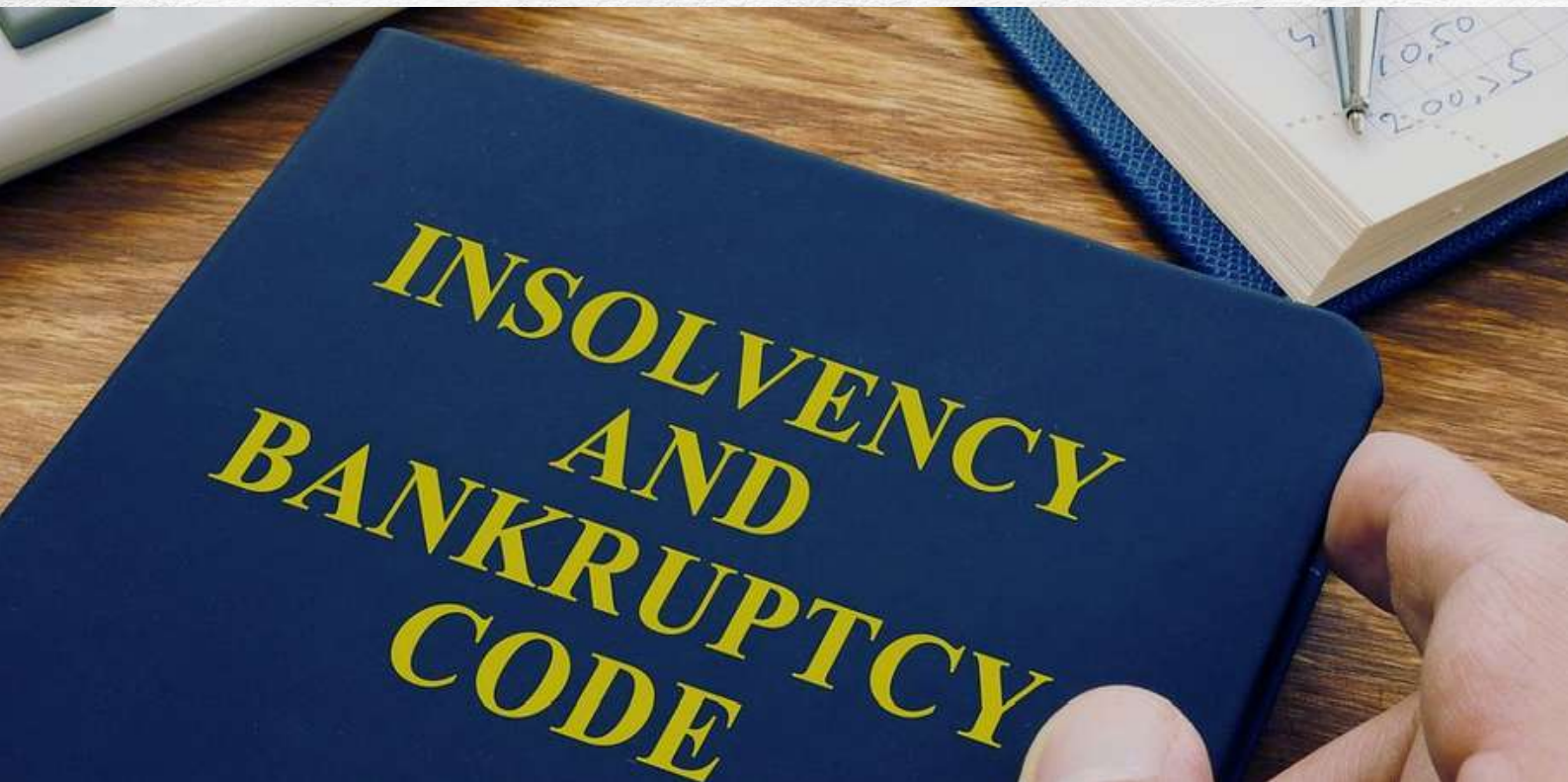


# RESOLUTION TIMES

Newsletter of a Premier Insolvency Professional Entity

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## APPOINTMENT OF AUDITOR AND SIGNING OF FINANCIAL STATEMENTS DURING CORPORATE INSOLVENCY RESOLUTION PROCESS

There is no specific provision under IBC 2016 (Code) read with CIRP Regulation 2016 regarding appointment of auditor and signing of financial statements during corporate insolvency resolution process (CIRP).

