be persons to whom a liability or obligation in respect of a "claim" is due. Such persons would, therefore, have a voice in the Committee of Creditors as to future plans for completion of the project, and compensation for late delivery of the flat/apartment. This contention therefore also has no legs to stand upon.

48. It was then argued that placing allottees as financial creditors is directly contrary to the object of the Code in maximising the value of assets and putting the corporate debtor back on its feet. We may only state that if a Section 7 application is admitted in favour of an allottee, and if the management of the corporate debtor is in fact a strong and stable one, nothing debars the same erstwhile management from offering a resolution plan, subject to Section 29A of the Code, which may well be accepted by the Committee of Creditors in which home buyers now have a voice. Equally, to assume that the moment the insolvency resolution process starts, corporate death must ensue is wholly incorrect. If the real estate project is otherwise viable, resolution plans from others may well be accepted and the best of these would then work in order to maximise the value of the assets of the

corporate debtor. Corporate death, as has been stated in **Chitra Sharma** (*supra*) is the last resort under the Code after all other available options have failed. This argument again need not deter us further.

49. It was then stated that there will be a flood of petitions before the NCLT, and as the NCLT has to decide within a period of 14 days, there will only be a summary decision in which a complicated agreement entered into between home buyer and real estate developer will not be gone into in order to discover whether a debt is due and payable. Coupled with this argument, is the alternative argument that, given the fact that RERA adequately looks after the rights and interests of allottees, to apply the Code would then be manifestly arbitrary, as a management which may have infused large funds to develop the real estate project would then be summarily removed. A supplementary argument was made that this would also infract Article 19(1)(g) and 300-A, as a person who invests a huge sum of money from its own resources or borrowed resources, would then be left in the lurch the moment the insolvency resolution process is admitted.

50. The answer to these contentions is provided by reading some of the provisions of RERA. Under paragraph 3 of the Statement of Objects and Reasons of RERA, one of the important reasons for enacting the RERA is to “establish symmetry of information between the promoter and purchaser”. This is achieved through Section 4, where every promoter in its application to the authority for registration Under Sub-clause (2)(b), has to include the current status of the project, any delay in its completion, details of cases pending, payments pending etc. Equally, Under Sub-clause (g), the proforma of the allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottee are all to be furnished. Also, Under Sub-clause (I)(C), the time period within which he undertakes to complete the project is also to be stated. Above all, Under Section 4(3) read with Section 11, the authority is to operationalise a web-based online system in which the promoter shall, upon receiving his Login Id and password, create a webpage on the website of the authority to enter all details as required by Section 4(2), including quarterly update of the status of the project and the stage-wise time Schedule of completion of the project. Also, Under Section 7, the Authority may revoke registration for various reasons, and Under Section 7(4)(a) shall debar the promoter from accessing its website in relation to that project, and thereafter specify its name in the list of defaulters and display its photograph on the website and inform other Real Estate Regulatory Authorities in other States and Union Territories about such revocation. Equally, Under Section 13(2), the prescribed agreement for sale, which is to be entered into between the promoter and allottee,

must clearly state the date on which possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee in the case of default and such other particulars, as may be prescribed. We were then referred to the 'Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016' to give us a flavour of what is actually prescribed by the Rules made by States and Union Territories under RERA. Here, Rule 14 of these Rules speaks of details to be published on the website; and among other details, Rule 14(1)(d) states that the following details shall be uploaded by the promoter:

**14. Details to be published on the website.-**

(1) The Authority shall ensure the following information, as applicable, shall be made available on its website in respect of each project registered under the Act, namely-

xxx xxx xxx

- (d) the promoter shall upload the following updates on the webpage for the project, within fifteen days from the expiry of each quarter, namely:
- (i) list of number and types of apartments or plots, booked;
  - (ii) list of number of garages booked;
  - (iii) status of the project-
    - (A) Status of construction of each building with photographs;
    - (B) Status of construction of each floor with photographs;
    - (C) Status of construction of internal infrastructure and common areas with photographs.
  - (iv) status of approvals,-
    - (A) Approvals received;
    - (B) Approvals applied and expected date of receipt;
    - (C) Approvals to be applied and date planned for application;
    - (D) Modifications, amendment or revisions, if any, issued by the competent authority with regard to any sanctioned plans, layout plans, specifications, license, permit or approval for the project;

Also, Rules 15 and 16 provide for interest payable by the promoter and timelines for refund as follows:

**15.** Interest payable by promoter and allottee-The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of Lending Rate plus two per cent.

Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

**16.** Timelines for refund-Any refund of monies along with the applicable interest and compensation, if any, payable by the promoter in terms of the Act or the Rules and Regulations made thereunder, shall be payable by the promoter to the allottee within forty-five days from the date on which such refund along with applicable interest and compensation, as the case may be, become due.

It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided Under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, *prima facie* at least, a “default” relating to amounts due and payable to the allottee is made out in an application Under Section 7 of the Code. We may mention here that once this *prima facie* case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that Under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under

RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death.

51. At this juncture it is necessary to deal with the argument of the Petitioners that as the NCLT is given only 14 days in which to adjudicate on "default", the NCLT cannot, in such a summary proceeding, give detailed findings based on arguments raised by the allottees which are then countered with reference to a large number of documents and complicated statutory provisions, and which entail detailed arguments, which are then put forward by real estate developers.

52. This Court, while dealing with timelines provided qua operational creditors, in **Surendra Trading Company** (supra), held that the timelines contained in the provisos to Section 7(5), Section 9(5) and Section 10(4) of the Code are all directory and not mandatory. This is for the obvious reason that no consequence is provided if the periods so mentioned are exceeded. Though this decision is not in the context of the 14-day period provided by Section 7(4), we are of the view that this judgment would apply squarely on all fours so that the period of 14 days given to the NCLT for decision Under Section 7(4) would be directory. We are conscious of the fact that Under Section 64(1) of the Code, the NCLT President or the Chairperson of the NCLAT may, after taking into account reasons by the NCLT or NCLAT for exceeding the period mentioned by statute, extend the period of 14 days by a period not exceeding 10 days. We may note that even this provision is directory, in that no consequence is provided either if the period is not extended, or after the extension expires. This is also for the good reason that an act of the court cannot harm the litigant before it. Unfortunately, both the NCLT and NCLAT do not have sufficient members to deal with the flood of applications and appeals that is before them. The time taken in the queue by applicants who knock at their doors cannot, for no fault of theirs, be put against them. This Court, in **State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti** MANU/SC/0826/2018 : (2018) 9 SCC 472, has held in the context of Section 34(5) of the Arbitration and Conciliation Act, 1996, that the absence of any consequences for infraction of a procedural provision implies that such a provision must be interpreted as being directory and not mandatory. The Court held thus:

**19.** It will thus be seen that Section 34(5) does not deal with the power of

the Court to condone the non-compliance thereof. It is imperative to note that the provision is procedural, the object behind which is to dispose of applications Under Section 34 expeditiously. One must remember the wise observation contained in **Kailash [Kailash v. Nanhu, MANU/SC/0264/2005 : (2005) 4 SCC 480]**, where the object of such a provision is only to expedite the hearing and not to scuttle the same. All Rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it.

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**21.** Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest, the public purpose underlying it being the advancement of justice by giving the Government the opportunity to scrutinise and take immediate action to settle a just claim without driving the person who has issued a notice having to institute a suit involving considerable expenditure and delay. This is to be contrasted with Section 34(5), also a procedural provision, the infraction of which leads to no consequence. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness.

This argument must also therefore be rejected.

#### Challenge to Section 21(6A) and 25A of the Code

53. In the challenge to Section 21(6A) and Section 25A of the Code, it has been argued by learned Counsel for the Petitioners that the allottees would fall in the following five categories and cannot be said, therefore, to be a homogenous class. A glance at the five categories would show, they argue, that they have, in fact, conflicting interests. These five categories are stated to be as follows:

- a) Those who have taken possession and have executed sale deeds, with or without further claims for delay compensation;
- b) Those who have taken possession but are yet to execute sale deeds, with or without further claims for delay compensation;
- c) Those who are yet to receive possession and seek possession, with or without delay compensation; or
- d) Those who are yet to receive possession and seek to obtain refunds of sale consideration with interest.

e) Each of the above may be without or without NCDRC/RERA orders/decrees.

54. It has been argued that different instructions may be given by different allottees making it difficult for the authorised representatives to vote on the Committee of Creditors and that in any case, the collegiality of the secured creditors will be disturbed. To this the answer is that like other financial creditors, be they banks and financial institutions, or other individuals, all persons who have advanced monies to the corporate debtor should have the right to be on the Committee of Creditors. True, allottees are unsecured creditors, but they have a vital interest in amounts that are advanced for completion of the project, maybe to the extent of 100% of the project being funded by them alone. As has been correctly argued by the learned Additional Solicitor General, under the proviso to Section 21(8) of the Code if the corporate debtor has no financial creditors, then Under Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, up to 18 operational creditors then become the Committee of Creditors or, if there are more than 18 operational creditors, the highest in order of debt owed to operational creditors to the extent of the first 18 are then represented on the Committee of Creditors together, with a representative of the workers. If allottees who have funded a real estate project of the corporate debtor to the extent of 100% are neither financial creditors nor operational creditors, the mechanism of the Committee of Creditors, who is now to take decisions after the Code is triggered as to the future of the corporate debtor, will be non-existent in a case where there are no operational creditors and no secured creditors, because 100% of the project is funded by the allottees. Even otherwise, as correctly argued by the learned Additional Solicitor General, it would in fact be manifestly arbitrary to omit allottees from the Committee of Creditors when they are vitally interested in the future of the corporate debtor as they have funded anywhere from 50% to 100% of the project in most cases.

55. On this point, we were referred to the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, which has just passed through the Parliament, to amend the provisions of the Code in various aspects. What is interesting is the insertion of Section 25A(3A) as follows:

**5. In Section 25A of the principal Act, after Sub-section (3), the following Sub-section shall be inserted, namely-**

(3A) Notwithstanding anything to the contrary contained in Sub-section (3), the authorised representative Under Sub-section (6A) of Section 21

shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote:

Provided that for a vote to be cast in respect of an application Under Section 12A, the authorised representative shall cast his vote in accordance with the provisions of Sub-section (3).

Given the fact that allottees may not be a homogenous group, yet there are only two ways in which they can vote on the Committee of Creditors-either to approve or to disapprove of a proposed resolution plan. Sub-section (3A) goes a long way to ironing out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision. As has been stated by us in **Chitra Sharma** (supra), the legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later. Thus, any challenge to the machinery provisions contained in Sections 21(6A) and 25A of the Code must be repelled.

#### The doctrine of ‘Reading Down’

56. Several counsel appearing on behalf of the Petitioners made alternative submissions stating that if the Constitutional validity of the impugned provisions is to be upheld, then the amendment to the Code needs to be read-down so as to make it conform with Article 14 and 19(1)(g) and 300-A. Different suggestions were given as to reading down these provisions by different counsel. According to some of them, before an order admitting a Section 7 application is made, all the financial creditors of the corporate debtor could be called to the NCLT so that the NCLT can then ascertain their views. If the vast majority of them were to state that they would prefer to remain outside the Code, then the Section 7 application filed by a single allottee ought to be dismissed. Another learned Counsel stated that there should be a threshold limit by which at least 25% of the total number of allottees of the project should be reached before they could trigger the Code. Other learned Counsel suggested that at the stage of the Section 7 application, an inquiry be made to see if the corporate debtor is otherwise well-managed and is solvent, in which case the Section 7 application ought to be dismissed. Shri Jayant Bhushan, learned Senior Advocate appearing

on behalf of some of the Petitioners, also suggested that allottees ought not to be allowed to trigger the Code at all, but that if the Code is otherwise triggered, they can be members of the Committee of Creditors to take decisions that will be beneficial to them. It was also suggested that, before the Code is triggered by an allottee, there should be a finding of "default" from the authorities under RERA. This is not unknown to law, and this Court has itself stated, in another context, that a jurisdictional finding by the Telecom Regulatory Authority of India must first be obtained before the Competition Commission of India gives a finding on unfair competition in the telecom sector, and the case of **Competition Commission of India v. Bharti Airtel Limited and Ors.** MANU/SC/1423/2018 : (2019) 2 SCC 521 was relied upon for this purpose. All these arguments were really made based on the presumption that some allottees who may now want to back out of the transaction and get a return of their money owing to factors which may be endemic to them, or owing to the fact that the market may have slumped as a result of which the investment made by them in the flat/apartment would fall flat requiring them to pull out of the transaction, would then be able to trigger the Code mala fide, and a reading down of these provisions would, therefore, obviate such problem. All these arguments have been refuted in detail earlier in this judgment. In a Section 7 application made by an allottee, the NCLT's 'satisfaction' will be with both eyes open-the NCLT will not turn a Nelson's eye to legitimate defences by a real estate developer, as outlined by us hereinabove. There is, therefore, no necessity to read into or read down any of these provisions. Also, in **Cellular Operators Association of India v. TRAI** MANU/SC/0551/2016 : (2016) 7 SCC 703, this Court held that when a provision is cast in definite and unambiguous language, it is not permissible either to mend or bend it, even if such recasting is in accord with good reason and conscience. This Court said:

**50.** But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or Regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in *Hindu Women's Rights to Property Act, 1937, In re [Hindu Women's Rights to Property Act, 1937, MANU/FE/0003/1941 : 1941 SCC OnLine FC 3: AIR 1941 FC 72]*. In that judgment, the word "property" in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which

would be outside the Central Legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word "property", the Federal Court held: (SCC OnLine FC)

... If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, *or an Act different in kind, and not merely in degree*, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of SS Kalibia v. Wilson* [*Owners of SS Kalibia v. Wilson*, (1910) 11 CLR 689 (Aust)], *Vacuum Oil Co. Pty. Ltd. v. Queensland* [*Vacuum Oil Co. Pty. Ltd. v. Queensland*, (1934) 51 CLR 677 (Aust)], *R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.* [*R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.*, (1910) 11 CLR 1 (Aust)] and *British Imperial Oil Co. Ltd. v. Federal Commr. of Taxation* [*British Imperial Oil Co. Ltd. v. Federal Commr. of Taxation*, (1925) 35 CLR 422 (Aust)].

(emphasis in original)

**51.** This judgment was followed by a Constitution Bench of this Court in *DTC v. Mazdoor Congress* [*DTC v. Mazdoor Congress*, MANU/SC/0031/1991 : 1991 Supp (1) SCC 600: 1991 SCC (L&S) 1213]. In that case, a question arose as to whether a particular Regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the Appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the Regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255)

255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the

incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. *However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience.* In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so.

(emphasis in original)

57. Given the fact that the Amendment Act has been held to be constitutionally valid, and considering that its language is clear and unambiguous, it is not possible to accede to the contentions of the Petitioners to read down the clear provisions of the Amendment Act in the manner suggested by them.

#### Interpretation of Section 5(8)(f) of the Code

58. Section 5(8)(f) of the Code has been set out in the beginning of this judgment. What has been argued by learned Counsel on behalf of the Petitioners is that Section 5(8)(f), as it originally stood, is an exhaustive provision which must be read noscitur a sociis, and if so read, Sub-clause (f) must take colour from the other clauses of the provision, all of which show that the sine qua non of a "financial debt" is a loan of money made with or without interest, which must then be returned as money. This, according to the learned Counsel for the Petitioners, is clear from even a cursory reading of Section 5(8). Secondly, according to learned Counsel for the Petitioners, by no stretch of imagination, could an allottee under a real estate project fall within Section 5(8)(f), as it originally stood and the explanation must then be read prospectively i.e. only on and from the date of the Amendment Act. Several sub-arguments were made on the effect of deeming fictions generally and on the functions of an explanation to a Section. Let us address all of these arguments.

59. First and foremost, a financial debt is defined as meaning a "debt". "Debt" is defined by Section 3(11) of the Code as follows:

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

xxx xxx xxx

(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;

This definition in turn takes us to the definition of “claim” in Section 3(6) and “default” in Section 3(12) of the Code which read as follows:

(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;

xxx xxx xxx

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

60. Thus, in order to be a “debt”, there ought to be a liability or obligation in respect of a “claim” which is due from any person. “Claim” then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes “default”, which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned Counsel for the Petitioners relied upon the judgment in **Union of India v. Raman Iron Foundry** MANU/SC/0005/1974 : (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading:

**11....Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority.**

It is precisely to do away with judgments such as **Raman Iron Foundry** (*supra*) that “claim” is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach,

followed by a judgment or decree or order. The expression “payment” is again an expression which is elastic enough to include “recompense”, and includes repayment. For this purpose, see **Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana** MANU/SC/0207/2012 : (2012) 4 SCC 505 (at paragraphs 13 and 14 therein), where the Webster’s Comprehensive Dictionary (International Edn.) Vol. 2 and the Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted.

61. The definition of “financial debt” in Section 5(8) then goes on to state that a “debt” must be “disbursed” against the consideration for time value of money. “Disbursement” is defined in Black’s Law Dictionary (10th ed.) to mean:

- 1.** The act of paying out money, commonly from a fund or in settlement of a debt or account payable.
- 2.** The money so paid; an amount of money given for a particular purpose.

In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project. We were shown the ‘Dictionary of Banking Terms’ (Second edition) by Thomas P. Fitch in which “time value for money” was defined thus:

present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.

That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by

way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

62. Shri Krishnan Venugopal took us to the ACT Borrower's Guide to the LMA's Investment Grade Agreements by Slaughter and May (Fifth Edition, 2017). In this book "financial indebtedness" is defined thus:

Definition of Financial Indebtedness (Investment Grade Agreements)

"Financial Indebtedness" means any indebtedness for or in respect of:

- (a) moneys borrowed;
- (b) any amount raised by acceptance under any acceptance credit facility or dematerialised 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 would, in accordance with GAAP, be treated as a balance sheet liability [(other than any liability in respect of a lease or hire purchase contract which would, in accordance with GAAP in force [prior to 1 January 2019]/[prior to [ ]]/[ ] have been treated as an operating lease)];
- (e) receivables sold or discounted (other than any receivables to the extent they are sold on a non-recourse basis);
- (f) any amount raised under any other transaction (including any forward sale or purchase agreement) of a type not referred to in any other paragraph of this definition 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, when calculating the value of any derivative transaction, only the marked to market value (or, if any actual amount is due as a result of the termination or close-out of that derivative transaction, that amount) shall be taken into account);
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution; and
- (i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (h) above.

63. When compared with Section 5(8), it is clear that Section 5(8) seems to owe its genesis to the definition of “financial indebtedness” that is contained for the purposes of Investment Grade Agreements. Shri Venugopal argued that even insofar as derivative transactions are concerned, it is clear that money alone is given against consideration for time value of money and a transaction which is a pure sale agreement between “borrowers” and “lender” cannot possibly be said to fit within any of the categories mentioned in Section 5(8). He relied strongly on the passage in Slaughter and May’s book which are extracted hereinbelow:

Any amount raised having the “commercial effect of a borrowing”

A wide range of transactions can be caught by paragraph (f), including for example forward purchases and sales of currency and repo agreements. Conditional and credit sale arrangements could also be covered here as could certain redeemable shares.

The precise scope of this limb can be uncertain. Ideally, from the Borrower’s perspective, if there are additional categories of debt which should be included in “Financial Indebtedness”, these should be described specifically and this catch-all paragraph, deleted. A few strong Borrowers do achieve that position. Most, however are required to accept the “catch-all” and will therefore need to consider which of their liabilities might be caught by it, and whether specific exclusions might be required.

64. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be a “catch all” provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

65. And now to the precise language of Section 5(8)(f). First and foremost, the Sub-clause does appear to be a residuary provision which is “catch all” in nature. This is clear from the words “any amount” and “any other transaction” which means that amounts that are “raised” under “transactions” not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression “transaction” is defined by Section 3(33) of the Code as follows:

(33) “transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

As correctly argued by the learned Additional Solicitor General, the

expression “any other transaction” would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

66. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (Second Edition, 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow:

borrow-vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill off the direct path to the hole: make sure you borrow enough.

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commercial.-adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.

67. A perusal of these definitions would show that even though the Petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the home buyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the home buyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same-the real

estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.

68. However, Dr. Singhvi strongly relied upon the report of the Bankruptcy Law Reforms Committee of November, 2015 and in particular paragraph 3 of 'Box 5.2-Trigger for IRP' which states that financial creditors are persons where the liability to the debtor arises from a "solely" financial transaction. This Committee report, which led to the enactment of the Code, is an important guide in understanding the provisions of the Code. However, where the provisions of the Code, as construed in the light of the objects of the Code, are clear, the fact that from a huge report one word is picked up to indicate that all financial creditors must have debtors who owe money "solely" from financial transactions cannot possibly have the effect of negating the plain language of Section 5(8)(f) of the Code. In fact, what is important is that the threshold limit to trigger the Code is purposely kept low-at only one lakh rupees-making it clear that small individuals may also trigger the Code as financial creditors (as financial creditors include debenture holders and bond holders), along with banks and financial institutions to whom crores of money may be due.

69. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the word "clarify", indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether home buyers would or would not be included within Section 5(8)(f), it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an explanation to Section 5(8)(f). Incidentally, the Insolvency Law Committee itself had no doubt that given the 'financing' of the project by the allottees, they would fall within Section 5(8)(f) of the Code as originally enacted.

70. And now some of the other arguments on behalf of the Petitioners need to be met. According to learned Counsel for the Petitioners, the expression "means and includes" would indicate that that the definition Section is exhaustive, and this being so, alien subject matter such as home buyers cannot be inserted therein. For this proposition, they relied upon **P. Kasilingam and Ors. v. P.S.G. College of Technology and Ors.** MANU/SC/0265/1995 : (1995) Supp (2) SCC 348 at paragraph 19 where this Court held as under:

**19.** We will first deal with the contention urged by Shri Rao based on the provisions of the Act and the Rules. It is no doubt true that in view of Clause (3) of Section 1 the Act applies to all private colleges. The expression ‘college’ is, however, not defined in the Act. The expression “private college” is defined in Clause (8) of Section 2 which can, in the absence of any indication of a contrary intention, cover all colleges including professional and technical colleges. An indication about such an intention is, however, given in the Rules wherein the expression ‘college’ has been defined in Rule 2(b) to mean and include Arts and Science College, Teachers’ Training College, Physical Education College, Oriental College, School of Institute of Social Work and Music College. While enumerating the various types of colleges in Rule 2(b) the rule-making authority has deliberately refrained from including professional and technical colleges in the said definition. It has been urged that in Rule 2(b) the expression “means and includes” has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. 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** [(1891) 2 QB 665: 60 LJ QB 726]; **Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court** [MANU/SC/0479/1990 : (1990) 3 SCC 682, 717: 1991 SCC (L&S) 71].) 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. The words “means and includes”, on the other hand, indicate “an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions”. (See: **Dilworth v. Commissioner of Stamps** [1899 AC 99, 105-106: (1895-9) All ER Rep Ext 1576] (Lord Watson); **Mahalakshmi Oil Mills v. State of A.P.** [MANU/SC/0314/1988 : (1989) 1 SCC 164, 169 : 1989 SCC (Tax) 56] The use of the words “means and includes” in Rule 2(b) would, therefore, suggest that the definition of ‘college’ is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(b) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of

Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time. As noticed earlier the Grants-in-Aid Code contains provisions which, in many respects, cover the same field as is covered by the Act and the Rules. The Director of Technical Education has been entrusted with the functions of proper implementation of those provisions. There is nothing to show that the said arrangement was not working satisfactorily so as to be replaced by the system sought to be introduced by the Act and the Rules. Rule 2(d), on the other hand, gives an indication that there was no intention to disturb the existing arrangement regarding private engineering colleges because in that Rule the expression 'Director' is defined to mean the Director of Collegiate Education. The Director of Technical Education is not included in the said definition indicating that the institutions which are under the control of Directorate of College Education only are to be covered by the Act and the Rules and technical educational institutions in the State of Tamil Nadu which are controlled by the Director of Technical Education are not so covered.

71. On the other hand, the learned Additional Solicitor General countered this submission by reference to **Krishi Utpadan Mandi Samiti v. Shankar Industries** MANU/SC/0729/1993 : (1993) Supp (3) SCC 361 (2), where, at paragraphs 5 and 12, this Court held:

5. Section 2(a) of the Act defines 'agricultural produce' and reads as under:
2. (a) 'agricultural produce' means such items of produce of agriculture, horticulture, viticulture, apiculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, and includes admixture of two or more of such items, and also includes any such item in processed form, and further includes gur, rab, shakkar, khandsari and jaggery.

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12. We have considered the arguments advanced on behalf of the parties and have perused the record. A perusal of the definition of agricultural produce Under Section 2(a) of the Act shows that apart from items of produce of agriculture, horticulture, viticulture, apiculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, the definition further 'includes admixture of two or more such items' and thereafter it further 'includes taking any such item in processed form' and again for the third time the words used are 'and further includes gur, rab, shakkar, khandsari and jaggery'. It is a well settled Rule of interpretation that where the legislature uses the words 'means' and 'includes' such

definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition. Thus the meaning of ‘agricultural produce’ in the above definition is not restricted to any products of agriculture as specified in the Schedule but also includes such items which come into being in processed form and further includes such items which are called as gur, rab, shakkar, khandsari and jaggery.

72. This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in **Jagir Singh and Ors. v. State of Bihar and Anr.** MANU/SC/0387/1975 : (1976) 2 SCC 942 at paragraphs 11 and 19 to 21 and **Mahalakshmi Oil Mills v. State of Andhra Pradesh and Ors.** MANU/SC/0314/1988 : (1989) 1 SCC 164, at paragraphs 8 and 11 (which has been cited in **P. Kasilingam** (supra)), this Court set out definition Sections where the expression “means” was followed by some words, after which came the expression “and includes” followed by other words, just as in the **Krishi Utpadan Mandi Samiti** (supra) case. In two other recent judgments, **Bharat Coop. Bank (Mumbai) Ltd. v. Coop. Bank Employees Union** MANU/SC/1574/2007 : (2007) 4 SCC 685, at paragraphs 12 and 23, and **State of West Bengal and Ors. v. Associated Contractors** MANU/SC/0793/2014 : (2015) 1 SCC 32 at paragraph 14, this Court has held that wherever the expression “means” is followed by the expression “and includes” whether with or without additional words separating “means” from “includes”, these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression “and includes” is an expression which extends the definition contained in words which follow the expression “means”. From this discussion, two things follow. **Krishi Utpadan Mandi Samiti** (supra) cannot be said to be good law insofar as its exposition on “means” and “includes” is concerned, as it ignores earlier precedents of larger and coordinate benches and is out of sync with later decisions on the same point. Equally, Dr. Singhi’s argument that Sub-clauses (a) to (i) of Section 5(8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed against the consideration for the time value of money, and which permeates Clauses (a) to (i), cannot be accepted as a matter of statutory interpretation, as the expression “and includes” speaks of subject matters which may not necessarily be reflected in the main part of the definition.

73. In any event, as was correctly argued by learned Additional Solicitor General Mrs. Madhavi Divan, the legislature is not precluded by way of amendment from inserting words into what may even be an exhaustive definition. What is an exhaustive definition is exhaustive for purposes of

interpretation of a statute by the Courts, which cannot bind the legislature when it adds something to the statute by way of amendment. On this score also, there is no substance in the aforesaid argument.

74. It was then argued, relying on a large number of judgments that Section 5(8)(f) must be construed noscitur a sociis with Sub-clauses (a) to (e) and (g) to (i), and so construed would only refer to loans or other financial transactions which would involve money at both ends. This, again, is not correct in view of the fact that Section 5(8)(f) is clearly a residuary "catch all" provision, taking within it matters which are not subsumed within the other sub-clauses. Even otherwise, in **Controller of Estate Duty v. Kantilal Trikamlal** MANU/SC/0520/1976 : (1976) 4 SCC 643, this Court has held that when an expression is a residuary one, ejusdem generis will not apply. It was thus held:

**21.** ...We have also to stress the expression "other right" in the explanation which is of the widest import and cannot be constricted by reading it ejusdem generis with "debt". "Other right", in the context, is expressly meant considerably to widen the concept and therefore suggests a somewhat contrary intention to the application of the ejusdem generis rule. We may derive instruction from Green's construction of the identical expression in the English Act. [Section 45 (2)]. The learned author writes:

A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it, this inchoate right is a 'right' for the purposes of Section 45(2). The ejusdem generis Rule does not apply to the words 'a debt or other right' and the word 'right' is a word of the widest import. Moreover, the expression 'at the expense of the deceased' is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit.

Also, in **Subramanian Swamy v. Union of India** MANU/SC/0621/2016 : (2016) 7 SCC 221, this Court held:

**70.** The other aspect that is being highlighted in the context of Article 19(2) is that defamation even if conceived of to include a criminal offence, it must have the potentiality to "incite to cause an offence". To elaborate, the submission is the words "incite to cause an offence" should be read to give attributes and characteristics of criminality to the word "defamation". It must have the potentiality to lead to breach of peace and public order. It has been urged that the intention of Clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact

but not as an actionable claim under the common law by an individual and, therefore, the word “defamation” has to be understood in that context, as the associate words are “incitement to an offence” would so warrant. Mr. Rao, learned Senior Counsel, astutely canvassed that unless the word “defamation” is understood in this manner applying the principle of noscitur a sociis, the cherished and natural right of freedom of speech and expression which has been recognised Under Article 19(1)(a) would be absolutely at peril. Mr. Narasimha, learned ASG would contend that the said Rule of construction would not be applicable to understand the meaning of the term “defamation”. Be it noted, while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution. There is no doubt that the principle of noscitur a sociis can be taken recourse to in order to understand and interpret the Constitution but while applying the principle, one has to keep in mind the contours and scope of applicability of the said principle.

**71. In State of Bombay v. Hospital Mazdoor Sabha [State of Bombay v. Hospital Mazdoor Sabha MANU/SC/0200/1960 : AIR 1960 SC 610: (1960) 2 SCR 866],** it has been held that it must be borne in mind that noscitur a sociis is merely a Rule of construction and it cannot prevail in cases where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said Rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the Rule of construction in question cannot be pressed into service.

**72. In Bank of India v. Vijay Transport [Bank of India v. Vijay Transport, MANU/SC/0023/1987 : 1988 Supp SCC 47: AIR 1988 SC 151],** the Court was dealing with the contention that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used. For the said purpose, reliance was placed on **R.L. Arora (2) v. State of U.P. [R.L. Arora (2) v. State of U.P., MANU/SC/0033/1964 : (1964) 6 SCR 784: AIR 1964 SC 1230].** Dealing with the said aspect, the Court has observed thus: **(Vijay Transport case [Bank of India v.**

**Vijay Transport**, MANU/SC/0023/1987 : 1988 Supp SCC 47: AIR 1988 SC 151], SCC p. 51, para 11)

**11.** ... It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation.

**73.** The Constitution Bench, in **Godfrey Phillips India Ltd. v. State of U.P. [Godfrey Phillips India Ltd. v. State of U.P.]**, MANU/SC/0051/2005 : (2005) 2 SCC 515], while expressing its opinion on the aforesaid Rule of construction, opined: (SCC pp. 550 & 551, paras 81 & 83)

**81.** We are aware that the maxim of noscitur a sociis may be a treacherous one unless the “societas” to which the “socii” belong, are known. The risk may be present when there is no other factor except contiguity to suggest the “societas”. But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as “including” is sufficiently indicative of the societas. As we have said, the word “includes” in the present context indicates a commonality or shared features or attributes of the including word with the included.

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**83.** Hence on an application of general principles of interpretation, we would hold that the word “luxuries” in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury.

