

NCLT Cases for Limited Solvency Examination

CHAPTER XXVII of the Companies Act

Sec 408 to Sec 434 of Cos Act, 2013 pertain to NCLT and NCLAT

Section 407 of Companies Act, 2013 deals with **Definitions**.

Chairperson, JM, Member, President, Tech Member

Sec 408 : Constitution of National Company Law Tribunal.—

The NCLT was established under the **Companies Act 2013** and was constituted on 1 June 2016.

The NCLT has eleven **benches**,

Two at New Delhi (one being the principal **bench**) and one each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai.

410. Constitution of Appellate Tribunal.—

National Company Law Appellate Tribunal (NCLAT) was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of National Company Law Tribunal(s) (NCLT), with effect from 1st June, 2016.

Number of members as the Central Govt. may deem fit but not exceeding ELEVEN members

I&B Code

Section 60- AA for Corporate Persons

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.

Section 61 – Appeals and Appellate Authority.

NCLAT is the Appellate Tribunal for hearing appeals against the orders passed by NCLT(s) under Section 61 of the Code (IBC), with effect from 1st December, 2016.

NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC.

Sec 202 : Appeal to NCLAT by Insolvency Professional Agency

Sec 211 : Appeal to NCLAT by Information Utility

NCLT Cases

1. Annapurna Infra - Applicant (Op Cr)

v/s

Soril Infra Resources Ltd. - Corporate Debtor (C. D.)

Principal Bench, New Delhi, 24/03/2017

Coram : CJ : M. M. Kumar (President)

R. Vardarajan (J)

Application u/s 9 by Op. Cr.

Arbitration going on between the two parties. In the meantime application u/s 9 of IBC

Reply of Respondent :

Operational Debt is disputed. Appeal u/s 37 Arbitration Act is under adjudication. Applicant has filed a caveat and has also filed for execution of Award. Both Parties fighting tooth and nail

Order of AA:

It cannot be said Arbitration comes to end merely on dismissal of application u/s 34 of Arbitration Act as sought to be canvassed by the Applicant (in Op. Cr)

Appeal u/s 37 still pending. Respondent still has time to appeal just because he has not filed appeal he cannot invoke Sec 9 of IBC.

We are of further opinion that proceeding for execution of award have been initiated by the Applicant in HC. **Effective remedy is already availed by Applicant.**

Cannot allow more than one remedy simultaneously--against principle of Judicial Administration. It would promote forum shopping which is impossible.

Application does not warrant Admission. Dismissed with cost Rs. 1.00 lacs.

2 Col. Vinod Awasthy - Applicant (Op Cr)

v/s

AMR Infrastructures Ltd - Corporate Debtor (C. D.)

Coram : CJ : M. M. Kumar (President)

R. Vardarajan (J.M)

Order :

2. Flat booked by Applicant with assured monthly returns. Amr Infra did not pay assured amount. Possession of flat not given

3. Notice u/s 433 of Company's Act On 26/09/2016. Then On 25/01/2017 Statutory Notice u/s 8 (1) of IBC

4. Question before AA : Whether Petitioner is Op. Cr. u/s 9, 5 (7), 5(8).

5. Against the same Respondent a case was filed i.e. Nikhil Mehta and Sons V AMR Infra – u/s 7. The same was dismissed.

6. AA says unable to convince itself to start CIRP. To understand the loci standi of the Applicant it says let us read Section 9

7 Reading of Sec 9 shows that to qualify as Op. Cr., Petitioner has to satisfy sec 5(20) Defn of Operational Creditor , 5(21) Defn of Operational Debt.

8. Op. Debt meansclaim...for.. goods, services, employment, Govt. dues

Financial Debt is defined in Sec 5(8). The framers of code have not said – Op. debt is not anything other than Financial Debt.

Operation debt confined to 4 categories. **The Applicant has neither given goods nor provided services to qualify as Op Cr.**

9. Given Timeline of Code – Not possible – to construe 9, 5(20), 5(21) so widely to include advance for flat purchase, especially when petitioner has remedy in Consumer Protection Act and General Law of Land.

10. Reference made to **Sanjeev Kumar v AMR Infra** we have decided whether there is a possibility that applicant can be treated as Op Cr u/s 9. Sec 5(20) and 5(21) need to be satisfied for Op. Cr.

The framers of code have not said – Op. debt is not anything other than Financial Debt. Operation debt in 5(21) is confined to 4 categories.

The Ld counsel of the Applicant has quoted defn of “Debt” given by sec 3(11). But Part II has its own definition of “Operational Debt” in sec 5(21) which defn will have to be taken as it will apply to sec 7 and sec 9. Expression used in Sec 3 cannot be exclusively read to interpret words used in sec 5.

14 As a sequel to above discussion – dismissed. It was dismissed at the initial stage itself and the Respondent did not come on the scene in this case.

3

K K C Naga - Applicant (Op Cr)

v/s

Lanco Infra Ltd. - Corporate Debtor (C. D.)