Pursuant to section 17 of the Code:

- The management of the affairs of the corporate debtor shall vest in interim resolution professional;
- Powers of Board of directors shall stand suspended and be exercised by interim resolution professional.

Section 23 of the Code further states that Resolution Professional shall manage the operations of corporate debtor during CIRP.

In the absence of any specific provision in Code, appointment

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of auditor and signing of financial statement during CIRP is governed by the provisions of Companies Act 2013 (Act).

### Appointment of Auditor

As per section 139(1) of the Act, every company shall at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting. Pursuant to section 139(1) states that the power to appoint an auditor is vested with the members only. Further, as per section 139(8), any casual vacancy in an auditor's office shall be filled by the Board within 30 days. If such casual vacancy is a result of the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next AGM.

In view of the above provisions of the Act, Resolution Professional has no power to appoint an auditor. Resolution Professional can merely confirm the appointment of the auditor for the unexpired period of his appointment, previously approved by shareholders. In the case of a casual vacancy arising due to the resignation of the Auditor, Resolution Professional has the power to appoint a new Auditor subject to the approval of the same at a general meeting within three months. However, where the holding of the general meeting is not feasible within three months, the only available option is to get the appointment of the Auditor confirmed through Adjudication Authority. Resolution professional shall have the power to fix the remuneration of Auditor, provided shareholders while approving such appointment, have delegated such power to Board.

### Signing of Financial Statements

As per Section 134 of the Act, Financial Statement need to be signed by the following:

- Chairperson of the Company (if he is authorized by the board of directors), or
- Two Directors (out of which one shall be Managing Director) and Chief Executive Officer, if he is director of the company
- Company Secretary
- Chief Financial Officer

### INSOLVENCY TRIVIA

**1 The Consent of the Resolution Professional should be obtained in which Form?**

- a) Form AA
- b) Form A
- c) Form AB
- d) Form B

**2) In what manner shall the liquidator maintain the particulars of consultation with stakeholders?**

- a) Form A of Schedule I
- b) Form A of Schedule III
- c) Form A of Schedule II
- d) Form A of Schedule IV

**3) All payments out of the account by the liquidator above ..... shall be made by cheques drawn or online banking transactions against the bank account ?**

- a) Rs. 1,000
- b) Rs. 10,000
- c) Rs. 5,000
- d) Rs. 15,000

**4)The key recommendations of the Code were made by the:**

- a) Narasimhan committee
- b) Raja Chelliah Committee
- c) Tiwari Committee
- d) Bankruptcy Law Reforms Committee

The Chairperson of the company can sign the financial statements after authorization by the Board of directors only.

Pursuant to section 17 of the Code, Powers of Board of directors stand suspended during CIRP, therefore, Board cannot authorize chairperson or other directors to sign financial statement on its behalf during CIRP. NCLAT in Company Appeal (AT) (Insolvency) No. 452 of 2021, in the matter of **Mukund Chaudhary versus Subhash Kumar Kundra**, held that it is the duty of the Directors to cooperate and sign the Financial Statements which is in terms of the provisions of the Code as well as in compliance of the Companies Act, 2013. In view of the above judgment and considering provisions of section 17 of the Code, it may be concluded that directors need to sign financial statement in their individual capacity only but not on behalf of Board, as its power stand suspended. Further, since management of the affairs of the corporate debtor vests in interim resolution professional / Resolution professional, therefore, adhering good corporate governance practice, IRP/ RP also need to sign financial statement, prepared during CIRP.