**74.** At this juncture, we may note that in **Ahmedabad (P) Primary Teachers' Assn. v. Administrative Officer [Ahmedabad (P) Primary Teachers' Assn. v. Administrative Officer]**, MANU/SC/0032/2004 : (2004) 1 SCC 755: 2004 SCC (L&S) 306], it has been stated that noscitur a sociis is a legitimate Rule of construction to construe the words in an Act of Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, *Principles of Statutory Interpretation* [(13th Edn., 2012) 509.] where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:

It is a Rule wider than the Rule of ejusdem generis; rather the latter Rule is only an application of the former. The Rule has been lucidly explained by Gajendragadkar, J. in the following words:

This rule, according to Maxwell [Maxwell, Interpretation of Statutes (11th Edn., 1962) 321.], means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general.

The learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps i.e. reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense. [Principles of Statutory Interpretation by G.P. Singh (8th Edn.) 379.] *Noscitur a sociis* is merely a Rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the Rule of *noscitur a sociis* is useful.

75. It is clear from a reading of these judgments that *noscitur a sociis* being a mere rule of construction cannot be applied in the present case as it is clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of “financial debt” subsume matters which are not found in the other sub-clauses of Section 5(8). This contention must also, therefore, be rejected.

76. It remains to deal with arguments on the effect of a deeming fiction. Under the explanation added to Section 5(8)(f), any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

77. In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in **East End Dwellings Co. Ltd. v. Finsbury Borough Council** (1952) Appeal Cases 109 are cited. These observations read as follows:

“If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.. The

statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

These observations have been followed time out of number by the decisions of this Court. (See for example, **M. Venugopal v. Divisional Manager, LIC** (1994) 2 SCC 323 at page 329).

78. But then it was argued that, relying upon Commissioner of Income Tax, **Bombay v. Bombay Trust Corporation** AIR 1930 PC 54 at 55, that the reason that a deeming fiction is introduced is that the subject matter of that fiction is not so in reality, which why Parliament requires such subject matter be treated as if it were real. To similar effect are the observations in **K. Kamaraja Nadar v. Kunju Thevar and Ors.** AIR 1958 SC 687 at paragraph 28, where this Court put it thus:

"The effect of such a legal fiction, however, is that a position which otherwise would not obtain is deemed to obtain under those circumstances."

79. It was also argued, relying upon **Delhi Cloth & General Mills Co. Ltd. and Anr. v. State of Rajasthan and Ors.** (1996) 2 SCC 449, that a deeming fiction can only be as to facts and cannot be the deeming of a legal position. It was further argued relying upon **Daiichi Sankyo Company Limited v. Jayaram Chigurupati and Ors.** (2010) 7 SCC 449, that a deeming provision cannot be destructive of the main provision and cannot be construed as such.

80. A closer look at **Delhi Cloth & General Mills Co. Ltd.** (supra) would show that the judgment in essence followed this Court's judgment in **Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors.** 1969 (2) SCC 283, in that the validating statute in question had not cured the defect that was pointed out. This becomes clear on a reading of paragraph 16 and 17 of the judgment which read as follows:

"16. The Validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal position that the villages of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the

legal consequences that follow.

17. Sections 4 to 7 remained on the statute book unamended when the Validating Act was passed. Their provisions were mandatory. They had admittedly not been followed. The defect of not following these mandatory provisions in the case of the villages of Raipura and Ummeganj was not cured by the Validating Act. The curing of the defect was an essential requirement for the passing of a valid validating statute, as held by the Constitution Bench in the case of **Prithvi Cotton Mills Ltd.** [(1969) 2 SCC 283 : (1970) 1 SCR 388] It must, therefore, be held that the Validating Act is bad in law and it must be struck down.”

81. It was in this context that it was stated that the fiction of a legal consequence cannot be deemed, whereas facts which preceded such consequence can so be deemed. In the present case, the deeming provision, as has been held by us, is only clarificatory of the true legal position as it already obtained. The present case does not concern itself with validating statutes at all. The ratio of this judgment, therefore, would have no application to this case.

82. Equally, in **Daiichi Sankyo Company Limited** (*supra*), it was found that the deeming provision contained in sub-clause (2) of Regulation 2(1) (e) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 flew in the face of the very idea of “persons acting in concert”, as a result of which it was held that a deeming fiction cannot do away with the very concept of “persons acting in concert” contained in the main provision. In the present case however, far from doing away with the concept of a “financial creditor”, we have already found that the deeming provision is only clarificatory of the fact that allottees are to be considered as “financial creditors” for the reasons already given by us hereinabove.

83. Although a deeming provision is to deem what is not there in reality, thereby requiring the subject matter to be treated as if it were real, yet several authorities and judgments show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, Stroud’s Judicial Dictionary of Words and Phrases (Seventh Edition, 2008), defines “deemed” as follows:

“Deemed”-, as used in statutory definitions “to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means

simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or things has- the way in which it is to be adjudged ; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."

**84. In Hindustan Cooperative Housing Building Society Limited v. Registrar, Cooperative Societies and Anr.** (2009) 14 SCC 302, this Court in dealing with legal fictions generally quoted a large number of authorities thus at paragraph 17:

"17. "13. ... It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James, L.J. in **Levy, Re, ex p Walton** [(1881) 17 Ch D 746 : (188185) All ER Rep 548 (CA)] : (Ch D p. 756)

'... When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.'

After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate. [Ed.: This latter sentence does not form part of what was observed by James, L.J. in **ex p Walton**, (1881) 17 Ch D 746 : (1881-85) All ER Rep 548 (CA) but is a paraphrase of what was observed by the Supreme Court in **State of Bombay v. Pandurang Vinayak**, 1953 SCR 773 at p. 778. See also **Ali M.K. v. State of Kerala**, (2003) 11 SCC 632 : 2004 SCC (L&S) 136, SCC at p. 639, para 13.]

[See **Hill v. East and West India Dock Co.** [(1884) 9 AC 448 (HL)], **State of Travancore-Cochin v. Shanmuga Vilas Cashewnut Factory** [AIR 1953 SC 333], **American Home Products Corp. v. Mac Laboratories (P) Ltd.** [(1986) 1 SCC 465] and **Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi** [(1996) 4 SCC 76] .] In an oft quoted passage, Lord Asquith stated:

'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact, existed, must inevitably have flowed from or accompanied it. ... The statute [states] that you must imagine a certain state of affairs; it does

not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'

(See **East End Dwellings Co. Ltd. v. Finsbury Borough Council** [1952 AC 109 : (1951) 2 All ER 587 (HL)] at AC pp. 132-33.)

'... The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'

[Per Lord Radcliffe in **St. Aubyn v. Attorney General (No. 2)** [1952 AC 15 : (1951) 2 All ER 473 (HL)], AC p. 53.]

#### 14. 'Deemed', as used in statutory definitions [is meant]

'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.' (Per Windener, J. in **Hunter Douglas Australia Pty. v. Perma Blinds** [(1970) 44 Aust LJ R 257] .)

15. When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., in **R. v. Norfolk County Court** [(1891) 60 LJ QB 379] ).

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in **Ferguson v. McMillan** [1954 SLT 109] .)

16. Whether the word 'deemed' when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see **St. Leon Village Consolidated School Distt. v. Ronceray** [(1960) 23 DLR (2d) 32] ).

'.... I ... regard its primary function as to bring in something which would otherwise be excluded.' (Per **Viscount Simonds in Barclays Bank v. IRC** [1961 AC 509 : (1960) 3 WLR 280 : (1960) 2 All ER 817 (HL)] at AC p. 523.)

'Deems' means 'is of opinion' or 'considers' or 'decides' and there is no implication of steps to be taken before the opinion is formed or the decision is taken. [See **R. v. Brixton Prison (Governor), ex p Soblen** [(1963) 2 QB 243 : (1962) 3 WLR 1154 : (1962) 3 All ER 641 (CA)] at QB p. 315.]" [Ed.: As observed in **Ali M.K. v. State of Kerala**, (2003) 11 SCC 632 : 2004 SCC (L&S) 136, SCC at pp. 63940, paras 13-16.]"

In the present case, it is clear that the deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within the enacting part contained in Section 5(8)(f) of the Code.

85. It was also argued that an explanation does not enlarge the scope of the original section and for this purpose **S. Sundaram Pillai** (supra) was relied upon. This very judgment recognises, in paragraph 46, that an explanation does not ordinarily enlarge the scope of the original Section. But if it does, effect must be given to the legislative intent notwithstanding the fact that the legislature has named a provision as an explanation. [See **Hiralal Ratanlal Etc. v. State of U.P and Anr. Etc.** (1973) 1 SCC 216 at 225, followed in paragraph 51 of **Sundram Pillai** (supra)]. In any case, it has been found by us that the explanation was added by the Amendment Act only to clarify doubts that had arisen as to whether home buyers/allottees were subsumed within Section 5(8)(f). The explanation added to Section 5(8)(f) of the Code by the Amendment Act does not in fact enlarge the scope of the original Section as home buyers/allottees would be subsumed within Section 5(8)(f) as it originally stood as has been held by us hereinabove. As a matter of statutory interpretation, that interpretation, which accords with the objects of the statute in question, particularly when we are dealing with a beneficial legislation, is always the better interpretation or the "creative interpretation" which is the modern trend of authority, and which is reflected in the concurring judgment of **Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr.** (2017) 15 SCC 133 at paragraphs 122 and 127. This argument must, therefore, also be rejected.

86. We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

### Conclusion

- i. The Amendment Act to the Code does not infringe Articles 14, 19(1) (g) read with Article 19(6), or 300-A of the Constitution of India.
- ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.
- iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

### Postscript

87. We have been informed that most of the States and Union Territories have established/appointed adjudicating officers, the Real Estate Regulatory Authority, as well as the Appellate Tribunal as under the RERA. Yet, despite the fact that 1st May, 2017 has long gone, some recalcitrant States and Union Territories have yet to do the needful. We direct that in those States in which the needful has not been done, in that, only interim or no adjudicating officer/Real Estate Regulatory Authority and/or Appellate Tribunal have been appointed-established, such States/Union Territories are directed to appoint permanent adjudicating officers, a Real Estate Regulatory Authority and Appellate Tribunal within a period of three months from the date of this judgment. Copies of this judgment be sent to the Chief Secretaries of all the States and Union Territories immediately. To be placed for compliance by affidavits filed by the Chief Secretaries of these States and Union Territories within 3 months as aforesaid. Post these matters in the second week of January, 2020.

88. Given the declaration of the constitutional validity of the Amendment Act, it is absolutely necessary that the NCLT and the NCLAT are manned with sufficient members to deal with litigation that may arise under the Code generally, and from the real estate sector in particular. For this purpose, an affidavit be filed by the Union of India within three months from today as to the steps taken in this behalf. Copy of this judgment be sent to the Ministry of Law and Justice, Government of India immediately. To come up

with the compliance report by States and Union Territories as aforesaid in the second week of January, 2020.

89. All writ petitions and the civil appeal are disposed of in the light of this judgment. Stay orders granted by this Court to continue until the NCLT takes up each application filed by an allottee/ home buyer to decide the same in light of this judgment. No order as to costs.

..... J.

**(R.F. Nariman)**

..... J.

**(Sanjiv Khanna)**

..... J.

**(Surya Kant)**

New Delhi;

August 9, 2019

**ANNEXURE X.23****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 15<sup>th</sup> 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. Mukhopadhyaya]  
Chairperson

[Balvinder Singh]  
Member (Technical)

**ANNEXURE X.23****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)  
VERGUS

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)

**ANNEXURE X.24**

**IN THE SUPREME COURT OF INDIA  
CIVIL APPELLANT JURISDICTION  
CIVIL APPEAL NO. 18520 OF 2017**

(Arising out of SLP(C) No. 26824 of 2017)

**UTTARA FOODS AND FEEDS PRIVATE LIMITED ... Appellant(s)**

Versus

**MONA PHARMACHEM ... Respondent(s)**

**O R D E R**

Leave granted.

Mr. Shyam Divan, learned senior counsel appearing on behalf of the appellant and the learned counsel appearing on behalf of the respondent both agree that the matter has since been settled amicably between the parties.

In an earlier order dated 24.07.2017, this Bench had observed that in view of Rule 8 of the I & B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal prima facie could not avail of the inherent powers recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission of the insolvency petition. We are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached. On the facts of the present case, we take on record the settlement between the parties and set aside the NCLAT order.

As a result, the appeal is allowed in the aforesaid terms.

A copy of this order be sent to the Ministry of Law & Justice immediately.

.....J.  
(ROHINTON FALI NARIMAN)

New Delhi,  
Dated: 13th November, 2017. .....J.  
(SANJAY KISHAN KAUL)

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.25****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."

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"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."

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**“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.”

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**“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.”

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**“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.”

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*“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.”*

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### **“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.”

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“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 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.”

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“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;

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

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

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

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

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

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

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

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

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

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

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

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

(5) Where the Adjudicating Authority is satisfied that –

- (a) a default has occurred and the application under sub-Section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- (b) default has not occurred or the application under sub-Section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application :

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

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

(7) The Adjudicating Authority shall communicate –

- (a) the order under clause (a) of sub-Section (5) to the financial creditor and the corporate debtor;
- (b) the order under clause (b) of sub-Section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

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

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

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

- (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

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

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

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

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

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

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

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

**“13. Declaration of moratorium and public announcement.” – (1)** The Adjudicating Authority, after admission of the application under Section 7 or Section 9 or Section 10, shall, by an order –

- (a) declare a moratorium for the purposes referred to in Section 14;
- (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under Section 15; and
- (c) appoint an interim resolution professional in the manner as laid down in Section 16.

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

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

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

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

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

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

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

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

**“17. Management of affairs of corporate debtor by interim resolution**

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

- (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;”

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

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

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

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

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

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

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

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

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a

single trustee or agent to act for all financial creditors, each financial creditor may –

- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
- (b) represent himself in the committee of creditors to the extent of his voting share;
- (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
- (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

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

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

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

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

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

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

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

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
  - (b) create any security interest over the assets of the corporate debtor;
  - (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
  - (d) record any change in the ownership interest of the corporate debtor;
  - (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
  - (f) undertake any related party transaction;
  - (g) amend any constitutional documents of the corporate debtor;
  - (h) delegate its authority to any other person;
  - (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
  - (j) make any change in the management of the corporate debtor or its subsidiary;
  - (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
  - (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
  - (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.
- (2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-Section (1).
- (3) No action under sub-Section (1) shall be approved by the committee of creditors unless approved by a vote of seventy-five per cent of the voting shares.
- (4) Where any action under sub-Section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this Section, such action shall be void.

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

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

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

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

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
- (b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53;
- (c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;
- (d) the implementation and supervision of the resolution plan;
- (e) does not contravene any of the provisions of the law for the time being in force;
- (f) conforms to such other requirements as may be specified by the Board.

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

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

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

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

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

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

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

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

- (a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and
- (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.”

**27.** The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of ‘debt’, we have to go to Section 3(11), which in turn tells us that a debt means a liability or 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 1. Van Devanter, J.'s majority judgment held (at 387) :

'8. The words "concurrent power" in that Section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and 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 Amaidas v. State of Bombay** [1955] 1 SCR 799, a question arose as to the efficacy of a Bombay Act of 1947 vis-a-vis the Essential Supplies (Temporary Powers) Act of 1946, as amended in 1950. This Court, after referring to Section 107 of the Government of India Act and article 254 of the Constitution, stated that article 254, is in substance, a reproduction of Section 107 with one difference – that the power of Parliament under article 254(2) goes even to the extent of repealing a State law. This Court then examined the subject-matters of the two Acts and found that the Parliamentary enactment as amended in 1950 prevailed over the Bombay Act in as much as the higher punishment given for the same offence under the Bombay Act was repugnant to the lesser punishment given by Section 7 of the Parliamentary enactment.

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

“Nicholas in his Australian Constitution, 2nd ed., p. 303, refers to three tests of inconsistency or repugnancy. – (1) There may be inconsistency in the actual terms of the competing statutes – *R v. Brisbane Licensing Court* [1920] 28 CLR 23.

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

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter – *Victoria v. Commonwealth* [1937] 58 CLR 618; *Wenn v. Attorney-General (Vict.)* [1948] 77 CLR 84 Isaacs, J, in *Clyde Engineering Co., Ltd. v. Cowburn* [1926] 37 CLR 466, 489 laid down one test of inconsistency as conclusive : “If, however, a competent Legislature expressly or implicitly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field”.

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

“When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of

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

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

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

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

"It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view,

if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test : there may well be cases of repugnancy where both laws say “don’t” but in different ways. For example, one law may say, “No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time” and another law may say, “No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time”. Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely, the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified.”

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

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

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

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

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

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

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

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

- (1) Whether there is direct conflict between the two provisions;
- (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature; and
- (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field." (at page 43)

**43.** In **Pandit Ukha Kolhe v. State of Maharashtra** [1964] 1 SCR 926, this Court found that Sections 129A and 129B did not repeal in its entirety an existing law contained in Section 510 of the Code of Criminal Procedure in its application to offences under Section 66 of the Bombay Prohibition Act. It was held that Sections 129A and 129B must be regarded as enacted in exercise of power conferred by Entries 2 and 12 in the Concurrent List. It was then held :

"It is, difficult to regard Section 129B of the Act as so repugnant to Section 510 of the Code as to make the latter provision wholly inapplicable to trials for offences under the Bombay Prohibition Act. Section 510 is a general provision dealing with proof of reports of the Chemical Examiner in respect of matters or things duly submitted to him for examination or analysis and report.

Section 129B deals with a special class of reports and certificates. In the investigation of an offence under the Bombay Prohibition Act, examination of a person suspected by a Police Officer or Prohibition Officer of having consumed an intoxicant, or of his blood may be carried out only in the manner prescribed by Section 129A : and the evidence to prove the facts disclosed thereby will be the certificate or the examination viva

voce of the registered Medical Practitioner, or the Chemical Examiner, for examination in the course of an investigation of an offence under the Act of the person so suspected or of his blood has by the clearest implication of the law to be carried out in the manner laid down or not at all. Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act, otherwise than in the manner set out in Section 129A cannot therefore, be used as evidence in the case. To that extent Section 510 of the Code is superseded by Section 129B. But the report of the Chemical Examiner relating to the examination of blood of an accused person collected at a time when no investigation was pending, or at the instance not of a Police Officer or a Prohibition Officer remains admissible under Section 510 of the Code." (at pages 953-954)

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

"It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. *Prima facie*, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied :

1. That there is a clear and direct inconsistency between the Central Act and the State Act.
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

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

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

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

"The rules prescribed by the Commonwealth law and the State law

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

Issacs, J observed as follows :

"There can be no question that the Commonwealth Navigation Act, by its own direct provisions and the Regulations made under its authority, applies upon construction to the circumstances of the case. It is inconsistent with the State Act in various ways, including (1) general supersession of the regulations of conduct, and so displacing the State Regulations, whatever those may be; (2) the jurisdiction to convict, the State law empowering the Court to convict summarily, the Commonwealth law making the contravention an indictable offence, and, therefore, bringing into operation Section 80 of the Constitution, requiring a jury; (3) the penalty, the State providing a maximum of £50 the Commonwealth Act prescribing a maximum of £100, or imprisonment, or both; (4) the tribunal itself."

Starke, J observed as follows :

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

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

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

Similarly Dixon, J observed, thus :

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

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

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

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

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

- (1) There may be inconsistency in the actual terms of the competing statutes – **R v. Brisbane Licensing Court** [1920] 28 CLR 23.
- (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code – **Clyde Engineering Co. Ltd. v. Cowburn** [1926] 37 CLR 466.

- (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter – **Victoria v. Commonwealth** [1937] 58 CLR 618; **Wenn v. Attorney-General (Vict.)** [1948] 77 CLR 84. This Court also relied on the decisions in the case of **Hume v. Palmer as also the case of Ex. Parte Mclean (supra)** referred to above. This Court also endorsed the observations of Sulaiman, J, in the case of **Shyamakant Lal v. Rambhajan Singh** [1939] FCR 188 where Sulaiman, J, observed as follows :

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

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

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

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

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

- (1) Whether there is direct conflict between the two provisions;
- (2) Whether Parliament intended to lay down an exhaustive code

in respect of the subject-matter replacing the Act of the State Legislature; and

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

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

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

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

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

"Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent Legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other Legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation."

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

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

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

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

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

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.' (at pages 272-278) [emphasis supplied]
- 45.** In **Hoechst Pharmaceuticals Ltd. v. State of Bihar** [1983] 3 SCR 130, this Court after referring to the earlier judgments held :

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

We may briefly refer to the three Australian decisions relied upon. As stated above, the decision in Clyde Engineering Co.'s case (supra),

lays down that inconsistency is also created when one statute takes away rights conferred by the other. In *Ex Parte McLean's case* (*supra*), Dixon, J, laid down another test, viz., two statutes could be said to be inconsistent if they, in respect of an identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties. In *Stock Motor Ploughs Ltd.'s case* (*supra*), Evatt, J held that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. As already stated the controversy in these appeals fails 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 yield to the Central law except if the State law is covered by article 254(2).

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

- (i) Repugnancy under article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.
- (ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.
- (iii) The question is what is the subject-matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.
- (iv) Since there is a presumption in favour of the validity of statutes

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

- (v) Repugnancy must exist in fact and not depend upon a mere possibility.
- (vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other.

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

- (vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject-matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject-matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.
- (viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject-matter. This need not be in the form of a direct conflict, where one says “do” and the other says “don’t”. Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the State legislation

or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject-matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

- (ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.
- (x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State.

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

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

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

'In order to mitigate the hardship that may be caused to the workers who may be thrown out of employment by the closure of an undertaking, Government may take over such undertaking either on lease or on such conditions as may be deemed suitable and run it as a measure of unemployment relief. In such cases Government may have to fix revised terms of employment of the workers or to make other changes which may not be in consonance with the existing labour laws or any agreements or awards applicable to the undertaking. It may become necessary even to exempt the undertaking from certain legal provisions. For these reasons it is proposed to obtain power to exclude an undertaking, run by or under the authority of Government as a measure of unemployment relief, from the operation of certain labour laws or any specified provisions thereof subject to such conditions and for such periods as may be specified. It is also proposed to make a provision to secure that while the rights and liabilities of the original employer and workmen may remain suspended during the period the undertaking is run by Government, they would revive and become enforceable as soon as the undertaking ceases to be under

the control of Government." There is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution, which reads as under :

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

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

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

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

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-Section (2) of Section 3 –

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

(ii) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act,

which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of the State Government, for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;

- (iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;
- (iv) any right, privilege, obligation 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.26****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 Limited ....Appellant**

**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 Mukhopadhyaya, 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 19<sup>th</sup> 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 17<sup>th</sup> 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 15<sup>th</sup> 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 17<sup>th</sup> 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 11<sup>th</sup> April 2017 but the matter was listed before the Adjudicating Authority, a day earlier on 10<sup>th</sup> 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 19<sup>th</sup> April 2017, the appellant appeared through their lawyers, Mr. Ketan Parikh with Mr. Pavan Godiwala. Paragraph 6 of the impugned order dated 19<sup>th</sup> 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 19<sup>th</sup> 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 11<sup>th</sup> 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)

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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)

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5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

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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)

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8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT"

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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 30<sup>th</sup> 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. Mukhopadhyaya)  
Chairperson

NEW DELHI

29th August 2017

**ANNEXURE X.27****IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH**

MA 701 in C.P. 1055/I&amp;BP/2017

Under section 33 &amp; 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 immoveable 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, Gummidi poondi - 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 Gummidi poondi, Chennai.	Land & Building
5.	Shop No.11, 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, Silvasa - 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)

**ANNEXURE X.28****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 306 of 2018****IN THE MATTER OF:****Shah Brothers Ispat Pvt. Ltd. ...Appellant****Vs****P. Mohanraj & Ors. ..Respondents****Present:****For Appellant: Mr. Sulabh Rewari and Ms. Neha Mathen,  
Advocates****For Respondents: Mr. Yugal Kishore Prasad and Mr. Sunil Prem Lalla,  
Advocates.****O R D E R**

**31.07.2018:** The Appellants filed complaint under Section 138 of the Negotiable Instrument Act, 1881 (for short 'NI Act') before the Metropolitan Magistrate 59th Court, Kurla, Mumbai. CC No.552/SS/2017 was filed prior to initiation of Corporate Insolvency Resolution Process i.e. prior to 6th June, 2017. Another complaint u/s 138 of NI Act being CC No.690/SS/2017 was filed after 6th June, 2017, i.e. after the order of moratorium. The Respondent - Directors moved before the Adjudicating Authority and argued that during the period of moratorium proceeding petition under Section 138 of NI Act was not maintainable. This was opposed by the Appellants but the Adjudicating Authority (National Company Law Tribunal) Single Bench, Chennai by order dated 24th May, 2018 passed in MA/102/IB/2018 in CP/507/IB/2017 directed the Appellants to withdraw the complaint case filed under Section 138 of NI Act treating it as a proceeding filed after order of moratorium with observation that such action amounts to deliberate attempt on the part of Appellant and sheer misuse of the process of law.

**2.** The question arises for consideration in this appeal is whether the order of moratorium will cover a criminal proceeding under Section 138 of NI Act, which provides punishment of imprisonment for a term which may extend to three years or with fine which may extend to twice the amount of cheque or with both?

**3.** The Company cannot be imprisoned, therefore aforesaid punishment

under Section 138 cannot be imposed against the company (Corporate Debtor) However, fine can be imposed by a court of competent jurisdiction on the Company (Corporate Debtor), if find guilty. The Directors of the Company (Corporate Debtor) being parties so can be imprisoned or fine may be imposed on them.

4. Section 14 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') relates to moratorium, which reads as follows:

***"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."*

5. Learned counsel appearing on behalf of the Respondent submitted that the proceeding under Section 138 of the NI Act is covered by clause of Sub-section (1)(a) of Section 14 of I&B Code, therefore, proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority cannot proceed.
6. We do not agree with such submission as Section 138 is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot be held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the purview of Section 14. Infact no criminal proceeding is covered under Section 14 of I&B Code.
7. The Adjudicating Authority having failed to appreciate law, we have no option but to set aside the impugned order dated 24th May, 2018 passed in MA/102/IB/2018 in CP/507/IB/2017. The court of competent jurisdiction may proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium. The appeal is allowed with aforesaid observations. I. A. Nos. 820/2018, 821/2018, 822/2018 and 823/2018 stands disposed of. No Cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**ANNEXURE X.29****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 664 of 2019****IN THE MATTER OF:****NUI Pulp and Paper Industries Pvt. Ltd. ....Appellant****Vs.****M/s. Roxcel Trading GMBH ....Respondent****Present: For Appellant: - Mr. S. Santanam Swaminadhan, Ms. Nishtha Khurana and Mr. Kartik Malhotra, Advocates.****For Respondent: - Mr. Arun Kathpalia, Senior Advocate with Mr. Ankur Khandelwal, Mr. Gowrang, Mr. Vatsal Joshi, Advocates.****ORDER**

**17.07.2019** 1. The Respondent- 'M/s. Roxcel Trading GMBH'-(‘Operational Creditor’) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) against ‘NUI Pulp and Paper Industries Pvt. Ltd.’- (‘Corporate Debtor’).

2. The matter was listed before the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, on 25th June, 2019 and counsel for the ‘Corporate Debtor’ appeared by filing a Caveat. The counsel for the ‘Corporate Debtor’ submitted that there is an existence of dispute between the parties and thereby prayed for time for filing reply. On the request of the counsel for the ‘Corporate Debtor’, time was allowed to file reply affidavit and time was also allowed to the ‘Operational Creditor’ for file rejoinder.

3. However, while adjourning the case for 15th July, 2019, the following interim order was passed:

“However, the apprehension of the Applicant can be taken note of till the time either the Application is admitted or rejected, the assets and the accounts of the Company need to be maintained on date except withdrawal of the legitimate expenses required for carrying on the day-to-day expenses. Therefore, this Authority in exercise of the powers conferred under Rule 11 of the NCLT Rules, 2016, restrains the Corporate Debtor and its Directors from alienating, encumbering or creating any

third party interest on the assets of the 1st Respondent Company till further orders.”

4. Learned counsel for the Appellant submits that before admission of an application under Sections 7 or 9, the Adjudicating Authority has no jurisdiction to restrain the ‘Corporate Debtor’ and its Directors from alienating, encumbering or creating any third party interest on the assets of the ‘Corporate Debtor’. No such power can be exercised under Rule 11 of the National Company Law Tribunal Rules, 2016.
5. It is submitted that inherent power can be exercised by the Adjudicating Authority (National Company Law Tribunal), if it comes to the notice on receipt of reply that the ‘Corporate Debtor’ somehow or other trying to get adjournment or to alienate the matter after filing of the application under Sections 7 or 9. No such ground having shown by the ‘Operational Creditor’ on the first day of issuance of notice or allowing the ‘Corporate Debtor’ to file reply. The Adjudicating Authority has no jurisdiction to pass interim order.
6. Learned counsel appearing on behalf of the Respondent-‘Operational Creditor’ while submitted that there was an apprehension that the ‘Corporate Debtor’ and its Directors are intended to sell the assets of the ‘Corporate Debtor’ to defeat the purpose of the ‘I&B Code’ and cause wrongful losses to all the creditors including the ‘Operational Creditor’ before the Adjudicating Authority. It is always open to the Adjudicating Authority to pass interim order.
7. Before deciding the issue, we asked learned counsel for the Appellant as to whether the ‘Corporate Debtor’ intends to sell or alienate or transfer or create any third party interest on the assets of the ‘Corporate Debtor’, it is submitted that the ‘Corporate Debtor’ cannot give any such undertaking as it will act taking into consideration the necessity of the ‘Corporate Debtor’ for its day-to-day functioning.
8. Rule 11 of the National Company Law Tribunal Rules, 2016 deals with ‘inherent powers’ of the National Company Law Tribunal and reads as follows:

“11. Inherent Powers.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.”
9. From the aforesaid Rule 11, it is clear that the Tribunal (Adjudicating Authority herein) can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

10. From the aforesaid provisions, it is clear that once an application under Sections 7 or 9 is filed by the Adjudicating Authority, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of 'Moratorium' under Section 14 of the 'I&B Code'. To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order.

11. The Respondent- 'Operational Creditor' had issued Demand Notice under Section 8(1) and after receipt of the reply under Section 8(2), informed that the 'Corporate Debtor' has not made payment, filed an application under Section 9. It was at this stage, the 'Operational Creditor' brought to the notice of the Adjudicating Authority (National Company Law Tribunal) that there is an apprehension that the 'Corporate Debtor' may abuse the process of the 'I&B Code' to deny the creditors from its legitimate rights if admission of the application under Section 9.

12. The Appellant having not given any undertaking or made any specific reply and refused to say that they have no such intention, we are of the view that it is always open to the Adjudicating Authority to pass ad-interim order before admitting any application under Sections 7 or 9 or 10 of the 'I&B Code'. However, on reply, once the application is admitted, then the order of 'Moratorium' under Section 14 will follow, taking away the right of the Board of Directors of the 'Corporate Debtor' to take any decision on behalf of the 'Corporate Debtor' prohibiting others from taking any action against the 'Corporate Debtor' which is different from interim order. On the other hand, if application under Sections 7 or 9 or 10 is rejected, the interim order will automatically stands vacated.

13. For the reasons aforesaid, we are not inclined to interfere with the impugned order. The appeal is dismissed. No costs.