Hyderabad Bench

Date of Order : 21/02/2017

1. Facts of the Case :

a) KKCNC was employed with Resp, resigned, claimed emoluments not paid, Sent demand Notice

b) Resp Replied to Dem Notice :

Notice mean to harass and agonise the Respondent

Notice issued u/s 7 – which section pertains to Financial Cr and therefore Notice is Incorrect, erroneous and not tenable

3) Case Admitted

4) Lanco filed statement

a) unjust, Unlawful demand, frivolous claims

b) The Tribunal cannot be misused to settle and determine the cases of disputed claims.

c) claim of Petitioner before IBC came into operation

6 Petitioner's case :

a) Relied on SAP generated documents

(b) The Corporate Debtor should have disputed the debt before receipt of demand notice under section 8(1) of IBC.

Mere existence of any frivolous, baseless and superficial disputes do not fulfill the requirement of section 8(2) of Insolvency Bankruptcy Code. So the alleged dispute notice issued by the Company is not at all tenable under the law.

c) The Company could have initiated appropriate legal action/remedy to recover the alleged amounts due to them as the applicant worked with the company for about 10 years. Debt in question is established, ascertained, definite and undisputed.

12) Resp. Case

a) argued Petitioner failed to prove FFS authenticated document. Co has proved clear dispute .

Order:

- a) KKN has resigned. Company paid Rs 5 Lacs at that time.
- b) Petitioner kept quiet from 2013 to 2017, no claim made.
- c) Petitioner failed to explain suitably that FFS in question was an authenticated document.
- d) Resp has been able to prove clear Disp
- e) **Default arises out of non-payment of debt, "which is due and payable** In the instant case, Due in question is totally in dispute as the petitioner claim was not only rejected by the Company but also filed a statement showing that the petitioner himself was due to the Company.
- f) Co asked petitioner to come forward and settle accounts. But petitioner chose IBL route.

g) Not a fit case to initiate IRP. Dismissed

4

One Coat Plaster & Shivam Cons - Applicant (Op Cr)

v/s

Ambience Pvt. Ltd. - Corporate Debtor (C.D.)

Principal Bench, New Delhi, 01/03/2017

Common Order

Coram : CJ : M. M. Kumar (President)

R. Vardarajan (J)

Application u/s 9 --Op. Cr.

Work done, bills raised, payment not received, filed application for CIRP.

CD : Denies claim, poor quality

Order :

Petitioner was engaged but liabilities is denied

The petitioner was asked to produce letter of Co, Architect certifying work done quality, The same was not produced.

Basis for present Application : Letter of Dispute Sent by CD

Tribunal has power to reject cases where Notice of Dispute is received by Op Cr

Sec 8 (1) gives enough room to NCLT to ascertain existence of Dispute

No material on Record by Petitioner to dislodge Letter of Dispute by the C.D.

Not inclined to accept. Remedy for Petitioner lies somewhere else.
Rejected

INDUSTRIAL AND COMMERCIAL BANK OF CHINA LIMITED & ANR. V/s. ALOK INDUSTRIES LIMITED

Industrial And Commercial Bank Of China Limited & State Bank of India (SBI) (Financial Creditors)Applicant

Respondent Alok Industries LimitedRespondent (Corporate Debtor)

Section 7 of IBC, 2016

Industrial and Commercial Bank of China Ltd. filed the present application for intervention in the proceedings filed by State Bank of India under section 7 of the Code (CP No. (IB) 48/2017) against Alok Industries Ltd. before the NCLT, Ahmedabad Bench (“Adjudicating Authority”).

Brief facts

- Hongkong and Shanghai Banking Corporation Limited (“HSBC”), as an agent of Lenders, including the applicant, filed Company Petition No. 194/2016 on 8th March, 2016 before the Hon'ble High Court of Bombay against the debtor seeking winding up of the debtor under section 433(e) of the Companies Act, 1956.
- During the pendency of the company petition filed by HSBC, an intervention application (CA No. 353/2016) was filed by SBI before Hon'ble High Court of Bombay on 27th April, 2016 seeking to put the winding up petition in abeyance.
- However this intervention application was withdrawn by SBI on 3rd May, 2017 and an application was filed on 29th June, 2017 before the Adjudicating Authority, i.e., CP No. 48/2017.

Applicant's submissions

- The applicant submitted that his intervention application should be allowed and the application filed by SBI should be kept in abeyance because the winding up petition filed before the Hon'ble High Court is at an advanced stage and any order passed by the Adjudicating Authority will lead to conflicting orders that may be passed by the Hon'ble High Court.
- Applicant relied upon section 446 of the Companies Act, 1956 which states that “when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company”.
- SBI, having withdrawn the intervention application before the Hon'ble High Court, was very well aware of the proceedings pending there and ought not to have filed the present application before Adjudicating Authority.

SBI's submissions

- Applicant cannot rely upon section 446 of Companies Act, 1956 yet no winding up order has been passed and no liquidator has been appointed.
- SBI is within its rights to file application under section 7 of the Code.

