NCLAT- 1

P.K. ORES PRIVATE LIMITED Applicant and (Corporate Debtor)

VERSUS

TRACTORS INDIA PRIVATE LIMITED. Respondent (Operational Creditor)

Section 8 and 9 of the Code

- The present appeal was filed by P. K. Ores Private Limited – (Corporate Debtor) against the judgment passed by NCLT, Kolkata Bench, Kolkata ("Adjudicating Authority") whereby the application filed by Tractors India Private Limited – (Operational Creditor) was admitted.
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The Corporate Debtor assailed the impugned order on the ground that the same has been **passed in violation of principles of natural justice, without giving any opportunity of hearing**

and further, that

there was 'existence of dispute' which the Corporate Debtor would have brought to notice of the Adjudicating Authority, if given an opportunity.

- The Operational Creditor, however, contended that the Corporate Debtor was served with notice under Section 8 of the Code as well as copy of application under Section 9 of the Code, the Corporate

Debtor failed to reply to the notice under Section 8.

- The NCLAT ("Appellate Authority") perused the record of the Adjudicating Authority and noted that there was no order issuing notice to the Corporate Debtor.

- **The Appellate Authority took note of section 424 of the Companies Act, 2013 which mandates that the Adjudicating Authority is supposed to follow the rules of natural justice before passing any order**.

- It observed that in the case of "Innoventive Industries Limited vs. ICICI Bank", the Appellate Authority held that a notice is required to be given to a Corporate Debtor before admitting any application for initiation of Corporate Insolvency Resolution Process under Section 7 and 9 of the Code.

- Since the Adjudicating Authority in the present case had not issued any notice to the Corporate Debtor, it was held that the impugned order was bad in law and thus, liable to be set aside.

- The Appellate Authority also took note of the reply given by the Corporate Debtor in November, 2016 to the letter issued by Operational Creditor in which the former had disputed the satisfactory installation of machinery (Engine) by latter and also stated that various complaints were made regarding rectifying the defects in the machinery.

- The Appellate Authority relying upon the judgment passed by it in "Kirusa Software (P) Ltd. versus Mobilox Innovations Pvt. Ltd." held that the Corporate Debtor had in fact, raised dispute about the quality of goods and brought the same to notice of Operational Creditor.

It also claimed damages for inferior quality of goods and its loss much prior to receipt of notice under Section 8 of the Code.

Accordingly, the Appellate Authority held that there was violation of the principles of natural justice as well existence of dispute and thus, the order passed by Adjudicating Authority was set aside.

- In effect, the order appointing an Interim Resolution Professional (IRP), order declaring moratorium, freezing of account and other actions taken by IRP pursuant to order of Adjudicating Authority were declared illegal.

2

M/s. Meyer Apparel Ltd. & Anr …Appellants and CD

Vs

M/s. Surbhi Body Products Pvt. Ltd. …Respondent and Op Cr

M/s. Meyer Apparel Ltd. & Anr. …Appellants and CD

Vs

M/s. Godolo & Godolo Exports Pvt. Ltd. …Respondent and Op Cr

The main ground taken by the Appellant is that **the petition under Section 9 of the I&B Code was not maintainable there being existence of dispute** between the parties with regard to the debt claimed by Operational Creditor.

From the impugned order dated 7th April 2017, we find that the **Adjudicating Authority relied on the decision of the Punjab & Haryana High Court in "Max India Limited vs Unicoat Tapes (P) CP No. 99 of 1994 decided on 4.7.1997" to find out the meaning of 'dispute', though we find specific definition of 'dispute' has been defined under subSection (6) of Section 5 of the I&B Code.**

The question as to what does 'dispute' and 'existence of dispute' means for the purpose of maintaining a petition for Corporate Insolvency Resolution Process under Section 9 of I&B Code was considered by this Appellate Tribunal in **"Kirusa Software Private Ltd. v. Mobilox Innovations Private Limited** i

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)

Admittedly in Section 5(6) of the 'I & B Code', the Legislature used the words 'dispute includes a suit or arbitration proceedings'. If this is harmoniously read with Section 8(2) of the 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 Section 8(2) of the 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 Section 8(2) would become surplus usage.

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 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 Code', it would violate the definition of operational debt under Section 5(21) of the Code' and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

27. Section 5(6) read with Section 8(2)(a) 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 Section 8(2) of the Code'. "

In the present case, **we find that the Appellants/ Corporate Debtor in both the cases have already raised dispute relating to quality of goods which culminated into pendency of Company Petition before the Punjab & Haryana High Court, no matter whether it was withdrawn, we hold that the dispute as raised by the Appellants/Corporate Debtor fall within the ambit of expression "dispute, if any" as defined under sub-section (6) of Section 6 of the I&B Code** and also within he ambit of expression 'existence of a dispute, if any" as mentioned under sub-Section (2) of Section 8 of I&B Code. The aforesaid fact has also been admitted by both the Respondents

AA order set aside. AA asked to close proceedings. Both appeals allowed.

3

M/s MCL Global Steel Pvt. Ltd. & Anr. Appellants and CD

Vs.

M/s Essar Projects India Ltd. & Anr. Respondents and Op Cr

Appeal preferred by MCL Global against order of AA admitting CIRP u/ 8 and 9

Grounds of appeal

The impugned ex parte order was passed by 'Adjudicating Authority without prior notice or intimation of hearing to the Appellants-Corporate Debtors against the principles of rules of natural justice.

The aforesaid correspondences clearly demonstrate the existence of dispute between the parties.

The word "includes" connote other dispute, if any, raised apart from the dispute mentioned in Section 8 of the 'I & B Code'.

Observations of NCLAT

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.**

AA passed order without Notice to the Appellant which is violation of the principle of Natural Justice. If Notice would have been given then the Appellant wld have highlighted the fact of existence of Dispute before the AA. The Op Cr had concealed the

fact that he had filed winding up Petition in which the Appellant had disputed the entire claim.

Adjudicating Authority failed to notice of 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.

NCLAT - 4

PHILIPS INDIA LIMITED- Appellant (Operational Creditor)

Vs

GOODWILL HOSPITAL & RESEARCH CENTRE LTD. (Corporate Debtor)

- Section 8 and 9 of the Code dealing with the initiation of corporate insolvency resolution process by Operational Creditor.

- The present appeal by Operational Creditor - Philips India Limited ("Philips") was filed against the judgment passed by NCLT, Principal Bench, New Delhi ("Adjudicating Authority") whereby the application filed by Philips against Goodwill Hospital & Research Centre Ltd. ("Corporate Debtor") was dismissed.

Facts in brief

- Philips, had entered into Comprehensive Annual Maintenance Contracts with corporate debtor for maintenance of installed machine in its premises.

- Philips provided maintenance services during the relevant period and fulfilled its obligations whereas, the Corporate Debtor failed to make full payment and the total outstanding dues.

- Philips filed an application under Section 9 of the Code.
- The Adjudicating Authority while taking note of definition of 'dispute' under section 5(6) of the Code to be inclusive one, was of the opinion that the reply given by Corporate Debtor raising

dispute over the satisfactory completion of the work was a 'dispute' which

- was existing and thus, the Adjudicating Authority dismissed the application stating that the remedy of Philips lies elsewhere but not under the Code.
- Aggrieved, Philips filed an appeal before the NCLAT ("Appellate Authority")
- **The Appellate Authority 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.**
- It was observed that the Corporate Debtor in the present case, much prior to issuance of notice under Section 8 of the Code, 2016 had raised disputes relating to quality of service/maintenance pursuant to notice under Section 433(e) of Cos Act, 1956 (unable to pay debts) and Section 434(1)(a) of Companies Act, 2013 (Transfer of Certain Proceedings) issued by Philips.
- **The Appellate Authority 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 the Code.**
- Accordingly, the Appellate Authority dismissed the appeal and upheld the order of the Adjudicating Authority.