(Justice S.J. Mukhopadhyaya)  
Chairperson

(Kanthy Narahari)  
Member(Technical)

**ANNEXURE X.30****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 302 of 2018****IN THE MATTER OF:**

**State Bank of India** ...Appellant

**Vs**

**Ram Dev International Ltd.** ..Respondent

(Through Resolution Professional)

**Present:**

**For Appellant:** **Mr. Ramji Srinivasan, Sr. Advocate with Mr. P. B. A. Srinivasan, Mr. Naveen Hegde and Ms. Aishwarya Nabh, Advocates and Ms. Rekha Kureel, AGM (Law), SBI.**

**For Respondent:** **Mr. Rakesh Kumar Jain, RP in person and Mr. Vinod Chaurasia, PCA for RP.**

**O R D E R**

**16.07.2018:** The ‘State Bank of India’, a member of the Committee of Creditors has preferred this appeal against order dated 15th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)178(PB)/2017, whereby Mr. K. G. Somani, who was proposed to act as Resolution Professional by the majority voting share of the Committee of Creditors has been held to be ineligible on the ground that he was in the panel of erstwhile ‘State Bank of Hyderabad’, which is now merged with the ‘State Bank of India’, which is one of the members of the Committee of Creditors.

**2.** The question arises for consideration in this appeal is whether the Adjudicating Authority can reject the proposal of the Committee of Creditors for appointment of Resolution Professional, on the ground that the name of proposed Resolution Professional is appearing in the panel of one of the member of the Committee of Creditors?

**3.** Learned Senior Counsel for the Appellant referred to the provisions of the Code and submitted that Mr. K. G. Somani was not empaneled as Retainer of State Bank of Hyderabad. He was not in the payroll of the Bank and is not an employee. He is a panel lawyer, as generally maintained by

the Banks, Public Sector Undertakings and Governments, who cannot be treated to be employee of the Bank.

**4.** Mr. Rakesh Kumar Jain, who was earlier functioning as Resolution Professional and was replaced by the majority decision of the Committee of Creditors has appeared. Learned counsel for Mr. Rakesh Jain submits that for removing the earlier Resolution Professional, the Committee of Creditors have not shown any reason; no adverse comments has been recorded by them.

**5.** To decide the issue, it is necessary to refer relevant provisions of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'), as discussed hereunder:

**6.** For initiation of Corporate Insolvency Resolution Process by Financial Creditor under Section 7 or by the Corporate Applicant under Section 10, the Financial Creditor alongwith the application require to provide the name of proposed 'Interim Resolution Professional' in terms of Section 7(3)(b). Similarly, the Corporate Debtor alongwith the Application under Section 10 is also required to provide the name of proposed 'Interim Resolution Professional' in terms of Section 10(3)(b). For initiation of Corporate Insolvency Resolution Process by Operational Creditor under Section 9 no such compulsion has been made, though it is open to an 'Operational Creditor' to propose the name of the 'Interim Resolution Professional'. The only bar for appointment of an Resolution Professional is that if any disciplinary proceeding is pending against such proposed Resolution Professional he cannot be appointed.

**7.** There is no other ineligibility prescribed for appointment of Interim Resolution Professional or Resolution Professional, either under I&B Code or the Regulations framed by the IBBI. However, in a particular case, the Adjudicating Authority for one or other good reason can remove a Resolution Professional for his act of omission and commission. Similarly, for the ground(s) to be recorded in writing, the name of the proposed Resolution Professional can be rejected by the Adjudicating Authority.

**8.** Section 22 of I&B Code relates to appointment of Resolution Professional. In the first meeting of the Committee of Creditors by majority voting of not less than 75% voting share (as per un-amended provision) of the Financial Creditors, can either resolve to appoint the Interim Resolution Professional as a Resolution Professional or to replace the Interim Resolution Professional by another Resolution Professional.

**9.** Section 27 deals with replacement of Resolution Professional by the Committee of Creditors, which reads as follows:

***"27. Replacement of resolution professional by committee of creditors.*** - (1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section..

(2) The committee of creditors may, at a meeting, by a vote of seventy five per cent. of voting shares, propose to replace the resolution professional appointed under section 22 with another resolution professional.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.”

**10.** From the aforesaid provision it is clear that during the Corporate Insolvency Resolution Process, at any time, if the Committee of Creditors ‘is of opinion’ that the Resolution Professional appointed under Section 22 is required to be replaced, it may replace him with another Resolution Professional in the manner provided under said section. In terms of Section 27(2), the Committee of Creditors at a meeting by vote of 75% of voting share (as per un-amended provision) can propose to replace the Resolution Professional appointed under Section 22 with another Resolution Professional.

**11.** Admittedly, Mr. Rakesh Kumar Jain was appointed as Interim Resolution Professional and after completion of 30 days of period his name was approved by the majority vote of the Committee of Creditors in terms of Section 22(2) to function as a Resolution Professional. In terms of the said provision he continued and functioned as Resolution Professional.

**12.** According to learned counsel for Mr. Rakesh Kumar Jain, the Resolution Professional had done tremendous job for completion of the Corporate Insolvency Resolution Process and has also lodged complaint against the Board of Director of the Corporate Debtor. However, no criminal complaint lodged by him.

**13.** Learned counsel appearing on behalf of Mr. Rakesh Kumar Jain, further submitted that no adverse comment has been made against him by the Committee of Creditors and no reasons has been recorded for replacing the Resolution Professional.

**14.** Though such submission seems to be attractive, we are of the view, it is not desirable for a Committee of Creditors to record its opinion in view of the following reasons:

- (i) If the Committee of Creditors record any adverse opinion for replacement of Resolution Professional, it will not only harm him for the present but will also affect him in future during appointment as Resolution Professional in another proceeding. In such case, the Committee of Creditor will have to refer the matter to IBBI for initiation of departmental proceeding, which is also not desirable in all the cases.
- (ii) If the Committee of Creditors forms opinion on the basis of performance of the Resolution Professional and not because of allegation, it will also go against the Resolution Professional in interest of the Resolution Process.

**15.** We have already held that except for pendency of a disciplinary proceeding or ineligibility in terms of provisions of the I&B Code, there is no bar for appointment of a person as Resolution Professional. A Resolution Professional if empaneled as an Advocate or Company Secretary or Chartered Accountant with one or other 'Financial Creditor' that cannot be a ground to reject the proposal, if otherwise there is no disciplinary proceeding is pending or it is shown that the person is an interested person being employee or in the payroll of the 'Financial Creditor'.

**16.** In the present case, as we find that the Adjudicating Authority has failed to take into consideration the aforesaid fact and as there is no allegation against Mr. K. G. Soman and no disciplinary proceeding is pending against him and he is not in the payroll of one or other member of the Committee of Creditors, we are of the view that the Adjudicating Authority was required to approve his name.

**17.** For the reasons recorded above, we set aside impugned order dated 15 th May, 2018 passed by Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)178(PB)/2017 and replace Mr. Rakesh Kumar Jain by appointing Mr. K. G. Soman as Resolution Professional, who will act in accordance with law and ensure early completion of the Resolution Process.

18. So far as fee and cost incurred by Mr. Rakesh Kumar Jain is concerned, he may submit his claim before the Committee of Creditors, who should take into consideration such claim while preparing Information Memorandum and Resolution Plan in terms of Regulation 31 and 32 of 'The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016'. The appeal is allowed with aforesaid observations and actions. No cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

## ANNEXURE X.31

REPORTABLE

IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 744 OF 2017

CHITRA SHARMA AND ORS ..Petitioners

VERSUS

UNION OF INDIA AND ORS ..Respondents

WITH

WRIT PETITION (CIVIL) NO 782 OF 2017

WITH

WRIT PETITION (CIVIL) NO 783 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 24001 OF 2017

WITH

WRIT PETITION (CIVIL) NO 803 OF 2017

WITH

WRIT PETITION (CIVIL) NO 805 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 24002 OF 2017

WITH

WRIT PETITION (CIVIL) NO 950 OF 2017

WITH

WRIT PETITION (CIVIL) NO 860 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 36396 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) D NO 33267 OF 2017

**AND WITH****WRIT PETITION (CIVIL) NO 511 OF 2018****JUDGMENT****Dr D Y CHANDRACHUD, J**

1. Permission to file the Special Leave Petitions is granted.
2. These proceedings have been initiated under Article 32 of the Constitution for protecting the interests of home buyers in projects floated by Jaypee Infratech Ltd. ('JIL'). JIL is a special purpose vehicle created by its holding company, Jaiprakash Associates Ltd. ('JAL').
3. IDBI Bank Ltd. instituted a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('IBC') against JIL before the National Company Law Tribunal ('NCLT') at its Bench at Allahabad. The bank sought the initiation of a corporate insolvency resolution process ('CIRP') against JIL. JIL filed its objections opposing admission of the petition. However, according to the petitioners, JIL withdrew its objections and furnished its consent for a resolution plan under the provisions of the IBC. IDBI Bank claimed that JIL had committed a default of Rs. 526.11 crore in the repayment of its dues. On 9th August, 2017, NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under Section 14 by which the institution of suits and the continuation of pending proceedings, including execution proceedings was prohibited. An interim resolution professional ('IRP') was appointed under the provisions of the IBC. On 14th August, 2017, JIL, in pursuance of the order of NCLT called for submissions of claims by creditors: financial creditors in Form-C, operational creditors in Form-B, workmen and employees in Form-E and other creditors in Form-F. On 16th August, 2017, the Insolvency and Bankruptcy Board of India made an amendment to its regulations and regulation 9(a) was inserted to include claims by other creditors. On 18th August, 2017, the Board released a press note clarifying that home buyers could fill in Form-F as they could not be treated at par with financial and operational creditors.
4. These proceedings were instituted for the following reliefs :
  - (i) A declaration that Sections 6, 7, 10, 14 and 53 of the Code are ultra vires insofar as only financial or operational creditors are recognised, disregarding other stakeholders such as the home buyers;
  - (ii) The order dated 9th August, 2017 of the NCLT be set aside;
  - (iii) The Union of India be directed to notify under Section 14(3) that the provisions for moratorium contained under Section 14(1)(a) shall

not apply to consumers and that the home buyers be allowed to exercise the rights available to them under the Consumer Protection Act, 1986 and the Real Estate (Regulation and Development) Act, 2016 ('RERA');

- (iv) A forensic audit of JIL and JAL be conducted for the period from 2009 to 2017; and
- (v) A direction be issued to the Union of India to protect the interests of home buyers in the larger public interest.

**5.** As the above narration indicates, the grievance with which this court was moved under Article 32 was that the CIRP ignores the interests of vital stakeholders in building projects, chief among whom are individuals who have invested their wealth in pursuit of the human desire to own a home. The IBC, in the submission of the petitioners, recognised only three categories or classes, namely, (i) corporate debtors; (ii) financial creditors; and (iii) operational creditors. Not being protected by the IBC, the petitioners contended that the rights conferred upon them by special enactments including the Consumer Protection Act, 1986 and by RERA could not be divested. Suspension of the right to seek redressal before an adjudicatory forum under Section 14(1)(a) would, it was asserted, leave the home buyers without a remedy. Section 238 of the IBC gives it an overriding effect over other laws in existence.

**6.** The petition before this court has grown in size to incorporate as many as 646 persons who claim to be home buyers. Arrayed before the Court as respondents to these proceedings, besides JIL, JAL and the Union of India are statutory authorities {including the Reserve Bank of India ('RBI')}, banks and welfare associations representing home buyers. A large number of intervention applications have been filed.

**7.** The home buyers invested in residential projects ("high-tech" townships as they were described) proposed by JIL and JAL in the National Capital Region. The townships were to be ready for possession within thirty to thirty-six months of the booking by a prospective buyer. Relying on the representations of the developers, individual purchasers invested in the residential projects. A large number of them have obtained loans from financial institutions. As a result of the delay in handing over possession, numerous flat buyers filed consumer complaints before the State and National Consumer Disputes Redressal Commissions. In June 2017, RBI is stated to have published a list of the top 12 defaulters in the country including JIL which was declared to be in default of an amount approximately of Rs. 8,000 crore to its lenders.

**8.** This court was moved in the exercise of its jurisdiction under Article 32 to protect the interests of home buyers, who had been left in the lurch. When the petition was instituted, they had no locus in the CIRP. Liquidation would leave the home buyers to face an uncertain future. The disposal of assets would, it is apprehended, deprive them of their right to own a home. Faced with a situation of human distress, occasioned by the failure of the developers to meet their contractual obligations and a legal regime as it then stood under the IBC which provided no solace to home buyers, this court issued notice on 4th September, 2017 in a batch of writ petitions. Proceedings before the NCLT at Allahabad were directed to remain stayed until further orders. The court further directed that a copy of the proceedings be served on the office of the learned Attorney General for India. Applications for impleadment and intervention were allowed.

**9.** On 11th September, 2017, IDBI Bank Ltd. file an application for vacating the ad interim order dated 4th September, 2017. The Attorney General submitted before this court that the order of stay would result in a consequence which was unintended : control of JIL would be restored to the erstwhile management. Such a consequence would affect the rights of creditors and of the consumers as well. In the meantime, as a result of the ad interim stay, the IRP had handed over records to JIL. Counsel for the home buyers contended that if the order of stay was being modified to enable the IRP to take back control, it was necessary to have their representative on the committee of creditors ('CoC'). The regime of the Act did not at that stage include any representation for the home buyers on the CoC.

**10.** Accordingly, on 11th September, 2017, this court modified its earlier order dated 4th September, 2017 in the following terms :

- (a) The IRP shall forthwith take over the management of JIL. The IRP shall formulate and submit an interim resolution plan within 45 days before this court. The interim resolution plan shall make all necessary provisions to protect the interests of the home buyers;
- (b) Mr. Shekhar Naphade, learned senior counsel along with Ms. Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the committee of creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the home buyers and protect their interests;
- (c) The managing director and the directors of JIL and JAL shall not leave India without the prior permission of this court;
- (d) JAL which is not a party to the insolvency proceedings, shall deposit

a sum of Rs.2,000 crore before this court on or before 27th October, 2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this court. Any person who was a director or managing director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present directors/managing director shall also not leave the country without prior permission of this court. The foregoing restraint shall not apply to nominee directors of lending institutions (IDBI/ICICI/SBI);

- (e) All suits and proceeding instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in management. Be it clarified that we have passed this order keeping in view the provisions of the Act and also the interest of the home buyers."

**11.** The above interim directions indicate that three significant aspects were the foundation of the order :

First, following the discipline of the IBC, the IRP was permitted to take over management of JIL and to proceed to formulate an interim resolution plan within a stipulated period;

Second, the IRP was directed to ensure that necessary provisions were made to protect the interests of home buyers. To facilitate the views of the home buyers being placed before the CoC this court nominated a senior counsel practising before this court to participate in those meetings under Section 21 of the IBC;

Third, JAL as the holding company of JIL was directed to deposit a sum of Rs 2,000 crore on or before 27th October, 2017.

In formulating these directions, the court initiated steps to protect the interests of the home buyers. At that stage, it must be noted, the CoC as constituted under Section 21 of the IBC did not include a representative of the home buyers. Nor were the home buyers regarded as financial creditors under the IBC. The mechanism evolved by the court was intended to provide a workable arrangement under the then prevailing regime so that the interests of the home buyers would not be ignored.

**12.** By an order dated 23rd October, 2017 leave was granted to the IRP to file an action plan and an information memorandum in a sealed cover before this court.

**13.** JAL moved an application before this court for vacating the direction for deposit of Rs. 2,000 crore or for a modification that would enable JAL to

transfer its rights under a concession agreement in respect of the Yamuna Expressway (between NOIDA and Agra). This request was seriously opposed by the Attorney General as well as by counsel appearing on behalf of IDBI Bank and the Yamuna Expressway Industrial Development Authority. Counsel for the IRP drew the attention of the court to the fact that the rights under the concession agreement belong to JIL which was subject to proceedings under the IBC as a result of which such a request for alienation could not be permitted. By its order dated 25th October, 2017, this court declined to modify the direction for deposit of an amount of Rs. 2,000 crore. However, time to do so was extended until 5th November, 2017.

**14.** On 30th November, 2017 this court directed that the home buyers may approach the amicus curiae appointed in the case. The amicus curiae was to open a web portal on which details of the home buyers would be uploaded. All directors were required to remain present in this court on the next date to disclose their personal assets on affidavit. The directors were present before this court on 22nd November, 2017 when a statement was made on behalf of JAL of its readiness to deposit a sum of Rs. 275 crore. By its order dated 22nd November, 2017 this court permitted JAL to deposit a demand draft of Rs. 275 crore during the course of the day and directed that a further sum of Rs. 150 crore be deposited by 13th December, 2017 and of Rs. 125 crore by 31st December, 2017. A restraint was imposed on the alienation of the properties and assets of the directors and their families. The earlier direction for the deposit of Rs. 2,000 crore was maintained. In pursuance of the order dated 22nd November, 2017 an amount of Rs. 150 crore was deposited, as noticed in the order dated 15th December, 2017.

**15.** On 10th January, 2018 RBI moved an interlocutory application before this court seeking leave to move the NCLT against JAL under the provisions of the IBC. While observing that the application filed by the RBI would be considered at a later stage, this court issued directions to JAL to file details of its housing projects on affidavit. The amicus curiae was permitted to open a separate web portal reflecting the details of the home buyers of JAL.

**16.** When the proceedings were listed before this court on 21st March, 2018, JAL stated through its counsel that an amount of Rs. 550 crore had been deposited with the Registry. Counsel for JAL stated that only 8 per cent of the home buyers are interested in seeking a refund while others have expressed the desire to seek possession of their flats. The court indicated in its order that presently it was concerned with those home buyers who sought a refund while the grievances of those who wished to have possession of their flats would be considered at a subsequent stage. Since the order for the deposit of Rs. 2,000 crore had not been complied

with despite the end of the deadline under the previous directions, the court issued further directions. As agreed by the managing director of JAL, an instalment of Rs. 100 crore was to be deposited by 15th April, 2018 while a second instalment in the like amount was directed to be deposited by 10th May, 2018. The amicus curiae informed the court that information gathered from the web portal indicated that an amount of Rs. 1,300 crore was required to be refunded by way of principal alone to the home buyers who were seeking refunds. The amicus curiae was requested to submit a project-wise chart to the court, indicating the number of persons and the stage of completion. One of the grievances of the home buyers was that the developer was making demands towards monthly instalments despite being unable to complete construction. Consequently, a direction was issued restraining the developer from raising demands towards outstanding or future instalments in respect of those flat buyers who had expressed a desire to obtain refunds. By the order of this court, the IRP was permitted to finalise the resolution plan. However, the plan would, this court directed, be implemented only with its leave. The NCLT was permitted to decide the proceedings subject to the directions which were issued.

**17.** On 16th April, 2018, the court was apprised of the fact that JAL had deposited the first instalment of Rs. 100 crore. We may note at this stage, that JAL had submitted before the court that it should be permitted to participate as one of the intending bidders in the resolution plan which was being formulated by the IRP. Dealing with the submission, this court allowed JAL to submit a representation to the competent authority, though with the clarification that the court had not expressed any opinion on that issue. This court also directed that if the amount as directed was not deposited within the time specified, steps would be taken to attach the personal properties of the directors.

**18.** On 16th May, 2018, the court was apprised of the fact that an amount of Rs. 750 crore was deposited by JAL. A further direction was issued for the deposit of Rs. 1,000 crore by 15th June, 2018 subject to which, a stay was granted of further proceedings only insofar as the liquidation is concerned.

**19.** We may note at this stage that both in its earlier order dated 21st March, 2018 as well as in the subsequent order dated 16th May, 2018, this court had recorded the request of the home buyers for a pro-rata disbursement of the amount which was deposited by JAL. No direction for disbursement has been issued and the request was deferred for being considered.

**20.** On 13th July, 2018, certain proposals were made by JAL before this court for permission to alienate specific assets to secure compliance with the

interim directions of this court for deposit of Rs. 2,000 crore. This proposal was seriously opposed by counsel for the petitioners and home buyers, besides the financial institutions. Observing that the court was not inclined to entertain the proposals mooted by the JAL, the proceedings were directed to be listed on 16th July, 2018 “exclusively for the purpose of considering the issue of the rights of the home buyers and the capability of JAL and JIL to construct the projects”.

**21.** Section 12(1) of the IBC envisages that the CIRP has to be completed within a period of 180 days from the date of admission of the application. However, a window is provided to the resolution professional to seek an extension of a further period of 90 days upon a resolution from the CoC. The extension can be provided only once.

**22.** In the case of JIL, the period for completing the CIRP was to end on 6th February, 2018. Based on the approval of the CoC an extension of 90 days was sought and granted by the NCLT by an order dated 12th February, 2018. The extended period was to end on 12th May, 2018. During the course of the process, the IRP invited expressions of interest in pursuance of which ten applicants including JAL submitted resolution plans. The IRP had made it clear while inviting applications for expressions of interest that the resolution plan to be submitted by the applicants must protect the interests of home buyers and provide for expeditious completion of the work of construction. The bid submitted by JAL was found to be ineligible in view of the bar contained in Section 29A of the IBC and was not opened. Of the resolution plans submitted by nine resolution applicants, five were found not to be compliant with the IBC and were not presented to the CoC for consideration. After initial negotiations, a discussion took place with four resolution applicants, these being :

- (a) JSW Infrastructure Ltd. and IBC Knowledge Park Ltd. ('JSW-IBC');
- (b) Adani Infrastructure and Developers (P.) Ltd. ('Adani');
- (c) Lakshdeep Investments & Finance (P.) Ltd. along with Sh. Sudhir Valia and relatives ('Lakshdeep'); and
- (d) Cube Highways and Infrastructure Pte. Ltd., Kotak Investment Advisors Ltd. and I Squared Asia Advisors Pte Ltd. (,Cube-Kotak-I Squared,).

Subsequently JSW was found to be ineligible under Section 29A. Hence, the resolution plans of the remaining three applicants were taken up for consideration. Counsel for the IRP has drawn the attention of the court to the fact that none of the remaining three applicants proposed to bring in

any funds for refund of the amounts paid by the home buyers to JIL. At a meeting held on 9th April, 2018, the CoC decided to shortlist the resolution plan of Lakshdeep for negotiation. Lakshdeep submitted a resolution plan on 1st May, 2018 and a meeting of the CoC was scheduled on 7th May, 2018 to consider it under Section 30(4). In the meantime, in pursuance of the liberty granted by this court on 16th April, 2018, JAL submitted a representation on 6th May, 2018. The CoC considered the resolution plan of Lakshdeep and the representation of JAL. JAL was permitted to present its plan before the CoC. The resolution plan submitted by JAL was rejected as a result of the statutory bar contained in Section 29A and since it failed to convince the CoC of its ability to tie up funds for construction. The CoC resolved to put the resolution plan of Lakshdeep for voting on 8th May, 2018. However, when the plan was taken up, only 6 per cent of the votes cast were in favour of Lakshdeep, as against a three-fourth majority which was then needed under Section 30(4) (the present requirement is of two-thirds, following the amendment to the IBC which has taken effect from 6th June, 2018). Accordingly, the IRP informed the NCLT that no resolution plan was approved by the CoC within a period of 270 days which came to an end on 12th May, 2018.

**23.** The total financial debt due to the financial creditors on the date of the commencement of corporate insolvency (9th August, 2017) stood at Rs. 9,984.70 crore.

**24.** Section 33(1) of the IBC postulates that liquidation follows upon the rejection of a resolution plan :

“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."

In terms of the provisions of Section 33(1), where the resolution plan has been rejected under Section 31, the NCLT is required to pass an order for the liquidation of the corporate debtor.

**25.** During the course of the hearing, there has been a unanimity of opinion that the liquidation of JIL will not subserve the interests of the home buyers. The home buyers have made valuable investments by contributing hard earned monies in the hope of obtaining a roof over their heads. A home for the family is a basic human yearning. In diverse contexts it has been held by this court to be a part of the right to life, as a fundamental constitutional guarantee. All the counsel for the home buyers have earnestly appealed to the court to exercise its jurisdiction to ensure complete justice to the home buyers instead of leaving them to the mercy of a liquidation process. The court appreciates the substance in that plea, understanding at the same time, the need to abide by the discipline of the law.

**26.** Now, it is in this background that it would be necessary for the court to understand and evaluate the provisions of the IBC which have a bearing on the issue at hand. The IBC is intended to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner to achieve a maximisation of the value of the assets of such persons and to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. The enactment of the IBC has created a paradigm shift in the regulatory framework and processes governing corporate insolvency. The IBC reflects a fundamental change in the basic premise of a "debtor in possession" to a "creditor in possession". The resolution process is market driven. Resolution professionals are appointed or replaced by the CoC to conduct the entire process within 180 days, which can be extended for a further period of 90 days. A moratorium would operate during the process. Failure of the resolution process leads to liquidation. Primacy is given in the process to commercial decisions. The success of the process is contingent upon the competence of the IRP and the CoC. The responsibilities entrusted to the IRP include managing the affairs of the corporate debtor, engaging experts or professionals, constituting a CoC, preparation of an information memorandum, determination of the liquidation value and enterprise value, inviting expressions of interest, permitting resolution applicants to submit plans which would be placed before the CoC where the applicant is found to be eligible (Sections 17, 18, 20, 23, 25, 26, 29 and 30). The CoC comprises of all financial creditors and authorised representatives of certain categories

of persons and classes of creditors under Section 21(6) and Section 21(6A)(b). The CoC is responsible for approving crucial decisions and actions of the IRP, while managing the affairs of the corporate debtor under Section 28. The resolution plan approved by 66 per cent of the voting share in the CoC is submitted by the IRP to the NCLT for its approval. When the NCLT is satisfied that the plan approved by the CoC meets the requirement of Section 30(2) it will approve the plan, which will be binding on all stakeholders (Sections 21, 22, 24, 25, 27, 28 and 30).

#### **Protecting home buyers:**

27. The IBC, as it was originally enacted, did not contain an adequate recognition of the interests of home buyers in real estate projects. Home buyers are vital stakeholders. The process of corporate insolvency resolution directly impacts upon their rights and interests. Yet the IBC, as initially crafted, did not protect them. The concerns of the home buyers have been sought to be assuaged by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into force on 6th June, 2018. As a result of the Ordinance, home buyers are brought within the purview of financial creditors under the IBC.

The expressions “secured creditor” and “security interest” are defined in Section 3(30) and (31), thus :

- ‘(30) “secured creditor” means a creditor in favour of whom security interest is created;
- (31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person :

Provided that security interest shall not include a performance guarantee;’

The expression “financial creditor” is defined in Section 5(7), thus :

- ‘(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’.

The expression ‘financial debt’ is defined in Section 5(8), thus :

- ‘(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 –....

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

Explanation : For the purposes of this sub-clause, –

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);”

As a result of the amendment brought about in the definition of financial debt, amounts raised from allottees under real estate projects are deemed to be amounts “having a commercial effect of a borrowing”. Hence, outstandings to allottees in real estate projects are statutorily regarded as financial debts. Such allottees are brought within the purview of the definition of financial creditors.

**28.** Section 7 of the IBC creates a statutory right in favour of financial creditors to initiate the corporate resolution process. Section 7 reads, thus :

“7. Initiation of corporate insolvency resolution process by financial creditor. – (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government 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.”

Being financial creditors under the IBC, allottees in real estate projects necessarily constitute a part of the CoC. Section 21 contains provisions for the constitution of the CoC. Insofar as is material, Section 21 is extracted below :

“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....

(3) Subject to Sub-Sections (6) and (6A), 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.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility 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.

(6A) Where a financial debt –

- (a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;
- (b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) of Sub-Section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under Sub-Sections (6) and (6A)."

Financial creditors are entitled to a voting share proportionate to the extent of the financial debt owed. Regulation 16A contains provisions for the selection of an authorised representative to represent financial creditors in the class. Regulation 16A is in the following terms :

"16A. Authorised representative. – (1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class :

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorized representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

Clarification : The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional,

as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely :

<i>Number of creditors in the class</i>	<i>Fee per meeting of the committee (Rs)</i>
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.” (emphasis supplied)

The voting share of a creditor in a class is proportional to the financial debt together with interest at 8 per cent per annum.

On 13th July, 2018, a circular has been issued by the Insolvency and Bankruptcy Board of India to facilitate the process of appointing an authorised representative for classes of creditors governed by Section 21(6A)(b) of the IBC. Insofar as is material, the circular states, thus :

“2. Section 21(6A)(b) of the Code read with regulation 16A of the Regulations provide for a simplified mechanism of representation of financial creditors through authorised representatives, as detailed in para 1 above, and are, therefore, matters of procedure. It is necessary that an ongoing corporate insolvency resolution process, where creditors belonging to a class are otherwise not represented in the CoC, uses this simplified mechanism, irrespective of the stage of the process. The resolution professional, who exercises the powers and performs the duties as vested or conferred on the interim resolution professional under Section 23(2) of the Code, shall facilitate representation through authorised representative(s).

3. It is, accordingly, clarified that wherever the approval of resolution plan under regulation 39(3) of the Regulations is at least 15 days away, the

resolution professional shall expeditiously obtain, by electronic means, the choice of the insolvency professional from creditors in a class to act as the authorised representative of the class and proceed further in the manner as specified in regulation 16A of the Regulations.”

**The case of JAL:**

29. Mr. F S Nariman, learned senior counsel appearing on behalf of JAL tendered a note of submissions before this court seeking to explain the perspective of the developers. JAL is stated to be a public listed company with 5.57 lakh individual shareholders and fifteen directors (including eight independent directors and two nominee directors of lenders). In 2003, JAL was allotted rights for the construction of an expressway from NOIDA to Agra. A concession agreement was entered into with the Yamuna Expressway Industrial Development Authority. A special purpose vehicle, JIL was set up. Finance was obtained from a consortium of banks – IDBI Bank being the lead bank – against a partial mortgage of lands acquired in the NOIDA-Agra sector and a pledge of 51 per cent of the shareholding held by JAL. A housing plan was envisaged for the construction of real estate projects in two locations of the land acquired: 1,162 acres in Wish Town, NOIDA and 1,355 acres in Mirzapur. JAL has stated that it has still to provide possession to 21,532 home buyers. According to JAL :

“7. Till date :

- (i) Construction of 106 Towers (out of remaining 228 towers) – consisting of 11,336 units/flats is 50 per cent to 90 per cent complete, and
- (ii) Construction of 50 Towers consisting of 6,500 units is between 25 per cent to 50 per cent complete, and
- (iii) Construction of 72 Towers is less than 25 per cent complete.

On the basis of the above the expectation and undertaking is to accommodate approximately 500 home buyers out of the remaining 21,532 home buyers every single month starting July 2018.”

JAL has sought to assure that it would double the strength of existing workers for the construction of its projects. JAL has also stated that it would deposit post-dated cheques of Rs. 600 crore with the Registry of this court. However, this is subject to the condition that the court should allow it to dispose of “identified cement assets” including its cement plant at Rewa in Madhya Pradesh. In order to enable it to do so, JAL has sought a direction to the NCLT at Allahabad to decide the application filed before it for sanctioning a scheme of arrangement, propounded pursuant to a master restructuring

agreement signed and accepted by the 32 creditors. JAL seeks to continue the stay of liquidation proceedings against its deposit of post-dated cheques of Rs. 600 crore. JAL also seeks a stay on the direction of this court allowing the IRP to remain in management.

**30.** Having carefully considered the proposal submitted on behalf of JAL by Mr. F S Nariman, learned senior counsel we are not inclined to accept it. As we shall explain, accepting the proposal submitted on behalf of JAL would cause serious prejudice to the discipline of the IBC and would set at naught the salutary provisions of the statute. In order to enable the court to explain the position, a reference is necessary to the provisions of Section 29A of the IBC which reads as follows :

‘29A. Persons not eligible to be resolution applicant. – 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 wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
- (c) at the time of submission of the resolution plan 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 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, 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 :

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I : For the purposes of this proviso, the expression “related party” shall not include a financial entity, regulated by a

financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

**Explanation II :** For the purposes of this clause, where a resolution applicant 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 and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

- (d) has been convicted for any offence punishable with imprisonment –
  - (i) for two years or more under any Act specified under the Twelfth Schedule; or
  - (ii) for seven years or more under any law for the time being in force :

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment :

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

- (e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013) :

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

- (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 :

Provided that this clause shall not apply if a preferential transaction,

- undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;
- (h) has executed a 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 and such guarantee has been invoked by the creditor and remains unpaid in full or part;
- (i) is 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 I : 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 Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor :

Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II : For the purposes of this Section, “financial entity” shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely :

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);
- (d) an asset reconstruction company register with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (e) an Alternate Investment Fund registered with Securities and Exchange Board of India;
- (f) such categories of persons as may be notified by the Central Government.'