Decision of the AA

- **There is no bar in the Code expressly or impliedly debarring creditors from triggering the insolvency resolution process under section 7, 9 and 10 of the Code.**
- **Section 11 of Code lists out persons not entitled to make application.**
- SBI does not come under any clause of section 11 of the Code.

- Thus, there is nothing to prevent the SBI and its Associate Banks, who are Financial Creditors, from triggering the insolvency resolution process under section 7 of the Code.
- **Pendency of winding up proceedings before Hon'ble High Court before its admission, is no bar either for initiation of proceedings under section 7 of the Code or for continuation.**
- There is no order, at present, passed by Hon'ble High court debarring initiation of proceedings under the Code.
- Thus, the argument that order passed by Adjudicating Authority might conflict with an order, yet to be passed, by the Hon'ble High Court does not merit acceptance.
- **Applicant cannot take help of section 446 of the Companies Act, 1956 because the winding up petition has not yet been admitted; no winding up order has been passed and no liquidator has been appointed.**
- Adjudicating Authority relied upon judgment dated 21.04.2017 passed by Division Bench of NCLT, Chennai Bench in CA/1/(IB)/2017 where it was held that pendency of winding up petition cannot be a bar under the Code for initiating corporate insolvency process unless winding up order has been passed by Hon'ble High Court and Liquidator has been appointed.
- Applicant's reliance on judgment in M/s Nowfloats Technologies Pvt. Ltd. vs. M/s Getit Infoservices Pvt. Ltd., passed by NCLT, Special Bench, New Delhi is wrong since in that case, an order appointing Official Liquidator was passed by Hon'ble High Court of Delhi, but, in the present case, no such order has been passed by Hon'ble High Court of Bombay.
- Applicant's submission that applicant is a Financial Creditor and must be heard in application filed by SBI.
- However, the Adjudicating Authority observed that **neither section 7 of the Code nor relevant Rule 4 of the Adjudication Rules contemplate giving notice to other Financial Creditor.**
- It only provides for giving notice to corporate debtor.

- **The applicant can very well go before the IRP and become member of Committee of Creditors and put forth his claim.**

In view of the above reasons, the Adjudicating Authority rejected the application filed by Industrial and Commercial Bank of China Ltd.

8

Magicrete Building - Applicant (Op Cr)

v/s

Pratibha Inds - Corporate Debtor (C. D.)

Mumbai Bench,

Coram : Mr. BSV Prakash Kumar JM

Nallosenapetting (T)

Bank maintaining account not issuing certificate u/s 9.

AA : all citizens of country bound by statute and therefore not exempted

Respective Bank may issue certificate

9

Bharatbhai Vrajlalbhai - Applicant (Op Cr)

Selani (Dev Cotex P. L.)

v/s

SBI - Financial Creditor

Ahmedabad Bench,

Dev Cotex filed for CIRP u/s 10

Order : 1st objection of FC i.e. Annual Financial Statement not filed. Do not merit acceptance

2nd Objection : Transaction routed through Corporation Bank. Even it is true, not a ground to not start CIRP.

3rd Object : Applicant received money from its creditors but did not pay FC. This itself shows CD has committed act of Default.

12) FC : CIRP only to delay action under SARFAESI

13) AA : Initiation of Proceedings under SARFAESI Act or

Pendency of Proc under Sarfaesi Act is not Ground Not to Commence CIRP

Section 238 overrides

15) Object of code to Protect Genuine C.D.

Same CD take benefit – delay. by having Moratorium. But that is only 180 days + 90 days if extended. THRFORRE to say CD with a view to

benefit from Moratorium or delay proc under Sarfaesi filed this application – do not merit acceptance

17) Application is complete. CD has committed default. Application Admitted

10

Sanjeev Jain - Applicant (Op Cr)

v/s

Eternity Infracon P Ltd. - Corporate Debtor (C. D.)

New Delhi Bench

Application u/s 9 by Op. Cr.

Coram : Ms Ina Malhotra (JM)

Mohapatra (T)

Sanjeev Jain booked commercial space

Definition of Op. Cr. analysed

Financial Debt is defined in 5(8). But Op. debt is NOT defined as “any debt other than Financial Debt”. Also Op. debt include 4 items only.

Applicant Not Op. Cr. (But applied u/s 9)

15) Counsel for Applicant in final arguments asked Applicant to be treated as “Financial Creditor”. Cited case of Delhi High Court, divorce petition under Hindu Marriage Act was all wedding to be converted under Sp. Marriage Act.

16) Aforesaid case – pending for 10 years

a) **In this case TIME IS ESSENCE**

b) TIME FRAME is stipulated by code

c) Besides CIRP has SERIOUS CIVIL CONSEQUENCES which suggest for a cautious Approach strictly in accordance with CODE.

17a) Rules for Sec 9 and Sec 7 different. No Provision to convert. In fact there is provision to Accept or REJECT application under 7, 9, 10. Language and Law of code clear. Provision must be strictly followed and PROCEDURALY

18. In state of UP v/s Baby Ram Upadhyay – Supreme Court “When a Std requires a thing to be done in a partial manner, it can be done only in that manner or not at all . All other methods are forbidden”.