5

Smart Timing Steel Ltd. . . .Operational Creditor

Vs.

National Steel and Agro Industries Ltd. .... Corporate Debtor

DOO : 19th May, 2017

no copy of "the certificate from the Financial Institution maintaining account of the 'Operational Creditor" as prescribed under clause(c) of subsection (3) of Section 9 was enclosed. For the said reason the adjudicating authority rejected the application.

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. T**he appellant being a foreign based 'Operational Creditor', the 'Adjudicating Authority' was required to interpret the provisions of 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 Debitors' 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.**

Section 9 deals ----- quoted and discussed. 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

The provision being "directory" or "mandatory" has fallen for consideration before Hon'ble Supreme Court on numerous occasions. In Manilal Shah Vs. Sardar Sayed Ahmed (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.**

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.

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 Vs. V.K.Kangan (1976) 2 SCC 895. In the said case, **the Hon'ble Supreme Court specifically held: 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."**

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"

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.

No merit in appeal. Dismissed.

NCLAT - 6

Agroh Infrastructure Developers Pvt Ltd -Appellant, CD

Vs

Narmada Construction (Indore) P Ltd -Respondents, Op Cr

Facts of the Case

The Appellants have challenged the order of NCLT (Ahmedabad) whereby AA admitted for CIRP application under sec 9 by Operational Creditor ie Respondent in this case

The appellant has challenged the impugned order on the following grounds:

1. The operational creditor has not issued any notice under sec 8 of Code.
2. The operational creditor had issued a notice under rule 6 of AA Rules ,but it was served only after the date of hearing.
3. The AA had admitted the application of the operational creditor without any notice to the appellant which is violation of rules of natural justice.

Suggestion made by the learned counsel for the appellant in point 1 , that the track report is incorrect cannot be accepted, having been issued from Postal Department of Government of India.

The Respondent has not disputed the fact that no notice was issued by the adjudicating authority to the appellant before admitting the application and passed the impugned order in violation of principles of natural justice.

The NCLAT heard both the parties on whether remand of the case to NCLT would be futile or not if the application is otherwise complete.

Counsel for both parties suggested that they have settled the matter and that if the order of A/A is set aside the respondent will withdraw his application filed u/s 9 in NCLT.

Accordingly, the order of A/A is set aside on the grounds of violation of the principle of Natural Justice The Adjudicating Authority may allow the operational creditor to withdraw the application and close the proceeding. The appellant is released from the rigour of law and allow the appellant company to function independently through its Board of Directors.

NCLAT - 7

Kaliber Associates P. L. vs Mrs Tirpat Kaur

The Appellants challenged the allowing of application under Sec 7 of the Code on the ground that no prior notice was given, thus violating the principles of Natural Justice. Both parties were however ready to settle the dispute..

The appellate tribunal placed reliance on Innoventive Industries Ltd Vs ICICI Bank and Another and declared that the adjudicating authority had passed the order without considering the valid precedent. Further, the counsel for respondent was ready to settle disputes with the appellant and thus, the impugned order and all other matters carried on based on this was declared to be illegal. The dues were paid thereon and the case was dismissed.

NCLAT -8

KIRUSA SOFTWARE PRIVIATE LTD. V/S MOBILOX INNOVATIONS PRIVATE LTD.

In this case, an appeal was preferred before the NCLAT by the operational creditor when the application filed by operational creditor was dismissed by NCLT, Mumbai Bench on the ground that the operational creditor had received notice of dispute disputing the debt allegedly owed to operational creditor.

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 refers to any dispute pending.

Order of the NCLAT

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

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.

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 26 would have come to a conclusion that condition of demand notice under subsection (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.

Order of AA set aside. Case remitted to AA for consideration of the application for admission if the application is otherwise complete.

NCLAT - 9

Era Infra Engg Ltd --- Cor Dr and Appellant

Vs

Prideco Commercial P L-- Op Cr

Contentions on part of the appellants:

The AA initiated the insolvency process under sec 9 of the Code and admitted the case though the application submitted on behalf of the operational creditor was incomplete. No notice was served to the appellant u/s 9 of Code . The petition was not filed in terms of IBC rules

Contentions on part of the respondent: The notice issued under sec 271 of Cos Act, 2013 for winding up which would be treated equally with the notice to be issued under sec 8 of Code.

Order : Demand Notice in form 3 still required as per Code which is not given, therefore 10 days after which case is to be filed has not expired. No question of admitting application.

Order of AA set aside.

NCLAT - 10

Seema Gupta Apellant and Op Cr

vs

Supreme Infra India Ltd Resp and CD

Seema Gupta's application under sec 9 was dismissed by NCLT. Therefore the appeal by her to NCLAT.

Learned counsel for the appellant submitted that the application preferred by appellant under Section 9 cannot be rejected at the threshold on the ground of technicalities that the notice has not been issued under Section 8 of the I&B Code.

It is contended that earlier a notice was issued under earlier Section 433 and 434 of the Companies Act, 1956 which provides for statutory period of 21 days as against notice period of 10 days enshrined under Section 8 of I&B Code. He placed reliance on Section 6(b) of the General Clauses Act

(Clause 6
Effect of repeal. —Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or
(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or…..)

Observations in Order of NCLAT

It is not necessary to discuss all such submissions in view of the provisions of law, as discussed below. Before filing of an application under Section 9 it is mandatory to issue a notice under Section 8 of I&B Code, 2016,

Section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8

Similar question was considered by this Appellate Tribunal in "Era Infra Engineering Ltd Vs Prideco Commercial Projects Pvt Ltd, Company Appeal (AT)(Ins) No.3 1 of 2017". In the said case the Appellate Tribunal vide judgement dated 3rd May, 2017 rejected the similar contentions that a notice issued to corporate debtor under provision of the Companies Act, 2013 for winding up

We find no merit in appeal. It is accordingly dismissed.

NCLAT - 11

Vishwa Nath Singh Apellant and CD

vs

Visa Drug and Pharm Pvt Ltd , Respondent and Fin Cr

Facts

Some erstwhile Share Holders of Swan Alum Ltd approached Swan to sell their shares. Agreement reached.

Six Share holders including Visa Steel sent Demand Notice under Sections 433(e), 434 and 439of the Cos Act 1956 and filed Petn in Punjab and Haryana HC under the same sections.

Pursuant to the Notification No. G.S.R. 1119(E) dated 7th December, 2016, issued by Central Government under sub-section (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the winding up cases were transferred from Hon'ble High Court to the Tribunal/Adjudicating Authority. The case of M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor), was transferred to the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench. **The application under Sections 433(e), 434 and 439 preferred by the respondent were treated to be application(s) under Section 7 of the I & B Code and were admitted**

The Appellant submitted that the Resp was a share holder and does not come under Fin Cr or Op Cr. Loan was without interest and therefore cannot be termed as Financial Debt u/s 5 (8)

There is nothing on record to suggest that M/s. Swan Aluminiums Pvt. Ltd. (Corporate Debtor) has borrowed money against the payment of interest from the respondent – Visa Drugs & Pharmaceuticals Pvt. Limited. There may be a loan taken by the Corporate Debtor from the respondent but that does not mean that such loan amount can be termed a money borrowed against the payment of interest

In the present case, the respondent has failed to show that the amount of loan treated to have been given to the Corporate Debtor were disbursed against the consideration for the time value of money.

Reference to 'Nikhil Mehta and Sons HUF vs. AMR Infrastructure Ltd. –

The appeal is allowed

NCLAT - 12

PEC Ltd, Apellant and Fin Cr

vs

Sree Ramkrishna Alloys Ltd Resp and CD

PEC Ltd. Appellant

Vs.