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## LATEST JUDGEMENTS AND UPDATES

### SUPREME COURT JUDGEMENTS

#### 1. New Okhla Industrial Development Authority v. Anand Sonbhadra

- Whether NOIDA is to be treated as an FC under the Insolvency and Bankruptcy Code, 2016 (“IBC”/“Code”)?
- Whether lease in the present case is a financial lease or not as under Section 5(8) (d) of the IBC?
- Whether disbursement is necessary for a debt to be a financial debt and is it required to be unilateral?
- Whether the transaction at present has the commercial effect of borrowing as is required under Section 5(8) (f) of the Code?

#### ANSWER KEY FOR THE PREVIOUS QUIZ

- 1.(c) Within 14 days from the date of submission of claim
- 2.(c) Rupees Ten Crores
- 3.(d) The Adjudicating Authority
- 4.(a) Financial Creditor

The Court observed that Section 5(8) (d) of the Code requires a lease or hire-purchase contract to be deemed as finance or capital lease under IAS to become a financial debt. For being a finance lease, Rule 61-67 of the IAS has to be adhered to. Thus, the Supreme Court observed that none of the rules was followed by the lessor thereby holding the lease not to be a financial lease and debt to be a financial debt under Section 5(8) (d) of the Code.

It further held that disbursement is an essential component to constitute a financial debt and the same should be from creditor to debtor and not vice-versa. The Court observed that the meaning of disbursement under Section 5(8) shall be the payment of money which is to flow from the creditor, i.e., unilateral payment. Thus, the lease in hand was not financial as there was no disbursement of debt from the Appellant lessor to the Respondent lessee and accordingly the same cannot be financial debt.

Lastly, it observed that for a debt to be a financial debt under Section 5(8) (f), it needs to have a commercial effect of borrowing. The Court held that as a statutory authority and a public authority, the transaction undertaken by such authority cannot have a commercial effect of borrowing, i.e., the authority cannot work with a profit motive which is essential for constituting a transaction having the commercial effect of borrowing.

## **Conclusion**

The Appellant was held not to be an FC but an Operational Creditor (“OC”).

## **2. State Bank of India v. Krishidhan Seeds Private Limited**

Supreme Court in the case of ***State Bank of India v. Krishidhan Seeds Private Limited (Civil Appeal No. 910 of 2021)*** has observed that the acknowledgement of liability within the limitation period shall extend the limitation under the IBC.

In the present case, the NCLT and subsequently the NCLAT dismissed the application filed by the Appellant for initiating CIRP against the Corporate Debtor (CD). The application at the lower stage was dismissed on the ground that since the Appellant has declared the bank account as NPA of the CD in the year 2014, filing of the application in the year 2018 will be barred by limitation as under the Code. The Respondents meanwhile in the year 2016 and 2017 had offered an OTS proposal to the Appellant.

The Court took cognizance of the documents produced by the Appellant regarding the acknowledgement of liability by the Respondent and further observed that the insolvency application was filed within a period of three years from the new date of default. The appeal was admitted and the matter was sent back to the NCLT for deciding on the issue of admission of application.

## **3. Indian Overseas Bank v M/s RCM Infrastructure Ltd. & Anr**

In the present matter of ***Indian Overseas Bank v M/s RCM Infrastructure Ltd. & Anr.***, the Appeal arose out the impugned order passed by Hon'ble NCLAT dismissing the appeal filed by the appellant Indian Overseas Bank. The brief fact of the matter is the appellate Bank had extended certain credit facilities to the Corporate Debtor ("CD"), which the CD failed to repay, thereby its account was classified as Non-Performing Asset. Pursuant to which SARFAESI Action was carried out wherein the appellant Bank auctioned the secured assets to the successful bidder. The successful bidder deposited 25% of the bid amount and the appellant Bank issued a sale certificate to them. Meanwhile the CD was taken into CIRP by virtue of a section 10 Application. However, during the pendency of the CIRP, the appellant Bank accepted the balance 75% of the bid amount, which was in turn challenged.