19. Equity has no place when law is clear. Power of court are exercised in advancing ends of justice but subject to the condition exercise of such power is not in conflict with expressed provision of statute.

As per statutory provision of code, pres application is to be admitted or rejected within the time from prescribed.

20. We have not analysed whether the creditor is Financial Creditor. Leave granted to move under applicable provisions of Code.

21) Debt in Question not Op. debt. Present application not maintainable . Rejected.

11

Applicant: SCHWEITZER SYSTEMTEK INDIA PRIVATE LIMITED (Corporate Debtor)

V/s.

PHOENIX ARC PRIVATE LIMITED ---- Fin Cr, Resp

Applicant filed this application under section 10 of the code for initiating corporate insolvency resolution process against itself.

Brief facts:

- On 19th December, 2011, CD raised a debt of Rs. 4,54,61,524/- from Dhanlaxmi Bank.
- **CD charged personal properties of its directors situated at Mumbai as security to Dhanlaxmi Bank.**
- On 17th April, 2012, CD raised a sum of Rs. 14,48,504/- from Standard Chartered Bank.
- Thereafter, Dhanlaxmi Bank **assigned its debt to Phoenix ARC Private Limited (“Respondent”)** by way of assignment agreement dated 28.03.2014.
- As a result of the said assignment, the charge also stood modified and assigned to the respondent.
- Since the **CD defaulted** in repaying its loan, proceedings under SARFAESI Act were initiated.
- An order was passed by Chief Metropolitan Magistrate, Esplanade, Mumbai appointing a court commissioner to take over the possession of the secured assets being residential units of the directors of CD.

Respondent’s contention

- Respondent opposed the present application on the ground that if the present application is admitted, then till insolvency process is

completed, moratorium shall commence prohibiting taking over of the possession.

Decision of the AA

- The Adjudicating Authority perused the balance sheet of the corporate debtor and gave following reasons for admission of the application.
 - The Balance Sheet of the CD did not contain the impugned heads of liability.
 - As a result, it was considered appropriate to appoint a Professional so that due examination of the books could be done and position of debt could be streamlined.
 - No evidence was found to indicate if the interests of the sundry creditors were safeguarded.
 - This aspect could be examined by Professional who would be appointed only on admission of the application.
 - Possibility of recovery from sundry debtors needed to be explored and reserves and surplus needed due examination which could be done only by a Professional who would be appointed on admission of the application.
 - Though a loss was reflected in Profit & Loss Account of the CD for the year ended March 31, 2017 but the same required due examination to ensure its correctness.
 - This further necessitated appointment of Professional.
 - However, before admitting the application, the Adjudicating Authority observed that the **personal properties of promoters** which were mortgaged to Dhanlaxmi Bank Limited and which subsequently stood assigned to the Respondent due to assignment of debt by Dhanlaxmi Bank Limited and in respect of which an order for taking over the possession was passed by the Chief Metropolitan Magistrate, Mumbai **would remain**

- outside the ambit of moratorium period commencing upon admission of the application.**
- **To substantiate this, the Adjudicating Authority relied upon section 14 of the Code which states that Moratorium shall be declared for prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of “its” property.**
 - **The word “its” was interpreted to denote the property owned by corporate debtor and the property not owned by corporate debtor would not fall within the ambits of Moratorium.**

12

Anark Aluminium - Applicant (Op Cr)

v/s

SBI, Hyderabad - Corporate Debtor (C. D.)

Section : u/s 10

Summary : AAL is a SPV between Penne Ground (70%) ad RAK grp (30%) to implement Aluminum Refinery to make first stage alumina.

Project Cost 4608 crores, Debt 2995 crores, Equity 1613 crores

Citing local issues, Govt of A.P. cancels Bauxite Supply Agreement.

Project is completed. Could not be started due to non avail of Raw Material

Force Majure

NPA o/s on 31/03/2014 --- Rs. 2905 crores (23 banks)

Observation of Court : 1) **In the interest of all stakeholders, AA not satisfied to admit petition filed u/s 10.**

2) Applicant have not complied with directions/suggested by AA. Petitioner have failed to list out developments – Petition is Incomplete and it deserves to be rejected.

3) Parties are at liberty to take up issue with government to Resolve the issued BEFORE it can be admitted for CIRP.