M/s. Sree Gangadhar Steels Ltd. '

Appellant filed for CIRP under sec 7

The matter is adjourned from time to time at the request of the Learned Counsel for the Respondent on the ground that the issue was going to be resolved now.

NCLT was of the view that – because of employment of several employees not inclined to admit case and wants it to be settled at the earliest. CD was directed to ensure issue is sorted out before next date.

Order of NCLAT

If AA granted some time we are not inclined to interfere with the order of AA with liberty to Apellant to approach appropriate forum. We hope and trust that Learned Adjudicating Authority, Hyderabad, will not grant further time to any of the parties and

decide the case(s) either way, there being a time frame given for admission or rejection of an application.

Both the appeals stand disposed of with the aforesaid observations

NCLAT - 13

Unigreen Global – Apellant

v

Punjab National Bank and others

Appellant had filed appln at NCLT u/s 10 which was Rejected. Therefore appeal at NCLAT

Observation of NCLT

Corporate debtor and directors also being guarantors are trying to avoid making lawful payments of the dues owed to the Bank

The questions involved in this appeal are :

i) Whether non-disclosure of facts beyond the statutory requirement under the I & B Code read with relevant form, prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 can be a ground to dismiss an application for initiation of Corporate Insolvency Resolution Process ? and

ii) ii) Whether the penalty imposed by the Adjudicating Authority under Section 65 of the I & B Code is legal or not?

Arguments by CD

The Adjudicating Authority cannot dismiss the application on the ground of non-disclosure of facts unrelated to the Corporate Insolvency Resolution Process.

If all information are provided by an applicant as required under Section 10 and Form 6 and if the Corporate Applicant is otherwise not ineligible under Section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground

Non-disclosure of any fact, unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the 'Corporate Applicant' has not disclosed disqualification, if any, under Section 11.

Legislature has made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I & B Code. In view of the provisions aforesaid, we hold that, if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.

In this case, it is not the case of the Financial Creditor/Respondent that a winding up proceeding under the Companies Act or liquidation proceeding under the I & B Code has been initiated against the Corporate Debtor. Therefore, the Corporate Applicant

is eligible to file application under Section 10, if there is a debt and default.

Non-disclosure of such relevant facts in the relevant Form 6, may be a ground to reject the application but a person can plead that the Form does not stipulate to disclose any ineligibility under Section 11. Therefore, we are of the view that the Central Government should make necessary amendment in the relevant Form 6 appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which will enable the Adjudicating Authority to decide at the time of admission whether any fact has been suppressed or the person has come with the clean hand or not. We hope and trust that appropriate modification of the relevant Rules and Forms shall be made by the Central Government.

Appeal allowed

NCLAT - 14

Hotel Gaudavan	Appellant and CD
v Alchemist Asset Recons Co	Resp and Fin Cr

An appeal was preferred against the order passed by NCLT (New Delhi). The original petition was filed by the Financial Creditor which is an asset reconstruction company. The petition arose, when the Debtor was sanctioned and given a term loan by SBI was defaulted continuously. SBI later, by means of an assignment agreement, assigned the debt to the Creditor. It was noted by the NCLT that SBI had, prior to the assignment agreement, invoked provisions under the provisions of SARFAESI Act. Though initially rejected by the DRT and DRAT, a fresh notice issued under the SARFAESI Act was allowed by the High Court when appealed to.

The Debtor was given a chance to refute the claims of the Creditor before the NCLT, according to the principles of Natural Justice. The debtor argued that:

1. The Applicant was not a Financial Creditor
2. The assignment deed executed was against the Circulars passed by RBI according to which, at the time of execution the Debtor account should be an NPA.
3. There was a Civil suit pending challenging the validity of the assignment deed.

The NCLT made certain observations in this regard:

1. It can be clearly understood that the Debtor was heavily indebted with proven default.
2. The assignment of NPAs /debt was elaborately considered by the Supreme Court in the case of ICICI Bank v. APS Star Industries. **In the said case, it was held that banks can transfer or assign debts due to it to any other bank.**
3. **NPAs may be a pre-requisite under the SARFAESI Act but not under IBC. Thus, the pendency of suit before the High Court cannot bar the initiation of CIRP**.
4. **The provisions of IBC governing the insolvency resolution process are not only for the benefit of all the stakeholders but also the Corporate Debtor**.

Thus, the contentions of the Debtor were not appreciated and the CIRP was commenced. The aggrieved Debtor appealed against this order to the NCLAT.

Case filed in Rajasthan HC agst order of AA, HC dismissed the same said go to NCLAT

Thereafter, the 'Corporate Debtor' along with another shareholder moved before the Hon'ble Supreme Court in SLP(C) No.12606-12707 of 2017 against different orders passed by Adjudicating Authority which were also dismissed on 26th April, 2017.

The 'Corporate Debtor' and Another thereafter preferred appeal before this Appellate Tribunal on 2nd May, 2017, which was subsequently withdrawn on 17th July, 2017.

In the meantime, as the Board of Directors refused to comply with the order of the Adjudicating Authority, the 'Interim Resolution Professional' filed Contempt Petition in which AA passes Order agnst Board of Dir of CD

‘Corporate Debtor’ had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 wherein certain orders were passed against which the Appellant(s) preferred the appeal before the District Judge, Jaisalmer, who admitted the appeal, issued notice to the Respondents and passed interim orders. Against the said order, the ‘Financial Creditor’ moved before the Hon’ble Supreme Court.

The appeal is allowed by SC and the steps that have to be taken under the Insolvency Code will continue unimpeded by any order of any other Court.”

Now NCLAT

Said very sorry state of affairs as also observed by SC.

When all the three appeals were taken up for hearing, nobody appeared for the Appellant(s). Learned counsel brought to the notice of this Appellate Tribunal the order passed by the Hon’ble Supreme Court, as recorded above, which is final.

In the facts and circumstances, we have no other option but to dismiss all the three appeals with cost of Rs. 25,000/- imposed on Appellant

NCLAT - 15

Forech India P L Appellant, Not a ‘Corporate Debtor’, but a third party

v

Edelwiess Assets Reconstruction Co Ltd.(Financial Creditor) Resp

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘I & B Code’) was filed by the Edelweiss Assets Reconstruction Company Ltd. (Financial Creditor) against one ‘Tecpro Systems Ltd.’ (Corporate Debtor). After notice to the Corporate Debtor, the case was taken up by the Adjudicating Authority, Principal Bench, New Delhi. The appellant, who is not a ‘Corporate Debtor’, but a third party and claimed to be an ‘Operational Creditor’, appeared and opposed the application under Section 7 preferred by the ‘Edelweiss Assets Reconstruction Company Ltd.’ (Financial Creditor) on the ground of pendency of winding up cases.

The Adjudicating Authority on hearing the parties and taking into consideration the facts that the record was complete, filed in Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the ‘Adjudicating Authority Rules’) by impugned order dated 7th August, 2017 admitted the application

Now in NCLAT

Learned counsel appearing on behalf of the appellant submits that **a number of winding up applications have been filed and pending against the 'Tecpro Systems Ltd.' (Corporate Debtor) and, therefore, the petition under Section 7 is not maintainable.** However, such objection cannot be accepted in absence of any ineligibility, as imposed under Section 11 of the I & B Code and reads as follows…. Sec 11 analysed and the conclusion is the FC is eligible to file for CIRP.

Chapter III of Part II deals with liquidation process. In the said Chapter the word 'winding up' has not been mentioned. However, if Section 255 is read with Schedule 11 of the I & B Code, we find that **in Section 2 of the Companies Act, 2013 after clause (94), the following clause shall be inserted namely : In this Act, unless the context otherwise requires –"winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016,** as applicable."

