

# National Program on Insolvency and Bankruptcy Code

*Topic: Judgements and Learnings so far*

*By  
Souvik Ganguly*

# ABOUT ACUITY LAW

- ❑ **Acuity Law** was established in October 2011. It provides legal services to multinational and domestic clients in India.
- ❑ **Acuity Law** is advising various stake holders under the Code include IPs and representing clients in NCLT
- ❑ **Services**
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  - Corporate & Commercial
  - Insolvency
  - Employment
  - Intellectual Property

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(Code)
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# General Principles/Laws made applicable to the Code

- ❖ Principles of Natural Justice
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# Principles of Natural Justice

In the matter of *M/s. Innoventive Industries Limited Vs. ICICI Bank & Anr.*, the NCLAT vide order dated 15/05/2017, *inter alia* held that:

- Principles of natural justice - to secure justice or to prevent miscarriage of justice
- Exception to PNJ – purely administrative action
- Code – mandatory to follow
- Sree Metaliks – Proceedings are adversarial in nature (Calcutta High Court)
- Interplay between two special laws - harmonious construction vs . conflict

# Time is of the essence

In the matter of *J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Co.*, the NCLAT vide order dated 01/05/2017, *inter alia* held the following:

- 14 day time limit prescribed for the adjudicating authority to either admit/reject an application made under the Code, is procedural in nature and the same cannot be termed to be as mandatory
- 14 day time line should be calculated from the day of its first hearing and not from the day of filing of the application with the NCLT
- However, other provisions relating to time lines, i.e., (a) period to cure defect in an application, (b) the 30 days period for the term of an IRP, and (c) the 180 day (+90 day, if provided) period for concluding the CIRP, is mandatory in nature

# Interpretation of Power of Attorney

In the matter of ***ICICI Bank Limited v. Palogix Infrastructure Private Limited***, the NCLT (Kolkata Bench) vide order dated 12/04/2017, *inter alia* held that:

- Strict interpretation: A general power of attorney is not sufficient to initiate a CIRP, if it lacks specific authorization to the attorney holder to initiate the same (thereby, relying upon the order dated 30/03/2017 of the Special Bench at Guwahati constituted to adjudicate the above captioned matter)
- Contextual interpretation: However in the matter of ***M/s DF Deutsche Forfait AG and Anr. v. M/s Uttam Galva Steel Limited***, the NCLT (Mumbai Bench) vide order dated 10/04/2017, *inter alia* held that, the Attorney Holder though not specifically authorized to initiate a CIRP, was in his legal capacity as he was authorized to initiate winding up proceedings under the Companies Act which is more or less similar to insolvency proceedings

# Dual role of the adjudicating authority

In the matter of ***J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Co.***, the NCLAT vide order dated 01/05/2017, *inter alia* held the following:

- The adjudicating authority enjoys a dual role i.e. one being administrative in nature and the other being judicial in nature
- Hence, the adjudicating authority under the Code could be termed as a judicial authority, while executing certain functions prescribed to it under the Code
- In addition to the above, the primary role of the adjudicating authority changes with respect to the stage of the proceeding



# Representative Proceeding

In the matter of ***Parker Hannifin India Private Limited v. Prowess International Private Limited***, the NCLT (Kolkata Bench) vide order 29/05/2017, *inter alia* held the following:

- Once a CIRP gets initiated against a corporate debtor, the application filed for initiating the same cannot be dismissed on the basis of a compromise so agreed between the applicant (financial/operational creditors) and the said corporate debtor, for the sole reason that other creditors right to file a claim against the said corporate debtor continues to exist
- Thereby, the operational creditor and the corporate debtor does not have the sole right to withdraw the petition after getting the same admitted for CIRP
- The only exception to the above scenario, would be when the corporate debtor is successful in clearing all its claims raised against it by the creditors as well as the insolvency resolution process costs so undertaken by the IRP/RP, as laid down by the NCLT (Principal Bench) in the matter of ***M/s. Tomorrow Sales Agency Private Limited v. Raipur Power and Steel Limited and Ors.*** vide order dated 16/03/2017

# Law on Limitation

In the matter of ***M/s. Prowess International Private Limited v. Action Ispat and Power Private Limited***, the NCLT (Principal Bench), vide order dated 15/03/2017, *inter alia* held that:

- Claims which are time barred are not amount due and cannot be recovered under law.
- Creditors have no right to recover claims of such due that becomes time barred
- “Default” has been defined in the code as non-payment of debt which has become due and payable. Hence, a debt which is not recoverable for any valid reason ceases to be an amount due and payable