REJECTED

Edelwiess ARC

v/s

Synergies Dooray Automotive Limited)

- The corporate debtor (Synergies Dooray Automotive Limited) had a negative net worth at the end of March, 2004 and consequently was declared a sick company by the BIFR on 14th February 2007.
- With coming into force of the SICA (Repeal) Act, 2003, the proceeding before the BIFR got abated in November, 2016. (Sec 252, Sch VIII of the Code)
- The corporate debtor applied for insolvency resolution under the Code.
- At the time of admission, it had total assets of Rs. 11.95 crore in books and liquidation value of Rs. 8.17 crore.
- **It received three resolution plans.**
- **The Committee of Creditors approved the resolution plan with 90.16% voting share while the rest abstained from voting.**
- The plan was approved by NCLT, Hyderabad Bench on 2nd August, 2017.
- This was the first resolution plan approved under the Code.
- The resolution plan provided for amalgamation of the corporate debtor with a related party, Synergies Castings Limited with effect from 31st March, 2017.
- All financial creditors, whether they voted in favour of the plan or abstained from voting, received similar treatment.
- **As compared to the outstanding financial debt of Rs. 972 crore, the outcome (recovery) of Rs. 55 crore does not appear good.**
- **As compared to the liquidation value of Rs. 8.17 crore, however, the recovery does not appear unreasonable.**

- This kind of outcome is consistent with the expectation under the Code in initial days of its implementation.
- The resolution process gives good outcomes when the process is initiated at the earliest and also completed at the earliest.
- If it is initiated very late, as happened in this case, the corporate is only worth its liquidation value, which even decays further with time.
- When that is not done, the resolution process yields either liquidation or abysmal recovery.
- The corporates coming up now for resolution committed the first default about 10-20 years ago.
- A few years down the line, corporate debtors would come up for resolution at the earliest instance of default of Rs. 1 lakh, that is, when they have reasonably good health and hence the outcome then would be good.

14

IDBI Bank FC (App)

v/s

BCC Estate Pvt. Ltd. CD

Date : 06/09/2017

Filed u/s Section 7

Case summary : Case of Applicant (IDBI) that BCC is a Guarantor to Asian Nat Res India Ltd. Amount 38.31 crores.

The Respondent raised several objections to this application:

1. The person filing the application, ie General Manager of the Bank is not duly authorized to do so.

Over ruled

2. The Applicant did not place copies of entries in Bankers' Book in accordance with the in Bankers' Book Evidence Act.

Overruled

3. There are other Financial Creditor Banks that constitute a consortium of Banks.

As per Sec 7 any Financial lender on his own or Jointly with other Financial lender can file for CIRP

4. The Application is against RBI Circulars that deal with distressed entities.

Circulars of RBI cannot override the provisions of the Code

5. The Respondent company is only a guarantor and not a Principal borrower.

Liabilities of Guarantor is co-extensive with Principal Borrower.
Creditor can choose whom to proceed against

6. The Principal Borrower is already undergoing Corporate Insolvency Resolution process in an application filed by IDBI. Thus, admitting of this application causes redundancy as the assets of the Guarantor are also attached in the resolution plan.

The Resp is a guarantor who has failed to pay when called to do so by the Lender. The Resp has committed a Default and cannot avoid CIRP just because the Principal Borrower is going thru CIRP

7. The validity of the registration of the proposed Interim Resolution Professional was questioned.
IRP has produced certificate of Regn. Overruled.

Admitted

15

Macro Leafin Pvt. Ltd. FC

v/s

Arrow Resource Ltd. CD

Under Section 7

From Records AA Satisfied

- a) Default
- b) Application is complete
- c) Application dispatched to C.D.
- d) No exception provided by C.D. to refuse admission of application

Admitted

16

Engenious Engineering FC

v/s

Ones Naura Pvt. Ltd. CD

Under Section 7

DOO : 20-09-2017

Ahmadabad Bench

Case : Applicant was allotted shares of Respondent Co.

But the allotment was held to be illegal.

Applicant filed for CIRP as Fin.Cred.

Order : No Material on record to show that an Unsecured Debt is due from Respondent Co. to Applicant

Amount claimed is only in respect of shares of Respondent Co allotted to Applicant Co and cancelled by virtue of order CLB. Non financial debt due.

Dismissed. No cost

17

ABG Shipyard

CD

v/s

ICICI

FC

Under Section 7

Ahmadabad Bench

Case Summary : Loan given, default

RBI directive to file CIRP – let dated 15/06/2017

Points

- 1) Permission of JLF not taken – overruled by AA – as ruled in Innoventive v/s ICICI
 - 2) Winding up petition pending in High Court – No order passed No Liquidator appointed – therefore section 446 of Cos Act, 1956 is N.A.
 - 3) Sec 238 will override over any other law
 - 4) Rest all in place
- Admitted

Section 446(1) in The Companies Act, 1956

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced. or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

Union bank of India

Applicant (Financial Creditor)

V/s.

Era Infra Engineering Ltd. Respondent (Corporate Debtor)

The present application was filed by Financial Creditor (Applicant) before the NCLT,

The facts in brief are that

- The respondent is engaged in execution of large construction projects like highways , airports etc.
- It availed various loan facilities from applicant.
- A perusal of the application filed by applicant indicated that the sanctioned amount was to the tune of Rs. 1506.33 crores and amount claimed in default was to the extent of Rs. 681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.12 as on 31.05.2017 was in default.
- Notice of application was issued and respondent put in the appearance.
- On 11.07.2017, Principal Bench framed the following question:
 - Whether the process under the Insolvency and Bankruptcy Code, 2016 ('Code') can be triggered in the face of the pendency of the winding up petitions or it is to be considered as an Independent process?
- Thereafter, the matter was listed for 25.07.2017.
- However, since the Principal Bench was not sitting on that date, Special Bench was constituted for hearing the case.