6. **Therefore, it is clear that the "winding up" under the Companies Act, 2013 has been treated to be "liquidation" under the I & B Code.**

7. There is no provision under the I & B Code which stipulate that if a 'winding up' or 'liquidation' proceeding has been initiated against the Corporate Debtor, the petition under Section 7 or Section 9 against the said Corporate Debtor is not maintainable.
8. **However, if a 'Corporate Insolvency Resolution' has started or on failure, if liquidation proceeding has been initiated against the Corporate Debtor, the question of entertaining another**

application under Section 7 or Section 9 against the same very 'Corporate Debtor' does not arise, as it is open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

9. **Similarly, one may argue that in case where 'winding up' proceeding has been ordered by the Hon'ble High Court and thus stands initiated, where is the question of filing an application under section 7 or 9 or initiation of Corporate Insolvency Resolution Process, which, on failure ultimately culminates into liquidation proceedings (winding up proceedings) ? The argument can be that once second stage i.e. liquidation (winding up) proceedings has already initiated, the question of reverting back to the first stage of 'Corporate Insolvency Resolution Process' or preparation of Resolution plan does not arise.**

It appears that some of the applications for 'winding up' under the Companies Act, 1956 are pending, but no order for 'winding up' has been passed. In the circumstances, in the absence of actual initiation of 'winding up' proceedings against the Corporate Debtor, it is always open to the Financial Creditor/Operational Creditor to file an application for Corporate Insolvency Resolution Process against the Corporate Debtor. 11. For the reasons aforesaid, the objection raised by the appellant that petition under Section 7 is not maintainable against the Corporate Debtor because of pendency of some applications for winding up cannot be accepted.

NCLAT - 16

Sabari Inn Pvt Ltd - Apellant and Cor Dr

vs

Ramesh Assoc Pvt Ltd Op Cr

The Appellant-'Corporate Debtor' has challenged the impugned order dated 19th June, 2017 passed by Adjudicating Authority whereby and where under the application preferred by the Respondent- M/s. Rameesh Associates Pvt. Ltd. ('Operational Creditor) under Sections 433 and 434 of the Companies Act, 1956 has been treated to be an application under Section 9 of Code, 2016 read with Rule 6 of the Bankruptcy (Application to Adjudicating Authority) Rules.

No notice under sub-section (1) of Section 8 was issued in Form-3 or 4 and the application has been admitted though there is an existence of dispute.

Facts of the case

Respondent issued a legal notice on 7th September, 2013 through a lawyer calling upon the Appellant to pay the outstanding sum of Rs. 12,06,508/-. Thereafter, the Respondent filed a Company Petition under Sections 433 & 434 of the Companies Act, 1956 before the Hon'ble High Court of Madras in C.P.No. 243 of 2015 claiming a sum of Rs. 12,06,508/- from the Appellant. Company Appeal (AT)

Insolvency No. 117of0 3 5. After constitution of the Tribunal and Adjudicating Authority, pursuant to the Notification No. G.S.R. 1119(E) dated 7th December, 2016, issued by Central Government under Section 434 of the Companies Act, 2013 read with Section 239 of the 'I&B Code', the case was transferred to Adjudicating Authority, Chennai Bench

IN NCLT, on notice, the Appellant appeared and disputed the liability.

According to Appellant, no such opportunity was given and the transferred application has been treated to be an application under Section 9 of the 'I&B Code' and was admitted by impugned order dated 20th June, 2017 giving rise to the present appeal.

Now in NCLAT

Notice was issued on Respondent but in spite of service of notice, the Respondent has not appeared nor disputed the statement made in the appeal

The aforesaid stand taken by the Appellant has not been disputed by the Respondent, as he failed to appear.

"The Companies (Transfer of Pending Proceedings) Rules, 2016" Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts which are to be transferred from the Hon'ble High Court's to the respective Tribunal and reads as follows: -…….

Admittedly, no notice was issued under sub-section (1) of Section 8 of the 'I&B Code'. In terms with Rule 5, other informations were also not placed before the Adjudicating Authority

Order of NCLT set aside.

NCLAT - 17

Ardor Global Pvt Ltd -- Appellant, CD

vs

Nirma Industries Pvt Ltd —Resp, Op Cr

Facts of the case at NCLT

Nirma filed for CIRP agst Ardor.

Defects in application. Nirma asked permission to withdraw and refile. Granted.

Now at NCLAT

Apellant says that once the defect was pointed out, then it was mandatory for the Adjudicating Authority to allow seven day' time to the 'Operational Creditor' to remove the defect and it has no authority to allow the 'Operational Creditor' to withdraw the application.

Order of NCLAT

Adjudicating Authority to allow the party(s) to withdraw an application and to grant liberty of filing a fresh application before admission of a case and where default has not been decided, in

view of Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which is 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."

Next it was contended that filing of the subsequent petition will be hit by 'constructive res judicata' but we do not agree with such submission, as no decision was given by the Adjudicating Authority while allowing a party to withdraw the application with liberty to file a fresh application.

Definition of RES JUDICATA

: a matter finally decided on its merits by a court having competent jurisdiction cannot be subject to litigation again between the same parties)

NCLAT - 18

Prowess International P L – Apellant, C.D.

vs Parker Hannifin P L –Resp, Op Cr

OP Cr filed appln for CIRP. Admitted for CIRP.

CD came to know later on, settled all Crs except PNB where the account was not NPA.

In spite of service of notice, the Respondent- 'Operational Creditor' has not appeared and not disputed the stand taken by appellant.

Tribunal has no power to allow any applicant or any other person to withdraw the application after admission, as apparent from Rule 8 and quoted below

It is seen that AA passed order of CIRP in violation of rules of Nat Justice.

If the order dated 20th April, 2017, would have been challenged by the appellant, it was open to this Appellate Tribunal to set aside the order dated 20th April, 2017 and then to permit the 'Operational Creditor' to withdraw the application, in view of settlement. In the present case as the order of admission is not under challenge and

the application cannot be withdrawn, we cannot grant the relief as sought for by the appellant.

In case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the Adjudicating Authority without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied. On the other hand, in case the Adjudicating Authority do not approve resolution plan, will proceed in accordance with law.

It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors.

I & B Code, 2016 is an Act relating to reorganisation and insolvency resolution of corporate persons. Such being the object of the Code 2016, if the interest of all the stakeholders are balanced and satisfied then to promote entrepreneurship and to ensure that the company continue to function as on going concern, it is desirable to close such proceeding without delay and going into technical rigour of one or other provisions, which are all otherwise futile for all purpose.

In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction whether the interest of all stakeholders have been satisfied and close the proceedings.

NCLAT 19

Neelkanth Township and Consts P. L. Applicant, Fin Cr

V/s.

Urban Infrastructure Trustees Ltd. Respondent & CD

Section 7 Insolvency Resolution Process by Financial Creditor.

The present appeal was filed before the NCLAT by the Corporate Debtor (appellant) against the order of the NCLT, Mumbai Bench, Mumbai whereby the application filed by Financial Creditor (respondent) was allowed.

