

JUGEMENTS ON

SECTION 4

Metal's & Metal Electric Pvt Ltd Vs. Goms Electrical Pvt Ltd.

- **Issue** : Whether Threshold limit under Section 4 of the IBC is applicable on the date of application and not on the date on which the Debt became due.
- **Judgment** : NCLAT holds that a mere running of the eye of the ingredients of Section 9 of the Code makes it lucidly clear that the date of initiation of CIRP shall be on the date on which an application is made. To put it precisely, the date of default is not to come into operative play and the same ought not to be taken into account for anything but computing the period of limitation.

Foseco India Ltd. Vs. Om Boseco Rail Products Limited

- NCLT held that it is a well settled law that a statute is presumed to be prospective unless it is held to be retrospective, either expressly or by necessary implication. When the amendment to section 4 of IBC was, inserted a proviso enhancing the pecuniary jurisdiction for filing applications as against small and medium scale industries nowhere in the notification mentioned that its application will be retrospective. Therefore, it appears to me that the amendment shall be considered as prospective and not retrospective.
- The above judgment is upheld by NCLAT as reported in (2020)

Jumbo Paper Products vs. Hansraj Agrofresh Pvt. Ltd.

- The Supreme Court held that :
- “The other judgments cited by learned Counsel for Appellant broadly lay down that any statute/law can be applied retrospectively only if explicit provision regarding its retrospective application is made in the statute. It is seen that notification dated 24.3.2020 (supra) makes it unambiguously clear that the threshold limit to be considered for section 9 application will be Rs. 1 crore. This threshold limit will be applicable for application filed u/s 7 or 9 on or after 24.3.2020 even if debt is of a date earlier than 24.3.2020. Since the application under section 9 which is the subject matter of this appeal was filed on 13.9.2020, therefore the threshold limit of Rs. 1 crore of debt will be applicable in the present case.”

Bank Of Baroda vs. Barnala Steel Industries Ltd.

- Allahbad HC observed that Corporate Insolvency Resolution Process (CIRP) can be commenced when the corporate debtor commits default of minimum Rs. 1 crore.
- CIRP cannot be initiated if the amount of default is less than Rs. 1 crore. However, discrepancies in the calculation of amount can be settled by Committee of Creditors (COC) and is not to be decided by the NCLT.

JUGEMENTS ON

SECTION 5

Jignesh Shah & Anr vs UOI & Anr

- The NCLT observed that, “...Financial debt can be split into two categories,” ***the NCLT stated*** in construing the meaning of “financial debt” under Section 5(8) of the IBC. One is distributed without regard for the time worth of riches. The second is any sum raised as part of any other business transaction that has the industrial effect of a loan. It is not required that money be “disbursed” on a regular basis. It was decided that in this situation, an amount had been raised for the purpose of economic gain or commercial gain, and hence could be classified as “financial debt.”
- The NCLAT upheld the pronouncement of the NCLT.

Orator Marketing Pvt. Ltd vs. Samtex Desinz Pvt. Ltd.

- The Hon'ble Supreme Court ("SC") has in its judgment dated July 26, 2021, in the matter of Orator Marketing Private Limited v. Samtex Desinz Private Limited [Civil Appeal No. 2231 of 2021] ("Judgement") held that the definition of financial debt under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("IBC") does not exclude an interest free loan and that it would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

Anchor Leasing vs. Euro Ceramics Ltd.

- The NCLAT emphasized on inclusive nature of the definition of financial debt and observed that *“It must be borne in mind that ‘Financial Debt’ under Section 5(8) of the I & B Code, is an inclusive definition and even if a transaction which does not fall under any of those described under the provision can be classified as a ‘Financial Debt’.”*
- The NCLAT came to the conclusion that the Appellant has established the existence of financial debt in view of the record of such loan transaction in the minutes of the meeting of the board of directors and the subsequent entries in the balance sheet. The view taken by Adjudicating Authority that the ‘Loan’ was not a ‘Financial Debt’ was held as legally ‘invalid’ and ‘untenable’.

Shailesh Sangani Vs. Joel Cardoso

- The NCLAT held that, “A plain look at the definition of ‘financial debt’ brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression ‘if any’ as suffix to ‘interest’ leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of ‘financial debt.’”

CBRE South Asia Pvt. Ltd. Vs. M/s. United Concepts and Solutions Pvt. Ltd.

- The NCLT held that “There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’. Under Section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term ‘operational debt’ under section 5(21) the word ‘interest’ has not been mentioned...”
- That in the light of the above discussion, we are of the view that the Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.”