**31.** Parliament has introduced Section 29A into the IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states, thus :

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have

submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.” (emphasis supplied)

Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of bidder companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29A has now specified a list of persons who are not eligible to be resolution applicants.

**32.** Clauses (c) and (g) of Section 29A would operate as a bar to the promoters of JAL/JIL participating in the resolution process. Under clause (c), a person who at the time of the submission of the resolution plan has an account which has been classified a non-performing asset under the guidelines of the RBI or of a financial regulator is subject to a bar on participation for a stipulated period. Under clause (g), a person who 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 the IBC is prohibited from participating. The court must bear in mind that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a back-door entry to erstwhile managements in the CIRP. Section 30 of the IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29A will not be considered by the CoC :

“30. Submission of resolution plan. – .... (4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six 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 (Ord. 7 of 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 :

Provided also that the eligibility criteria in Section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.”

**33.** Mr. Anand Grover appearing on behalf of the home buyers has opposed the proposal submitted by JAL/JIL on the following grounds :

- (i) Loans given to JAL have been classified as non-performing assets which renders JAL ineligible as a resolution applicant/new promoter under Section 29A(b) of the IBC;
- (ii) In addition to Section 29A(b), JAL is also disqualified under Section 29A(g) of IBC. Section 29A(g) provides that a person who is engaged in a fraudulent transaction should not be allowed to bid for another company as such a person may again engage in fraudulent transactions. In May 2018, the NCLT, Allahabad set aside a fraudulent transaction involving a mortgage of around 750 acres of JIL’s land in favour of the lenders of JAL. This mortgage was without any consideration and the land of 750 acres may be worth INR 5,000 crore. The matter is now before the NCLAT, which has specifically framed an issue in this regard;
- (iii) The RBI is already before this court seeking initiation of insolvency proceedings against JAL. JAL’s proposal, although presented under the garb of protecting the interest of home buyers, is aimed at the twin benefits of avoiding insolvency of JAL and regaining control of JIL, thereby defeating RBI’s application for insolvency proceedings of JAL as well as Section 29A of IBC;
- (iv) The reasons pleaded by JAL/JIL to excuse their failure to complete the housing projects such as the stay order granted by the National Green Tribunal have been rejected by orders of the National Consumer Disputes Redressal Commission as there was no stay. One such order was passed by the NCDRC on 2nd May, 2016, in Developers

Township Property Owners Welfare Society v. Jaiprakash Associates Ltd. (Consumer Case No. 1479 of 2015);

- (v) The contention of JAL that they faced impediments on account of the purported stay imposed by the NGT is patently incorrect as the stay by the NGT was only on handing over possession without an occupation certificate, which had no bearing on the construction. Moreover, JAL carried out construction during that period as is evidenced, *inter alia*, by the fact that they raised demands for construction linked payments during this period;
- (vi) During the pendency of the CIRP from 9th August, 2017, construction work was done under the aegis of the IRP under whom JAL was a mere contractor;
- (vii) The claim by JAL that flats have been delivered is a fractured claim as flats have been delivered in incomplete stages and are not in accordance with the allotment letters. The flooring is not complete, doors and windows are missing, no objection certificates have not been obtained from the Fire Department and the offer of possession is being made without the occupation certificate;
- (viii) JAL does not have the capacity to deliver the flats and 22,000 home buyers are suffering due to delays of more than four years in completion of various projects of JAL and JIL;
- (ix) Under the contracts, JAL and JIL are jointly and severally liable to deliver the flats. If JAL was serious about delivering the flats, the present situation would not have arisen. Further, JAL would have avoided the insolvency process of JIL and would not have cast the home buyers to the uncertainties of insolvency;
- (x) There are serious doubts about the credentials of JAL which has diverted funds from JIL towards its other businesses. The applicant-associations had appointed ASA Financial Services to conduct an audit of JIL's financials and the audit report demonstrates that JAL may have diverted more than INR 10,000 crore from JIL;
- (xi) JAL is undergoing a serious financial crisis. This is clear from the following facts :
  - (a) JAL has not yet honoured the order of this court asking it to deposit Rs. 2,000 crore for protection of the interest of the home buyers. JAL has paid only Rs. 750 crore out of Rs. 2,000 crore, after the expiry of almost 10 months from 11th September, 2017 which was the date of the initial order of this court;

- (b) JAL has failed to pay even the latest instalment of Rs. 1,000 crore by 15th June, 2018 in accordance with the order of this court dated 16th May, 2018;
- (c) JAL is a defaulter of more than 30 banks to the extent of around Rs. 30,000 crore. JAL has also defaulted on fixed deposits, foreign currency convertible bonds and payments to Noida Authority;
- (d) Even in the latest proposal, the proposal to deposit Rs. 600 crore is spread over time indicating that JAL has no resources; and
- (e) The proposal of doubling the strength of workers from 4,000 to 8,000 would only mean doubling the strength from 17 workers per tower to 35 workers per tower (228 towers to be built by 8,000 workers). This would amount to 2 workers in each floor of 4 flats (21,532 flats in 228 towers by 8,000 workers). At this rate, completion of flats may take several years.

**34.** Similar submissions have been urged on behalf of the home buyers by other learned counsel.

**35.** The bar under Section 29A would preclude JAL/JIL from being allowed to participate in the resolution process. Moreover, the facts which have been drawn to the attention of the court leave no manner of doubt that JAL/JIL lack the financial capacity and resources to complete the unfinished projects. To allow them to participate in the process of resolution will render the provisions of the Act nugatory. This cannot be permitted by the court.

**36.** But it has been submitted on behalf of JAL/JIL by Mr. F S Nariman, learned senior counsel that with the expiry of the time lines prescribed in the IBC for the CIRP, the only option that would now remain is to liquidate the corporate debtor. Mr. Nariman submitted that liquidation is not in the interest of the home buyers. In that event, in his submission, the only way out would be to obviate the consequence of liquidation by envisaging an arrangement outside the provisions of the IBC and not under it. It has been submitted that an ongoing project which has provided over 11,200 homes to home buyers in 79 towers should not, as far as possible, be stopped midway since that would affect the interests of the remaining 21,532 buyers who await possession. Their rights, it has been urged, are recognised and preserved under the RERA. Mr. Nariman submitted that unless a group of independent professionals, to be appointed by this court, comes to a conclusion that it is not financially viable at all for JIL/JAL to complete the

remaining work in a time bound manner, their role as developers should not be discounted. Hence, it has been submitted that an independent committee of experts should be constituted by this court to evaluate the financial capability of JAL/JIL to continue executing the ongoing projects. In this background it has also been submitted that following the opening of the web portal under the directions of the court, only 8 per cent of the home buyers have opted for refunds while 92 per cent have chosen not to claim refunds thereby implying a confidence in the ability of JIL/JAL to complete the project. JIL, it has been submitted, has assets valued at Rs. 17,116 crore by bank valuers to whom they were submitted as security and even the distress value is Rs. 14,548 crore. Mr. Nariman submitted that among the two sets of financial creditors of JIL and JAL :

- (i) the creditors of JIL are headed by IDBI Bank apart from which there are 12 other banks in the consortium;
- (ii) the financial creditors of JAL await formal orders of the NCLT to the scheme of arrangement which has been agreed to by all its 32 creditors under a master restructuring arrangement.

**37.** We may note at this stage that counsel appearing on behalf of the home buyers have uniformly opposed the proposal of JIL/JAL. The home buyers have urged before this court that they have no confidence in the ability of either JIL or JAL to complete the outstanding projects. The home buyers have urged that they have been left in the lurch by the developers who have miserably failed to fulfil their contractual obligation by allotting flats on time.

**38.** On behalf of the IRP, Mr. Parag Tripathi, learned senior counsel submitted that essentially, the court has two options before it. The first option would be to revive the process of corporate insolvency by extending the time period of 270 days specified in the IBC in order to enable fresh consideration to be made of the prospect for a resolution which would now have take into account the interests of the home buyers under the amended IBC. The second option would, it was urged, be for this court, in the exercise of its jurisdiction under Article 142 to appoint a Committee under its directions and supervision. The Committee would explore the possibility of a resolution which would obviate the need for the liquidation of the corporate debtor. The second option which has been proposed by learned senior counsel for the IRP forms the basis of the additional submissions tendered by Mr. Nariman. As we have noted, Mr. Nariman urged that on the expiry of the time lines prescribed in the IBC for the completion of the resolution process the only available alternative is to proceed outside the provisions of the IBC.

**39.** In considering the rival submissions, several important facets of the case

need to be underscored. First and foremost, the CIRP was initiated on 9th August, 2017, following the order of the NCLT admitting the proceedings. The period of 180 days for concluding the CIRP came to an end on 6th February, 2018 and the extended period ended on 12th May, 2018. When the CIRP was initiated and until the period of 270 days concluded, the home buyers did not have the status of financial creditors under the provisions of the IBC. They had no statutory voting rights in the CoC. Under the interim directions of this court, a workable arrangement was sought to be put into place by appointing a representative of the home buyers on the CoC to facilitate their interests being duly borne in mind. But the point to be noted is that in the absence of a statutory recognition of the position of the home buyers as financial creditors, the law did not allow for real and substantive entitlements to them in the CoC. These statutory entitlements have been brought in by the Ordinance in order to recognise the vital interests of the home buyers in a real estate project and to allow them a statutory status in the insolvency resolution process. Unfortunately by the time that the Ordinance came into being on 6th June, 2018, the period of 270 days had expired; the resolution plan of Lakshdeep was rejected and the IRP informed NCLT that no resolution plan had been approved within the extended period of 270 days on 12th May, 2018. Having regard to the material change which has been brought about by the amendment of the IBC by the Ordinance and the fact that this court has been in seisin of the proceedings to ensure that the home buyers are protected, we are of the view that it is but appropriate and to do complete justice to secure the interests of all concerned that the CIRP should be revived and CoC reconstituted as per the amended provisions to include the home buyers. In the facts of the present case, recourse to the power under Article 142 would be warranted to render complete justice. Parliament has undoubtedly provided a period of 180 days and an extended period of 90 days to complete the process. But in the present case a peculiar situation has arisen as a result of which the status of the home buyers which had not been recognised prior to 6th June, 2018 has now been expressly recognised as a result of the amending Ordinance. Learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the home buyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this court should follow the discipline of the IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The Legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The court should not take upon itself the burden of supervising the intricacies

of the resolution process. Accepting the suggestion of Mr. Nariman (and one of the two options proposed by Mr. Tripathi) of the court appointing a Committee to supervise the resolution process outside the IBC will involve the court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms. We are emphatically of the view that it would not be appropriate for the court to appoint a Committee to oversee the CIRP and assume the task of supervising the work of the Committee. We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions. Such a course of action would in our view not be consistent with the need to ensure complete justice under Article 142, under the regime of law. Hence, the power under Article 142 should be utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated 9th August, 2017 and resultantly renew the period which has been prescribed for the completion of the resolution process. We have furnished above, the reasons for doing so. Chief amongst them is the fact that in the present case the period of 270 days expired before the Ordinance conferring a statutory status on home buyers as financial creditors came into existence. In the circumstances, it would be necessary to revive the period prescribed by the statute by another 180 days commencing from the date of this order. During this period, the IRP shall follow the provisions of the IBC afresh in all respects. A new CoC should be constituted in accordance with the amended provisions of the IBC to enforce the statutory status of the allottees as financial creditors. We also clarify that apart from the three bidders whose bids were found to be eligible by the IRP, it would be open to the IRP to invite fresh bids to facilitate a wider field of choice before the CoC. In that process, the offers made by the intervenors in this proceeding can also be considered by CoC anew. We are not inclined to evaluate the merits of the bids submitted by the bidders who were left in the fray, two of whom have intervened. All bids must follow the discipline of the IBC. We have, however, not accepted the submission to allow JIL or JAL and the erstwhile promoters to participate in the process. Their participation is expressly prohibited by Section 29A and we decline to make any exception which would breach a salutary and express provision made in the IBC.

**40.** As we have stated earlier, an amount of Rs. 750 crore is lying in deposit before this court pursuant to the interim directions, on which interest has accrued. The home buyers have earnestly sought the issuance of interim directions to facilitate a pro-rata disbursement of this amount to those of the home buyers who seek a refund. We are keenly conscious of the fact

that the claim of the home buyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason. Firstly, during the pendency of the CIRP, it would as a matter of law, be impermissible for the court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. For the present, we leave open the question as to whether the home buyers are unsecured creditors (as was urged by Mr. Tripathi) or secured creditors (as was urged by counsel appearing for them). Directing disbursement of the amount of Rs. 750 crore to the home buyers who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors. Once we have taken recourse to the discipline of the IBC, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process. Secondly, the figures which have been made available presently, following the opening of the web portal by the amicus curiae, indicate that 8 per cent of the home buyers have sought a refund of their monies while 92 per cent would evidently prefer possession of the homes which they have purchased. We cannot be unmindful of the interests of 92 per cent of the home buyers many of whom would also have obtained loans to secure a home. They would have a legitimate grievance if the corpus of Rs. 750 crore (together with accrued interest) is distributed to the home buyers who seek a refund. The purpose of the process envisaged by the IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC. Thirdly during the course of the hearing, the court has been apprised of the concerns of the secured creditors, chief among them being the IDBI Bank Ltd. In its submissions before this court, IDBI Bank has emphasised that one of the major reasons for the enactment of the IBC was to protect the interest of lenders. The debt owing to the banks and financial institutions has been secured by the assets of JIL, to protect their interests. This debt originates in the public deposits of the banks and financial institutions, who are answerable to their stakeholders. Fourthly, the RBI has moved this court for permission to initiate an insolvency resolution process. Parliament enacted the Banking Regulation (Amendment) Act, 2017 by introducing Section 35AA and Section 35AB into the Banking Regulation Act, 1949. The amendment empowers the Central Government to authorise RBI to issue directions to any banking company to initiate an insolvency resolution process in respect of a default as understood under

the IBC. Such an order was issued by the Central government on 5th May, 2017. The RBI constituted an Internal Advisory Committee ('IAC') consisting primarily of its independent directors. The IAC took up for consideration accounts which were classified either partly or wholly non-performing from amongst the top 500 exposures in the banking system as on 31st March, 2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstandings exceeding Rs. 5,000 crore. The IAC has initially taken up twelve accounts involving total exposure of Rs1,79,769 crore. JIL was one of the twelve accounts in respect of which directions have been issued to banks for initiating insolvency resolution. Subsequently, the IAC recommended that in respect of those accounts where 60 per cent or more had been classified as NPAs as on 30th June, 2017, banks may be directed to implement a viable resolution plan within six months failing which the accounts may be directed for a reference under the IBC by 31st December, 2017. JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP. RBI has carried out this exercise as a matter of economic policy in its capacity as the prime banking institution in the country, entrusted with a supervisory role, and the power to issue binding directions. The position of the RBI as an expert regulatory body particularly in matters of economic and financial policy has been reiterated in several decisions of this court – R K Garg v Union of India [1981] 4 SCC 675 at para 19, Peerless General Finance & Investment Co. Ltd. v. RBI, [1992] 2 SCC 343 at para 31, T N Generation & Distribution Corpn. Ltd. v. CSEPCI-Trishe Consortium [2017] 4 SCC 318 at para 36.

**41.** JAL was classified under the SMA-II category (demands overdue for more than 60 days) by banks as early as on 3rd October, 2014 and as an NPA since 31st March, 2015. We agree with the submission of the RBI that any further delay in resolution would adversely impact a viable resolution being found for JAL and JIL. The facts which have emerged before the court from the application filed by the RBI clearly indicate the financial distress of JAL and JIL. The apprehensions of the home-buyers in regard to their financial incapacity is borne out by RBI, as a responsible institution has urged before the court. The IBC has been enacted in the form of a comprehensive bankruptcy law and with a specific legislative intent. With the amendment brought about by the Ordinance promulgated in June 2018, the interests of the home buyers have been sought to be safeguarded. Accordingly, we accede to the request made on behalf of the RBI to allow it to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC.

**42.** We, accordingly, issue the following directions :

- (i) In exercise of the power vested in this court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;
- (ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors";
- (iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;
- (iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;
- (v) RBI is allowed, in terms of its application to this court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;
- (vi) The amount of Rs. 750 crore which has been deposited in this court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT.

**43.** We see no reason to keep these proceedings pending before the court any further. The proceedings shall stand disposed of. However, we grant liberty to all concerned parties to adopt appropriate proceedings in accordance with law, should it become necessary to do so in future. Applications, if any, pending are also disposed of.

.....**CJI**

**[DIPAK MISRA]**

.....**J**

**[A M KHANWILKAR]**

.....**J**

**[Dr D Y CHANDRACHUD]**

New Delhi;

**August 09, 2018**

**ANNEXURE X.32****REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3595 OF 2018

STATE BANK OF INDIA ...APPELLANT

VERSUS

V. RAMAKRISHNAN & ANR. ...RESPONDENTS

WITH

CIVIL APPEAL NO. 4553 OF 2018

**JUDGMENT**

R.F. NARIMAN, J.

- 1.** The present appeals revolve around whether Section 14 of the Insolvency and Bankruptcy Code, 2016, which provides for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor.
- 2.** The factual backdrop of the present appeals is that the Respondent No.1 is the Managing Director of the corporate debtor, 1namely, the Respondent No.2 Company, and also the personal guarantor in respect of credit facilities that had been availed from the Appellant. The Guarantee Agreement entered into between the Appellant and the Respondent No.1 is dated 22.02.2014.
- 3.** As the Respondent No.2 Company did not pay its debts in time, the account of Respondent No.2 was classified as a non-performing asset on 26.07.2015. Consequent thereto, the Appellant issued a notice dated 04.08.2015 under Section 13(2) of the SARFAESI Act demanding an outstanding amount of Rs.61,13,28,785.48 from the Respondents within the statutory period of 60 days. As no payment was forthcoming, a possession notice under Section 13(4) of the SARFAESI Act was issued on 18.11.2016.
- 4.** As matters stood thus, an application was filed by Respondent No.2, the corporate debtor, under Section 10 of the Code on 20.05.2017 to initiate the corporate insolvency resolution process against itself. On 19.06.2017, this petition filed under Section 10 was admitted, followed by the moratorium that is imposed statutorily by Section 14 of the Code. While the said proceedings

were pending, an interim application was filed by Respondent No.1 as personal guarantor to the corporate debtor, in which Respondent No.1 took up the plea that Section 14 of the Code would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to be stayed. The National Company Law Tribunal, by its order dated 18.09.2017, held that since under Section 31 of the Code, a Resolution Plan made thereunder would bind the personal guarantor as well, and since, after the creditor is proceeded against, the guarantor stands in the shoes of the creditor, Section 14 would apply in favour of the personal guarantor as well. The interim application filed by Respondent No.1 was thus allowed, and the Appellant was restrained from moving against Respondent No.1.

**5.** An appeal filed to the National Company Law Appellate Tribunal resulted in the appeal being dismissed. By the impugned judgment dated 28.02.2018, the Appellate Tribunal relied upon Section 60(2) and (3) of the Code as well as Section 31 of the Code to find that the moratorium imposed under Section 14 would apply also to the personal guarantor. The reasoning was that since the personal guarantor can also be proceeded against, and forms part of a Resolution Plan which is binding on him, he is very much part of the insolvency process against the corporate debtor, and that, therefore, the moratorium imposed under Section 14 should apply to the personal guarantor as well.

**6.** Shri Sanjay Kapur, learned counsel appearing on behalf of the Appellant in C.A. No. 3595 of 2018, and Shri C.U. Singh, learned Senior Advocate appearing on behalf of Appellant in C.A. No. 4553 of 2018, both argued that the corporate debtor and personal guarantor are separate entities and that a corporate debtor undergoing insolvency proceedings under the Code would not mean that a personal guarantor is also undergoing the same process. As the guarantor's liability is distinct and separate from that of the corporate debtor, a suit can be maintained against the surety, though the principal debtor has not been sued. For this purpose, they relied upon Section 128 of the Indian Contract Act, 1872. They also relied heavily upon the reasoning contained in a judgment by a Single Judge of the Bombay High Court in **M/s. Sicom Investments and Finance Ltd. v. Rajesh Kumar Drolia and Anr.**<sup>1</sup> They then referred to Part III of the Code, and in particular, to Sections 96 and 101. Although Part III of the Code has not been brought into force, it is clear that if an insolvency resolution process is to be carried out against a personal guarantor, it can be done only under Part

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<sup>1</sup> (2017) SCC Online Bom 9725 (decided on 28.11.2017).

III, which contains a separate moratorium provision, namely, Sections 96 and 101, both of which would attach only if a separate insolvency process were carried out as against the personal guarantor. Shri Singh, in particular, relied heavily upon the difference in language between Section 14 and Section 101. According to the learned senior counsel, Section 14, in all its sub-sections, speaks only of the corporate debtor. When contrasted with Section 101, it becomes clear that Section 14 cannot possibly attach to a personal guarantor as well, as Section 101 does not speak of a 'debtor' but speaks 'in relation to the debt' and is not only wider than Section 14, but would attach only if Part III proceedings were to be instituted against the personal guarantor. They also relied heavily upon the Amendment Ordinance dated 06.06.2018, by which Section 14(3) of the Code was substituted, including a surety in a contract of guarantee to a corporate debtor. They relied upon the Insolvency Law Committee proceedings, which led to the aforesaid amendment, stating that it had been recommended to clarify, by way of an explanation, that all assets of such guarantors to the corporate debtor shall be outside the scope of the moratorium imposed under the Code. The very impugned judgment in the present proceedings was referred to by the Insolvency Law Committee stating that such a broad interpretation of Section 14 would curtail significant rights of the creditor. They relied upon judgments which made it clear that clarificatory statutes, like this amendment, would have retrospective operation and that, therefore, in any case, the impugned judgment would have to be set aside.

7. Learned counsel appearing on behalf of the Respondents first took shelter under Section 60(2) of the Code, as according to the learned counsel, the said Section precludes the bank from proceeding against the personal guarantor under SARFAESI or any other Act outside the Code. He relied upon the reasoning of the Tribunal and took shelter under Section 31, as did the Tribunal. He also relied upon a judgment of the Allahabad High Court in **Sanjeev Shriya v. State Bank of India and Ors.**,<sup>2</sup> which stated that as a proceeding relatable to the corporate debtor is pending adjudication in two forums, it is not permissible to proceed against the personal guarantor. A financial creditor cannot operate in a manner that imperils the value of the property of the personal debtor. He also relied strongly upon the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which came into effect on 23.11.2017, by which, clause (e) of Section 2 was substituted so as to include within the sweep of the Code, personal guarantors to corporate debtors. He then relied upon the Statement of Objects of the Amendment

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2. (2018) 2 All LJ 769 (decided on 06.09.2017).

Act, 2018, which was, *inter alia*, to extend the provisions of the Code to personal guarantors of corporate debtors, to further strengthen the corporate insolvency resolution process. He then relied upon certain statutory forms which are contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and in particular, to Annexure VI(e) to Form 6. Regulation 36(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also provides, as did Annexure VI(e), that information as to personal guarantees have to be given in relation to the debts of the corporate debtor when an insolvency process is initiated against the corporate debtor. All this would show that since the personal guarantor is very much part of the overall process, the moratorium contained in Section 14 of the Code should apply to the personal guarantor as well.

**8.** We appointed Shri K.V. Viswanathan, learned Senior Advocate, to assist us as *Amicus Curiae* in this matter. We thank him for the valuable assistance that he has rendered. He has pointed out that the whole idea of the Insolvency Code was that the history of debt recovery had shown that the earlier statutes were loaded heavily in favour of corporate debtors and that, as a result, huge outstanding debts to banks and financial institutions had not been repaid. In particular, he pointed out Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and stated that as a result of the said Section applying to guarantors as well, creditors could not proceed against guarantors as well after the company had been declared sick under the said Act, without permission from the Board for Industrial and Financial Reconstruction. Now that the said Act has been repealed, and the fact that several later enactments, including the Companies Act, 2013 had omitted a provision akin to Section 22, would show that the enactment of Section 14 of the Code was deliberate, and that the idea was that there should be no stay of proceedings against the guarantor while the corporate debtor is undergoing an insolvency proceeding. For this, he cited various judgments. He also relied upon the Amendment Act, 2018 and stated that since the Act was to get over the appellate judgment in particular, and since it was clarificatory, the position in law would be that it would be retrospective, and would thus govern the case at hand.

**9.** Before dealing with the arguments of learned counsel on both sides, it is important at this stage to set out some of the provisions of the Code. One difficulty that we faced when hearing the matter was that different provisions of the Code were brought into force on different dates, as Section 1(3) indicates. Also, certain important provisions of the Code have not yet been brought into force. This we will advert to a little later in our judgment.

**10.** Section 2(e) of the Code, as originally enacted, reads as under:

“2. Application.— The provisions of this Code shall apply to—

xxx                           xxx                           xxx

(e) partnership firms and individuals; xxx xxx xxx”

By the Amendment Act, 2018, this Section was substituted as follows:

“2. Application.— The provisions of this Code shall apply to—

xxx                           xxx                           xxx

(e) personal guarantors to corporate debtors; xxx xxx xxx”

Though the original Section 2(e) did not come into force at all, the substituted Section 2(e) has come into force w.e.f. 23.11.2017.

**11.** Section 3(7), (8) and (11) of the Code read as under:

“3. Definitions.— In this Code, unless the context otherwise requires,—

(7) “corporate person” means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

(8) “corporate debtor” means a corporate person who owes a debt to any person;”

xxx                           xxx                           xxx

“(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;”

**12.** Section 5(8)(i) of the Code reads as follows:

“5. Definitions.— In this Part, unless the context otherwise requires,—

xxx                           xxx                           xxx

(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—

xxx                           xxx                           xxx

(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;

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**13. Section 5(22) of the Code read as follows:**

"5. Definitions.— In this Part, unless the context otherwise requires,—

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(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor;"

**14. Sections 14, 31, 60, 95, 101, 238, 243, and 249 of the Code read as under:**

"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 (54 of 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.”

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“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.”

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“60. Adjudicating Authority for corporate persons.— (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.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a

personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(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.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 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."

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"96. Interim-moratorium.—(1) When an application is filed under Section 94 or Section 95—

- (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and
- (b) during the interim-moratorium period—
  - (i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and
  - (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(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.”

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“101. Moratorium.— (1) When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium period—

- (a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and
- (c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

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

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“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.”

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“243. Repeal of certain enactments and savings. – (1) The Presidency-Towns Insolvency Act, 1909 (3 of 1909) and the Provincial Insolvency Act, 1920 (5 of 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 (10 of 1897) with regard to the effect of repeal of the repealed enactments or provisions of the enactments mentioned in the Schedule.”

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“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.”

**15.** The first important thing that needs to be noticed is that, as has been stated earlier in this judgment, Part III of the Code has not yet been brought into force. This part is entitled “Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms”. The repealing provision, namely Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, has also not been brought into force. Section 249, which amends the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, so that the Debt Recovery Tribunals under that Act can exercise the jurisdiction of the Adjudicating Authority conferred by the Code, has also not been brought into force.

**16.** Under Part II of the Code, which deals with “Insolvency Resolution and Liquidation for Corporate Persons”, a financial creditor or a corporatedebtor may make an application to initiate this process. Once initiated, the Adjudicating Authority, after admission of such an application, shall by order, declare a moratorium for the purposes referred to in Section 14 (See Section 13 of the Code).

**17.** Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

**18.** However, Sections 2(e) and Section 60 are strongly relied upon by learned counsel for the Respondents as, according to them, the Code will apply to personal guarantors of corporate debtors, and by Section 60, proceedings against such personal guarantors will show that such moratorium extends to the guarantor as well.

**19.** We are afraid that such arguments have to be turned down on a careful reading of the Sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of said enactments, has not been notified till date, 20and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals.

**20.** It is for this reason that sub-section (2) of Section 60 speaks of an application relating to the “bankruptcy” of a personal guarantor of a corporate debtor and states that any such bankruptcy proceedings shall be filed only before the National Company Law Tribunal. The argument of the learned counsel on behalf of the Respondents that “bankruptcy” would include SARFAESI proceedings must be turned down as “bankruptcy” has reference only to the two Insolvency Acts referred to above. Thus, SARFAESI proceedings against the guarantor can continue under the SARFAESI Act. Similarly, sub-section (3) speaks of a bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any Court or Tribunal, which shall stand transferred to the Adjudicating Authority dealing with the insolvency resolution process or liquidation proceedings of such corporate debtor. An “Adjudicating Authority”, defined under Section 5(1) of the Code, means the National Company Law Tribunal constituted under the Companies Act, 2013.

**21.** The scheme of Section 60(2) and (3) is thus clear - the moment there is a proceeding against the corporate debtor pending under the 2016 Code,

any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018.

**22.** Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.

**23.** We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a

personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor - often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in State of Kerala and Ors. v. Mar Appraem Kuri Co. Ltd. and Anr., (2012) 7 SCC 106, that a law '*made*' by the Legislature is a law on the statute book even though it may not have been brought into force. The said judgment states:

"79. The proviso to Article 254(2) provides that a law *made* by the State Legislature with the President's assent shall not prevent Parliament from *making* 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 a State Legislature.

Thus, Parliament need not wait for the law made by the State Legislature with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any State legislation, which has received the President's assent, overriding within the State's territory, an earlier parliamentary enactment in the concurrent sphere, *before it is brought into force*. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented-to State law is

brought into force. This view finds support in the judgment of this Court in *Tulloch* [AIR 1964 SC 1284 : (1964) 4 SCR 461].

80. Lastly, the definitions of the expressions “*laws in force*” in Article 13(3)(b) and Article 372(3) Explanation I and “existing law” in Article 366(10) show that the laws in force include laws passed or *made* by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression “*laws in force*” in Article 13(3)(b) and Article 372(3) Explanation I and the definition of the expression “existing law” in Article 366(10) demolish the argument of the State of Kerala that a law has not been *made* for the purposes of Article 254, unless it is enforced. The expression “existing law” finds place in Article 254. In *Edward Mills Co. Ltd. v. State of Ajmer* [AIR 1955 SC 25], this Court has held that there is no difference between an “existing law” and a “law in force”.

81. Applying the tests enumerated hereinabove, we hold that the Kerala Chitties Act, 1975 became void on the making of the Chit Funds Act, 1982 on 19-8-1982, [when it received the assent of the President and got published in the Official Gazette] as the Central 1982 Act intended to cover the entire field with regard to the conduct of the chits and *further* that the State Finance Act 7 of 2002, introducing Section 4(1)(a) into the State 1975 Act, was void as the State Legislature was denuded of its authority to enact the said Finance Act 7 of 2002, except under Article 254(2), after the(Central) Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution.”

**24.** Thus, for the purpose of interpretation, it is certainly open for us to contrast Section 14 with Sections 96 and 101, as Sections 96 and 101 are laws made by the Legislature, even though they have not yet been brought into force.