Contentions of Appellant – Corporate Debtor

- Application filed by Respondent under section 7 of the Code, 2016 was defective being not accompanied by mandated documents
  - Application under section 7 of the Code can be filed only when accompanied by documents under sub-section (3) of section 7 of Code and none other, namely

- record of default as recorded by Information Utility
- such other record or evidence of default 'as may be specified'. 'As may be specified' can only be by Insolvency and Bankruptcy Board of India (Board) by way of Regulations. It was the duty of the Board to specify Regulations and in absence of same, proceedings under section 7 of the Code cannot be initiated.
- Reliance was placed on Smart Timing Steel Limited to contend that provisions of section 3(a) of section 7 is mandatory

- Application was time barred
  - The application was time barred as the debenture certificates were due for redemption as far back as in the years 2011, 2012 and 2013 and the application filed in 2017 is hopelessly time barred.
- 'Default of debt' has not been admitted by Corporate Debtor
- Respondent is not a 'Financial Creditor', but an investor
  - It was contended that the respondent does not come within the ambit of 'Financial Creditor' as no 'financial debt' is owed.
  - The claim of Financial Creditor was against Debenture Certificates which does not fall under 'financial debt'.
  - A debt is a financial debt only when it is disbursed against consideration for time value of money.
  - Since debenture certificates issued to Financial Creditor was carrying only zero interest and another was carrying one percent interest, the same was not issued against consideration for time value of money and the Financial Creditor was merely an investor.

Contentions of Respondent – Financial Creditor

- In the absence of Regulations framed by Board, the Code cannot be made ineffective.
- The Adjudicating Authority, before admitting the application, looked at the Balance Sheet of Corporate Debtor and 'Form C' under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

Decisions of Appellate Authority and reasons thereof:

Issues–

- Whether in absence of record of default as recorded with information utility or 'any other record or evidence of default' specified by Board, application under section 7 is maintainable.
- The Appellate Authority noted the provisions of section 7 of the Code. It observed that **it was a settled principle of law that procedural provisions cannot override or affect substantive obligations of Adjudicating Authority to deal with applications under section 7 of the Code merely because Board has not specified Regulations.**
- The Appellate Authority noted that 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, 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 include documents, record and evidence of default**
- The Appellate Authority also noted that Board has framed CIRP Regulations which, under Regulation 8, provide for filing of claim by Financial Creditor under Form C

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

Whether claim filed by Financial Creditor is barred by Limitation

- **The Appellate Authority observed that there is nothing on the record that Limitation Act, 2013 is applicable to the Code.**
- **Moreover, the Code is not an Act for recovery of money claim, it relates to initiation of corporate insolvency resolution process, hence default in payment of debt with continuous course of action cannot be barred by limitation.**

Whether the respondent comes within the definition of 'Financial Creditor'

- Section 5(8)(c) of the Code defines the term 'financial debt' to include, inter-alia, as – any amount raised pursuant to any note purchase facility or the issue of bonds, notes, **debentures,** loan stock or any similar instruments.
- Therefore, from above said provisions, it is clear that 'debentures' comes within the meaning of 'Financial Debt Accordingly, the Appellate Authority dismissed the appeal filed by Corporate Debtor

Subsequent Development

- The Corporate Debtor challenged the above judgment of Appellate Authority before the Hon'ble Supreme Court of India.

- The Hon'ble Supreme Court dismissed the appeal filed by Corporate Debtor.
- However, it observed that the question of law viz. Whether limitation act is applicable to Insolvency proceedings is left open.

NCLAT - 20

Nikhil Mehta and Sons HUF Appellant, Fin Cr

V/s.

AMR Infrastructure Ltd. Respondent, CD

U/s Section 7 of Code

The present appeal was filed by the Financial Creditors against the order dated 23 January, 2017 passed by NCLT , Principal Bench New Delhi("Adjudicating Authority") whereby the Adjudicating Authority held that the appellants are not Financial Creditors as defined under Section 5(7) of Insolvency and Bankruptcy Code, 2016 ("Code").

Brief Facts

- The appellants entered into different agreements/Memorandum of Understandings with

Respondent/Corporate Debtor for purchase of 3 units in a project developed by Respondent.

- One of the unit was purchased by the appellant under the **"Committed Return Plan"** as per which if the appellant pays a substantial portion of the total sale consideration upfront at the time of execution of the MOU.
- The Respondent would pay a particular amount to the appellant each month as committed return/assured return each month from the date of execution of MOU till the time of handing over the physical possession of the unit.
- **The Respondent started paying the committed returns to the Appellant as per the MOU for some time, but stopped thereafter.**
- In view of the above, the appellants filed application under Section 7 of the Code before the Adjudicating Authority which was dismissed vide the impugned order.

Appellants' Submissions

- The transaction between the appellants and respondent was not a simple real estate transaction. **In this regard, appellants relied upon an order passed by SEBI holding that transactions whereby the developer offers to pay assured returns to the buyer are not pure real estate transactions; rather they satisfy the ingredients of a collective investment scheme as defined under section 11AA of the SEBI Act.**
- Since the provisions of winding up under the Companies Act, 2013 stand substituted by the Code, the appellants should be entitled to relief under the Code.
- **The balance sheet of the respondent shows the amount to be paid to appellants as "commitment charges" under the head of "Financial Costs".**

- The respondent was deducting TDS on the amount paid as committed returns/assured returns under Section 194(A) of Income Tax Act, 1961, which is applicable to deduction of TDS on the amount which is paid to some as “interest, other than Interest on Securities”.
- Thus, the payment made by respondent to appellants is payment of “interest” thereby making the amount payment made by appellants to respondent as “Loan” for constructing the project.

Respondent’s stand

- Respondent appeared but did not file any affidavit denying the averments made by appellants.

Decision of Appellant Authority and reasons thereof

- The Appellate Authority noted that following two questions arose before it for consideration
  - **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 Code?** and
  - **Whether an application for triggering insolvency process under Section 7 of the Code is maintainable where winding up petitions have been initiated and pending before the Hon'ble High Court against the 'Corporate Debtor?**

- As regards the first question, the Appellate Authority quoted the provisions of section 5(7), section 5(8) and section 7 of the Code as well as the extracts of the judgment passed by the Learned Adjudicating Authority with regard to the appellants being Financial Creditors.
- Thereafter, the Appellate Authority noted the relevant clause of one of the MoU dated 12th April, 2008 executed between appellants and respondent.
- **After scrutinizing the above provisions, the Appellate Authority held that the appellants are "investors" and had chosen the "committed return plan".**
- **The respondent in their turn agreed upon to pay monthly committed return to the investors.**
- **Thus, the amount due to the appellants came within the meaning of "debt" defined under section 3(11) of the Code.**
- Furthermore, the Appellate Authority noted from **the Annual Return and Form 16A of the respondent that the respondent had treated the appellants as "investors" and borrowed amount pursuant to sale purchase agreement for their commercial purpose treating at par with loan in their return.**
- **Thus, the Appellate Authority held that the amount invested by appellants 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".**
- **For determining "time value of money", the Appellate Authority perused the MoU between the parties providing for "monthly committed returns" to be paid to the appellants.**
- **The Appellate Authority held that it was clear from the MoU that the amount disbursed by appellant was "against consideration of time value of money" and respondent raised the amount by way of sale-purchase agreement, having commercial effect of borrowing".**

- **This was clear from the annual returns of respondent wherein the amount so raised/borrowed was shown as "commitment charges" under the head "financial cost".**
- **Thus, the appellants were "Financial Creditors" under section 5(7) of the Code.**
- Accordingly, the Appellate Authority allowed the appeal and remitted the matter to the Adjudicating Authority to admit the application subject to the condition that other conditions of section 7 of the Code are satisfied by the appellants.
- From a reading of the judgement, it is clear that the Appellate Authority did not deliberate upon the second question raised in the appeal.

NCLAT - 22

Pec Ltd --Appellant, F Cr

vs

Sree Ramkrishna --Resp, CD

The grievance of the Appellant is that though the application was preferred by the Appellant under Section 7 of the 'I&B Code', at the request of the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' ('Corporate Debtor'), the application has been treated to be an application under Section 9 of the 'I&B Code', and order of admission has been passed.

Similar is the plea taken in the case of 'M/s. Sri Gangadhara Steels Limited' the other ('Corporate Debtor') Respondent in the other appeal.