Decision of Adjudicating Authority and reasons thereof:

- At the time of hearing, it was noticed that different benches of NCLT have taken different viewpoints on the above question framed by Principal Bench.
- Views of NCLT coordinate benches on the above said question are :
 - In matter of M/s Alcon Laboratories (India) Pvt. Ltd. –Vs- M/s. Vascon Health Care Pvt. Ltd.- NCLT Chennai- The pendency of winding up petition can't be a bar under the Code for initiating CIRP, reason being the Hon'ble High Court has not passed any order for winding up of CD and no official liquidator appointed.
 - Industrial and Commercial bank of China –Vs- Alok Industries- NCLT Ahemdabad- As similar as NCLT Chennai above.
 - M/s Nauvata Engineering Pvt. Ltd.- Vs- Punj Lloyds Ltd.- NCLT Principal Bench- Where winding up proceedings are pending against a company, then it would not be conducive for Tribunal to trigger insolvency process as there is likelihood of conflict between two statutory entities, namely Official Liquidator and Insolvency Resolution Professional and therefore Delhi H.C. may constitute a better basis of adjudication.
 - In Nikhil Mehta & Sons – Vs- AMR infrastructure Ltd.- NCLT Principal Bench The present petition would not be maintainable as winding up petitions have been filed before Delhi H.C. and official liquidator has been appointed. (although the matter is presently before the NCLAT with interim directions)
 - In M/s Now floats Technologies Pvt. Ltd. – vs- M/s Getit Infoservices Pvt Ltd. – NCLT Special Bench – Where official liquidator has been appointed then the proceedings cannot be sustained before this Tribunal without obtaining leave of the H.C.

Decision

- Considering that differing views were taken by different benches of NCLT, the Adjudicating Authority placed the matter before the Hon'ble President NCLT for the purpose of being transferred to Larger Bench or as the Hon'ble President may deem fit in accordance

with second proviso to sub-section (2) of section 419 of Companies Act,2013.

- The questions to be referred to such Bench, as Hon'ble President may deem fit, were:
 - Whether the process under IBC can be triggered in the face of pendency of winding petitions before the respective HC or it is to be considered as independent process?
 - In case the process not considered independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?
 - Whether the Code gives any room for discretion to be exercised for adjourning its status in view of statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?
 - In case if the petition is adjourned status and if the winding up petition is dismissed or set aside in appeal subsequently whether there is scope in such an eventuality of power of revival within the framework of the Code, conferred on this Tribunal?

19

Sarthak Creation Pvt. Ltd. CD

v/s

BOB FC

Under Section 10

DOO : 30/08/2017

Ahmadabad Bench

C.D. filed u/s 10.

Admitted dues payable to BOB

Cannot revive company

BOB raised objection of Sarfaesi i.e. in view of pending proceedings u/s Sarfaesi, this application is not maintainable.

AA : This is no ground not to start CIRP

All other things in place

Admitted

(Only one point in this case.)

20

Axis Bank [Applicant] DBS Bank [Financial Creditor]

vs.

Edu Smart Services Pvt. Ltd. [Corporate Debtor]

Brief facts:

- The application was filed by Axis Bank Limited (“Axis Bank”) under section 60(5) of the Code for setting aside the decision of Resolution Professional (“RP”) where RP had rejected the claim filed by Axis Bank in regard to Corporate Insolvency Resolution Process (“CIRP”) of Edu Smart Services Pvt. Ltd., Corporate Debtor (“Edu Smart”).
- Briefly stated, an application under section 7 of the Code was filed by DBS Bank Limited, Financial Cr (“DBS”)

NCLT, New Delhi Principal Bench admitted the case

- Axis Bank filed a claim of around Rs. 396 crores before RP on the basis of a corporate guarantee given by Edu Smart.
- **RP communicated to Axis Bank intimating that the claim cannot be verified as corporate guarantee had not been invoked.**
- Subsequently, Axis Bank invoked corporate guarantee vide letter dated 21 st July, 20 17 and informed the Resolution Professional (“RP”) to process the claim.
- **The claim was rejected by RP on the ground that the liability under corporate guarantee was contingent as on date of commencement of insolvency process on 27 th June, 2017, and thus, not verifiable.**

Decision of NCLT and reasons thereof:

- NCLT held that as per Regulation 13(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”), RP shall verify claims, as on the insolvency commencement date. Since the claim of Axis Bank arose on the basis of invocation of guarantee on 21 st July, 2017, i.e. after the insolvency commencement date, the claim was correctly not verified by RP.
- **The NCLT also observed that invocation of corporate guarantee against Edu Smart would result in enforcing of security interest and it would thus, be in violation of moratorium provisions of section 14(1)(c) of the Code.**

Accordingly, the application by Axis Bank was dismissed.