**25.** As argued by Shri Viswanathan, the historical background of the Code now needs to be looked at. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 reads as follows:

“22. Suspension of legal proceedings, contracts, etc.—(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association

of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed [in pursuance of any scheme sanctioned under Section 18] notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—

- (a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
- (b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) [Where an inquiry under Section 16 is pending or any scheme referred to in Section 17 is under preparation or during the period] of consideration of any scheme under Section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in

the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,—

- (a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and
- (b) on the declaration ceasing to have effect—
  - (i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and
  - (ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded. It will be clear from a reading of sub-section (1) thereof that suits for the enforcement of any guarantee in respect of loans or advances granted to the industrial company, shall not lie or be proceeded with further, except with the consent of the Board or Appellate Authority. It may be noted that the Sick Industrial Companies (Special Provisions) Act, 1985 was repealed on 01.12.2016. By a notification dated 30.11.2016, Section 14 of the Code was brought into force w.e.f. 01.12.2016. In Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors., (2016) 4 SCC 1, this Court found:

“40. An interesting pointer to the direction Parliament has taken after enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is also of some relevance in this context. The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were

recommended for winding up, and 626 cases were dismissed as not maintainable.

These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985.

The Committee further pointed out that effectiveness of the Sick Industrial Companies (Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (See Paras 5.8, 5.9 and 5.15 of the Report.) Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself.

41. Pursuant to the Eradi Committee Report, the Companies Act was amended in 2002 by providing for the constitution of a National Company Law Tribunal as a substitute for the Company Law Board, the High Court, BIFR and AAIFR. The Eradi Committee Report was further given effect to by inserting Sections 424-A to 424-H into the Companies Act, 1956 which, with a few changes, mirrored the provisions of Sections 15 to 21 of the Sick Industrial Companies (Special Provisions) Act, 1985. Interestingly, the Companies Amendment Act, 2002 omitted a provision similar to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Consequently, creditors were given liberty to file suits or initiate other proceedings for recovery of dues despite pendency of proceedings for the revival or rehabilitation of sick companies before the National Company Law Tribunal.

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43. Close on the heels of the amendment made to the Companies Act came the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. This particular Act was meant to repeal the Sick Industrial Companies (Special Provisions) Act, 1985 consequent to some of its provisions being telescoped into the Companies Act. Thus, the Companies Amendment Act, 2002 and the SICA Repeal Act formed part of one legislative scheme, and neither has yet been brought into force. In fact, even the Companies Act, 2013, which repeals the Companies Act, 1956, contains Chapter 19 consisting of Sections 253 to 269 dealing with revival and rehabilitation of sick companies along the lines of Sections 424-A to 424-H of the amended Companies Act, 1956. Conspicuous by its absence is a provision akin to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act,

1985 in the 2013 Act. However, this Chapter is also yet to be brought into force. These statutory provisions, though not yet brought into force, are also an important pointer to the fact that Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been statutorily sought to be excluded, Parliament veering around from wanting to protect sick industrial companies and rehabilitate them to giving credence to the public interest contained in the recovery of public monies owing to banks and financial institutions. These provisions also show that the aforesaid construction of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 vis-a-vis the Sick Industrial Companies (Special Provisions) Act, 1985, leans in favour of creditors being able to realise their debts outside the court process over sick industrial companies being revived or rehabilitated. In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV.14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011-2012 was Rs 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least.

44. It will, thus, be seen that notwithstanding the non obstante clauses in Sections 22(1) and (4), read with Section 32, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will have to give way to the measures taken under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, more particularly referred to in Section 13 of the said Act, and that this being

the case, the sale notices issued both in 2003 and 2013 could continue without in any manner being thwarted by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.” (emphasis supplied)

It is thus clear that for this reason also, it is obvious that Parliament, when it enacted Section 14, had this history in mind and specifically did not provide for any moratorium along the lines of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 in Section 14 of the Code.

**26.** The reasoning of the Bombay High Court in the judgment of M/s. Sicom Investments and Finance Ltd. (*supra*) commends itself to us. The reasoning of the Allahabad High Court, on the other hand, does not.

**27.** We now come to the argument that the amendment of 2018, which makes it clear that Section 14(3), is now substituted to read that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amended Section reads as follows:

“14. Moratorium.—

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(3) The provisions of sub-section (1) shall not apply to—

- (a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
- (b) a surety in a contract of guarantee to a corporate debtor.”

**28.** The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26.03.2018, made certain key recommendations, one of which was:

- “(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-a-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;”

The Committee insofar as the moratorium under Section 14 is concerned, went on to find:

“5.5 Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate debtor and its assets.

There have been contradicting views on the scope of moratorium

regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that Section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.”

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“5.7 The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya v. State Bank of India*, 2017 (9) ADJ 723, by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor’s liability may not be triggered. The Committee deliberated and noted that this would mean that surety’s liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.

5.8 In *State Bank of India v. V Ramakrishnan and Veeson Energy Systems*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017 [Date of decision - 28 February, 2018], the NCLAT took a broad interpretation of Section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.”

5.9 A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety [*National Project Construction Corporation Limited v. Sandhu and Co.*, AIR 1990 P&H 300]. The surety here may be a corporate or a natural person and the liability of such person goes as far as the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence [*Chokalinga Chettiar v. Dandayunthapani Chettiar*, AIR 1928 Mad 1262]. Though this may be limited by the terms of the contract of

guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several [*Bank of Bihar v. Damodar Prasad*, AIR 1969 SC 297]. The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only."

**29.** The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments:

**(i) CIT v. Shelly Products, (2003) 5 SCC 461:**

"38. It was submitted that after 1-4-1989, in case the assessment is

annulled the assessee is entitled to refund only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. But before the amendment came into effect the position in law was quite different and that is why the legislature thought it proper to amend the section and insert the proviso. On the other hand learned counsel for the Revenue submitted that the proviso is merely declaratory and does not change the legal position as it existed before the amendment. It was submitted that this Court in *CIT v. Chittor Electric Supply Corp* [(1995) 2 SCC 430 : (1995) 212 ITR 404] has held that proviso (a) to Section 240 is declaratory and, therefore, proviso (b) should also be held to be declaratory. In our view that is not the correct position in law. Where the proviso consists of two parts, one part may be declaratory but the other part may not be so. Therefore, merely because one part of the proviso has been held to be declaratory it does not follow that the second part of the proviso is also declaratory. However, the view that we have taken supports the stand of the Revenue that proviso (b) to Section 240 is also declaratory. We have held that even under the unamended Section 240 of the Act, the assessee was only entitled to the refund of tax paid in excess of the tax chargeable on the total income returned by the assessee. We have held so without taking the aid of the amended provision. It, therefore, follows that proviso (b) to Section 240 is also declaratory. It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the Revenue to refund the entire amount of income tax paid by the assessee where the Revenue was not in a position to frame a fresh assessment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well settled that the legislature may pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear the meaning of a provision of the principal Act and make explicit that which was already implicit.”

**(ii) CIT v. Vatika Township, (2015) 1 SCC 1:**

“32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as “declaratory statutes”. The circumstances under which provisions can be termed as “declaratory statutes” are explained by Justice G.P. Singh [*Principles of Statutory Interpretation*, (13<sup>th</sup> Edn., Lexis Nexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

“Declaratory statutes

The presumption against retrospective operation is not applicable to

declaratory statutes. As stated in Craies [W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [in *Central Bank of India v. Workmen*, AIR 1960 SC 12, para 29]: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions."

**30.** For all these reasons, we are of the view that the impugned judgment of the Tribunal has to be set aside. The appeals are accordingly allowed.

.....J.  
(R.F. Nariman)

.....J.  
(Indu Malhotra)

New Delhi;  
August 14, 2018.

**Annexure X.33****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**I.A. No. 594 of 2018 in  
Company Appeal (AT) (Insolvency) No. 188 of 2018**

**IN THE MATTER OF:**

**Rajputana Properties Pvt. Ltd.** ...Appellant

**Vs**

**Ultra Tech Cement Ltd. & Ors.** ..Respondents

**Present:**

**For Appellant:** **Mr. C. A. Sundaram and Mr. Neeraj Kishan Kaul,**  
**Senior Advocates assisted by Mr. Manu Nair,**  
**Ms. Misha, Mr. Siddhant Kaul, Ms. Rubika, Mr.**  
**Deepak Joshi, Mr. Rajeev, Mr. Samar and Ms.**  
**Hansa Kaul, Advocates.**

**For Respondents:** **Mr. Mukul Rohatgi and Mr. Amrendra Saran, Sr.**  
**Advocates assisted by Mr. Mahesh Agarwal,**  
**Mr. Rajeev Kumar, Ms. Aastha Mehta and Mr.**  
**Himanshu Satija, Advocates for R-1.**

**Mr. Arvind Kumar Gupta, Mr. Kumar Karthikay,**  
**Mr. Vishal Meghwa, Advocates for R-2 (BIL).**

**Mr. Tushar Mehta, Sr. Advocate with Mr. R.**  
**Sudhinder, Ms. Amrita Sarkar, Mr. Sumant Batra,**  
**Advocates for R-4 (CoC).**

**Mr. Sumant Batra, Ms. Honey Satpal and Ms.**  
**Srishti Kapoor, Advocates for EARC.**

**Mr. Abhinav Vashishta, Mr. Prashant Pakhiddey,**  
**Mr. Pranshu Paul, Advocates for RP.**

**O R D E R**

**15.05.2018:** An Interlocutory Application has been filed by the 1st Respondent alleging violation of the interim order passed by this Appellate Tribunal on 4th May, 2018 which reads as follows:

*“During the pendency of the Appeal, it will be open to the ‘Committee of Creditors’ and the Adjudicating Authority to approve one or other*

*'Resolution Plan.', including the Plans if received subsequently which will be subject to the decision of this Appeal.'*

**2.** Learned senior counsel for 1st Respondent submits that the resolution plan or the eligibility of Resolution Applicant are to be considered by the 'Committee of Creditors' and the 'Adjudicating Authority' but the Resolution Professional has given notice to the parties that he will decide about the eligibility of one or other Resolution Applicant.

**3.** According to learned senior counsel for the Appellant, the Resolution Professional is required to decide whether resolution plan(s) are in accordance with existing provisions of law and fulfil other conditions as prescribed under Section 30(2) of the I&B Code, 2016 and therefore, it is within the domain of the Resolution Professional to decide such issue.

**4.** Learned senior counsel appearing on behalf of 'Committee of Creditors' submits that the Committee of Creditors are required to consider all the resolution plans for maximization of assets and taking into consideration all aspects a resolution plan may be approved by the Committee of Creditors.

**5.** Learned counsel appearing on behalf of the Resolution Professional submits that in the notice he has not intimated Resolution Applicants that he will decide eligibility of one or other Resolution Applicant. He has only called for comments of all the Resolution Applicants. The meeting of the Committee of Creditors has been fixed for 18.05.2018 to consider all the aspects in accordance with law.

**6.** The questions arises for consideration in this appeal are:-

- (i) Whether the Resolution Professional is required to notice the comments of one or other Resolution Applicant(s) to decide the eligibility? and
- (ii) What procedure the 'Committee of Creditors' are required to be followed at the time of approval of resolution plan?

**7.** To decide the aforesaid issues it is desirable to notice different provisions of I&B Code, 2016, as discussed herein.

**7(A).** In terms of Section 29, the Resolution Professional is required to prepare an 'Information Memorandum' in the form and manner containing relevant information as specified by the Insolvency and Bankruptcy Board of India ('Board' for short) for formulating a resolution plan. The Resolution Professional is required to provide Resolution Applicant all the relevant information in physical and electronic form. As per Section 29(2), the Resolution Applicant is required to undertake-

- 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 sub-section aforesaid are complied with.

From the aforesaid provision it is clear that the Resolution Professional cannot share the information with third parties without complying with clauses (a) and (b) of Sub-section (2) of Section 29.

7(B). Section 30 relates to Submission of resolution plan by Resolution Applicant based on ‘Information Memorandum’. As per Section 30(2), the Resolution Professional is required to examine each resolution plan received by him to confirm that the resolution plan provides for payment of Insolvency Resolution Process costs, payment of debts of Operational Creditor(s), management of the affairs of the corporate debtor, implementation and supervision of the resolution plan, other requirements as may be specified by the Board and does not contravene any of the provisions of law for the time being in force. The relevant provisions of Section 30 are quoted below for proper appreciation:

**“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-sectionx (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.”*

The Committee of Creditors may approve the resolution plan by a vote of not less than 75 per cent of the voting share of the financial creditors as per Section 30(4).

From Section 30(2) it is clear that the Resolution Professional himself is required to examine each resolution plan to find out whether they confirm the requirement in terms of clause (a), (b), (c), (d) and (f) of Section 30(2) and does not contravene any of the provisions of the law for the time being in force.

7(C). The persons who are ineligible to submit the resolution plan prescribed under Section 29 A which reads as follows:

*“29A. 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 wilful 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;*
- (f) *is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;*
- (g) *as 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 Securitisation 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.”

The provision have made it clear as to who will declare whether a person is ineligible to submit resolution plan as per Section 29A.

**8.** Prima facie, in absence of any information through any source while scrutinizing the resolution plan under Section 30(2), the Resolution Professional cannot hold or decide as to who is ineligible under Section 29A. Section 30(2) does not confer such power to the Resolution Professional nor there is any other provision conferring such power to the Resolution Professional to scrutinize the eligibility of one or other Resolution Applicant.

**9.** As per Section 30(2), the Resolution Professional is required to examine whether resolution plan confirm the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(s), who has submitted the resolution plan. According to us, the resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.

**10.** The meeting of the Committee of Creditors is prescribed under Section 24 reads as follows:

**“24. Meeting of committee of creditors. - (1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.**

**(2) All meetings of the committee of creditors shall be conducted by the resolution professional.**

**(3) The resolution professional 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.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

*Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.*

(5) Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

*Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.*

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified. ”

**11.** From Section 24(3) it is clear that the Resolution Professional is not only required to give notice of the meeting to ‘the members of Committee of Creditors’ but also to the members of (suspended) Board of Directors or partners of the corporate person as the case may be. The ‘Operational Creditors’ or their representatives are also to be informed to attend the meeting of Committee of Creditors, if the amount of the aggregate dues is not less than ten per cent of the debt. Section 24(4) shows that the Directors, Partners, Representatives of Operational Creditors may attend the meeting of Committee of Creditors but have no right to vote in such meeting. The meeting of the Committee of Creditors is required to be conducted in such a manner as may be specified by the Board.

**12.** As per Section 30(5), the Resolution Applicants can attend the meeting of Committee of Creditors in which the resolution plans of the Resolution Applicants are considered.

**13.** If Section 24 is read with Section 30, it is clear that the following persons are to take part in the meeting of Committee of Creditors at the time of approval of one or other resolution plan.

- (a) members of Committee of Creditors;
- (b) members of the (suspended) Board of Directors or the Partners of the corporate persons;
- (c) Operational Creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt [Clause (a), (b), (c) of Section 24(3)]; and
- (d) Resolution Applicant(s) when resolution plan of such applicant(s) are placed for consideration [Section 30(5)].

**14.** The members of the 'Committee of Creditors' have voting right but others who attend the meeting as noticed above including the Board of Directors, Partners, Operational Creditor(s) and the Resolution Applicant(s) have no voting right.

**15.** From the aforesaid provisions the intention of the legislature is clear that the Committee of Creditors while approving or rejecting one or other resolution plan should follow such procedure which is transparent. Those who will be watching the proceeding such as (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s) are not mere spectator but may express their views to the Committee of Creditors for coming to conclusion in one or other way.

**16.** For the reason aforesaid we are of the view that the Committee of Creditors should record reasons (in short) while approving or rejecting one or other resolution plan.

**17.** Views, if any, are expressed by the (suspended) Board of Directors or its Partners; Operational Creditors or its representatives and Resolution Applicant(s), are also required to be taken into consideration by the Committee of Creditors before approving or rejecting one or other resolution plan. The views so expressed by any of those who are watching the proceeding should also be recorded (in short).

**18.** As the resolution plans are opened and placed before the Committee of Creditors, as per Section 30(5), the Resolution Applicant(s) are entitled to be present. At this stage they may point out whether one or other person (Resolution Applicant) is ineligible in terms of Section 29A or not. If one or other objection is overruled, reasons should be recorded by the Committee of Creditors. After decision of the Committee of Creditors, the Resolution

Professional is required to place the decision before the Adjudicating Authority under Section 31. The Adjudicating Authority who is required to take decision as per Section 31 of the I&B Code, can go through the reasoning to accept or reject one or other objection or suggestion and may express its own opinion/decision.

**19.** In view of aforesaid observations while we direct the Resolution Professional not to take any comment from one or other Resolution Applicant(s), if such step has been taken be ignored. Resolution Professional and the Committee of Creditors will proceed in accordance with law taking into consideration the observations as made above and decision, if any, taken by the Adjudicating Authority shall be subject to decision of this appeal. I.A. No. 594 of 2018 stands disposed of. Matter be listed as per earlier order.

Let a copy of this order be sent to Chairperson, IBBI for information.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**Annexure X.34****IN THE NATIONAL COMPANY LAW TRIBUNAL : NEW DELHI  
PRINCIPAL BENCH**

(IB)-25(PBt/2018)

**IN THE MATTER OF:****ICICI Bank Limited .... APPLICANT / PETITIONER****Vs****Essar Power Jharkhand Ltd. .... RESPONDENT****SECTION:****Under Section 7 of Insolvency & Bankruptcy Code****Order delivered on 16.01.2018****Coram:****CHIEF JUSTICE (RETD.) M. M. KUMAR****Hon'ble President****S. K. MOHAPATRA****HON'BLE MEMBER (TECHNICAL)****PRESENTS:****For the PETITIONER**

**:-** Mr. Arun Kathpalia, Senior Advocate  
Ms. Misha, Mr. Madhav Kanoria &  
Ms. Srishti Khare, i/b Shardul  
Amarchand Mangaldas & Co.

**For the RESPONDENT**

**:-** Ms. Shally Bhasin, Ms. Sayaree Basu  
Mallik, Ms. Surbhi Limaye, Advocates  
Mr. Nirnay Gupta, Advocate

**ORDER**

Learned Counsel for the respondent states that they are not contesting the petition by raising any objection to its admission.

We find that 1RP has signed Form-2 as prescribed by Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In the form, the IRP is also required to certify that the facts averred by the applicant in the application are true, accurate and complete and a default has occurred in respect of the relevant Corporate Debtor. It further

requires the IRP to certify that he/ she has reached the conclusion based on the following facts and/or opinion.

“ICICI Bank Limited (“ICICI Bank”) had advanced financial assistance of INR 3033,29,45,267.73 (Rupees Three Thousand Thirty Three Crores Twenty Nine Lakhs Forty Five thousand Two Hundred Sixty Seven and Seventy Three Paise) by way of Rupee facility, letter of credit facility, external commercial borrowing facility and bank guarantee facility to Essar Power Jharkhand Limited (“Corporate Debtor”) vide facility agreements executed in the year(s) 2010, 2011, 2012 and 2015. Due to the inability of the Corporate Debtor to service the aforesaid facilities, the account of the Corporate Debtor was classified as non-performing asset on September 30, 2016 in compliance with the RBI guidelines. Pursuant thereto, ICICI Bank issued a recall notice dated August 1, 2017 to the Corporate Debtor, thereby accelerating the facilities and directing the Corporate Debtor to make payment of the dues under the aforesaid facilities owed by it to ICICI Bank.

Further, as per banker’s book of evidence, CRILC report, and CIBIL report as annexed to this application, the account of the Corporate Debtor was declared as a non-performing asset in the books of ICICI Bank and in the records of relevant credit information companies”.

The aforesaid description of form would bring in the element of patent bias impinging upon the independent character of an IRP who has to be above board and has to act as an independent umpire. Moreover, there is no whisper in the Code or in the rules requiring an IRP to furnish such a certificate which is optional. Such a form is negation of principle of fair play. We cannot require IRP to follow such a performa. We further direct that since it is optional to fill up such a performa an IRP shall not fill up such a performa as it is wholly alien to principles to act fairly. Therefore, the Rule making Authority is directed to have relook on this part of the performa and may consider appropriate to delete it.

At this stage, Ms. Misha, learned Counsel for the applicant states that she will name another IRP.

List the matter on 24th January, 2018. A copy of this order be sent to the Rule making Authority by the registry.

**(M. M. KUMAR)  
PRESIDENT**

**(S. K. MOHAPATRA)  
MEMBER (TECHNICAL)**

**Annexure X.35****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 203 of 2019**

**(Arising out of Order dated 1st February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in MA/71/2019 in CP/682/IB/CB/2017)**

**IN THE MATTER OF:**

**Saravana Global Holdings Ltd. & Anr.** ...Appellants

**Vs.**

**Bafna Pharmaceuticals Ltd. & Ors.** ...Respondents

**Present:** **For Appellants:** - Mr. Sudhir Makkar, Senior Advocate with Mr. Jatin Mongia, Mr. Yashvardhan Bandi, Ms. Riya, Mr. Abhishek Chaudhary, Ms. Sumya Gupta and Mr. N. Srikanth, Advocates.

**For Respondents:-** Mr. Basava Prabhu. S Patil, Senior Advocate with Mr. T.N. Purga Prasad, Mr. Soumik Ghosal, Mr. Geet Ahuja and Mr. Gaurav Singh, Advocates for Respondent No. 2.

**Mr. Rana Mukherjee, Senior Advocate with Mr. K.V. Balakrishnan and Mr. R.K. Sharma, Advocates for Respondent No.3.**

**Mr. P. V. Dinesh, Ms. Sindhu T.P and Mr. R.S. Lakashman, Advocates for SBI.**

**JUDGMENT****SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. Pursuant to an application filed by 'M/s. Aries' under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), 'Corporate Insolvency Resolution Process' was initiated against 'M/s. Bafna Pharmaceuticals Limited'- ('Corporate Debtor'), a Micro, Small & Medium Enterprises ('MSME', for short). The 3rd Respondent-Mr. Mahaveer Chand Bafna, Promoter of the 'Corporate Debtor' filed improved 'Resolution Plan' which was approved by the 'Committee of Creditors' and placed before the Adjudicating Authority (National Company Law Tribunal). By impugned order dated 1st February, 2019, the Adjudicating Authority approved the

improved plan of the promoter of the ‘Corporate Debtor’ which is under challenge in this appeal.

2. Learned counsel appearing on behalf of the Appellants submits that ‘Saravana Global Holdings Ltd.’ along with Mrs. P. Shobha (Appellants herein) were interested to submit their ‘Resolution Plan’ but no opportunity was given to them to file the same.

3. According to the Appellants, the impugned order has been passed approving the ‘Resolution Plan’ without complying the mandatory provisions of the ‘I&B Code’. It was submitted that as per Section 25(2)(h) of the ‘I&B Code’, it is the duty of the ‘Resolution Professional’ to invite prospective ‘Resolution Applicants’ who fulfill criteria laid down by him with the approval of the ‘Committee of Creditors’. Once the ‘Expression of Interest’ has been published under Regulation 36A and prospective ‘Resolution Applicants’ have been invited, the ‘Information Memorandum’ prepared under Section 29 of the ‘I&B Code’ shall be shared with them.

4. It was submitted that the Respondents have failed to follow the aforesaid procedure as prescribed under the ‘I&B Code’.

5. It was further submitted that the ‘Information Memorandum’ was prepared but it was not circulated. 2nd and 4th Respondents decided to defer the publication of ‘Expression of Interest’ and inviting prospective ‘Resolution Applicants’ which they could not have done away with the provisions entirely on account of the provisions being mandatory under the ‘I&B Code’.

6. Learned counsel appearing on behalf of 2nd Respondent-‘Resolution Professional’ submitted that the ‘Committee of Creditors’ in its 3rd meeting held on 27th September, 2018, informed the members that the Draft Invitation for ‘Expression of Interest’ and submission of ‘Resolution Plan’ with eligibility details to be published in newspapers had been prepared and the same had already been circulated to all the members of the ‘Committee of Creditors’. The ‘Committee of Creditors’ members have expressed that the publication of ‘Expression of Interest’ may be deferred for the time being as there is an active consideration of ‘Resolution Plan’ with the ‘Corporate Debtor’ itself.

7. In the 4th ‘Committee of Creditors’ meeting which was held on 30th November, 2018, the reasons for deferring the issue of ‘Expression of Interest’ was discussed by the ‘Committee of Creditors’ members with reasoning and the issue pertaining to extension application before the Adjudicating Authority was discussed.

8. In the 5th ‘Committee of Creditors’ meeting held on 20th December, 2018,

the ‘Resolution Professional’ was asked by the ‘Committee of Creditors’ members regarding the eligibility of the ‘Resolution Applicant’ (promoter of the ‘Corporate Debtor’). The ‘Resolution Professional’ confirmed the eligibility of the ‘Resolution Applicant’ being an MSME and eligible under 29 A of the ‘I&B Code’. The ‘Resolution Applicant’ (3rd Respondent) presented his plan to the ‘Committee of Creditors’, which was discussed in the meeting and unanimous decision was taken by the ‘Committee of Creditors’, relevant of which reproduced below:

“.....(1) CD (Resolution Applicant) to submit the full set of resolution plan again by 26th December, 2018 incorporating the further details required by the CoC members points.

(2) The Resolution Plan to be presented to the CoC again by the RP if the plan is in order incorporating the changes proposed as per (1) above.

(3) In case details are not adequate or resolution plan if presented is not approved, then the RP to seek for ‘Expression of Interest.”

9. It was submitted that all the requirements under the ‘I&B Code’ have been complied with by the ‘Interim Resolution Professional’ and ‘Resolution Professional’, more specifically the ‘Information Memorandum’ was prepared in compliance with section 25(2)(g) and the same were furnished to the members of ‘Committee of Creditors’ on obtaining the Non-Disclosure Agreement.

10. It is informed that the revised ‘Resolution Plan’ submitted by the 3rd Respondent was discussed and put to vote which was approved by 74.84% votes in favour of the resolution plan. A monitoring committee was constituted in order to successful implementation of the ‘Resolution Plan’.

11. It was also informed that 3rd Respondent in the initial stages also tried for settlement under 12(A) of the ‘I&B Code’. The ‘Resolution Applicant’s’ plan was under active consideration in at least three ‘Committee of Creditors’ meetings.

12. It was informed that the ‘Resolution Plan’ provides for payment to ‘Operational Creditors’ who had submitted their claim and which was admitted by the ‘Interim Resolution Professional’/‘Resolution Professional’ and the statutory dues, employee’s and workmen dues. The financial creditors have been provided for to the tune of 70% of the admitted claims. Thus the ‘Resolution Plan’ has taken care of all the stakeholders and there is no discrimination of any kind whatsoever amongst the same set of creditors.

13. Similar plea has been taken by the ‘State Bank of India’ on behalf of lead Bank of the ‘Committee of Creditors’. They have also taken plea that in terms of Section 25(2)(h), the ‘Resolution Professional’ shall invite 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 the operations of the business of the ‘Corporate Debtor’.

14. The 3rd Respondent has been in the pharmaceutical business for close to 40 years, the ‘Resolution Plan’ having filed by 3rd Respondent being viable and feasible and fulfills all other financial matrix has been accepted.

15. With regard to Appellant- ‘Saravana Global Holdings Ltd.’, it is stated that Mr. Padam J Challani is also a Director, had a NPA account with the answering Respondent, State Bank of India, for a debt amounting to INR 48.33 Crores. This account was declared NPA on 29th March, 2012. Even restructuring attempts had failed as the borrower could not repay any amount. Finally, the bank was constrained to settle the account by taking a painful haircut of close to 50% in March, 2018. The sacrifice made by the bank in this settlement was INR 23.14 crores. It may be noted that the Appellants, belonging to the same group companies, is making tall claims of proposing a plan worth 100 Crores. However, before this Appellate Tribunal, learned counsel for the Appellant submitted that the Appellant is ready to pay total amount of Rs. 81.57 Crores.

16. The Statement of Objects and Reasons of the ‘I&B Code’ specifically states the objective of the ‘I&B Code’ is 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 maximization 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.

17. In “**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.** MANU/SC/0079/2019”, the Hon’ble Supreme Court while deal with preamble observed:

“20. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value

of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See **Arcelor Mittal** (*supra*) at paragraph 83, footnote 3]."

18. Therefore, it is clear that 'I&B Code' envisages maximization of value of the assets of the 'Corporate Debtor' so that they are efficiently run as going concerns and in turn, will promote entrepreneurship. The preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no 'Resolution Plan' or the 'Resolution Plan's submitted are not up to the mark.

19. Admittedly, the 'Corporate Debtor' is a 'MSME' and the promoters are not ineligible in terms of Section 29A of the 'I&B Code'. Therefore, it is not necessary for the 'Committee of Creditors' to find out whether the 'Resolution Applicant' is ineligible in terms of Section 29A or not.

20. The 'Committee of Creditors' is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable and fulfill all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'. For example, if case is settled before the constitution of the 'Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all

other procedure for calling of application of ‘Resolution Applicant’ etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the ‘Corporate Debtor’ as a going concern, it is always open to ‘Committee of Creditors’ to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. The Parliament with specific intention amended the provisions of the I&B Code’ by allowing the Promoters of ‘MSME’ to file ‘Resolution Plan’. The intention of the legislature shows that the Promoters of ‘MSME’ should be encouraged to pay back the amount with the satisfaction of the ‘Committee of Creditors’ to regain the control of the ‘Corporate Debtor’ and entrepreneurship by filing ‘Resolution Plan’ which is viable, feasible and fulfills other criteria as laid down by the ‘Insolvency and Bankruptcy Board of India’.

22. Therefore, we hold that in exceptional circumstances, if the ‘Corporate Debtor’ is MSME, it is not necessary for the Promoters to compete with other ‘Resolution Applicants’ to regain the control of the ‘Corporate Debtor’.

23. In the present case, the Adjudicating Authority on perusal of the ‘Resolution Plan’ observed as follows:

“7. The perusal of the ‘Resolution Plan’ shows that it provides for the Resolution for all the Financial Creditors, out of the total claim of Rs. 49.23 Crores, the payment proposed is Rs. 34.46 Crores. It further provides that 70% of the admitted claims of all the Financial Creditors shall be paid within three months from the ‘Approval Date’ as full and final settlement of the dues and personal guarantees. In relation to the Workmen dues, it provides for total payment of Rs. 0.24 Crores, as far as the Employees’ dues are concerned, the Plan provides for total payment of Rs. 0.32 Crores. The Plan also provides for payment of Insolvency Resolution Process Costs, the dues for PP and ESI. A provision has also been made for payments of Rs. 6.53 Crores to other Operational Creditors and Rs. 0.13 Crores towards statutory liabilities. In essence, the Plan provides to settle the claim of various stakeholders.

8. The Plan provides that to balance the interest of all stakeholders, a capital reduction is proposed and the capital of all the fully paid up equity shareholders as on 30.06.2018 shall be reduced to 10% and consequently, the existing 2.36 Crores number of shares shall be reduced to 0.236 number of shares.

9. The Resolution Plan provides that upon its approval the Resolution Applicant shall have authority to reconstitute the Board of Director and the

Board shall have the authority to act and execute in the name and on behalf of the Corporate Debtor all deeds, receipts, and other documents, as may be required. However, the Resolution Applicant shall be responsible for the proper implementation of the proposed Resolution Plan from the date of its approval. Further, the Resolution Plan provides that the Resolution Applicant will appoint a Chartered Accountant or a Resolution Professional qualified and registered under the IBBI as the supervisor ("supervisor") for the supervision of the approved Resolution Plan, a representative from Corporate Debtor and other two representatives from the Financial Creditors. The supervisor shall be appointed for a period till the payment of all the liabilities mentioned in the Resolution Plan. Therefore, the Resolution Plan provides suitable arrangement for management of the Corporate Debtor and the implementation of the same (Plan).