Order of NCLAT

We hold that if an application is filed by a person under Section 7 of the 'I&B Code' and in case the Adjudicating Authority comes to the conclusion that the Applicant is not a 'Financial Creditor' in such case the Adjudicating Authority has jurisdiction to reject the application under Section 7 of the 'I&B Code', but the said Authority cannot treat the format of the application under Section 7 of the 'I&B Code' (Form-1) as an application under Section 9 of the 'I&B Code' (Form-5), nor can treat such person an 'Operational creditor', in absence of any claim made under Section 9 of the 'I&B Code'. Further, for filing an application under Section 9 of the 'I&B Code' it is mandatory to issue a demand notice/invoice of payment under subsection (1) of Section 8.

Both the applications for all purpose should be treated to be an application under Section 7 of the I&B Code' and the Appellant-'M/s. PEC Ltd.' in both the cases should be treated as 'Financial Creditor'.

NCLAT - 23

Speculum Plast P L vs PTC Techno P L

In all these appeals as common question of law is involved, they were heard together and are being disposed of by this common judgment.

The question that arises for determination in these appeals is: - Whether Limitation Act, 1963 is applicable for triggering 'Corporate Insolvency Resolution Process' under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code")?

On merit, Learned Counsel for the 'Corporate Debtor(s)' submitted that all the application in question, having filed beyond the period of three years, the application for triggering 'Corporate Insolvency Resolution Process' were not maintainable.

However, Section 433 of the Companies Act, 2013 has not been amended to make it as a part of the 'I&B Code', therefore, we hold

that Section 433 which relates to limitation of the Companies Act, 2013, ipso facto will not be applicable to 'I&B Code'.

In view of the aforesaid discussion, we hold that Section 24 of the Recovery of Debts and Bankruptcy Act, 1993 and Section 36 of the SARFAESI Act, 2002 are not applicable to the proceedings for initiation of 'Corporate Insolvency Resolution Process'.

From Article 137 of the Limitation Act, 1963, it is clear that the period of three years' is to be counted from the date right to apply accrues to a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Debtor'. i.e.

Limitation period will be 3 years from the day the Code came into operation.

NCLAT - 25

M/s. Aruna Hotels Limited ... Appellant , CD

Versus

Mr. N. Krishnan ... Respondent, Op Cr.

ex-employees of appellant M/ s. Aruna Hotels Limited, preferred their respective applications under Section 9 of the Code, for initiation of Corporate Insolvency Resolution Process against the appellant/ 'Corporate Debtor'-M/s. Aruna Hotels Ltd. They alleged that the arrears of salaries due to them have not been paid and thereby, there is a default of debt.

In view of the fact that one of the application has been admitted, in relation to the other two applications, preferred by Mr. N. Kirshnan and Mr. C. Ganapathy, both the 'Operational Creditors', Learned Adjudicating Authority directed them to approach Interim Insolvency Professional appointed pursuant to the first case

Admittedly, no demand notice under Section 8 was given by any of the individual respondent-'Operational Creditor', either in Form-3 or Form-4 of the Adjudicating Authority Rules.

All the notices, which are same and similar and all dated 27th February, 2017, were issued by the same advocate, on behalf each of the respondents. Only the amount of default shown therein are varying.

Learned counsel for the respondents accepts that apart from advocate notice, no separate notice under Section 8. were individually given by any of the respondents.

Learned counsel appearing on behalf of respondents tried to make a distinction between the aforesaid case of 'Macquarie Bank Limited' and the present case on the ground that the notice in the said case was issued on behalf of the 'Operational Creditor', which was a bank, whereas respondents are individual ex-employees.

But such distinction cannot be accepted, in view of the law laid down under the I&B Code. It is true that no authorisation on behalf of any Company, or firm is required to be given, but the **individual(s) are also required to give notice under Section 8 in Form-3 or Form-4** under their signatures with clear understanding and request to repay the unpaid 'Operational Debt' (in default) unconditionally, in full, within ten days from the receipt of the letter, with further intimation that on failure, the said employee(s)/ workmen shall initiate a Corporate Insolvency Process in respect of the 'Corporate Debtor'. **If such notice in Form-3 or Form-4 with the aforesaid stipulation is served on the 'Corporate Debtor', the**

'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/advocate notice or like notice under Section 80 of the Code of Civil Procedure, 1908 or notice for initiation of proceeding under the Industrial Disputes Act, 1947, the 'Corporate Debtor' may not take it seriously and may decide to contest the suit/case, if filed, before the appropriate forum. As the case of the appellant in all the appeal, is covered by the decision rendered in the case of 'Macquarie Bank Limited (supra)', we are not going into other aspects as to whether the respective claims made by the respondents are barred by limitation or there is a delay and laches on their part or there is any dispute in existence.

14. In view of the discussion as made above, we have no other option but to **set aside the impugned order** dated 13th June, 2017 passed by the Learned Adjudicating Authority,

NCLAT - 26
Sandeep Reddy & Anr. …Appellants – Corporate Debtor
v/s
Jaycon Infrastructure Ltd. …Respondent – Operational Creditor

Date of Judgment: 26th October, 2017

Brief facts:

- An appeal was filed by Sandeep Reddy & Anr, the Corporate Debtor ("Sandeep Reddy") challenging the order of NCLT, Hyderabad Bench, admitting the application for initiation of corporate insolvency resolution process under section 9 of the Code filed by Jaycon Infrastructure Ltd., the Operational Creditor ("Jaycon").
- It was alleged by Sandeep Reddy that there is a dispute in existence prior to issuance of notice of demand under sub-section (1) of Section 8 of the Code.
- It was further contended that the name of the Interim Resolution Professional was not recommended by the

Operational Creditor and the NCLT without calling for name of any IRP from the IBBI appointed IRP, on its own.

- Jaycon admitted that IRP was appointed without any suggestion made by it and submitted that parties have reached the settlement in writing which is binding on the parties.

Decision of the NCLAT and reasons thereof:

- NCLAT held that the application under Section 9 of the Code was not maintainable since it is not disputed by Jaycon that there was a dispute in existence prior to issuance of demand notice under sub-section (1) of Section 8 of the Code and that parties have already reached the settlement
- **NCLAT prima facie was of the opinion that the Code do not empower the NCLT to suggest any name or appoint any IRP/ Resolution Professional of its own choice.**
- **However, NCLAT observed that since the parties have settled the dispute and initiation of resolution process under section 9 of the Code was not maintainable, in view of existence of dispute, we leave the question open as to whether the NCLT has power to appoint any person of its own choice or not which will be decided in an appropriate case.**

NCLAT – 27

Alpha & Omega Diagnostics (India) Ltd. ... Appellant, CD

Vs.

Asset Reconstruction Co --Respondents, FC

The Appellant-Corporate Dr filed an application under Section 10

Adjudicating Authority Mumbai Bench, after notice to the 'Financial Creditor' passed impugned order dated 10th July, 2017 admitting the application subject to qualification,

In order of NCLAT order of NCLT reproduced

Order of NCLT

The Learned Chief Metropolitan Magistrate vide Order (supra) dated 11.04.2017 has appointed a Court Commissioner to take over the possession of the flats. The admitted position is that the Flats in question are not under the Ownership of the corporate Debtor.

The personal properties of the Promoters have been given as a "Security" to the banks.

Now the question is that whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambit of the Moratorium

Sec 14 analysed

On careful reading I have noticed that the term "its" is significant

There are recognised canons of interpretation. **Language of the Statute should be read as it existed.** No word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. Rather in this Section the language is so simple that there is no scope even to supply 'casus omissus'. (legal **Definition of casus omissus**. : a situation omitted from or not provided for by statute or regulation and therefore governed by the common law.)