***The interesting issue at hand was whether the appellate Bank was correct in concluding the sale and accepting the balance 75% of the bid amount after the imposition of moratorium u/s 14 of the Code?***

It was contended that continuation of any proceeding including the proceeding under the SARFAESI Act is totally illegal and the receipt of the balance sale consideration was violative of Section 14(1)(c) of the Code. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. The words "including any action under the SARFAESI Act" are significant.

The Hon'ble Supreme Court held that the sale

would be complete only when the auction purchaser makes the entire payment.

The sale under the statutory scheme as contemplated under Rules 8 and 9 of the said Rules would stand completed only on the day the balance payment was made and therefore it cannot be accepted that sale was complete upon receipt of the part payment. Furthermore, the Hon'ble Supreme Court held that appellant Bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated and moratorium was ordered.

#### ***4. Kotak Mahindra Bank Ltd v. A. Balakrishnana & Anr.***

In the present case of ***Kotak Mahindra Bank Ltd v. A. Balakrishnana & Anr.***, the appeal arose challenging the impugned order passed by the NCLAT whereby the Appellate Authority has held that the application filed by the appellant was time-barred and that issuance of Recovery Certificate would not trigger the right to sue.

***The issue at hand was whether a person, who holds a Recovery Certificate would be a financial creditor within the meaning of Section 5(7) of the IBC?***

The Hon'ble Supreme Court observed that it is pertinent to note that in clause (8) of section 5 of the Code, the words used are "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes." The Bench emphasized on the term include and stated that it is a settled position of law that when the word

“include” is used in interpretation clauses, the effect would be to enlarge the meaning of the words or phrases occurring in the body of the statute, therefore in such situation, there would be no warrant in giving a restricted meaning to the provision.

Consequently, the Hon'ble Bench held that liability in respect of a claim arising out of a Recovery Certificate would be a “financial debt” within the ambit of its definition under clause (8) of Section 5 of the IBC, as a natural corollary thereof, the holder of such Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the Code. The Bench further placed reliance on *Dena Bank v Shivkumar Reddy & Anr.* observed that the issuance of a Recovery Certificate could trigger the limitation and therefore limitation period of three years starts from the date of issuance of the Recovery Certificate therefore.

## NCLAT JUDGEMENTS

1.. Proceedings before any forum shall not absolve the creditor to file an application under the IBC.

NCLAT in the case of *Mr. Amar Vora v. City Union Bank Ltd.* (Company Appeal (AT) (CH) (Ins) No. 130 of 2022) has held that proceedings before any forum shall not absolve the creditor to file an application under the IBC.

In the present case, the Appellant has challenged the impugned order of the NCLT on the ground that the Respondent has done forum shopping and has not brought the issue of it issuing a demand notice under SARFAESI and subsequently taking possession before the NCLT.

It was further contended that the NCLT did not consider that parallel SARFAESI and DRT proceedings and hence, the proceedings under IBC should be kept in abeyance.

The NCLAT observed that Section 238 of the IBC will override over other laws and proceedings in different forum and thus, the financial creditor can file an application under Section 7 of the Code even though in respect of the same any proceeding is pending before other forums. Hence, the appeal was dismissed and admission of Section 7 was upheld.

## 2. License Fee during CIR Process

NCLAT in the case of *Mack Star Marketing Pvt. Ltd. v. Ashish Chawchharia* has held that even though the lessor was entitled to a license fee for the CIRP period, still no provision in the approved resolution plan shall not create an entitlement to the lessor for the same.

In the present matter, the Appellant has challenged the impugned order of the Adjudicating Authority (AA) which observed that the Corporate Debtor (CD) was entitled to use the property taken on the lease without paying the rent owing to the fact the Appellant has not returned the security deposits. The Appellant contended that the terms of the lease and license agreement provide that the security deposit will only be returned once the property has been vacated. In the present case, the property has been used for 3 years (moratorium period) without paying any rent and the same shall form part of the CIRP cost.

On the contrary, the Respondent argued that the clauses of the agreement provide that CD shall continue to enjoy the possession of the property till the time the security deposit is not returned by the lessor.