**10.** Thus, the 'Resolution Plan' filed with the Application meets the requirements of Section 30(2) of the I&B Code, 2016 and Regulations 37, 38, 38(1A) and 39(4) of IBBI (CIRP) Regulations, 2016. The 'Resolution Plan' is also not in contravention of any of the provisions of Section 29A. The Resolution Professional has also certified that the "Resolution Plan" approved by the CoCs does not contravene any of the provisions of the law for the time being in force. The Compliance Certificate is placed at pages 7 to 11 of the typed set filed with the Application. The 'Resolution Plan' stands approved by the CoCs with 74.84% voting share."

24. In view of the fact that the 'Resolution Applicant' is the Promoter of the 'M/s. Bafna Pharmaceuticals Limited'- ('Corporate Debtor'), 'MSME', we hold that it is open to the 'Committee of Creditors' to defer the process of issuance of 'Information Memorandum', if the Promoter of MSME offers a viable and feasible plan maximising the assets of the 'Corporate Debtor' and balancing all the stakeholders. For such purpose, it is not required to follow all the procedure as the case for accepting the proposal under Section 12A of the 'I&B Code'.

25. This apart, one of the Director of the Appellant having declared 'NPA' by the 'State Bank of India', lead Bank of the 'Committee of Creditors', at this stage, we are not inclined to give opportunity to the Appellant to file its offer.

26. We find no merit in this appeal. It is accordingly, dismissed. No costs.

(Justice S.J. Mukhopadhyaya) Chairperson  
(Justice A.I.S. Cheema) Member(Judicial)

NEW DELHI

4th July, 2019

**ANNEXURE X.36****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 188 of 2019**

[Arising out of order dated 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP/2912/I&BP/NCLT/MAH/2018]

**IN THE MATTER OF:**

**Peter Johnson John (Employee),**  
S/o. N. John,  
Assistant Manager – Coordination,  
No.2, 6th Cross, Tagore Nagar,  
Lawspet, Puducherry – 605 008.

....Appellant

**Vs**

**M/s KEC International Limited,**  
RPG House, 463,  
Dr. Annie Besant Road,  
Worli, Mumbai – 400 030  
Maharashtra.

....Respondent

**Present:**

**For Appellant:** Mr. K. S. Ilangovan and Mr. P. Jegan, Advocates.

**For Respondent:** Mr. K. Datta, Mr. Shakunt Saumitra and Ms. Pallavi Srivastava, Advocates.

**JUDGMENT****Bansi Lal Bhat, J. (Member (J))**

1. The Appellant is aggrieved of rejection of his application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') in terms of impugned order dated 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench on the ground that a dispute was existing between the parties regarding the debt and the application was not maintainable. The impugned order is assailed primarily on the ground that there was a default in discharging

the debt qua the services rendered by the Appellant to the Respondent - 'M/s. KEC International Ltd.' (Corporate Debtor) having its registered office at Worli, Mumbai, independent of the foreign decree passed in favour of the Appellant and the suit filed by the Appellant (Operational Creditor) for realization of decreed amount as per foreign judgment (Labour Court of Kinshasa at DR Congo) dated 11th April, 2013 could not be termed as a dispute to decline initiation of Corporate Insolvency Resolution Process.

2. The factual matrix leading to filing of application under Section 9 of I&B Code by the Appellant before the Adjudicating Authority need to be briefly adverted to. Appellant was appointed by the Corporate Debtor as Assistant Manager - Coordination Foreign Overseas Engagement vide appointment letter dated 9th November, 2011. The Appellant was asked to lead a technical project but he declined to carry out the assignment as he lacked technical qualification. Allegedly, the Appellant was pressurized to resign but he declined. He was not assigned any work and no salary was paid to him. He was also not terminated from service. It was in utter desperation that the Appellant sought legal help in terms of Clause 9 of his appointment letter and filed a suit in the Labour Court of DR Congo. The suit was decreed. The Labour Court directed the Corporate Debtor to pay compensation of USD 37,500/- towards abusive termination and USD 13,997/- towards final liquidation. Besides repatriation costs of USD 1690/- in addition to arrears of salary computed at USD 80,000/- admissible from September, 2012 till date of order viz. 7th April, 2015 + interest was also awarded in favour of the Appellant. The Corporate Debtor did not comply with the judgment. Instead it wound up its operations and project in Congo. This forced the Appellant to seek shelter with the Indian Embassy in Congo and return to India. The Appellant filed suit No. 526 of 2017 under Section 13 of the Code of Civil Procedure 1908 before the Bombay High Court. The Appellant claimed unpaid Operational Debt calculated at INR 1,59,09,181/- from Corporate Debtor as according to the Appellant he continued to be on the roll of Corporate Debtor. Appellant issued demand notice under Section 8(1) of I&B Code which was served upon the Corporate Debtor on 12th June, 2018. Since the demand notice did not invoke any response from the Corporate Debtor within the prescribed period, but a delayed reply was received by the Appellant wherein the Corporate Debtor raised the plea of dispute in regard to the Operational Debt in the form of suit commenced by the Appellant in Bombay High Court after issuance of demand notice. On consideration of the pleadings and documents relied upon and arguments advanced on behalf of the parties, the Adjudicating Authority declined to admit the application filed by Appellant under Section 9 of the I&B Code.

3. The Adjudicating Authority noticed that the Appellant sought initiation of Corporate Insolvency Resolution Process on the basis of claim on account of salary dues adjudicated by the Labour Court of Kinshasa and a civil suit is pending regarding the same before Bombay High Court seeking declaration in regard to executability of the decree passed by the foreign court in India. It noticed that since there was no reciprocating treaty with Democratic Republic of Congo whereby a decree passed by Labour Court of Kinshasa, Congo could be executed in India, Section 44A of CPC whereunder a foreign decree could be directly executed in India was not applicable. Such foreign decree was required to be adjudicated upon by a Court in India in view of Section 13 of CPC. It also noticed that the Appellant had already approached the Hon'ble High Court of Judicature at Bombay for declaration in regard to executability of the Kinshasa Labour Court Decree in India and that suit is still pending adjudication. The Adjudicating Authority was of the view that since application under Section 9 of I&B Code was filed by Appellant during the pendency of the aforesaid suit and the Appellant's claim was based on the foreign decree, it constituted an existing dispute between the parties on the date of filing of application under Section 9 of I&B Code before the Adjudicating Authority.

4. Learned counsel for the Appellant submitted that in the instant case the Operational Debt being a claim for services rendered during employment and non-payment resulting in accumulation of arrears of salary constituted default. It is further submitted that the Corporate Debtor has admitted contract of employment and no record has been produced to show that the services of Appellant have been terminated in terms of the contract of employment. He also submits that the Respondent has not produced any record to show that the salary was paid to the Appellant from the date it fell due. It is submitted that the Respondent also did not take any steps for setting aside of the foreign decree. Thus, default in payment of salary constituted a legally enforceable debt and the salary not being paid being an Operational Debt, the Appellant was justified in invoking jurisdiction of Adjudicating Authority under Section 9 of the I&B Code. It is lastly submitted that Corporate Insolvency Resolution Process could be invoked by the Appellant irrespective of the foreign judgment. According to learned counsel for Appellant, the foreign decree is only a record supporting Appellant's claim for debt in respect whereof default has been committed by the Corporate Debtor and there being no pre-existing dispute between the parties, the impugned order cannot be sustained.

5. Per contra learned counsel for Respondent submits that the alleged debt as claimed by the Appellant is not due and payable by the Respondent as

the alleged debt is not crystallized by a court of competent jurisdiction. It is submitted that the foreign decree relied upon by the Appellant being an ex-parte decree passed by a court in a non-reciprocalating territory is not an enforceable decree in India unless held to be conclusive and executable in India under Section 13 of CPC. The alleged debt till then would not be a debt payable in law as on the date of filing of insolvency application suit filed by the Appellant was pending adjudication before the Hon'ble High Court of Bombay and the foreign decree was yet to be held conclusive and executable.

6. Heard learned counsel for the parties and perused the record. The only issue requiring determination is whether in absence of adjudication of the foreign decree passed by a court in a non-reciprocalating, territory, which is relied upon by the Appellant, the Appellant was legally justified in seeking initiation of Corporate Insolvency Resolution Process under Section 9 of the I&B Code against the Corporate Debtor. It is not in controversy that the claim upon which default of Operational Debt is founded arises out of a contract of employment. The fact that the Appellant was engaged as Assistant Manager- Coordination by the Corporate Debtor for an Overseas Project in terms of Appointment Letter dated 9th November, 2011 and that the Appellant was entitled to salary in terms of contract of employment for the services rendered to Corporate Debtor bringing the salary dues accruing as per the specified mode of payment within the fold of Operational Debt is not disputed. It is also not in dispute that the Appellant, upon denial of his salary dues, filed a suit before Labour Court of Kinshasa in Democratic Republic of Congo where he was posted by the Corporate Debtor for rendering services in terms of contract of employment as in terms of Clause 9 of the contract such disputes were to be resolved as per local legal framework. Admittedly, the suit was decreed in ex-parte which has not been appealed against by the Respondent - Corporate Debtor. It is also not in controversy that there is no reciprocal arrangement between India and Congo. Therefore, Section 44A of Civil Procedure Code providing for execution of a foreign decree by filing of a certified copy of such decree passed by a superior court in a reciprocalating territory in a District Court has no application and the observations of the Adjudicating Authority in this regard cannot be termed as unwarranted.

7. It is well settled that foreign decree either of reciprocalating or non-reciprocalating territory not passed on merits or not satisfying the requirements of Section 13 of CPC cannot be the basis of winding up petition. An ex-parte decree based on default summary judgment for nonappearance before a foreign court cannot be relied upon for seeking winding up of a company.

Such decree cannot be held conclusive as it has not been given on merits of the case. Reference may profitably be made to law laid down by Hon'ble High Court of Delhi in "**Rajkumar Gupta Vs. Barnes Investments Ltd. & Ors.**", reported in MANU/DE/8917/2007 : 2007 (99) DRJ 629 and Hon'ble High Court of Bombay in "**Marine Geotechnics LLC Vs. Costal Marine Construction and Engineering Ltd.**", reported in MANU/MH/0267/2014: (2014) 183 CompCas 438 (BOM). It cannot be disputed that the concept of winding up under the Companies Act, 2013 tantamount to liquidation under the I&B Code and viewed in perspective of legislative change it has to be accepted that the liquidation being culmination of the process under I&B Code as a sequel to failure of Insolvency Resolution, a foreign decree passed in ex-parte for default in appearance of the Corporate Debtor and not on merit could not be the basis for initiation of Corporate Insolvency Resolution Process.

8. Learned counsel for Appellant tried in vain to persuade us that the requirement of filing of a suit on the foreign decree in keeping with the mandate of Section 13 of CPC would not preclude the Appellant-Operational Creditor from triggering Corporate Insolvency Resolution Process. This argument, on the face of it, is sound neither in technique nor in substance. One wonders as to how can an Operational Creditor seek initiation of Corporate Insolvency Resolution Process without the debt having crystallized and being payable in law or in fact. Admittedly, under the terms of contract (service conditions governing the engagement of Appellant) during the period of Appellant's posting at the foreign location he would be governed by the local rules and regulations of the country of posting. Since, the dispute arose in regard to his engagement, performance of duties, salary and emoluments, the Appellant chose to approach the Labour Court at Kinshasa, Democratic Republic of Congo, where the suit was decreed in his favour in ex-parte, albeit on account of non-appearance of the Respondent - Corporate Debtor. It is not disputed that such ex-parte decree of a foreign court would not be executable in India until adjudicated upon by a Civil Court in India within the ambit of Section 13 of CPC and having regard for the same, the Appellant has chosen to file suit before Hon'ble High Court of Bombay, which is still sub judice. Unless the decretal amount is adjudicated upon by the Hon'ble High Court of Bombay as a legally payable claim, the same would not constitute a "Debt" in the hands of Appellant - Operational Creditor and unless the debt is crystallized and payable in law, the issue of default would not be attracted. Admittedly, Appellant is pursuing the litigation before the Bombay High Court in regard to the foreign decree and claim payable thereunder. He cannot be permitted

to circumvent the appropriate legal remedy, already pursued, by invoking provisions of Section 9 of I&B Code, thereby defeating the fundamental provisions of law governing execution of a foreign decree obtained in ex-parte from a court located in a non-reciprocal territory. Such course is neither legally permissible nor warranted as admittedly the matter is not covered under Section 44A of CPC. The argument advanced warrants outright rejection and is accordingly rejected.

9. For what has been discussed hereinabove, we are of the considered opinion that the adjudication initiated by the Appellant before Bombay High Court wherein adjudication is sought in regard to foreign decree obtained ex-parte falls within the purview of a pre-existing dispute placing an embargo on the powers of Adjudicating Authority to initiate Corporate Insolvency Resolution Process at the instance of a Corporate Debtor. This is apart from the fact that until such adjudication fructifying in a decree favouring the Appellant, the claim of Appellant cannot be held to have crystallized into a "Debt payable in law". We find no scope for interference with the impugned order. The appeal being devoid of merit stands dismissed.

[Justice Bansri Lal Bhat]  
Member (Judicial)

[Mr. Balvinder Singh]  
Member (Judicial)

**NEW DELHI**

**3rd July, 2019**

**ANNEXURE X.37****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 324 of 2019****IN THE MATTER OF:**

Insolvency and Bankruptcy Board of India (IBBI) .... Appellant

Vs

Shri Rishi Prakash Vats & Ors. .... Respondents

Present:

**For Appellant:** Present but appearance not marked.

**For Respondents:** Mr. Apoorv Sarvaria with Mr. Manas Shukla,  
Advocates for Respondent No.1.

**O R D E R**

**11.07.2019** 1. This Appeal has been preferred by the Insolvency and Bankruptcy Board of India (hereinafter referred to as the ‘IBBI’) against order dated 5th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench quashing the disciplinary proceedings initiated by IBBI.

2. The only question arises for consideration in this Appeal is whether the Adjudicating Authority/National Company Law Tribunal has jurisdiction to quash the disciplinary proceedings once initiated by the IBBI.

3. On hearing the IBBI, we are of the view that once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the Disciplinary Authority, i.e., IBBI to close the proceeding or pass appropriate orders in accordance with law. Such power having been vested with IBBI and in absence of any power with the Adjudicating Authority/(National Company Law Tribunal), the Adjudicating Authority cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority/National Company Law Tribunal.

4. In the present case, we find that ‘Corporate Insolvency Resolution Process’ was initiated against Rana Global Limited (‘Corporate Debtor’), in which Mr. Rishi Prakash Vats (1st Respondent) was appointed as a ‘Resolution Professional’. For certain reason, ‘Corporate Insolvency Resolution Process’ was delayed and the Adjudicating Authority (National

Company Law Tribunal), New Delhi Bench passed order dated 26th April, 2018, which reads as follows:-

"The matter had been listed on 25th April, 2018 for report of the RP. The petition filed by the PNB had been admitted vide an order dated 23rd March, 2018. The IRP has taken no steps till date merely because of a typographical error in his name as Shri Rishi Prakash Vats has been typed out as Shri Rishi Kumar Vats. However, it is not denied that address namely, Suit No. 1, 19, Park Area, Karol Bagh, New Delhi-110005 or his Registration Number IBBI/IPA-002/IPN00248/2017-18/10733, Email ID: *rpvats&yqclawfirm.com* were correct. It is also inexplicable as to why the Financial Creditor has considered it fit now at this stage after more than a month to seek correction. Such a lackadaisical attitude in such proceedings is inexplicable. It would be necessary and expedient to bring it to the notice of the IBBI for an appropriate action."

5. As the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench observed lackadaisical attitude in such proceedings is inexplicable and the matter be brought to the notice of the IBBI for an appropriate action, pursuant to the aforesaid direction, a disciplinary proceeding was initiated against 1st Respondent.

6. Subsequently, the 1st Respondent Mr. Rishi Prakash Vats filed certain explanation before the Adjudicating Authority, showing the reasons for delay for execution of the 'Corporate Insolvency Resolution Process'. Since, the proper explanation was given by the 'Resolution Professional', the Adjudicating Authority expunged the earlier observation made on 26th April, 2018 and IBBI was informed. As IBBI continued proceeding Adjudicating Authority passed impugned order on 5th February, 2019 and the disciplinary proceedings have been quashed. We have already noticed that once a disciplinary proceeding is initiated, the final order is required to be passed by the IBBI. Expunge of the earlier order made by the Adjudicating Authority on 26th April, 2018 may be a good ground to close the proceeding, but the Adjudicating Authority/National Company Law Tribunal cannot quash the proceeding initiated by the IBBI.

7. For the reasons aforesaid, we set aside the last portion of the impugned order dated 5th February, 2019 relating to quashing of all disciplinary proceedings. The matter is remitted to the IBBI to pass appropriate order taking into consideration the reference of initiation of proceeding by the Adjudicating Authority as made on 26th April, 2018 and later acceptance of explanation. The 'Resolution Professional' has already been expunged

and it is expected that an order of closure will be passed at an early date. The Appeal stands disposed of. No cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthy Narahari]  
Member (Technical)

**ANNEXURE X.38****NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI****Company Appeal (AT) (Insolvency) No. 749 of 2019****IN THE MATTER OF:**

Punjab National Bank ...Appellant

Versus

Mr. Kirah Shah,  
IRP of ORG Informatics Ltd. ...Respondent

Present:

For Appellant : Ms. Natasha Dhruman Shah , Mr. Atul Sharma  
and Mr. Vikky Dang, Advocates

For Respondent : Mr. Saurabh Kalia, Advocate

**O R D E R**

**06 .08.2019** This appeal has been preferred by the 'Punjab National Bank', lead bank of the 'Committee of Creditors' against order dated 27th June, 2019 passed by the Adjudicating authority (National Company Law Tribunal), Ahmedabad Bench, which reads as follows:

*The parties are represented through their respective Learned Counsel/ FCA(s).*

*The instant application is filed under Section 22 of the Insolvency and Bankruptcy Code on 18.04.2019 with a prayer to replace the IRP with the proposed RP by the COC.*

*On perusal of the record, it is found that, no ground is given/mentioned in the application showing the cause of replacement of the IRP, who is the appointee of this Adjudicating Authority. It is a matter of record that CP(IB) No. 120 of 2017 was admitted on 27.11.2018, whereas the instant application was preferred on 18.04.2019, after lapse of five months, when the CIRP is on the verge of the completion.*

*As per Section 22(1) of the Insolvency & Bankruptcy Code, the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.*

*(2) The committee of creditors, may, in the first meeting, by a majority*

***vote of not less than seventy five per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.***

**(3) Where the committee of creditors resolves under sub-section (2) ----**

- (a) to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or (b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional**
- (b) to replace the interim resolution professional it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.**

*Thus, it is expected from the COC that immediately after first meeting of the COC, the COC supposed to prefer an application under Section 22 which was not done in case.*

*On 11.06.2019 when the issue with regard to the replacement as well as ground were asked by the bench to the Learned Lawyer of the COC then the conducting lawyer of the COC took time for taking necessary instruction and to file supplementary affidavit. The said supplementary affidavit is filed today with a copy to the Resolution Professional.*

*It is pertinent to note that CIRP i.e. 180 days has already been expired on 17.05.2019 but the COC has not taken any necessary steps either to extend the time for further 90 days or able to submit any resolution plan as on date, rather came with an application under Section 22 of the Code on 18.04.2019, ignoring the time bound process of CIRP.*

*Learned FCA/ Resolution Professional is present in person and apprised to this bench that the COC has already passed Resolution for liquidation of the corporate debtor. The said fact is also conceded by the Learned Lawyer of the COC, if that be the situation, we don't find any reason to replace the IRP/RP at this stage.*

*It is mentioned herein that the CIRP has to be completed in time bound manner and as such the COC is expected to take steps diligently and not in perfunctory or casual manner.*

*The Resolution Professional who is present today further submitted that from the date of his appointment as IRP the professional fee as well as expenditure incurred till date during the CIRP has not yet been paid to him. Hence, an appropriate direction may be given to the COC. The COC is hereby directed to take necessary steps towards the payment of remuneration and expenditure of the IRP.*

*Meanwhile, Resolution Professional is at liberty to file his reply upon the supplementary affidavit within two weeks by serving an advance copy to the COC.*

*The Registry is directed to inform this matter by issuing notice to the GM as well as CMD of the respective banks to look in to the matter along with the today's order as well as the order dated 11.06.2019."*

Having heard the learned counsel appearing on behalf of the Appellant and the learned counsel appearing on behalf of the 'Resolution Professional', we are of the view that the 'Committee of Creditors' is not required to record any reason or ground for replacing of the 'Resolution Professional', which may otherwise call for proceedings against such 'Resolution Professional'. For the purpose of proceedings reported to the 'Insolvency and Bankruptcy Board of India' (for short, 'the IBBI', the 'Committee of Creditors' cannot await the decision of the IBBI for the purpose of replacement. The 'Committee of Creditors' having decided to remove the 'Resolution Professional with 88% voting share, it was not open to the Adjudicating Authority to interfere with such decision, till it is shown that the decision of the 'Committee of Creditors' is perverse or without jurisdiction. The 'Committee of Creditors' with majority voting share of 88% having decided to replace 'Mr. Kiran Shah', he cannot function as 'Resolution Professional', though he will be entitled to his fee and cost, if any, incurred by him in terms of the 'I&B Code'.

For the aforesaid reason, it was not open to the Adjudicating Authority to direct the same very 'Resolution Professional' to file an application for 'Liquidation' particularly when the 'Committee of Creditors' in its meeting decided to request the Adjudicating Authority to extend certain period and if not allowed, then pass order of 'Liquidation'.

For the reason aforesaid, we set aside the impugned order dated 27th June, 2019 passed by the Adjudicating Authority. It is informed that the Adjudicating Authority has already passed the order of 'Liquidation' and therefore, we are not expressing any opinion with regard to such order in absence of challenge. However, it will be open to the parties to challenge the same, if it is not in accordance with law or there is a chance of resolution

on ‘exclusion of certain period’ or in view of the amended law. The appeal is allowed with aforesaid observations. No costs.

[Justice S.J. Mukhopadhyaya]  
Chairperson

[ Justice A.I.S. Cheema ]  
Member (Judicial)

[ Kanthi Narahari ]  
Member (Technical)

**ANNEXURE X.39****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 259 of 2019****IN THE MATTER OF:**

Sukhbeer Singh .... Appellant

Vs

Dinesh Chandra Agarwal,  
 (Resolution Professional),  
 Maple Realcon Pvt. Ltd. & Ors. .... Respondents

**Present:**

**For Appellant:** **Mr. Mrinal Harsh Vardhan and Mr. Kartik Sarin,**  
**Advocates**

**For Respondents:** **Mr. Nakul Mohta, Ms. Anju Jain, Mr. Hitesh Sachar**  
**and Ms. Namita Jose, Advocates for Respondent**  
**No.3.**

**Mr. Shobhan Mahanti, Mr. S.S. Bhati, Mr. Takrim, Ms.**  
**Priyanka, Advocates for Resolution Professional.**

**O R D E R**

**07.08.2019** By our order dated 16th July, 2019, we have observed as follows: -

*"In the present case, as we find that the matter relates to real estate and there are number of allottees (Home Buyers), who are Members of the 'Committee of Creditors', we are of the view that before exclusion of any period for accepting any 'Resolution Plan', let the proposal of the Appellant be placed before the 'Committee of Creditors', which may exercise its powers in terms of Section 12A of the Insolvency and Bankruptcy Code, 2016. If it is approved with the 90% voting shares of the 'Committee of Creditors', this Appellate Tribunal may consider as to whether in such case, the application under Section 9 should be allowed to be withdrawn, and on failure, the Appellate Tribunal may decide whether proposed 'Resolution Plans' are to be considered or not?"*

2. Now it is stated that the proposal given by the Appellant/ Promoters has not been placed before the 'Committee of Creditors' by the 'Resolution Professional' on technical ground that the Promoters cannot file application

under Section 12A of the Insolvency and Bankruptcy Code, 2016 (for short ‘I&B Code’). We reject such objection, if any, raised by the ‘Resolution Professional’. It is the Promoters, who can settle the matter with all the ‘Financial Creditors’, ‘Operational Creditors’ including the Allottees and for that they may give their proposal and the ‘Resolution Professional’ is bound to place it before the ‘Committee of Creditors’, which is supposed to consider such application in the light of Section 12-A and the order of this Appellate Tribunal dated 16th July, 2019 as quoted above. The Allottees (Home Buyers) are also Members of the ‘Committee of Creditors’, therefore, while calling meeting of the ‘Committee of Creditors’, they should also be called for voting in accordance with the existing provisions of law. In that view of the matter, we direct the ‘Resolution Professional’ to place the proposal of Appellant/ Promoters before the ‘Committee of Creditors’. If necessary, the date of meeting of the ‘Committee of Creditors’ be fixed in the manner as prescribed under the Regulations and information be given to the ‘Financial Creditors’ including the allottees to take part.

3. The ‘Committee of Creditors’ will consider the same taking into consideration the interest of the Allottees and will also take into consideration the viability and feasibility of the proposal.

4. So far as, the Bank Guarantee is concerned, we make it clear that if the ‘Committee of Creditors’ approves the proposal with 90% voting shares, it may also ask the Promoters to give Bank Guarantee, as it may propose, failing which the Applicant, who has filed the application under Section 9, may not make prayer for withdrawal of the application. We expect that the ‘Resolution Professional’ will call for meeting of the ‘Committee of Creditors’ at an early date, preferably within three weeks to take decision in either way.

In case of rejection, the Appeal would be heard on merit. Parties will inform the development on the next date.

Place the case ‘for orders’ on **4th September, 2019**.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthy Narahari]  
Member (Technical)

**ANNEXURE X.40****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 253 of 2019  
And I.A. No. 995 of 2019**

**IN THE MATTER OF:**

**Ilam Chand Kamboj** .....Appellant

**Vs.**

**M/s ANG Industries Ltd.** .....Respondents

**Present :**

**For Appellant:** **RP in person**

**Mr. Prashant Mehta, Mr. Gaurav Malik,**

**Mr. Joy Bajaj, Mr. Kanav Gaba, Advocates**

**O R D E R**

**02.08.2019** 1. This appeal has been preferred by Appellant - 'Ilam Chand Kamboj' ('Resolution Professional') of 'ANG Industries Ltd.' ('Corporate Debtor') against part of the impugned order dated 4th February, 2019 passed by the Adjudicating Authority ('National Company Law Tribunal'), New Delhi Bench, New Delhi in Company Petition no. (IB)-292(ND)/2017 wherein certain observations have been made giving rise to initiation of proceeding by 'Insolvency and Bankruptcy Board of India' (IBBI).

2. The grievance of the Appellant is against the following observations made by the Adjudicating Authority:-

"5.5. It is seen that the RP has not complied with the directions of this Tribunal as per para 10 of our order dated 15.10.2018.

"it is also noted that the valuation report of two valuers as submitted by the Resolution Professional during the course of proceedings to consider the resolution plan did not inspire confidence and therefore during the course of the proceedings it was considered expedient to get yet another valuation conducted by a valuer as approved and on the panel of the IBBI. In these circumstances, and also considering the fact that the Corporate Debtor is a public listed company where approximately 74% of the shareholding is held by the public at large it is directed that a fresh valuation may be done by a valuer approved by IBBI".

The RP has not complied with these directions and no valuation as

directed by the court has been done, ostensibly for the reason that the COC is not able to foot the expense for yet another valuation. We are unable to see any merit in this argument and consequently do not agree with the RP.

**7.4** It was stated by the RP that the resolution plan was submitted by a consortium of resolution applicants. It was noted that the resolution plan was not submitted by either a resolution applicant individually or jointly with any other person. The resolution plan was submitted by five different entities, each styled as Resolution Applicant. These resolution applicants had individually signed the proposals for the resolution plan. No agreement was filed along with the resolution plan in respect of the formation of such consortium. Thus, the resolution plan was not as per the definition u/s. 5(26) of the Code, quoted above.

**8.4** it is seen that while submitting the resolution plan, the Resolution Professional while praying for all kinds of relief and blanket exemptions from payment of dues, penalties etc., as well as withdrawal of all pending cases against the CD, did not even exclude from the prayer, the relief regarding which he himself had a doubt. One such prayer is quoted below:-

“Direct the financial creditors and operational creditors (who have filed cases recovery of their dues) to withdraw all suits/applications filed against the Corporate Debtor on approval of the Resolution Plan: (can we pray that on approval of this plan by the tribunal, all the existing litigations shall stand disposed off)”.

**8.7** In CA 858/C-II/ND/2018, the RP while seeking approval of this Tribunal for liquidation of the CD has also sought approval for private sale of the assets of two units, namely, Sitarganj Unit for Rs. 18.50 crores to M/s. Mayur Industries Private Limited and Greater Noida unit for Rs. 15.50 crores to MM Forgings. While the offer of MM Forgings Limited for purchase of Greater Noida unit has been considered many times by this Tribunal (as mentioned in Para 5.2 above), the offer of Mayur Industries Private Limited to buy the Sitarganj Unit has been mentioned for the first time in this application for liquidation. The proposal for private sale of Sitarganj Unit was also not raised before us in oral hearing of his application.

**8.8** In CA No. 858/C-II/ND/2018, the details of complete voting have not been filed as it was stated the representatives of SBI, Bank of Baroda expressed that though they agree with the proposal/Resolution but the formal approval shall be communicated by way of their vote through email shortly. Ballot papers regarding the COC meeting dated 19.11.2018 have been placed on record after the Court hearing and the same have not been accompanied by any affidavit.

9. We are of the opinion that the assets of the CD are not valued properly and hence they are required to be referred to an independent valuer for valuation. We are also persuaded that the RP had not submitted a resolution plan in compliance with the provisions of the Code. The Resolution Professional has also been avoiding carrying out orders of this Tribunal, specifically, with reference to independent valuation of the assets of the CD. Hence, the recommendation of the COC to appoint the present RP as liquidator is not approved. We are persuaded that, it would be appropriate to refer the matter to the IBBI, the body for regulating the functioning of the Resolution Professionals, to examine the actions of the Resolution Professional and taking suitable action. The IBBI is also requested to suggest the name of another approved Resolution Professional to act as Liquidator. The Liquidator appointed after recommendation of IBBI shall also get a fresh valuation done of the assets of the Corporate Debtor. The liquidator so appointed will also appoint a qualified CA to determine the claim of the Operational Creditor, SBIPL and consider the same as mentioned in Para 3.4.5 above."

3. Normally, the Adjudicating Authority is not supposed to pass any adverse observations, even *prima facie*, against the 'Resolution Professional', without giving an opportunity to the 'Resolution Professional' as to why in view of certain Act, the matter be not referred to 'IBBI'.

4. However, as in the meantime, we find that the matter has been taken cognizance by the IBBI which has initiated the proceedings against the Appellant - 'Resolution Professional', we are not expressing any opinion on the merit of the observations.

5. However, the 'IBBI' cannot treat observations as made by the Adjudicating Authority, as referred to above, as final decision against the Appellant, as the observation made, without granting any opportunity to the Appellant. Therefore, the 'IBBI' will hear the proceedings and decide on merit after hearing the 'Resolution Professional' and taking into consideration reply as may be submitted by the Appellant, uninfluenced by the observations made by the Adjudicating Authority as referred to above. It is expected that IBBI will complete the enquiry on an early date preferably within three months.

The appeal stands disposed of with aforesaid observations. No costs.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice A. I. S. Cheema]  
Member (Judicial)

[Kanthy Narahari]  
Member (Technical)

**ANNEXURE X.41****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 396 of 2019**

(Arising out of Order dated 19th March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench in C.A. No. 19 (PB) of 2019 in C.P. No. (IB) 378(PB)/ 2017))

**IN THE MATTER OF:**

**State Bank of India** ...Appellant

**Vs.**

**Moser Baer Karamchari Union & Anr.** ...Respondents

**Present:** **For Appellant:** - Mr. Ramji Srinivasan, Senior Advocate with Mr. Ankur Mittal, Mr. Abhay Gupta, Ms. Sylona Mohapatra, Mr. Nikhil Ramdev, Advocates.