I hasten to add that the doctrine of 'Noscitur a Sociis' (under the doctrine of **noscitur a sociis**, the **meaning** of questionable words or phrases in a statute may be ascertained by reference to the **meaning** of words or phrases associated with it) is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate (related; connected."cognate subjects such as physics and chemistry") sense be interpreted.

This Bench has no legislative authority to expand the meaning of the term, "its" even under the umbrella of 'Ejusdem generis'. (EG--

denoting a rule for interpreting statutes and other writings by assuming that a general term describing a list of specific terms denotes other things that are like the specific elements.)

The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.

To conclude the Application under Section 10 of the Code is hereby "Admitted" subject to the exception as carved out supra.

End of order of NCLT

Order of NCLAT contd

According to the appellant, the Moratorium should take into its recourse on the subject matters and assets relating to its matters pending before the Debt Recovery Tribunal (DRT) and under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).

However, we are not inclined to accept such submissions as Appellant-Corporate Applicant has sought for "its" own insolvency resolution process that will include only the assets of the Corporate Debtor and not any assets, movable or immovable of a third party, like any director or other.

In so far as 'guarantor' is concerned, we are not expressing any opinion, as they come within the meaning of 'Corporate Debtor individually', as distinct from principal debtor who has taken a loan.

In the aforesaid background, if Ld. Adjudicating Authority, on careful reading of the provisions has come to the definite conclusion that on commencement of the insolvency process the "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, no ground is made out to interfere with the said order.

Rejected

NCLAT - 28

M/s Annapurna Infrastructure Pvt. Ltd. --Apellant and Op Cr
Vs
M/s SORIL Infra Resources Ltd. --Resp and CD

The appeal was filed by Appellant against the order of the NCLT, Principal Bench, New Delhi (Adjudicating Authority) whereby the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by appellant was dismissed by the Adjudicating Authority on the ground that there was a existence of dispute pending adjudication between the parties.

Material Facts

- Pursuant to a Lease Deed executed in 2005 between the parties, **appellant rented the premises to respondent for which rent was not paid. Arbitration clause in the Lease Deed was**

invoked and the Sole Arbitrator passed an award in favour of the appellant.

- Respondent's challenge to the Award under 34 of the Arbitration & Conciliation Act, 1996 (Act) was rejected thereby affirming the award.
- As a consequence, appellant issued a demand notice under the Code which was replied by respondent under Section 8 of on January, 2017 raising objection that there was existence of dispute with regard to 'Operational Debt'.
- It was also stated by respondent that appeal under Section 37 of the Act has been preferred against the order dated 19th December, 2016.
- Further, execution proceedings were also pending to recover the amount of the award.

Submissions of Appellant

- Appellant is an 'operational creditor' within the meaning of Section 9 r/w Section 5(20) and 5(21) of the Code.
- Award passed by the Learned (Ld.) Arbitrator had attained finality as application under Section 34 of the Act has been dismissed on 19th December, 2016
- 'Arbitral Proceedings' cannot be said to be pending under Section 8(2)(a) of the Code because under Section 21 of the Act, arbitral proceedings commence on the date on which request for referring the matter for arbitration is received by respondent and terminate on passing of the award in terms of Section 32 of the Act.
- Thus, arbitration proceedings came to an end on passing of the award on 9th September, 2016.

Submissions of the Respondent

- **The respondent does not owe any 'operational debt' to the appellant.**
- **A claim not arising out of 'supply of goods' and providing 'services', which may include employment would not amount to 'operational debt'.**
- 'Debt' is not arising under the law for the time being in force and would be attracted only when the said debt is payable as per Section 5(21) of the Code.
- Provisions of Section 8, 9, 5(20) and 5(21) must be construed in accordance with the object of the Code.

Questions for determination of NCLAT

- **Whether there is an 'existence of dispute' between the parties, the award passed by Arbitral Tribunal having affirmed by the Court under Section 34 of the Act?**
- **Whether pendency of a proceeding for execution of an award or a judgment and decree bars an operational creditor to prefer any petition under the Code?**
- **Whether the 1st Appellant is 'operational creditor' within the meaning of Section 5(20) r/w Section 5(21) of the Code?**

Answer to Question (i) and (ii) above

- The NCLAT observed that a perusal of Section 8(2) (a) of the Code shows that pendency of an arbitration proceedings has been termed to be an 'existence of dispute' and not the pendency of an application under Section 34 or Section 37 of the Act.
- Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) required to be filled to apply under Section 9 of the Code indicates order passed by

Arbitral Panel as one of the document, record and evidence of default.

- **Section 36 of the 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.**
- ****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.**
- **Therefore, NCLAT held that the observations of Adjudicating Authority that, a dispute is pending, is not only against the provisions of law and rules framed there under, but is also against the decision of NCLAT in Kirusa Software Pvt. Ltd.**
- Thereafter, NCLAT observed that the Code is an act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons in a time bound manner.
- Insolvency Resolution Process is neither a money suit for recovery nor a suit for execution of decree or award.
- **Thus, CIRP can be initiated for default of debt, as awarded under the Act, however, the finding of the Adjudicating Authority that it is an executable matter is against the essence of the Code.**
- **The question of availing any effective remedy or alternative remedy, in case of default of debt for an 'operational creditor' was thus, held to be not based on any sound principle of law.**

Answer to Question (iii)

- **The NCLAT observed that the Adjudicating Authority had not considered all the contentions of the Respondent to contend that the appellant is not an 'operational creditor'.**
- **Having agreed with the above submission of the respondent, the NCLAT remanded the matter back to Adjudicating Authority to decide on the issue whether the appellant was an 'operational creditor' or not.**
- **Accordingly, the appeal of the appellant was allowed on above two questions.**
- **NCLAT held that if the Adjudicating Authority holds that the appellant is an operational creditor, it would decide other issues whether the application is complete or not and decide thereon.**

Date of Judgment: 17th October, 2017

NCLAT - 30

Uttam Glava Steels Limited Appellant, CD

V/s

DF Deutsche Forfait AG & Anr. Respondent, Op Cr

Section 10 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Corporate Debtor.

The present appeal was filed by the Corporate Debtor ("Appellant") against the impugned order dated 10th April, 2017 passed by NCLT, Mumbai Bench ("Adjudicating Authority") whereby the Adjudicating Authority admitted the application filed by two Operational Creditors ("Respondents")

Appellant/Corporate Debtor's Submissions

- **There is a pre-existing bonafide dispute between the parties.**

To support this submission, appellant contended that:

- Respondents violated the contractual terms
- There is a dispute about quantum of default
- There is a dispute as to who is the defaulter (whether Uttam or 3rd party)
- Dispute as to whether respondents are operational creditors of appellant or not
- Respondents had issued a winding up notice on 8th December, 2016 much prior to the issuance of notice under section 8 of the Insolvency and Bankruptcy Code ("IBC"). This winding up notice was replied in detail by appellant vide reply dated 3rd January, 2017.