After hearing both the parties, the NCLAT observed that the monthly license fee shall be treated as CIRP cost as the CD has used the premises during the CIRP period and has upheld the arguments presented by the Appellant. The Appellate Tribunal also held that the mere fact that the CIRP has been initiated will not absolve the CD from giving the fees for the facilities enjoyed by it.

It is further observed that the terms of the agreement provide that the possession has to be vacated first followed by the return of security deposits, hence, in the present case wherein the possession was not vacated, the question of returning the security deposit does not arise.

On the point of giving the amount to the Appellant, the NCLAT observed that since the resolution plan has been approved and there was no provision made for payment of leave and license fees for the CIRP period as the RP never accepted the amount as the CIRP cost, the amount even though entitled by the Appellant shall not be disbursed to it on the ground of plan been approved by the NCLT.

**3. Maximum time of 90 days for making the deposit in case of auction sale under liquidation is a mandatory provision.**

NCLAT in the **case of Potens Transmissions & Power Pvt. Ltd v. Gian Chand Narang** has held that in the case of auction sale under liquidation, the maximum time of 90 days for making the deposit is mandatory provision.

The NCLAT had observed that as per Clause 1(12) of Schedule I of the Liquidation Process Regulations, 2016, the balance amount has to be deposited within a period of 90 days from the closure of the auction and if the payment is been made after 30 days within this period of 90 days then the same will attract 12% interest rate. Further, the said clause also provides that the sale shall be cancelled if the payment is not received within a period of 90 days.

It was held that the period of 90 days is the maximum time within which the auction purchaser has to deposit the remaining amount. Further, it was observed that the provision is a mandatory one as the consequence of non-depositing the amount provided in the statute itself. Thus, the NCLAT upheld the decision of the AA and dismissed the appeal.

**4. Section 9 application cannot be admitted with respect to welfare claims**

NCLAT in the case of **Kishore K. Lonkar v. Hindustan Antibiotics Ltd.** has observed that the service benefits like LTC, gratuity accrue during the course of employment, however for the same an application under

Section 9 of the Code cannot be admitted as the objective of the Code is not recovery of dues but resolution and value maximisation of the assets of CD.

The NCLAT bifurcated the employees claims into two heads, i.e., service claims which arise during the employment and welfare claims which arise after cessation of employment, and gratuity, leave encashment, superannuation dues etc. forming part of welfare claims can be submitted in Form D under Regulation 9 of CIRP Regulations, however, for the same an application cannot be filed and admitted.

## 5. Whether there are any grounds for considering change in the legislative scheme towards the payment to the Operational Creditors?

In the matter of ***Damodar Valley Corporation vs. Dimension Steel and Alloys Pvt. Ltd***, the NCLAT found no merit and dismissed the appeal filed by Corporate Debtor's electricity supply provider ('Appellant'/'Operational Creditor') challenging NCLT order approving the resolution plan submitted by the Respondent and directing the Appellant to restore the electricity connection to Corporate Debtor's premises.

However, observing that the Operational Creditors have been given only a minuscule of their admitted claim to the extent of only 0.19%, and as the law stands today, no exception can be taken to such plans, which provide payment to Operational Creditor in accordance with Section 30(2)(b) of the Code.

NCLAT urged and stated that the time has come when it should be examined by the Government and the Board to find out as to whether there are any grounds for considering change in the legislative scheme towards the payment to the Operational Creditors, which also consist of Govt. dues and other statutory dues.

NCLAT made it clear that their observation is only to facilitate the Government and other competent Authority to consider this issue and take decision, so as to the objective of equitable and fair distribution can be fulfilled with clear parameters to guide the all concerned to arrive at the fair and equitable distribution. In view of the above, NCLAT has not found any good ground to interfere with the impugned order of NCLT approving the Resolution Plan.

## NCLT JUDGEMENTS

1.. Whether the CIRP can be initiated / triggered solely on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor”.

In the present matter of ***Saraf Chits Pvt. Ltd. vs. M/s. KAD Housing Pvt. Ltd***, the Adjudicating Authority by referring to the definitions of financial debt, debt and claim observed that the interest is not included in the term “debt” per se.