M Ravindranath Reddy v. Mr. G. Kishan & Ors

- By giving a strict interpretation to Section 5(21) of the Code, the NCLAT held that only when a claim by way of debt falls within one of the three categories mentioned in Section 5(21) will it be categorised as an operational debt.
- It further held that for a debt to qualify as operational debt, the debt must have arisen with a nexus of direct input to the direct output produced. Based on the above reasoning, the NCLAT held that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot be considered as operational debt.

BSE Ltd. Vs. KCCL Plastic Ltd.

- **Issue:** Whether listing fees shall be considered as Operational Debt
- **Held:** Listing Fees comes under the ambit of 'Regulatory dues' which SEBI is entitled to recover. The Respondent being an entity registered under SEBI, is under an obligation to follow the Regulations prescribed by SEBI for recovery of its dues. The dues so said are not 'Operational Dues' but 'Regulatory Dues'. The Insolvency Law Committee suggests that Regulatory Dues are not to be recovered under 'Operational Debt'. It concluded that no interference is required in the impugned order. Hence, the impugned order is hereby affirmed. The Appeal is dismissed. No order as to costs.

Anup Sushil Dubey vs. National Agricultural Co-operative Marketing Federation of Indian Limited & Ors.

- The NCLAT in the case of Anup Sushil Dubey vs. National Agricultural Co-operative Marketing Federation of Indian Limited & Ors.[11] ('Anup Sushil Dubey') was once again faced with the question of deciding whether dues arising from leave and licence agreement would qualify as operational debt and the court answered in the affirmative.

Promila Taneja v. Surendri Design Pvt. Ltd.

- The NCLAT taking note of the conflicting judgments on the issue, and after analysing the available jurisprudence on the matter, upheld the view taken in *Ravindranath Reddy*.
- The NCLAT analysed Section 5(8)(d) of the IBC, which while defining financial debt says that it includes “*the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standard or such other accounting standards as may be prescribed;*”
- Accordingly, the NCLAT held that a perusal of the above definition makes it clear that the legislature was conscious of liabilities arising from lease and made specific provision to club it under a financial debt, but no such provision was made for operational debt.

Telangana State Trade Promotion Corporation v. AP Gems & Jewellery Park Private Limited & Anr (NCLAT, Chennai)

- **Issue:** Whether an authority to appoint nominee director and the power of affirmative vote make the creditor a related party?
- **Held:** The NCLAT held that, “The financial creditor’s Managing Director was also a Director of the corporate debtor. Moreover, its nominee director advised the FC in matters relating to the corporate debtor. The Articles of Association pointed out that action relating to significant matters ought to be taken only by affirmative vote of three or more Directors and in the qualified majority, minimum one Director is to be nominated for inclusion. The corporate debtor clearly acts on the advice, direction and instructions of the appellant in its normal business affairs. As such, the appellant squarely comes within the ambit of related party as per Section 5(24)(f) and ought to have been excluded from the composition of the Committee of Creditors (CoC).”

Sai Peace and Prosperity Apartment Buyers Association v. ASK Investment Managers P Ltd & Ors (NCLAT, New Delhi)

- In the aforementioned case, an investment management company was taking part in the management of the corporate debtor on the basis of an investor agreement and in the capacity of an investor.
- Even though it was a financial institution, the NCLAT held that the protection from exclusion from CoC can only be given to pure play financial institutions who convert their debts into equity. Even if the investor is controlling the board and affirming decisions in the interest of participating investors, it still falls within the category of a related party and hence has to be excluded from the CoC.

Aasaan Global Trade Vs. Vasudevan & Ors.

- The NCLAT held that “On plain reading of Section 5(24) (h) – ‘related party’ in relation to a corporate debtor, we find that related party is any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act. The said provision cannot be made applicable in relation to the 2nd Respondent, who is also a Financial Creditor and in agreement referred to above, he is not supposed to give any advice, directions or instructions to the director or partner or manager of the corporate Debtor. Even if it is accepted that he is an agency of the Corporate Debtor, he has to act on the directions of the Corporate Debtor and not to give advice.”

JUGEMENTS ON

SECTION 7

Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd.

NCLAT held that:

- We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.
- As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.

- At this stage, learned Counsel for the Appellant submits that it was improper on the part of the Adjudicating Authority to impose a fine of Rs. 1 lakh relying on provision of Section 75 of IBC which relates to false information. Looking to the facts even if Appellant failed to make out case, that by itself may not be sufficient to invoke Section 75 of IBC.
- We set aside the part of impugned order of the Adjudicating Authority as regards the imposing of a fine of Rs. 1 lakh relying on Section 75 of IBC. Rest part of the impugned order does not call for interference.

The appeal is disposed of accordingly at the stage of admission.