**For Respondents:-** Mr. Swarnendu Chatterjee and Ms. Shriya Maini, Advocates for R-1.

Mr. Abhishek Anand and Mr. Tushar Tyagi, Advocates for R-2.

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. On 14th November, 2017, pursuant to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short), the ‘Corporate Insolvency Resolution Process’ was initiated against the ‘Corporate Debtor’, wherein finally on 20th September, 2018, the order of liquidation was passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, and the workmen stood discharged under Section 33(7) of the ‘I&B Code’.
2. According to the Liquidator, by e-mail dated 5th December, 2018, he categorically denied the payment of the gratuity fund, the provident fund and the pension fund preferentially and included the same for the payments under the waterfall mechanism under Section 53 of the ‘I&B Code’.
3. In January 2019, the ‘Moser Baer Karamchari Union’ filed CA No. 19(PB)/2019 with prayer that the directions be issued to the Liquidator to

exclude the amount due to them towards ‘Provident Fund’, ‘Pension Fund’ and Gratuity Trust Fund’ from the waterfall mechanism envisaged under Section 53 of the ‘I&B Code’ and pay them the ‘Provident Fund Dues’, ‘Pension Fund Dues’ and ‘Gratuity Fund Dues’ as these will not constitute part of the liquidation estate.

4. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 19th March, 2019, allowed the CA No. 19(PB)/2019 and held that the ‘Provident Fund Dues’, ‘Pension Fund Dues’ and ‘Gratuity Fund Dues’ cannot be part of Section 53 of the ‘I&B Code’. The ‘State Bank of India’, a ‘Secured Creditor’, has challenged the order in this appeal.

5. Learned counsel appearing on behalf of the Appellant- ‘State Bank of India’ submitted that for the purpose of distribution of assets of the ‘Corporate Debtor’ under Section 53 of the ‘I&B Code’, dues of employees as mentioned in sub-clause (c) of sub-section (1) therein includes the contribution of ‘Provident Fund’.

6. It placed reliance on Explanation below Section 53 to suggest that the ‘workmen’s dues’ shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013.

7. Reliance has been placed on Explanation (iv) below Section 326 of the Companies Act, 2013, which relates to ‘Overriding Preferential Payments’ and Explanation (iv) below Section 326, it is mentioned that all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the Company is covered by term “workmen’s dues”.

8. Learned counsel for the Appellant- ‘State Bank of India’ also relied on Section 327 of the Companies Act, 2013 which related to ‘Preferential Payments’ and submitted that the sums due to the workman from the provident fund or any other fund for the welfare of the workmen, maintained by the Company, be treated as ‘workmen dues’.

9. Learned counsel appearing on behalf of the ‘Resolution Professional’ submitted that Section 36(3) of the ‘I&B Code’ defines the components of the liquidation estate and also lays down what forms the liquidation estate. Sub-section (3) therein is subject to sub-section (4). Sub-section (4)(a) (iii) specifically excludes from the liquidation estate or all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund.

10. Therefore, it is submitted that the workmen have the first charge on the aforesaid funds.

11. The question arises for consideration in this appeal is whether the provident fund, pension fund and gratuity fund come within the meaning of assets of the ‘Corporate Debtor’ for distribution under Section 53 of the ‘I&B Code’.

12. Section 36 of the ‘I&B Code’ deals with ‘Liquidation Estate’ for the purpose of liquidation. As per sub-section (1) of Section 36, for the purpose of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the ‘Corporate Debtor’ and reads as follows:

“36. Liquidation estate.—(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:-

- (a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
- (c) tangible assets, whether movable or immovable;
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the determination of ownership by the court or authority;
- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:-

- (a) assets owned by a third party which are in possession of the corporate debtor, including-
  - (i) assets held in trust for any third party;
  - (ii) bailment contracts;
  - (iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;
  - (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
  - (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;
- (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;
- (c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) assets of any Indian or foreign subsidiary of the corporate debtor; or
- (e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.”

13. From sub-section (4)(a)(iii) of Section 36, it is clear that all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund, shall not be included in the liquidation estate assets and cannot be used for recovery in the liquidation.

14. Section 53 relates to ‘Distribution of assets’, as mentioned hereunder:

“53. Distribution of assets.— (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature

for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely:-

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
  - (b) the following debts which shall rank equally between and among the following:
    - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
    - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
  - (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
  - (d) financial debts owed to unsecured creditors;
  - (e) the following dues shall rank equally between and among the following:-
    - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
    - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
  - (f) any remaining debts and dues;
  - (g) preference shareholders, if any; and
  - (h) equity shareholders or partners, as the case may be.
- (2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.
- (3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

**Explanation.** - For the purpose of this section-

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013)."

15. From sub-section (1) of Section 53, it is clear that the proceeds from the sale of the liquidation assets of the 'Corporate Debtor', the distribution is to be made in order of priority and within such period and in such manner as provided thereunder.

16. In terms of sub-section (4)(a)(iii) of Section 36, as all sums due to any workman or employees from the provident fund, the pension fund and the gratuity fund, do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor', the question of distribution of the provident fund or the pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1), does not arise.

17. The 'workmen's dues' is mentioned in clause (b)(i) of Section 53(1), which are the dues for the period of twenty-four months preceding the liquidation commencement date.

18. In view of the aforesaid specific provisions, the Explanation (iii) below Section 53, for the purpose of meaning of 'workmen's dues', the Appellant cannot derive the meaning as assigned to it in Section 326 of the Companies Act, 2013, including the Explanation below it.

19. Section 326 of the Companies Act, 2013, since its amendment w.e.f. 1st December, 2016 provides 'overriding preferential payments', relevant of which reads as follows:

"326. Overriding Preferential Payments. – (1) In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:--

- (a) workmen's dues; and
- (b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

(2) The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that sub-section shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Explanation.--For the purposes of this section, and section 327--

- (a) “workmen”, in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);
- (b) “workmen’s dues”, in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:--
  - (i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);
  - (ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;
  - (iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen’s Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

- (iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;
- (c) “workmen’s portion”, in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen’s dues bears to the aggregate of the amount of workmen’s dues and the amount of the debts due to the secured creditors.”

20. There is a difference between the distribution of assets and preference/priority of workmen’s dues as mentioned under Section 53(1)(b) of the ‘I&B Code’ and Section 326(1)(a) of the Companies Act, 2013. It has also been noticed that Section 53(1)(b)(i) which relates to distribution of assets, workmen’s dues is confined to a period of twenty-four months preceding the liquidation commencement date.

21. While applying Section 53 of the ‘I&B Code’, Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding ‘workmen’s dues’ which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4)(iii).

22. On the other hand, the workmen’s dues as mentioned in Section 326(1)(a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen’s dues as mentioned in Section 53(1)(b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013.

23. This apart, as the provisions of the ‘I&B Code’ have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1)(b) read with Section 36(4) will have overriding effect on Section 326(1)(a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013.

24. Once the liquidation estate/assets of the ‘Corporate Debtor’ under Section 36(1) read with Section 36(3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53, the provident fund, the pension fund and the gratuity fund cannot be included.

25. The Adjudicating Authority having come to such finding that the aforesaid funds i.e., the provident fund, the pension fund and the gratuity fund do not come within the meaning of ‘liquidation estate’ for the purpose of distribution

of assets under Section 53, we find no ground to interfere with the impugned order dated 19th March, 2019.

The appeal is accordingly, dismissed. No costs.

(Justice S.J. Mukhopadhyaya)  
Chairperson

(Justice A.I.S. Cheema)  
Member(Judicial)

(Kanthy Narahari)  
Member(Technical)

NEW DELHI

19th August, 2019

**ANNEXURE X.42**

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 782 of 2019**

**IN THE MATTER OF:**

Excel Metal Processors Limited .... Appellant  
Vs

Benteler Trading International GMBH and Anr. .... Respondents

**Present:**

**For Appellant: Mr. Javeed Hussain and Mr. Ashish Rana, Advocates.**

**O R D E R**

**21.08.2019** 1. An application for substitution has been filed by Mr. Imran Iqbal Khan, Director of 'Corporate Debtor'-M/s. Excel Metal Processor Limited, to substitute him as the Appellant in place of M/s. Excel Metal Processors Limited ('Corporate Debtor') and transpose M/s. Excel Metal Processors Limited through 'Interim Resolution Professional' as Respondent. However, as we find that Mr. Imran Iqbal Khan is already Appellant No. 2, we allow the Appellant to delete the name of the 1st Appellant-M/s. Excel Metal Processors Limited from the Cause Title and to treat Mr. Imran Iqbal Khan as sole Appellant. M/s. Excel Metal Processors Limited through 'Interim Resolution Professional' is allowed to be impleaded as 3rd Respondent. Counsel for the Appellant will make necessary corrections in the Cause Title of the paper book and the Cover Page in course of the day.

2. The Respondent-Benteler Trading International GMBH, a German Company ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the 'I&B Code') against Excel Metal Processors Private Limited ('Corporate Debtor') alleging that the 'Corporate Debtor' committed default on 27th March, 2016 in making the payment to an extent of US \$1,258,219.42 inclusive of interest @ 15% per annum. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by impugned order dated 25th June, 2019 having admitted the application, the Appellant-Imran Iqbal Khan, Director has challenged the said order. Learned Counsel appearing on behalf of the Appellant referred to the Agreement reached between the parties and submitted that as per the Agreement and as the Office of the Respondent-Benteler Trading

International GMBH is in Germany, any suit or case is maintainable only in the Court at Germany. No case can be filed in any Court in India. Therefore, Counsel has raised the question of jurisdiction of the National Company Law Tribunal, Mumbai Bench in entertaining the application under Section 9 of the I&B Code.

3. However, we are not inclined to accept the aforesaid statement as it is now settled and decided by this Appellate Tribunal in **Binani Industries Limited vs. Bank of Baroda and Anr.** Company Appeal (AT) (Insolvency) No. 82 of 2018 etc. decided on 14th November, 2018 wherein it was held that ‘Corporate Insolvency Resolution Process’/insolvency proceedings is not a ‘suit’ or a ‘litigation’ or a ‘money claim’ for any litigation; No one is selling or buying the ‘Corporate Debtor’ a ‘Resolution Plan’; It is not an auction; it is not a recovery, which is an individual effort by the creditor to recover the dues through a process that had debtor and creditor on opposite sides; and it is not liquidation. The object is mere to get resolution brought about, so that the Company do not default on dues.

4. Pursuant to Section 408 of the Companies Act, 2013, the National Company Law Tribunal has been constituted in different States. In terms of the said provision, the Central Government has notified and vested the power on respective National Company Law Tribunals to deal with the matter within its territory, where the registered Offices of the Companies are situated. As per Section 60(1) of the I&B Code, “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”. As admittedly, the Registered Office of the ‘Corporate Debtor’ namely-Excel Metal Processors Private Limited is situated at 132, B, Mittal Towers Nariman Point, Mumbai-400021, we hold that the National Company Law Tribunal, Mumbai Bench has the jurisdiction to entertain an application under Section 9 of the I&B Code and the Appellant cannot derive advantage of the terms of the Agreement reached between the parties.

5. Next, it was pointed out that the ‘Corporate Debtor’ was not served with the Demand Notice in terms of Section 8(1) of the I&B Code. However, from the record we find that Demand Notice under Section 8(1) of the I&B Code was issued by the Respondent-‘Operational Creditor’ on 6th March, 2018 demanding the repayment of US \$971,412.98 plus ancillary obligations @ 15 % p.a. amounting to US \$286.804.44 and despite receiving of the said Demand Notice, the ‘Corporate Debtor’ had not replied, nor repaid the

outstanding dues. The Adjudicating Authority has as such not accepted such plea based on record.

6. In spite of the same, we gave option to the Appellant to suggest whether the Appellant or the 'Corporate Debtor' would agree to repay the debt as payable to the 'Operational Creditor', but it is informed that the 'Corporate Debtor' or the Appellant is not in a position to do so.

7. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 25th June, 2019 and in absence of any merit, the Appeal is accordingly dismissed. No cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthy Narahari]  
Member (Technical)

**ANNEXURE X.43****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 676 of 2019**

(Arising out of Order dated 29th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in C.A. No.229(PB)/2009 in C.P.No.IB-1140(ND)/2018)

**IN THE MATTER OF:****L&T Infrastructure Finance Company Ltd.,**

Brindavan, Plot No.177, C.S.T. Road,  
Kalina, Santacruz (East),  
Mumbai, Maharashtra-400098

.... Appellant

Vs

**1. Gwalior Bypass Project Ltd.,**

Through its Interim Resolution  
Professional, Mr. Rajesh Samson  
370-371/2, Sahi Hospital Road,  
Jangpura, Bhogal, New Delhi-110014.

**2. ICICI Bank Limited,**

ICICI Bank Tower, Near Chakli Circle,  
Old Padra Road Vadodara,  
Gujarat – 390007.

.... Respondents

**With****Company Appeal (AT) (Insolvency) No. 677 of 2019**

(Arising out of Order dated 29th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in C.P.No.IB-1140(ND)/2018)

**IN THE MATTER OF:****L&T Infrastructure Finance Company Ltd.,**

Brindavan, Plot No.177, C.S.T. Road,  
Kalina, Santacruz (East),  
Mumbai, Maharashtra-400098

.... Appellant

Vs

**1. Gwalior Bypass Project Ltd.,**

Through its Interim Resolution  
 Professional, Mr. Rajesh Samson  
 370-371/2, Sahi Hospital Road,  
 Jangpura, Bhogal, New Delhi-110014.

2. **ICICI Bank Limited,**  
 ICICI Bank Tower, Near Chakli Circle,  
 Old Padra Road Vadodara,  
 Gujarat – 390007.
3. **National Highways Authority of India,**  
 Room No.509, Transport Bhawan 1,  
 Parliament Street, New Delhi-110001. .... Respondents

**Present:**

**For Appellant:** **Mr. Abhinav Vasisht, Senior Advocate with Mr. C.A. Sinha, Ms. Akshita Sachdeva, Ms. Sonali Khanna and Mr. Anshuman Chaturvedi, Advocates**

**J U D G M E N T**

1. ICICI Bank Limited filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for 'Corporate Insolvency Resolution Process' against 'Gwalior Bypass Project Limited'- ('Corporate Debtor'). After hearing the Applicant-ICICI Bank Limited and 'Corporate Debtor', when the matter was reserved for orders, the Appellant - L&T Infrastructure Finance Company Ltd. filed a petition for intervention for impleadment as a party-Respondent.
2. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 29th May, 2019 rejected the petition for intervention not being a necessary party.
3. The Adjudicating Authority by another order dated 29th May, 2019 admitted the application under Section 7 preferred by the ICICI Bank Limited and initiated 'Corporate Insolvency Resolution Process' against 'Gwalior Bypass Project Limited'-('Corporate Debtor').
4. The order of rejection dated 29th May, 2019 and order of admission of application under Section 7 dated 29th May, 2019 are under challenge in these Appeals.
5. According to the Appellant, 'Gwalior Bypass Project Ltd.'- ('Corporate Debtor') is a 'Special Purpose Vehicle' (SPV) for construction, development, finance, operation and maintenance of the work of construction of New Four

Lane, Gwalior Bypass on NH-75 in the State of Madhya Pradesh. It is ‘step-down subsidiary’ of ‘Era Infrastructure Engineering Ltd.’ As per Regulation of National Highway Authority of India (‘NHAI’ for short) in projects involving public interests led to a ring-fenced financing, in order to protect the ‘Special Purpose Vehicle’s’ asset from being encumbered.

6. It is stated that on 9th October, 2006, a Concession Agreement was executed between NHAI and ‘Corporate Debtor’ for construction, development, operation and maintenance, in terms of which the concessionaire was barred from creating any encumbrance, lien or from creating any rights or benefits under this Agreement or any Project Agreement except with prior consent in writing from NHAI.

7. Further, case of the Appellant is that the ‘Corporate Debtor’ approached the Appellant L&T Infrastructure Finance Company Ltd. for refinancing the erstwhile loan advanced by IDFC (erstwhile lender) by subscribing to secured, rated, redeemable, non-convertible debentures proposed to be issued by the ‘Corporate Debtor’, which was sanctioned vide letter dated 12th March, 2014 issued by the Appellant for subscribing non-convertible debentures aggregating to Rs. 260 crores.

8. The said sanction letter was later superseded and replaced by a modified sanction letter dated 10th December, 2014 towards subscription of non-convertible debentures aggregating to Rs. 241.55 crores. Thereafter, on 24th December, 2014, a Debenture Trust Deed was executed between the ‘Corporate Debtor’ and Trustees (IL&FS) entailing inter alia the rights, powers and obligations of the Trustees, terms and conditions of the Debentures, security and asset cover, representation and warranties of the Companies. The Debenture Trust Deed specifically barred an act whereby the payment of the Appellant’s debt may be hindered or delayed. The said facilities by way of non-convertible debentures were sanctioned by the Appellant based on no objection letters dated 21st July, 2014, 21st October, 2014 and 11th March, 2015 issued by NHAI in favour of the ‘Corporate Debtor’ in terms of Clause 9 of Schedule 3 of the Debentures Trust Deed. It is alleged that in the meantime, the ICICI Bank sanctioned certain loan facilities to the tune of Rs. 91.5 crore to the ‘Corporate Debtor’. The sanction in favour of the ‘Corporate Debtor’ took place in the absence of any approval of NHAI, as mandated in terms of the Concession Agreement dated 9th October, 2006.

9. Therefore, according to the Counsel for the Appellant sanction of loan by ICICI Bank having not been approved by NHAI, the Bank by filing application under Section 7 cannot deprive the Appellant from occupying position of sole/senior lender. It is stated that the ‘L&T Infrastructure Finance Company

Ltd.' (Appellant) is occupying the position of sole/senior lender approved by NHAI of its rights and interests as accorded under the financing document, based on a pre-mature and unenforceable claim, the validity of which is disputed and pending adjudication before the Hon'ble Debt Recovery Tribunal - II, New Delhi in O.A. No. 805/2016. It is stated that a notice has been issued in the said case to all the parties including the Appellant.

10. It was submitted that the impugned order has the effect of relegating the rights and interest of the Appellant to that of a minority financial creditor with 38.76% voting share, as opposed to 61.24% share of 2nd Respondent - ICICI Bank, blatantly disregarding Appellant's sole/senior and secured lender status vis-a-vis the 'Corporate Debtor'. It was also submitted that by using the provisions of the I&B Code, the ICICI Bank indirectly manipulated in collusion with the 'Corporate Debtor'

11. We have heard learned Counsel for the parties and perused the record.

12. In absence of any prohibition, it is always open to 'Financial Creditor' to file an application under Section 7 of the I&B Code for initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor', if the 'Financial Creditor' owes debt and the 'Corporate Debtor' defaults in payment.

13. In the case of "**Innoventive Industries Ltd. v. ICICI Bank**" MANU/SC/1063/2017 : (2018) 1 SCC 407], the Hon'ble Supreme Court while dealing with the application under Section 7, 8 and 9 of the I&B Code observed:-

"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 dispatch 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."

14. From the aforesaid decision of the Hon'ble Supreme Court, it will be evident that the Adjudicating Authority is required to notice as to whether the application is complete or not and if there is debt and the 'Corporate Debtor' defaulted in payment and the amount is more than Rs. 1 lakh, it is bound to admit an application under Section 7. Though, it is open to the 'Corporate Debtor' to object admission of application under Section 7 on the ground that the 'debt is not payable in law or in fact', but the application under Section 7 can be triggered even if the debt is disputed by the 'Corporate Debtor' and the amount of default is more than Rs. 1 lakh.

15. As per the decision of this Appellate Tribunal in '**Innoventive Industries Limited vs. ICICI Bank & Anr.**' - (Company Appeal (AT) (Ins.) Nos. 1 and 2 of 2017, decided on 15th May, 2017), a limited notice is required to be given to the 'Corporate Debtor' before admitting an application under Section 7. In such case, the 'Corporate Debtor' may raise objection and may point out that there is no debt payable in law or in fact or that the default has not been committed. It is also open to the 'Corporate Debtor' to take plea that the Applicant is not a 'Financial Creditor' or 'Operational Creditor'. The 'Corporate Debtor' may also settle the claim with the 'Financial Creditor' or 'Operational Creditor' before admission of an application under Section 7 or 9.

16. In view of the aforesaid position of law, we hold that the Appellant being not a Member/Shareholder of the 'Corporate Debtor', and has claimed to be a 'Financial Creditor' of the 'Corporate Debtor' has no right to intervene to oppose admission of the application under Section 7 preferred by the ICICI Bank against the 'Corporate Debtor'.

17. After admission of the application under Section 7, if the Appellant claims that it is one of the ‘Financial Creditor’, it can file claim before the ‘Resolution Professional’, but it cannot challenge the order of admission in absence of any challenge by the ‘Corporate Debtor’, on the ground that it has first charge on the asset of the ‘Corporate Debtor’ or has superior claim over the claim of the other ‘Financial Creditors’.

18. In view of the aforesaid position of law, no relief can be granted to the Appellant. Both the Appeals are accordingly dismissed. No cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

(Justice A.I.S. Cheema)  
Member (Judicial)

(Kanthy Narahari)  
Member (Technical)

NEW DELHI  
19th August, 2019

**ANNEXURE X.44**

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 498 of 2019**

[ arising out of Order dated 16th April, 2019 by NCLT, Bengaluru Bench,  
in I.A. Nos. 446 of 2018 in CP (IB) No. 122/BB/2017 ]

**IN THE MATTER OF:**

**Mr. M. Srinivas**

No. D26, Golden Corner Apartments  
Belangur Gate, Sarjapur Road, Near Belandur Gate  
Bangalore – 560 003

...Appellant

**Versus**

**Smt. Ramanathan Bhuvaneshwari**

Resolution Professional,  
M/s Bhuvana Infra Projects Private Limited  
Flat No. 528, K.R. Garden, First Floor,  
6th Block, Koramangala,  
Bangalore

...Respondent No. 1

**Mr. Pratap Kundra**

6-3-1096, FNOL 304 V.V. Vintage,  
Somajiguda Hyderabad- 500082,  
Telangana, India

...Respondent No. 2

**Mr. C.D. Sanjay Raj**

No.4, Benson Road, Benson Town,  
Bangalore- 560046, Karnataka

...Respondent No. 3

**Mr. L. Ramesh**

#230, 4th Cross, Bellandur,  
Bangalore South- 560103,  
Karnataka

...Respondent No. 4

**Mr. B.R. Rajashekhar**

No. 20, 12th Cross, RMVIIInd Stage,  
Gedalahalli, Sanjay Nagar,  
Bangalore- 560094, Karnataka

...Respondent No. 5

**M/s Commune Properties India Pvt. Ltd.**

# 823, 21st Main Road 8th Block,  
Koramangala, Bangalore,  
Karnataka- 560095

...Respondent No. 6

**M/s Prisha Properties India Pvt. Ltd.**

1st Floor, Vikas Tower, Castle Street,  
Ashok Nagar, Bangalore,  
Karnataka- 560025

...Respondent No. 7

**M/s Golden Gate Properties Ltd.**

#820, 80 Feet Road, 20th Main,  
8th Block, Koramangala, Bangalore,  
Karnataka- 560095

...Respondent No. 8

**Mr. Jayatheerthak.B**

NO-337/1A, 18th Cross Upper Place  
Orchards, Sadashivanagar,  
Bengaluru- 560080

...Respondent No. 9

**Present:**

**For Appellant : Mr. Ashish Rana and Mr. Surekh Baxy, Advocates**

**J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. In the ‘Corporate Insolvency Resolution Process’ against M/s. Bhuvana Infra Projects’, the ‘Resolution Professional’ brought to the notice of the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench that the promoters of the ‘Corporate Debtor’ and its company defrauded a number of creditors of more than crores of rupees. The Adjudicating Authority by impugned judgment dated 16th April, 2019 dispose of Interlocutory Application in exercising of power conferred u/s. 213 of the Companies Act, 2013, with following directions:

“19. In the result by exercising powers conferred on this Adjudicating Authority, which being NCLT, U/s 213 of Companies Act, 2013, I.A. No. 446/2018 in C.P. (IB) No. 122/BB/2017 is disposed with the following directions:

(1) Learned Resolution Professional is directed to forward all material documents, which is connected to the present case including the Forensic Audit Report dated 14.12.2018, the Central Government, within a period of three weeks from the receipt of the copy of the order.

(2) Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/other side duly following principles of natural justice.

(3) The Central Government is directed to refer the matter to the SFIO for further investigation into the Affairs of the Corporate Debtor, Bank of Maharashtra and other related Companies including Director of Companies of Corporate Debtor & related Companies and officials of Bank of Maharashtra basing on the Report of Forensic Audit Report, as expeditiously as possible.

(4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.

(5) The parties are liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.

(6) The prayer as sought for the application stand disposed of in the light of above directions.

(7) No order as to costs."

2. The Appellant - 'M. Srinivas', majority shareholder of the 'Corporate Debtor' (3rd Respondent before the Adjudicating Authority) has challenged the order dated 16th April, 2019 on the ground that the Adjudicating Authority has no jurisdiction to pass order u/s. 213 of the Companies Act, 2013.

3. The question arises for consideration in this appeal is whether the 'Adjudicating Authority' which is 'National Company Law Tribunal' having dual jurisdiction under the 'Companies Act, 2013' and the' Insolvency and Bankruptcy Code, 2016' can direct the Central Government to refer the matter to the 'Serious Fraud Investigation Office' (SFIO) for further investigation into the affairs of the 'Corporate Debtor', Bank of Maharashtra and other group of companies including the Directors of the companies of Corporate Debtor and group companies and officials of Bank of Maharashtra basing it on the 'Forensic Audit Report'.

4. During the 'Corporate Insolvency Resolution Process', the 'Resolution Professional' of M/s. Bhuvana Infra Projects Pvt. Ltd. earlier filed an application (I.A. No. 269/2018) u/s. 66 of the 'Insolvency & Bankruptcy Code, 2016 (for short, 'the I&B Code') for recovery of Rs. 46 Crores from the 'Groups of Companies' and the Directors of the 'Corporate Debtor', the Adjudicating Authority by order dated 24th October, 2018 observed that the 'Resolution Professional' has not made out any *prima facie* case for alleged discrepancies under Section 66 of the I&B Code and there cannot be a parallel proceedings before the Tribunal and the Court.

5. Subsequently, the ‘Committee of Creditors’ appointed ‘Forensic Auditor’ to conduct a Forensic Audit Report and on receipt of the report, ‘Resolution Professional’ filed another I.A. No. 446 of 2018 under Section 66 read with Section 25(2), 69, 70 and other applicable sections of the “I&B Code” inter alia’ seeking to attach the personal assets of one Mr. Pratap Kunda (who was the 1st Respondent) and Mr. Sanjay Raj (who was the 2nd Respondent) and Mr. M. Srinivas (who was the 3rd Respondent and Appellant herein) alleging that they are responsible for defrauding the creditors and in order to recover the total dues of Rs. 461,163,402/- by exercising power conferred on the ‘Adjudicating Authority’/‘National Company Law Tribunal’ and on the said application, the order has been passed referring the matter to the Central Government for investigation through SFIO. The appellant - ‘Mr. M. Srinivas has challenge the aforesaid order.

6. Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority has not been conferred with power u/s. Section 213 of the Companies Act, 2013 in absence of any amendment made in Schedule XI of the I&B Code. It was also submitted that the Adjudicating Authority has powers under Section 49, - “Transactions defrauding creditors” - which relates to undervalued transaction; Section 65, which provides action against any person who has done certain things fraudulently or with malicious intent during the ‘Insolvency Resolution Process’ or ‘Liquidation’; Section 66 in case during the ‘Corporate Insolvency Resolution Process’ or in ‘liquidation process’, it is found that any business of the ‘Corporate Debtor’ has carried out with the intent to defraud creditors and under Section 35 for the ‘Liquidator’ to investigate the affairs of the ‘Corporate Debtor’. This apart, action can be taken and punishment can be imposed by Special Court only under Section 68(b) of the I&B Code, Section 69, Section 71 and Section 74 of the ‘I&B Code’. According to the Appellant all the allegations are baseless and not based on record.

7. From the record, we find that the Adjudicating Authority having gone through the ‘Forensic Audit Report’ and observed:

“7. Following are the irregularities pointed out in the Forensic Audit Report:

- a. Related Parties’ and individuals behind these Companies:
  - i. Corporate Debtor M/s. Bhuvana Infra Projects (BIPPL) M/s. Golden Gate Properties Ltd. (GGPL), M/s. Prisha Properties India Pvt. Ltd. (PPIL) and M/s. Commune Properties Pvt. Ltd. (CPIL), New Age Properties LLP are part of the 56 Group Companies, which are Related Parties.

- ii. Mr. Prattap Kunda and Mr. Sanjay Raj are the individuals related to all the above Group/Related Entities.
  - iii. Loan from HDB Financial Services being serviced by GGPL and PPIPL, also showing Group Company relationship between the entities and Corporate Debtor.
  - iv. Mr. Sanjay Raj is the 'Benami' Individual in whose name the properties are being purchased by the Group Companies.
- b. Loans availed from the Bank of Maharashtra (BoM) in a fraudulent manner and misutilisation of CC facility:
- i. Few months Directorship to impress the Bank with Credentials of Group Entities: Mr. Sanjay Raj, the Director cum KMP of the Group became director of Corporate Debtor (BIPPL) for a period of five months only during which period the first tranche of CC limit of INR 500 Lakhs was availed from BoM by also providing personal guarantee and had hypothecated land in his name as collateral security.
  - ii. Mis-use of CC facility from BoM against the terms of sanction: The Cash Credit facility, meant for working capital, was misutilized by transfer to other bank accounts of BIPPL and in turn used for purchase of fixed assets for INR 79.50 Lakhs in contravention to the conditions of CC limit sanction. As per the loan sanction, the facility can be called back if there is violation in the utilization of funds.
  - iii. Enhancing bank CC facility from Rs. 5 crores to Rs. 10 Crores to accommodate Fixed assets purchase in violation of Loan sanction Terms: BIPPL had applied for a term loan of INR 450 Lakhs with BoM in relation to setting up of a per-cast plant for the Commune 1 project under CPIPL in FY 2015-16. However, the term loan was rejected due to issues with the property pledged as collateral and the bank requesting additional security which BIPPL was not willing to give. Thus, it appears that during FY 2014-15 the CC facility from BoM was enhanced from INR 500 Lakhs to INR 1,000 Lakhs in order to potentially accommodate the setting up of Precast Plant which is in violation of the restrictive covenant of the loan.
  - iv. Further issue of shares from ICD from the group: During FY 2015-16, the Inter Corporate Deposit ("ICD") from PPIPL was

used to allot an additional 37,00,000 shares to M. Srinivas taking the subscribed share capital to 50,00,000 shares.