# Important order with respect to section 7 of the Code

In the matter of ***M/s. Edelweiss Asset Reconstruction Company Limited v. M/s. Bharati Defence and Infrastructure Limited***, the NCLT vide order dated 25/04/2017, *inter alia* held that:

- Admission Vs. Ascertaining of claim
- In view of the definition of financial creditor under the Code, the same would include a person to whom an owed financial debt has been legally assigned, thereby the applicant being the assignee to the assignment agreement, shall automatically fall under the definition of financial creditor
- When a trust deed provides that a trustee can deal in all respects of the trust and its assets, it gives a locus to the trustee to make an application under the Code on behalf of the trust

# Important orders with respect to section 9 of the Code

In the matter of ***Kirusa Software Private Limited v. Mobilox Innovations Private Limited***, the NCLAT vide order 24/05/2017, *inter alia* held the following:

- The definition of ‘dispute’ as stipulated under the Code, should be read as ‘inclusive’ and not ‘exhaustive’
  
- In addition to the above, the term ‘dispute’ should be given a wide interpretation, provided the same is relatable to either of the three aspects stipulated under section 5(6) of the Code i.e.
  - a) the existence of the amount of debt;
  - b) the quality of good or service; or
  - c) the breach of a representation or warranty

# Important orders with respect to section 9 of the Code

In the matter of ***Col. Vinod v. AMR Infrastructure***, the NCLT (Principal Bench) vide order dated 20/02/2017, *inter alia* held that:

- An amount owed to a person/entity who deals in the business of real estate cannot be classified as an 'Operational Debt' or 'Financial Debt'
- In view of the above, the applicant was not held to be an 'Operational Creditor' as neither had the applicant supplied any goods/services to the respondent nor was the applicant in employment of the respondent
- Where dues are on account of the advance made to purchase a flat/commercial site from a construction company, the appropriate remedy would lie under the Consumer Protection Act, 1986 and the general law of the land

# Important orders with respect to section 9 of the Code

In the matter of ***Smart Timing Steel v. National Steel and Agro Industries Steels Limited***, the NCLAT vide order dated 19/05/2017, *inter alia* held that:

- Mandatory to file copy of certificate from the 'Financial Institution'
- If a foreign company is not able to produce the afore-mentioned document in its application, it cannot avail the remedy provided under the Code

# Important orders with respect to section 10 of the Code

In the matter of ***M/s. Schweitzer Systemtek India Private Limited v. Phoenix ARC Private Limited***, the NCLT (Mumbai Bench) vide order dated 03/07/2017, *inter alia* held that:

- Other than the properties that are owned by a corporate debtor, no other properties shall come under the ambit of a Moratorium, as stipulated under section 14 of the Code

In the matter of ***Unigreen Global Private Limited***, the NCLT (Principal Bench) vide order dated 08/05/2017 *inter alia* held that:

- The corporate debtor and two of its directors were imposed a penalty of INR 10,00,000/-, as they had abused the process of law under the Code by suppressing vital facts, thereby failed to approach the NCLT with clean hands

# Relevant orders in relation to other issues arising out of the Code

In the matter of ***M/s. Innoventive Industries Limited v. ICICI Bank & Anr.***, the NCLAT vide order dated 15/05/2017), *inter alia* held that:

- When objects of two enactments operate in entirely different fields, it is apparent that there is no repugnancy between the two enactments and in view of the *non obstante* clause the provisions of the later enactment shall have effect

In the matter of ***Diamond Power Transformers Limited v. Indian Overseas Bank & Ors.***, the NCLT (Ahmedabad Bench) vide order dated 06/06/2017, *inter alia* held that,

- When there is a legally valid debt due from the corporate debtor and there is a default, the application cannot be rejected merely because the corporate debtor has taken contradictory pleas (with regards to the existence of default) before different forums.



# Relevant orders in relation to other issues arising out of the Code

In the matter of ***M/s. Starlog Enterprises Limited v. ICICI Bank Limited***, the NCLAT vide order dated 24/05/2017, *inter alia* held that:

- The Code does not in any manner empower an IRP to interfere with the affairs of the subsidiaries of a corporate debtor (as provided under the explanation to section 18 of the Code), thereby the action of the IRP in directing the employees of the corporate debtor to change the mandate of authorized signatories in the bank accounts of the subsidiaries of the corporate debtor was ex-facie illegal and unsustainable in law.
- In addition to the above, the learned counsel for the applicant in the above captioned matter submitted that, there had been complete mismanagement of the business of the corporate debtor by the hands of the IRP, which resulted in financial loss at the tune of INR 2,70,00,000/- and the loss of good will for the corporate debtor, during the moratorium.

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