Rather, the “interest” can be claimed as “financial debt” only if such debt exists. The NCLT referred the judgement of Hon’ble NCLAT in the matter of S. S. Polymers v. Kanodia Technoplast Ltd. wherein it can be inferred that the “interest” component alone cannot be claimed or pursued, in absence of the debt, to trigger a CIR process against the corporate Debtor. Further, the application pursued for realization of the interest amount alone is against the intent of the IBC, 2016.

Therefore, the NCLT concluded that the CIRP against a Corporate Debtor cannot be initiated/ triggered solely on the basis of the un-paid amount of interest where the entire principal amount has already been discharged by the Corporate Debtor. The Petition is accordingly dismissed.

## 2. Whether the Tribunal has got powers under Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 prescribing the procedure to be adopted in case of sale as a going concern and under Rule 11 of NCLT Rules to grant relief sought for by the applicant.

In the matter of ***Sarda Mines Pvt. Ltd. Vs. Shailendra Ajmera Liquidator of Kwality Ltd***, the NCLT analysed the sub-clause 12 of Clause 1 and Regulation 32A of Schedule 1 of the IBBI Liquidation Process Regulations, 2016, LOI and Process Memorandum from where it was amply clear that interest is chargeable in case the payment is not made within 30 days from the execution of the LOI.

Moreover, nowhere in the IBC or the Regulations thereto, there is any provision which empower the Tribunal to waive interest. In the light of the factual position of the present case, the NCLT examined the extent of powers under the Rule 11 of the NCLT Rules, 2016 which deals with the exercise of inherent power and which can be exercised in granting the relief claimed by the Applicant in the present case. The said power can be used only to meet the ends of justice or to prevent abuse of the process of the Tribunal.

Further, an interest of 12% will be attracted if the payment is made after 30 days as stipulated under the Regulations as well as the Process Memorandum and the terms of sale under the LOI. Further, nowhere in the IBC or the Regulations thereto, there is any provision which empowers the Tribunal to waive interest. In the light of the same, NCLT was of the view that when express provisions have been made in the IBBI (Liquidation Process) Regulations, 2016 for levy of interest in case of delayed payments and also the process memorandum and terms of sale under the LOI provide for levy of interest, it is not appropriate to invoke the inherent powers under Rule 11 of NCLT Rules, 2016 in the present case. Further, the intention of the legislature in bringing the IBC is to consolidate insolvency resolution of corporate persons in a time bound manner for maximization of value of assets and to achieve the said objective of the legislature has in its wisdom provided for levy of interest in case of delayed payments so as to ensure that the process of liquidation is completed within time.

3. Is RP duty bound to determine the financial position of the Corporate Debtor beyond the business operations of previous two years?

In the matter of *M/s. Indian Sources Vs. M/s Vas Data Services Pvt. Ltd. Through RP*, the Resolution Professional (respondent) filed the response to the present application and submitted that claim of the applicant is barred by limitation as the applicant submitted it after more than 800 days from the CIRP commencement date have passed. Further, the applicant argued mainly with respect to the prayer regarding direction to the RP to provide the C Forms for the Invoices, goods related to the year 2016, which is more than 2 years from the date of commencement of CIRP. In this, the RP submitted that the same is not in his possession as the suspended BOD is not cooperating and emphasised on the provisions of Section 18(a) of IBC, 2016. Hence, he prayed that the application may be dismissed as the RP is not duty bound to determine the financial position of the Corporate Debtor beyond the business operations of previous two years.

In this matter, the Adjudicating Authority held that from the plain reading of the Section 18 of the IBC, it is clear that the RP is only bound to include the information related to previous two years and not beyond that. As per the records, the CIRP of Corporate Debtor was commenced on 09.04.2019, therefore, the RP is duty bound to have financial position of Corporate Debtor for the year F.Y. 2017-18 and 2018-19 and not for the year 2016. Hence, NCLT found no merit in the application and same was dismissed being devoid of merit.