Therefore, RP is of the view that this done primarily to meet the capital adequacy ratio and the requirement of promoters' contribution for the enhanced CC facility.

v. Inflating Revenue to avail CC limit enhancement:

Revenue for FY 2014-15 inflated by INR 2,300.49 Lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 Lakhs to 1,000 Lakhs in FY 2015-16, apparently based on the financial for 2014-15.

vi. Surge in Financials in 2014-15 to facilitate enhancement: The auditors observed in FY 2014-15, when then enhancement of the CC facility from INR 500 Lakhs to INR 1,000 Lakhs, a surge in revenue, profit, and inventory and a reduction in debtors.

c. Financial Irregularities in the conduct of business of CD:

- i. Identified cash deposits of INR 171.95 Lakhs into and cash withdrawals of INR 165.81 Lakhs from the bank accounts of BIPPL. The transactions pattern indicates that these could potentially be diversion of funds for generation of unaccounted cash.
- ii. Identified purchases of INR 1,881.55 Lakhs from non-OEM, small time vendors and traders, which appears to be suspicious.
- iii. Parking of funds of INR 346.66 Lakhs with contactors through potentially fictitious suspense account in FY 2013-14 and subsequently written-off the books of accounts of BIPPL in FY 2016-17.

d. Round Tripping Transaction:

- i. Identified round tripping transactions form the bank accounts of BIPPL for INR 779.00 Lakhs which could potentially be accommodation entries.

e. Asset Stripping:

- i. Inventory worth INR 941.23 Lakhs written-off during FY 2017-18 without any documentation and/or revenue being recognized.
- ii. Fixed assets sold to scrap dealers, resulting in INR 579.00 Lakhs of fixed assets being written-off in the books of BIPPL during FY 2016-17.

- f. Anomalies in Accounting and Audited Financial Statements:
- i. Revenue for FY 2014-15 inflated by INR 2,300.49 lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 Lakhs to 1,000 Lakhs in FY 2015-16, apparently passed on the financial for 2014-15.
  - ii. Revenue for FY 2015-16 written-off to the extent of INR 2,437.24 Lakhs through year-end adjustment entry. However, BOM enhanced CC limit from 1,000 Lakhs to 1,250 Lakhs in FY 2016-17.
  - iii. Revenue for FY 2016-17 written-off to the extent of INR 2,706.26 Lakhs through year end adjustment entry.
  - iv. Undue Benefit to the Statutory Auditor: Outstanding balance of INR 8.82 Lakhs of statutory auditor settled through transfer of plots worth Rs. 26 Lakhs to Miracle Pools Private Limited, an entity registered by the Auditor.
  - v. Variance in accounts receivable between financial statements of BIPPL and payables in the financial statements of customers of BIPPL.
  - vi. Revenue, cost and advances recognized for Golden Serenity project with no work order.
  - vii. Cost recognized and advances given in relation to Golden County project with no work order with no revenue recognized.
  - viii. Cash and other receipts of INR 44.91 Lakhs associated with ledger "GMD - Golden Days" in relation to work execution, with no work order and no revenue recognized; and
  - ix. Arm's length pricing not assessed while estimating costs and revenue for projects.
  - x. Inflated value of work orders issued to BIPPL by customers of BIPPL in relation to projects Commune and Orchids.

**8. Modus Operandi Adopted:** From the above observations of the Forensic audit Report, RP submits the following fraudulent intentions and actions:

- a. The Corporate Debtor was set-up for fraudulent Purpose and to defraud the creditors: This Golden Gate Group of Companies with a fraudulent intention set up the CD for various fraudulent transactions, namely, to somehow avail bank loans, to generate unaccounted cash,

to manage round tripping of funds with respect to group Companies businesses, for diversion of funds amounting to fraud, etc.

- b. Wrong-Purpose shown to ensure loan sanction: The CD and its Directors applied for enhancement of CC facility for working capital with a fraudulent intention to use the same for purchase of Fixed Assets as the Term loan applied for Capex was rejected by Bank.
- c. Manipulated Financials to ensure loan sanction.
- d. Increased the losses in 2016-17 through fictitious transactions to reduce the statutory liability and also to justify default to banks.
- e. Liquidated Assets/Inventory in a planned manner in 2016-17 to make the Company a Shell.
- f. Facilitated to file u/s. 7 of the Code with the sole aim to liquidate the CD: Mr. Sanjay Raj, one of the Common Directors in all the Group Companies resigned from directorship of all the customers of BIPPL i.e. GGPL, PPIPL, CPIPL and from New Age Properties LLP in 2017, the year when New Age Properties LLP filed an application on BIPPL under Section 7 of the IBC.

Planned Resignation of original Shareholder cum Directors: To avoid responsibility on loans becoming NPA all Directors of CD resign around the same time in Feb/March 2017 and Dummy Directors were brought in to meet MCA requirement.

- g. Statutory Auditors of the Group-Companies used for the entire Modus Operandi: The Director cum Statutory Auditor of the Group Companies Mr. Rajashekhar and Mr. Jayatheertha, the Statutory Auditor have been used for their expertise to facilitate the entire modus operandi.

#### **9. Total Dues to the CD:**

As per the Audited Results as on 31st March 2018, The Corporate Debtor has overdues from its Group Companies, in the form of Receivable of Rs. 33.70 crores and dues towards Assets worth Rs. 1.52 Crores which were distributed to the Group Companies. Details are below:

<i>Group Company Name</i>	<i>Net Receivables (Rs.)</i>	<i>Assets of CD distributed to the Group Rs.</i>	<i>Total Dues (Rs.)</i>
M/s. Commune Properties India Pvt. Ltd. (Respondent 6)	46,322,665	13,375,380	59,698,045
M/s. golden Gate Properties Ltd. (Respondent 8)	41,804,526	1,801,180	43,605,706
M/s. Prisha Properties India Pvt. Ltd. (Respondent 7)	233,937,377	233,937,377	
<b>Total</b>	<b>322,064,568</b>	<b>15,176,560</b>	<b>337,241,128</b>

**10.** Also as per Audited results for 2017-18, the rest of the assets shown in the books have been distributed to the Group Companies to the extent of Rs. 1,51,76,560/- (Rs. 1.52 Crores), Duly confirmed by the Director of the Company and the rest of the assets worth Rs. 7,441,849 is not found physically. Also, as pointed out in the audit report 2017/18 and also confirmed in the forensic audit report, the inventory of amount Rs. 941,23,192/- have been written off without any revenue recognized/no invoice raised.

Hence, the minimum amount due from the Group to the Corporate Debtor amounts to:

<i>Sl. No.</i>	<i>Details</i>	<i>Amount overdue from Group (Rs.)</i>	<i>To be recovered from the Directors of CD (Rs.)</i>	<i>Total amount due (Rs.)</i>
1.	Receivables overdue	322,064,5681		322,064,5681
2.	Assets with Group	15,176,560		15,176,560
3.	Assets not found		7,441,849	7,441,849
4.	WDV of Assets sold to scrap dealers and money siphoned off		22,357,233	22,357,233
5.	Inventory consumed, not invoiced		94,123,192	94,123,192
	<b>Total dues from Group</b>	<b>337,241,128</b>	<b>123,922,274</b>	<b>461,163,403</b>

9. The Appellant, who is the 3rd Respondent, was heard by the Adjudicating Authority, which has been recorded by the Adjudicating Authority as follows:

“3. The application is opposed by the Respondent No. 3 by filing separate reply dated 20.03.2019 by inter alia contending as follows:

1. The instant application is not maintainable either in law or on facts, and thus it is liable to be dismissed in limine on this ground alone.
  2. It is true that the Company M/s. Bhuvana Infra Projects was incorporated in the year 2011. However, it is not correct to state that it is a subcontracting arm of its group Companies. The Companies has its own objects and functions within the ambit of objects as stated in the Memorandum & Article of Association. Hence, it is denied that the Company M/s. Bhuvana Infra Projects (herein after referred to as Company for brevity) exclusive for the group Companies obviously RP has not looked into the records and has made bald and frivolous allegations. It is asserted that the Application is the New Age Properties LLP itself is not a Group Company belied this claim. However, the RP is put to strict proof of the allegations made in this paragraph.
  3. It is admitted that the RP has to take control of all the assets of the Corporate Debtor but it is false to state that there are receivables overdue from the Group Companies. It is pointed out that the Tribunal rejected earlier I.A. No. 269/2018 with an observation that the appropriate forum for initiating fraudulent actions is Criminal Court and also granted liberty to RP to initiate Criminal Proceedings in accordance with law.”
10. We have heard the learned counsel for the parties and perused the record. As per Section 60(1) of the I&B Code the National Company Law Tribunal having territorial jurisdiction over the place where the registered office is located will be the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors, as quoted below:
- “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.”
11. The provision aforesaid makes it clear that the National Company Law Tribunal is empowered to deal with insolvency resolution and liquidation for corporate persons including corporate debtor and others. Merely because additional power of Adjudicating Authority has been vested, the power of the National Company Law Tribunal under the Companies Act, 2013 does not stand extinguished.

12. In the case of "**Y. Shivram Prasad Vs. S. Dhanapal & Ors.**" Company Appeal (AT) (Insolvency) No. 224 of 2018 etc." disposed of on 27th February, 2019 the Appellate Tribunal held that the Adjudicating Authority has dual role of 'Adjudicating Authority' and 'National Company Law Tribunal' for the purpose of 'I&B Code'.

13. Hon'ble Supreme Court in '**Swiss Ribbons Pvt. Ltd. & Anr.**', '2019 SCC Online SC 73' while dealing with the matter of settlement between the parties also observed that the 'National Company Law Tribunal' has inherent power under Rule 11 of the National Company Law Tribunal Rules, 2016.

14. Therefore, we hold that the 'Adjudicating Authority' which is the 'National Company Law Tribunal' has dual and interwoven role and power to pass order under Section 213 of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

15. Section 213 of the Companies Act, 2013 relates to 'investigation into company's affairs in other cases' and reads as follows:

**"213. Investigation into company's affairs in other cases**

The Tribunal may,-

(a) on an application made by-

- (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or
- (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital,

and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that-

- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;
- (ii) persons concerned in the formation of the company or the

management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

- (iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Provided that if after investigation it is proved that-

- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or
- (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.”

16. From Clause (b) of Section 213 of the Companies Act, 2013, it is clear that on an application made to it ‘by any other person’ or ‘otherwise’, if Tribunal/Adjudicating Authority is satisfied that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, or that the company was formed for any fraudulent or unlawful purpose and that the person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of

fraud, misfeasance or other misconduct towards the company or towards any of its members or the members of the company have not given all the information with respect to its affairs which they might reasonably expect, and that the affairs of the company ought to be investigated, after giving a reasonable opportunity of being heard to the parties concerned, the Tribunal/Adjudicating Authority has power to refer the matter to the Central government for investigation into the affairs of the company.

17. Apart from the power conferred by Section 213 of the Companies Act, 2013, the 'National Company Law Tribunal' has inherent powers under Rule 11 of National Company Law Tribunal Rules, 2016. Therefore, in public interest, it is always open to the 'National Company Law Tribunal' after giving a reasonable opportunity of being heard to the parties concerned refer the matter to the Central Government for investigation, if the Tribunal/ Adjudicating Authority forms a *prima facie* opinion that acts of fraud have been committed by company or group of companies or its Director(s) or officers. In the present case 'Forensic Audit Report' alleged that the members of the 'Corporate Debtor' and its 'Group Companies' along with officers of the 'Bank of Maharashtra' have committed certain fraud, which, *inter alia*, suggest that a sum of Rs. 3,172.25 Lakhs are receivable by the 'Corporate Debtor'. The Appellant and others were given reasonable opportunity of hearing by Adjudicating Authority. As such no interference is called for against the impugned order. In absence of any merit, the appeal is dismissed. No cost.

[Justice S.J. Mukhopadhyaya]  
Chairperson

[ Justice A.I.S. Cheema ]  
Member (Judicial)

[ Kanthi Narahari ]  
Member (Technical)

New Delhi

24th July, 2019

**ANNEXURE X.45****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 601 of 2019****IN THE MATTER OF:**

Shweta Vishwanath Shirke &amp; Ors. .... Appellants

Vs

The Committee of Creditors &amp; Anr. .... Respondents

**Present:****For Appellants: Mr. Rajeev Ranjan, Senior Advocate with Mr. Sanklap Sharma, Mr. Aarif Akhtar, Advocates.****For Respondents: Mr. Siddharth Sharma, Advocate for Respondent No.1.****Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Deepanjan Dutta and Mr. Naman Tandon, Advocates for Liquidator.****Mr. A.K. Mishra, Advocate for Andhra Bank.****Mr. Pranav Vyas and Mr. Satendra K. Rai, Advocate for Respondent No.2, Resolution Professional.****With****Company Appeal (AT) (Insolvency) No. 612 of 2019****IN THE MATTER OF:**

Andhra Bank .... Appellant

Vs

Sterling Biotech Ltd.  
(Through the Liquidator) & Ors. .... Respondents**Present:****For Appellant: Mr. Siddharth Sharma and Mr. A.K. Mishra, Advocates****For Respondents: Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr.**

**Deepanjan Dutta and Mr. Naman Tandon,  
Advocates for Liquidator**

**Mr. Nitesh Rana and Mr. Adil Ali Khan, (SPP) for  
Enforcement Directorate (R-3)**

**Mr. Pranav Vyas and Mr. Satendra K. Rai, Advocate  
for Respondent No.2, Resolution Professional.**

**With**

**Company Appeal (AT) (Insolvency) No. 527 of 2019**

**IN THE MATTER OF:**

Sundaresh Bhatt,  
Resolution Professional for  
Sterling Biotech Ltd. .... Appellant

Vs

Andhra Bank .... Respondent

**Present:**

**For Appellant:      Mr. Pranav Vyas and Mr. Satendra K. Rai,  
                                Advocates.**

**O R D E R**

**28.08.2019** 1. The main grievance of the Appellant - 'Shweta Vishwanath Shrike & Ors' (employees of the 'Corporate Debtor') is that though the application under Section 12A of the Insolvency and Bankruptcy Code, 2016 (for short, 'the I&B Code') was filed at the instance of the 'Promoter' approved with more than 90% voting share of the 'Committee of Creditors', but it was rejected by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai on the ground that the 'Promoter' not eligible to file the 'resolution plan' under Section 29A cannot file the application under Section 12A of the 'I&B Code'. The impugned order dated 8th May, 2019 passed by the Adjudicating Authority has also been challenged by the 'Andhra Bank' in Company Appeal (AT) (Ins.) No. 612 of 2019 and the 'Resolution Professional' in Company Appeal (AT) (Ins.) No. 527 of 2019, but on different grounds.

2. Learned counsel appearing on behalf of the 'Andhra Bank' submits that Section 29A is not applicable to an application filed under Section 12A for withdrawal of application under Section 7 filed by Andhra Bank, if the Committee of Creditors accept the same with more than 90% of the voting share.

3. The ‘Resolution Professional’ has challenged the order dated 8th May, 2019 insofar it relates to observations made by the Adjudicating Authority against Mr. Sundaresh Bhat (‘Resolution Professional’).
4. Notices were issued on the Respondents. The ‘Andhra Bank’, lead Bank of the ‘Committee of Creditors’, has already filed an appeal and challenged the impugned order.
5. Mr. Nitesh Rana, learned counsel for ‘Enforcement Directorate’; Mr. Vishwanath, Advocate for ‘SEBI’; Mr. C. Balooni, Assistant Director, Ministry of Company Affairs and Mr. Sukant Vats, Public Prosecutor, Central Bureau of Investigation, appear and submit that they are investigating the matter against the ‘Corporate Debtor’ and its promoters, Directors and officers and role of other public servants.
6. Learned counsel appearing on behalf of the ‘Enforcement Directorate’ submit that the assets of the ‘Corporate Debtor’ are based on the proceeds of the crime and therefore, it cannot be given to any person.
7. The question arises for consideration in these appeals is whether Section 29A of the ‘I&B Code’ is applicable to the applicant, if he intends to withdraw the petition under Section 7 or 9, if the Committee of Creditor, approves a proposal with 90% voting share, in terms of Section 12A.
8. Section 29A relates to ineligibility of a “resolution applicant”, which is as follows:

“29A. Persons not eligible to be resolution applicant. 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 wilful 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;

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

**Explanation I.**-For the purposes of this proviso, the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

**Explanation II.**-For the purposes of this clause, where a resolution applicant 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 and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code’;

- (d) has been convicted for any offence punishable with imprisonment -
  - (i) for two years or more under any Act specified under the Twelfth Schedule; or
  - (ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;”

- (e) is disqualified to act as a director under the Companies Act, 2013;
 

“Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;
- (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;

“Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

- (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 and such guarantee has been invoked by the creditor and remains unpaid in full or part;
  - (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 I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into

equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

'Explanation II.-For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:-

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;
- (d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;
- (f) such categories of persons as may be notified by the Central Government."

9. If any person, including the 'Promoter'/'Director' is ineligible in terms of any one or more clauses of Section 29A, he/she is not entitled to file any 'resolution plan' individually or jointly or in concert with another.

10. In so far Section 12A is concerned, it relates to withdrawal of the application filed by an "applicant" under Section 7 or Section 9 of the I&B Code, if the 'Committee of Creditors' with more than 90% voting share approves the proposal as is apparent from Section 12A and reads as follows:

"12A. Withdrawal of application admitted under section 7, 9 or 10.-

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified."

**11. In Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.** ‘MANU/SC/0079/2019’, the Hon’ble Supreme Court of India considered the stages in which an application can be withdrawn including Section 12A observed and held :

“75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

**76.** Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law (the Uncitral Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

“Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by Uncitral Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an

insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.”

- 77.** NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

“38. Mandatory contents of the resolution plan.- (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, to the extent unpaid, 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.”

Post amendment, Regulation 38 reads as follows:

“38. Mandatory contents of the resolution plan.- (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) 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.”

The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

Section 12-A is not violative of Article 14

- 79.** Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. It reads as follows:

“12-A. Withdrawal of application admitted under Sections 7, 9 or 10.- The adjudicating authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent voting share of the Committee of Creditors, in such manner as may be specified.”

- 80.** The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:

*“29.1. Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP, MANU/SC/1220/2017 : (2018) 15 SCC 589]; Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd. [Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd., MANU/SC/1221/2017]; Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem, MANU/SC/1535/2017 : (2018) 15 SCC 587]]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring 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.” Thus, it was agreed that once CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.*

- 29.2. *On a review of the multiple NCLT and Nclat judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage [as observed by the Hon’ble Supreme Court in *Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem* [*Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem*, MANU/SC/1535/2017 : (2018) 15 SCC 587]] and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules.”*

(emphasis in original)

Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or Nclat.”

12. From Section 12A and the decision of the Hon’ble Supreme Court in ‘**Swiss Ribbons Pvt. Ltd. & Anr.**’ (Supra), it is clear that the Promoters/ Shareholders are entitled to settle the matter in terms of Section 12A and in such case, it is always open to an applicant to withdraw the application under Section 9 of the ‘I&B Code’ on the basis of which the ‘Corporate Insolvency Resolution Process’ was initiated.

13. In view of the aforesaid provisions of law, we hold that Section 29A is not applicable for entertaining/considering an application under Section 12A as the Applicants are not entitled to file application under Section 29A as ‘resolution applicant’.

14. In the present case, the ‘Corporate Insolvency Resolution Process’ was initiated pursuant to an application under Section 7 filed by the ‘Andhra Bank’ (Appellant herein). The application under Section 12A having been approved by the ‘Committee of Creditors’ more than 90% of the voting share, it was not open to the Adjudicating Authority to reject the same and that too on a ground of ineligibility under Section 29A, which is not applicable.

15. In so far the assets of the ‘Corporate Debtor’ is concerned, if it is based on the proceeds of crime, it is always open to the ‘Enforcement Directorate’ to seize the assets of the ‘Corporate Debtor’ and act in accordance with the ‘Prevention of Money Laundering Act, 2002’ (for short, ‘the PMLA’).

16. However, it will not come in the way of the individual such as ‘Promoter’ or ‘Shareholder’ or ‘Director’, if he pays not from the proceeds of crime but in his individual capacity the amount from his account and not from the account/assets of the ‘Corporate Debtor’ and satisfies all the stakeholders, including the ‘Financial Creditors’ and the ‘Operational Creditors’. There is nothing on the record to suggest that the individual property of the ‘Promoter’/‘Shareholder’/‘Director’ who proposed to pay the amount has been subjected to restraint by the ‘Enforcement Directorate’. Therefore, even if the asset of the ‘Corporate Debtor’ is held to be proceeds of crime, the Adjudicating Authority cannot reject the prayer for withdrawal of application under Section 7, if the ‘Promoter’/‘Director’ or ‘Shareholder’ in their individual capacity satisfy the creditors.

17. For the reason aforesaid, while we hold that the order of ‘Liquidation’ was uncalled for, we set aside the impugned order dated 8th May, 2019 passed by the Adjudicating Authority and allow the Appellant (who filed the application of Section 7 - ‘Andhra Bank’) to withdraw the application.

18. In the result, the ‘Corporate Insolvency Resolution Process’ initiated against the ‘Corporate Debtor’ namely- ‘M/s. Sterling Biotech Ltd.’ stands set aside subject to the payment of the amount as payable by the ‘Promoters’/Shareholders to all the stakeholders/financial creditors and operational creditors in terms of Section 12A as approved with 90% voting share of the ‘Committee of Creditors’. However, setting aside the order of initiation of ‘Corporate Insolvency Resolution Process’ will not amount to interference with any of the order passed by the ‘Enforcement Directorate’ with regard to the assets of the ‘Corporate Debtor’ and the

proceedings under 'PMLA' will continue against the 'Corporate Debtor' etc. in accordance with law.

19. In view of the fact that the impugned order dated 8th May, 2019 is set aside, all the observations made against Mr. Sundaresh Bhat, 'Resolution Professional' also stand expunged.

20. All these appeals stand disposed of with liberty to the 'Enforcement Directorate', the 'Central Bureau of Investigation', the 'Ministry of Corporate Affairs', 'Securities and Exchange Board of India' and the other Authorities to continue/take any action against the Company, 'Promoter'/Shareholder'/Director' under the existing laws and will continue irrespective of the settlement made by the individual 'Promoter'/Shareholder'/Director' with the creditors under Section 12A of the 'I&B Code'.

21. So far as the fees and resolution cost of the 'Resolution Professional'/'Liquidator' are concerned, the 'Committee of Creditors' will determine the same and will be paid by 'Andhra Bank' on behalf of the 'Committee of Creditors' and may adjust the same with other members.

22. Till the 'terms and conditions' under Section 12A is complied, the 'Resolution Professional' will manage the company and ensure that the company remains a going concern and protect its assets.

All the appeals stand disposed of with aforesaid observations and directions.

[Justice S.J. Mukhopadhyaya]  
Chairperson

[ Justice A.I.S. Cheema ]  
Member (Judicial)

[ Kanthi Narahari ]  
Member (Technical)

**ANNEXURE X.46****NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 765 of 2019**

(Arising out of Order dated 12<sup>th</sup> June, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP 1661 (IB)/MB/2017)

**IN THE MATTER OF:**

Mr. Hemang Phophalia  
Having Address at P.O. Box Number 7109,  
C/o Wadala Post Office,  
Wadala West, Mumbai – 400031. .... Appellant

Vs

1. The Greater Bombay Co-operative Bank Limited  
GBCB House, 89, Bhuleshwar Road,  
FanasWadi, Kalbadevi,  
Mumbai – 400 002.
2. M/s. Penguin Umbrella Works Private Limited  
Through Mr. Vijay Pitamber Lulla,  
(Interim Resolution Professional)  
[IBBI/IPA-001/IP-P00323/2017-18/10593]  
B-12/13, Chinnar, 1st Floor,  
R.A. Kidwai Road, Mumbai – 400031. .... Respondents

**Present:**

**For Appellant:** **Mr. Arun Kathpalia, Senior Advocate with Mr. P.V. Dinesh, Mr. R.S. Lakshman, Mr. Ashwini Kumar, Mr. Sindhu, Advocates.**

**For Respondents:** **Mr. Shridhar Y. Chitale, Advocate. Mr. Sumit Shukla, Advocate for Respondent No.2.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. First Respondent - The Greater Bombay Co-operative Bank Limited (hereinafter referred to as the 'Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred

to as the 'I & B Code') for initiating 'Corporate Insolvency Resolution Process' against Penguin Umbrella Works Private Limited ('Corporate Debtor'), alleging default in repayment of Rs. 9,11,08,439.37/- including interest and other charges. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by impugned order dated 12th June, 2019 having admitted the application, the present Appeal has been preferred by Mr. Hemang Phophalia, Ex-Director and Shareholder of the 'Corporate Debtor'.

2. Learned Counsel appearing on behalf of the Appellant submitted that name of the 'Corporate Debtor' was struck-off from the Register of the Companies under Section 248 of the Companies Act, 2013 (hereinafter referred to as the 'Companies Act'), therefore, the application under Section 7 against non-existent Company ('Corporate Debtor') is not maintainable.

3. It was further submitted that the application under Section 7 preferred by 1st Respondent Bank - 'Financial Creditor' was barred by limitation.

4. Learned Counsel appearing on behalf of the Appellant submitted that in view of the initiation of 'Corporate Insolvency Resolution Process', now, the 'Resolution Professional' will ask the Appellant, Ex-Director and others to handover the records and assets of the 'Corporate Debtor', which are not available. However, in absence of any such order passed by the 'Resolution Professional' or the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, we are not inclined to decide such issue.

5. Learned Counsel for the Appellant also submitted that Company is non-functional since number of years and there is no employee working in company and even assets are not there. Therefore, according to him, the 'Resolution Professional' cannot make the 'Corporate Debtor' a going concern. Therefore, the application under Section 7 is not maintainable. However, on the ground that there is no employee working, or the Shareholder(s) or Director(s) ceased to be Shareholder(s) or Director(s), cannot be a ground to reject application under Sections 7 or 9 of the I & B Code.

6. The question arises for consideration is whether an application under Section 7 or 9 for initiating 'Corporate Insolvency Resolution Process' is maintainable against a Company/'Corporate Debtor', if the name of the Company/'Corporate Debtor' is struck-off from the Register of the Companies.

7. For deciding the issue, it is necessary to refer the relevant provisions of the Companies Act, 2013, as also the reasons and manner in which the name of a Company is struck-off.

8. Chapter XVIII of the Companies Act deals with “Removal of Names of Companies from the Register of Companies”. The Registrar of Companies is empowered under Section 248 of Companies Act to remove the name of the Company from the Register of the Companies, which reads as follows:-

### **“CHAPTER XVIII**

#### **REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES**

**248.** Power of Registrar to remove name of company from register of companies.--(1) Where the Registrar has reasonable cause to believe that--

- (a) a company has failed to commence its business within one year of its incorporation; [or]  
[ \*\*\* ]
- (c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455,

he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

(2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner: Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

(3) Nothing in sub-section (2) shall apply to a company registered under section 8.

(4) A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

(5) At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

(6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

(8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies"

9. As per sub-section (6) of Section 248, before passing an order under sub-section (5) (removing the name from the Register of Companies), the Registrar is to satisfy himself that sufficient provision has been made for realization of all amount due to the company and for the payment or discharge of its liabilities and obligations within a reasonable time and, if necessary, obtain necessary undertakings from the Managing Director, Director or other persons in charge of the management of the Company.

10. As per proviso thereof, notwithstanding the undertakings referred to in sub-section (6), the assets of the Company are to be made available for payment or discharge of its liabilities and obligations even after the date of the order removing the name of the Company from the Register of Companies.

11. From sub-section (7) of Section 248, it is also clear that the liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5) of Section 248, shall continue and may be enforced as if the company had not been dissolved.

12. From sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the power of the Tribunal to wind up a company, the name of which has been struck off from the Register of Companies.

13. Section 250 of the Companies Act, 2013 relates to effect of Company notified as dissolved and reads as follows:-

“250. Effect of company notified as dissolved.--Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.”

14. Therefore, it is clear that after removal of the name of the Company from the Register of the Company for the purpose of right of realization of all amount due to the Company and for the purpose of payment or discharge of its liabilities or obligations of Company continues.

15. Section 252 relates to ‘Appeal to Tribunal’ against order of Registrar, notifying a Company as dissolved under Section 248. As per Section 252(3), if a Company, or any member or creditor or workman thereof feels aggrieved by the Company having its name struck off from the Register of Companies, the Tribunal on an application made by the Company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248, may, if satisfied that the Company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the Company be restored to the Register of Companies, order the name of the Company to be restored to the Register of Companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the Company and all other persons in the same position as nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

Section 252(3) reads as follows:-

“252. Appeal to Tribunal.--

xxx xxx xxx

(3) If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member,

creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248, may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies."

16. From sub-section (3) of Section 252, it will be evident that the Tribunal, by the order, before expiry of twenty years from the publication in the Official Gazette of the Notice under sub-Section (5) of Section 248, on an application made by a creditor or workman, may pass order and give such other directions and make such provisions as deemed just for placing the name of the Company and all other persons in the same position as nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

17. The Tribunal is the Adjudicating Authority in terms of Section 60(1) of the I & B Code. Hence, on one side it plays role of 'Adjudicating Authority' and on the other 'Tribunal' under the Companies Act. Therefore, if an application is filed by the 'Creditor' ('Financial Creditor' or ('Operational Creditor') or workman ('Operational Creditor') before the expiry of twenty years from the publication in the Official Gazette of the Notice under sub-section (5) of Section 248, it is open to the Adjudicating Authority to give such directions and make such provisions as deemed just for placing the name of the Company and all other persons in the same position nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

18. As per amended Clause (94-A) of Section 2 of the Companies Act, 2013 "winding up" means 'winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable'. Therefore, it is clear that the Company, whose name has been removed from the Register of the Companies can be liquidated under the I & B Code.

19. In terms of Part II of I & B Code, for the purpose of liquidation, except 'Voluntary Liquidation of Corporate Persons' under Section 59 of the I & B Code, procedure of 'Corporate Insolvency Resolution Process' is to be followed, if a proceeding is initiated under Sections 7 or 9 of the I & B code. Instead of liquidation, the first step to be taken is to ensure that in a time bound manner the value of assets of Corporate Debtor/Company is maximized and to promote entrepreneurship, availability of credit

by balancing the interest of all the stakeholders; within an active legal framework for timely resolution of insolvency and bankruptcy. Liquidation of assets of the ‘Corporate Debtor’/Company is not the object, but object is revival and rehabilitation of the ‘Corporate Debtor’/Company by way of ‘Resolution’ and maximization of the value of assets of the ‘Corporate Debtor’ and balancing the interest of all the stakeholders.

20. The name of the ‘Corporate Debtor’ (Company) may be struck-off, but the assets may continue. Whether in the present case, there are assets of the ‘Corporate Debtor’ or not can be looked into only by the ‘Interim Resolution Professional’/‘Resolution Professional’.

21. The name of the Company having been struck-off, the Corporate Person cannot file an application under Section 59 for Voluntary Liquidation. In such a case and in view of the provisions of Section 250(3) read with Section 248(7) and (8), we hold that the application under Sections 7 and 9 will be maintainable against the ‘Corporate Debtor’, even if the name of a ‘Corporate Debtor’ has been struck-off.

22. So far as, liability of the Ex-Directors or Shareholders or Officers are concerned, Section 248(7) of the Companies Act being clear, we are not expressing specific opinion, till any order is passed by the Adjudicating Authority or demand is made by the ‘Interim Resolution Professional’.

23. In view of the aforesaid provision, we hold that the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of ‘Corporate Insolvency Resolution Process’ under Sections 7 and 9 of the I & B Code based on the application, if filed by the ‘Creditor’ (‘Financial Creditor’ or ‘Operational Creditor’) or workman within twenty years from the date the name of the Company is struck off under sub-section (5) of Section 248. In the present case, application under Section 7 having admitted, the ‘Corporate Debtor’ and its Directors, Officers, etc. deemed to have been restored in terms of Section 252(3) of the Companies Act.

24. We find no merit in this Appeal, it is accordingly dismissed. No cost.

[Justice S. J. Mukhopadhyaya]  
Chairperson

(Justice A.I.S. Cheema)  
Member (Judicial)

(Kanthy Narahari)  
Member (Technical)

**NEW DELHI**

5th September, 2019

## NOTES