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Neeta Chemicals - CD

v/s

SBI - FC

Hyderabad Bench

DOO : 14/08/2017

Application u/s 10

C.D. trying to avoid Sarfaesi

Application duly filed, complete

Petitioner relied on

Indus Finance Ltd. v/s Quantam Ltd. - NCLT

Amit Spinning Inds. - NCLT

Alpha & Omega Diagnostic (I) Ltd. Vs. Asset Reconstruction Co. of I Ltd.
– NCLAT

The Bench has no legislative Authority to expand meaning of term “its” even under the umbrella of “Ejusdem Generis”

(Ejusdem Generis is a Latin **term** which means “of the same kind.” Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

For example, if a law refers to automobiles, trucks, tractors, motorcycles, and other motor-powered vehicles, a court might

use **ejusdem generis** to hold that such vehicles would not include airplanes)

Moratorium applies only to prop of CD, otherwise NOT

SBI opposes the Application

- a) CD has not come with clean hands
- b) Filed to circumvent Sarfaesi
- c) Petition cannot be admitted mechanically – relevant facts to be seen/verified
- d) Case Law, Leo Duct Engg and Cons. Ltd. (Wherein after discussing merits of case u/s. 10 case dismissed)

FUNDAMENTAL ISSUE is what are the criteria for Admission of a case filed u/w 10 of IBC.

9) In order to adjudicate legally NECESSARY to read whole Act, not a provision in Isolation

Fundamental Judicial Principles i.e.

- a) Prin of Natural Justice
- b) Party to come with clean hands
- c) Not allow party to abuse/misuse Judicial Proceeding

11) Checks and balances provided by sec 60, 65, 66 of the Code

12) **AA referred to Banks Notice to CD to pay and CD's reply to bank in which CD has denied execution of mortgage etc .**

AA has commented : These untenable contentions of CD are liable to be rejected out rightly. AA then refers to Notice u/s 13(2) and reply of CD where CD denies everything.

14) As per replies of CD to Bank under Sarfaesi, there is no default, all loans disputed, and bank has to prove its bonafide in extending loans, but in this Application the Ld Counsel for CD is asserting that there is admitted debt and default in Question and the Application deemed to be admitted as matter of right.

15) CD has Huge liabilities to Bank

Creditors

Taxes

There will be no purpose to initiate CIRP

16) CD has taken no steps to clear even part of the loan and mischievously denied loans.

This bench will not be party permit CD to MISUSE provisions of IBC for its selfish ends, and that too against Public Interest.

Courts / Tribunals are custodians of public funds.

17) **Section 60(5), 65, 66 give wide pursuant to AA. AA should apply Code correctly and not mechanically in entertaining Applications which have serious Repercussions.**

Applicant is mischievous, This is fit case for exemplary costs – Rs. 10.00 lacs,

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V R Polyfab Pvt. Ltd - FC

v/s

Sadbhav Ent. Pvt. Ltd. - CD

Resp : Directors of both companies are brothers

Debt not Financial Debt

AA : Perusal of Form 26AS and Accounts show payment of Interest on loan. Therefore Loan is Financial Debt.

Now the question whether there is Default by Resp in payment of Financial Debtor to Applicant.

In Innoventive Ind Ltd. V/s ICICI the NCLAT held :

AA should Ascertain and Record Satisfaction of occurrence of Default before admitting application. Once satisfied default occurred and application complete and no Disciplinary Action against IRP, IT IS REQUIRED TO ADMIT THE APPPLICATION.

In the same case on appeal to SC, the SC held

In case where CD commits a default in financial debt, the AA has merely to see records of IU or other evidence produced by Financial Creditor to satisfy itself that a Default has occurred.

It is NO MATTER that the debt is disputed so long it is DUE i.e. Payable UNLESS not interdicted by some law or is payable at a future

date. It is only when this is proved to satisfaction of AA that AA may reject application NOT OTHERWISE.

16) Respondent cited IBH Health v Info Drive System – S. C. Judgement in winding up. AA says the objective of code is different.

i.e. to Initiate CIRP with aim to Revive Company or else liquidation.

17) AA's reply to various objection raised by Resp.

a) letter produced by Resp proves Dr Cr Relationship. But it helps case of Applicant. Pertaining to this transaction the applicant says Resp asked for loan. **This does not mean no other transaction between the two.** In case any amount is due to Resp then that is only a set off.

On ground of set off the Resp cannot claim that there is no default in repayment of Financial Debt. There is occurrence of default of Financial Debt.

Admitted

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Hero Steels Ltd. - Op. Cr.

v/s

Rolex Cycles Pvt. Ltd. - CD

Chandigarh (NCLT) Bench

DOO : 13/07/2017

Under Section : 9

Facts of case : Op. Cr.. No dispute .

Only one point which is of Interest

Order of AA on Interest.

1) Books of Account of Applicant not credited with Interest amount.

2) (i) ANYHOW, it has been HELD by this Tribunal in case of WANBURY Ltd V/s Panacea Biotech Ltd.,

It is not the Intimation of legislature that the Tribunal determines the amount or ROI and gives time for payment as per its directions.

(ii) for Interest, Petitioner can approach Civil Court.

(iii) Controversy of Interest can be left to be determined by COC.