4. Whether the Resolution Professional is competent to adjudicate upon the eligibility of Successful Resolution Applicant under Section 29A(f) of the Code on asking of whistle blower when the Resolution Professional has already submitted the resolution plan for approval of committee of creditors?

In the present matter of *Mr. Sumat Gupta RP, M/s Vallabh Textiles Company Ltd. Vs. M/s Aggarsain Spinners Ltd*, the Adjudicating Authority held that the RP has failed to discharge its duties diligently about verifying the eligibility of Resolution Applicant. There is no averment and evidence placed on record on behalf of the RP that before submitting the resolution plan to committee of creditors for approval, he had verified the antecedents of the resolution applicants from the websites of SEBI and BSE.

Further, from the careful perusal of the finding of Hon'ble NCLAT in the matter of *JSW Steel Ltd. vs Mahender Kumar Khandelwal and Other* and referring the same, the Bench found it competent to decide the issue of ineligibility of Resolution Applicants at the time of submitting the Resolution Plan under Section 29A(f) of the Code as it has not been decided by the Committee of Creditors when the Resolution Plan was put before it by the RP for approval. The Resolution Applicants were declared ineligible under Section 29A(f) of the Code at the time of submission of the resolution plan and resolution plan submitted by the Resolution Applicants stands rejected.

Consequently, to avoid the liquidation of the corporate debtor, period of Corporate Insolvency Resolution Process was extended by 90 days for exploring the possibility of resolution of the Corporate Debtor. Accordingly, matter was referred back to Committee of Creditors, which is ordered to be reinstated and revived to make another attempt for consideration of other resolution plans in accordance with law.

## 5. Whether interest component can be clubbed with Principal debt to reach minimum pecuniary threshold of Rs. 1 Crore?

In the present case of *M/s Plastofab v. Electroteknica Switchgears Private Limited*, the Section 9 petition was filed by an operational creditor, who entered into an agreement with the corporate debtor for the supply of certain goods, pursuant to which several invoices were raised however the CD failed to make payments. The operational creditor's advocate issued a Demand Notice dated 23.06.2015 to the Corporate Debtor, thereby demanding the repayment of ₹65,42,956/- along with interest @18%. Furthermore, demand notices under section 8 of the Code was issued by the Operational Creditor on 20.11.2020, and 25.11.2020. In the instant petition, the principal amount in default is ₹45,33,363/-. According to the CD, the operational creditor has used the interest component being ₹68,23,688/- to make the total debt due cross the threshold of ₹1 Crore.

The NCLT held that, it is clear that the pecuniary threshold of ₹1 Crore has been achieved by the Operational Creditor by

clubbing together the principal sum of ₹45,33,363/- and the interest of ₹68,23,688. Reliance was placed on Jumbo Papers stating that in case of Operational Debts, the interest component cannot be clubbed with the Principal Debt to arrive at the minimum pecuniary threshold of ₹1 Crore. Further, that the threshold limit of ₹1 Crore will be applicable for applications filed u/s 7 or 9 on or after 24.3.2020 even if the date of default precedes 24.3.2020.

## LATEST UPDATE

### Standard Operating Procedure (SOP) for NCLT cases in respect of the Insolvency and Bankruptcy Code

On 23rd May 2022, the Central Board of Indirect Taxes & Customs, Ministry of Finance has published the guidelines (SOP) as (Annexure A) for NCLT cases with respect to IBC matters to ensure a robust mechanism of communication from the nominated officer to the field formations and vice-versa and subsequent monitoring of action taken by the field formations on such communication by the Nodal Officer.

Earlier, the Insolvency and Bankruptcy Board of India has requested that role of GST and Customs authorities in certain key issues under the IBC, 2016 needs to be formulated. Accordingly, it has been proposed that IBBI would share the details of the public announcement on a regular basis to the identified office/ officer or a centralized system and hence, it has been requested that such office/ officer/ system in CBIC needs to be identified and intimated to the IBBI for implementing the system for sharing of information.

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