- Respondents relied upon a document dated 27th December, 2013 to fix liability of appellant which has not been signed by appellant. This fact was brought to notice of respondents in the year 2013 itself.
- **The notice under section 8 of IBC dated 28.02.2017 is issued jointly by the respondents through their counsel and not by the respondents themselves.**
- **Section 9 of IBC does not contemplate filing of joint application by two or more operational creditors, as is done in the present case by respondents.**
- Demand notice under section 8 of IBC was not issued by 'authorized persons' in accordance with law.
- **Certificate of 'financial institution' as prescribed and mandatory under clause (c) of sub-section (3) of section 9 of IBC was not filed by respondents.**
- **The certificate produced on record by respondents was defective on multiple counts as it was not issued by a notified 'financial institution' but by Misr Bank which is not recognized as 'financial institution' in India as per section 3(14) read with clause © of sub-section (3) of section 9 of IBC.**
- The affidavit in support of the application should have been filed, as prescribed in Form 5 of the IBBI (Application to

Adjudicating Authority) Rules, 2016 ("Adjudicating Authority Rules")

Respondents'/Operational Creditors' submissions

- A joint petition is maintainable which per se indicates/suggests joinder of more than one cause of action to enable parties to institute a proceeding jointly in court of law.
- **The transaction between the appellant and supplier of goods was single and the same has not been split into two cause of actions.**
- **It is only the right to receive payment under the Bills of Exchange that has now been vested in two entities.**
- **Therefore, in effect, there is no joinder of cause action but only right to receive payment under Bills of Exchange**
- Vide Notification dated 20.12.2016, NCLT Rules, 2016 was amended and Rule 23A was inserted.
  - In view of Rule 23A, it was contended that joint petition is maintainable.
- Appellant himself admitted to filing of suit 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 disputed the existence of debt.
- Only contention raised in that suit was that goods were meant for consumption of another end user and that person has not paid any amount to the appellant
- Procedures are hand maiden of justice which cannot defeat the substantive rights of parties.
- Therefore, format of demand notice cannot be stated to be mandatory.

- The requirement of certificate by a financial institution, which has been held to be mandatory in Smart Timing Steel Limited vs. National Steel and Agro Industries Limited, is only for the purpose of confirming or ascertaining through a trustworthy source like any financial intuition to find out, whether any payment has been received in response to the demand notice or not.
- **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.**
- Further, since the appellant has himself contended that the end user has not made the payment, non-payment of invoice becomes an admitted fact and requires no further elaboration by way of independent certificate in the manner there is no requirement of.

Questions for consideration before the Appellate Authority

- **Whether a joint application by two or more 'operational creditors' under Section 9 of the IBC is maintainable?**
- **Whether it is mandatory to file 'certificate of recognized financial institution' along with an application under Section 9 of IBC**
- **Whether the demand notice with invoice under Section 8 of IBC can be issued by any lawyer on behalf of an Operational Creditor? and**
- **Whether there is an existence of dispute, if any, in the present case?**

Decision of Appellant Authority and reasons thereof

- The Appellate Authority quoted section 7, 8 and 9 of IBC and noted the difference between them.
- It stated that 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.
- The reliance of respondents on Rule 23A of NCLT Rules, 2016 is not correct since the said Rule has not been adopted by section 10 of IBC.
- The Appellate Authority, after quoting the extract of judgment passed in Smart Timing Steel Limited (supra), observed that the Certificate relied upon 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 IBC but has been issued by Misr Bank which is a foreign bank and is not recognised as a 'financial institution'.
- The said Certificate has been issued by 'collecting agency' as distinct from 'Financial Institution" and genuity of the same cannot be verified by the Adjudicating Authority.
- The Appellate Authority also noted 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 IBC, was not maintainable.
- The Appellate Authority observed that 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.
- 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.
- 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.
- In view of provisions of IBC, read with Rules, as referred to above, it was held that an 'Advocate/ Lawyer' or 'Chartered Accountant' or 'Company Secretary', in absence of any authority of Board of Directors and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of IBC, which otherwise is a 'lawyer's notice' as distinct

from notice to be given by operational creditor in terms of section 8 of the IBC.

- 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 holds any position with or in relation with the Respondents, it was held that the notice issued by the lawyer on behalf of the Respondents cannot be treated as a notice under section 8 of IBC and for that, the petition under section 9 at the instance of the Respondents against the Appellant was not maintainable.

- The Appellate Authority noted that from bare perusal of record, it is clear that Respondents issued winding up notice on 8th December, 2016 i.e., much prior to issuance of lawyer's notice purported to be under Section 8 of IBC.
- On receipt of such notice, appellant disputed the claim by detailed reply dated 3rd January, 2017. Apeart from that, 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 and such fact was brought to the notice of the Respondents as back as in the year 2013
- In "Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd.", the Appellate Authority decided the issue of 'dispute'
- In view of the decision of "Kirusa Software Put. Ltd. v. Mobilox Innovations Put. Ltd", as a notice of winding up dated 8th December, 2016 was issued by Respondents, and 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, the Appellate

Authority held that there is an existence of 'dispute', within the meaning of Section 8 read with sub-section (5) of Section 5 of IBC and, therefore, the petition under Section 9 preferred by Respondents against the Appellant was not maintainable.

- In view of the detailed reasons and finding recorded above, it was held by Appellate Authority that the impugned order was illegal and set aside the same.

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Macquarie Bank Limited Appellant, Op Cr

Vs.

Uttam Galva Metallics Limited Respondent

Appellant "Macquarie Bank Limited", claiming to be the 'Operational Creditor', preferred the application under Section 9

Learned Adjudicating Authority Chandigarh Bench, by impugned order dated 1st June 2017, having noticed that the demand notice under Section 8 of 'I & B Code' was issued through an Advocate of Singapore and that the appellant has not enclosed any certificate from a 'Financial Institution' maintaining the accounts of the 'Operation Creditor' in terms of Clause (c) of sub-section (3) of Section 9 of the 'I & B Code' held that the petition preferred by

appellant, a foreign company having office at Singapore, under Section 9 was not maintainable

Order of NCLT quoted

The question 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 subsection (3) of Section 9 of the 'I & B Code is mandatory or directory was considered by this Appellate Tribunal in "Smart timing Steel Ltd. Vs. National Steel and Agro Industries Ltd."

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

It was contended that the record of default with the 'information utility' has been mentioned therein but not the record as a certificate for 'financial institution' But such submission cannot be accepted for two reasons, the first being the appellant has not even enclosed 'record of default with the information utility', as mentioned therein and the second reason is that Form 5 cannot override the substantive provision of clause (c) of sub-section (3) of Section 9 of 'I & B Code' which mandates enclosure of certificate from 'Financial Institution' maintaining accounts of 'Operation Creditor' confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor'

In view of such provision we hold that an advocate / lawyer or Chartered Account or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/ pleader's notice, as distinct from notice under Section 8 of 'I & B Code

Only if such notice in Form - 3 or Form - 4 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/Advocate notice or like notice under Section 80 of C.P.C.

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 authorized 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.

18. We find no merit in this appeal

NCLAT - 32

Lokhanwala Kataria Constructions PL Appellant, CD

V/s.

Nisus Finance & Investment Manager LLP Resp, Fin. Cr.

Appellant: Lokhanwala Kataria Constructions Private Limited (Financial Creditor) Respondent: Nisus Finance & Investment Manager LLP (Corporate Debtor) Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.

The present appeal was preferred by the Corporate Debtor ("Appellant") against order dated June 15, 2017 passed by NCLT, Mumbai Bench ("Adjudicating Authority") whereby the application

filed by financial creditor ("Respondent") under Section 7 of the Code was admitted.

Respondent's Submissions

- At the time of the hearing, the respondent stated that the dispute between the parties has been settled and part amount has also been paid.

Appellant's Submission

- The fact of settlement having been made was highlighted by the appellant.
- A request was made to NCLAT to exercise inherent power under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 ("NCLAT Rules") which empowers 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.

Decision of NCLAT

- The Appellate Authority 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.**

- The Appellate Authority further held that **even a financial creditor is not allowed to withdraw the application once admitted till the claims of all the creditors are satisfied by a Corporate Debtor. It was further held that the settlement between the parties could not be a ground to interfere with the impugned order in absence of any other infirmity.**
- **On the issue of exercising inherent powers, the Appellate Authority 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 the is not merit the question of exercising inherent power does not arise.**

Subsequent Development

- 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.