Admitted

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Mariners Buildcon I Ltd. - CD

V/s

Inderpreet Singh - FC

New Delhi Sp. Bench

DOO : 24/08/2017

Under Section : 7

Coram : Varadhrajan (JM)

Deepa Krishnan (T)

Facts of Case : Copy of petition under Rule 4(3) of AAA Rules dispatched to Registered office of CD.

As per Tracking Report not Served as CD but served on director of CD

Resp Not present before AA when case decided

The NCLAT in Innoventive Inds v/s ICICI Bank has discussed in detail whether it is MANDATORY for AA to follow principle of National Justice. NCLAT also referred to Judgement of HC of Calcutta in writ petition ASSAILING the vires of Section 7 of the code and Relevant Rules of AAA, 2016 in case of SREE METALIKS and Anr.

NCLAT of view that AA BOUND to Issue LIMITED NOTICE TO CD. ADHERENCE TO NJ would mean that in every situation AA is required to afford a reasonable app to hearing to CD before passing the order. Adherence to Prin of NJ wls not mean that the CD is given a opportunity of hearing in every case.

12) Copy of petition not served on CD, but served on a Director of CD. Received replied that facing troubles, cannot pay now.

Director is Director as per MCA records, Has received petition and replied.

Thus copy of petition served on CD.

ADMITTED

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Soft Wareone (I) - Op. CR

V/s

Emhor Solutions - CD

New Delhi Bench

DOO : 13/10/2017

Under Section : 9

Facts

1) Banks letter u/w 9(3)(c) - defective – designation and seal not there.

Respondent claimed payments made not disclosed in letter of Bank

Letter from Bank u/s 9(3)(c) Mandatory – word “Shall” is used in section.

Application not complete, AA is REQD to give 7 Days time to complete application.

Time is essence of code – NCLAT in Surendra Trading Co. v J. /k. Jute Mills held that if Applicant fails to rectify defect in 7 days, Application to be rejected

2)

17) Dispute between parties as can be seen from emails between parties.

Decision of Mobilox Innovative P. Ltd. v/s Kirusa Software Pvt. Ltd. By SC is quoted.

18) Dispute raised by CD will qualify as Dispute as defined u/s 5(6) of code

Rejected.

Summary u/s 9

- 1) Bank letter defective, Not Rectified in 7 days. On this count Application liable to be rejected – Time is essence of code – NCLAT in J K Jute Mills v/s Surendra Trading Co,
- 2) Emails show dispute. SC order in Mobilox v/s Kirusa quoted. On basis of disp Application Rejected.

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Namdhari foods (I) Pvt. Ltd. - CD

V/s

SBI - FC

New Delhi Single Bench

Coram : Varadhrajan (J)

DOO : 30/08/2017

Under Section : 7

Ex parte

Notice of Petition, copy of Petition posted to CD. No Response

Admitted

Registration of IRP on record expired. New IRP suggested, taken as IRP.

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Deccan Chonicle Holdings Ltd.

V/s

Canara Bank

Hyderabad Bench

DOO

Under Section : 7

Exparte

Facts – Loans given, unpaid, application u/s 7

Objection of Respondent :

- 1) NCLT cannot admit Petition
 - a) Winding up petn at HC of Telangana and A.P.
 - b) Sec 434 of Cos Act 2013,
 - c) Rue 10(2) of AA Rules
 - d) Nowfloats Technologies Pvt. Ltd. V/s Getit Info Service P. L.

- 2)
 - i) It is not in dispute that loans given and it is not the case of CD that full amount and interest repaid.
 - ii) CD resisting claim on untenable grounds, which are purely technical, clerical.
 - iii) **Only application made for winding up. No order till now.**
 - iv) **Judgment cited by CD not applicable in our case.**

iv) Sec 7(4) Quoted, FC have proved existence of default on basis of other evidence.

v) Mindful of fact that Jurisdiction of Tribunal is below High Court and Supreme Court. Exercising only powers as given by code,

vi) Know that CD is a publisher of newspaper. Granted sufficient opportunity to establish case

If AA starts rejecting application due to clerical errors, objective of code would be defeated.

Admitted

Summary : Application u/s7, Objection raised by Resp.
Observation of AA imp. Admitted,

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Smart Tinting Steel OC

V/s

National Steel and Agro CD

Coram : Prakash Kumar (Mem) (J)

V. Nalle Senpatty (T)

DOO : 30/01/2017

Under Section : 9

Certificate u/s 9 (3) (C) not filed,

Time given

Certificate not filed

OC says impossible to file as bank situated outside India

Requested such compliance be EXEMPTED

Order : On perusal of Sec 9 of Code – evident –

Mandatory to file certificate from Financial Institution reflecting non payment of Operational Debt.

Op. Cr. failed to file certificate.

Rejected

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Asian Natural

CD

V/s

IDBI Bank

FC

Andhra Bench

DOO : 23/05/2017

Under Section : 7

Order of Tribunal

FC gave notice of Petition to CD. Filed proof of the same. CD did not appear.

Admitted