Innoventive Industries Ltd vs. ICICI Bank Ltd

- 29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code

- . 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

Laxmi Pat Surana vs. UOI

- NCLAT held that by virtue of Deed of Guarantee Corporate Debtor being a Corporate Person owes debt to the Bank and that the 'Financial Debt' includes a 'Debt' owed to a Creditor by 'Principal' and 'Guarantor'. A just Omission or failure to pay on the part of a Guarantor to pay the 'Financial Creditor', When the Principal sum is claimed/demanded certainly, will come with the scope of 'Default' under Section 3(12) of the Code. The proceedings under Section 7 of the Code can be triggered by a 'Financial Creditor' who had taken Guarantee in respect of 'Debt' against 'Guarantor' for failure to repay the money borrowed by the 'Principal Borrower'.

CoC of Essar Steel India Ltd vs. Satish Kumar Gupta

The Supreme Court laid down the following important observations with respect to provisions of IBC:

- The role of the resolution professional under the IBC is administrative and not adjudicatory.
- The decision taken by the majority of the committee of creditors would prevail in any case. NCLT or NCLAT cannot take away this power of the committee of creditors.
- Limited judicial review is available to NCLT and NCLAT and they shall not trespass upon a business decision of the majority of the committee of creditors.
- The Hon'ble Supreme Court clarified that the amended Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") does not put all the creditors at an equal footing. Secured and unsecured financial creditors were differentiated in resolution plans and operational creditors are viewed separately.

- The committee of creditors has the power to approve a resolution plan under section 30(4) of the IBC and this power cannot be delegated to any other body by the committee of creditors.
- Section 31(1) of IBC laid down that once a resolution plan is approved by the Committee of Creditors, it shall be binding on all stakeholders, including guarantors.
- The rule of presumption of constitutionality was applied and it was laid down that the legislature had not directly set aside the judgment of the NCLAT by the Amendment Act and hence the Amendment Act could not be struck down.
- The Hon'ble Supreme Court held that there was no residual equity jurisdiction in the NCLT or the NCLAT to interfere in the merits of a business decision taken by the majority of the committee of creditors.
- Distribution of profits made during the CIRP would not go towards payment of debts of any creditor.

Macquire Bank Ltd vs Shilpi Cables Technologies Ltd

- The Adjudicating Authority while rejecting the application under Section 7 granted 7 days time to the applicant to file complete application. However, the application could not be filed by Friday, when the 7th day was over. The complete application was filed on Monday as NCLT was closed on Saturday and Sunday. The issue in front of the SC was that whether the application was duly filed
- The Supreme Court held that the period of 7 days for removing defects is directory in nature and not mandatory as the applicant does not get anything by not removing the objections.

Dena bank vs C. Shivakumar Reddy

- The SC held that the proviso to Section 7(5)(b) of the IBC obliges the Adjudicating Authority to give notice to an applicant, to rectify the defect in its application within seven days. The Adjudicating Authority may accept the cured application, even after expiry of seven days, for the ends of justice. There is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed.
- Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order.

Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. UOI & Ors.

- It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments.
- It was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

JUGEMENTS ON

SECTION 9

Mobilox Ltd vs. Kirusa Software Ltd.

On Point of Pre Existence of Dispute under Section 9 of IBC

- The Supreme Court held that the objective of IBC is to rescue a failing but viable business. Resolution plan is for insolvency resolution of corporate debtor as a going concern.
- The plan should maximize the value of assets of corporate debtor and should promote entrepreneurship, availability of credit and balance in the interest of all stakeholders.
- Resolution plan is not a sale of corporate debtor, it is not an auction, it is not recovery, it is not liquidation.
- Whenever there is existence of real dispute, the provisions of IBC cannot be invoked.
- IBC is not a substitute to recovery forums.
- Held that if there is existence of valid dispute before Operational Creditor application is filed, then the said application can be rejected due to pre existing dispute.

M/S. Surendra Trading Company Vs. M/S. Juggilal Kamlapat Jute Mills Company Limited and Others

- The question before the NCLAT was as to whether time of fourteen days under section 9(5) given to the adjudicating authority for ascertaining the existence of default and admitting or rejecting the application is mandatory or directory. NCLAT hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.
- Further question (with which supreme Court is concerned) was as to whether the period of seven days for rectifying the defects under proviso to sub-section (5) of Section 9 is mandatory or directory. The aforesaid provision of removing the defects within seven days is directory and not mandatory in nature.

Swiss Ribbon vs UOI

- This case dealt with regard to the dilemma of constitutional validity of certain provisions of IBC, 2016.
- The Supreme Court held that IBC is constitutionally valid.