INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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APPLICATION OF SECTION 9 IBC: ITS RELEVANCE AND OTHER RELATED ISSUES

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Abstract

Section 9 of the Insolvency and the Bankruptcy Code, 2016[1] (hereinafter referred as Code) provides for the application by an operational creditor to initiate Corporate Insolvency Resolution Process (hereinafter referred as CIRP) against the corporate debtor. The application under Section 9 of the Code cannot stand without the prerequisites of Section 8 of the Code which provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default and the corporate debtor within a period of 10 days of receipt of the demand notice or the invoice bring to the notice of the operational creditor existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute or the repayment of unpaid operational debt. It is clear from

[1] "9. (1) After the expiry of the period of ten days from the date of delivery of the or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process. (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed. (3) The operational creditor shall, along with the application furnish— (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt; (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and (d) such other information as may be specified. (4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional. (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order— (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,— (a) the application made under sub-section (2) is complete; (b) there is no repayment of the unpaid operational debt; (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if— (a) the application made under sub-section (2) is incomplete; (b) there has been repayment of the unpaid operational debt; (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or (e) any disciplinary proceeding is pending against any proposed resolution professional: Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority. (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section".

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the reading of Section 9(1) that an application by the operational creditor would lie before the Adjudicating Authority only on the expiry of 10 days.

Key Words: Corporate Debtor, operational creditor, liquidation, Corporate Insolvency Resolution Process (hereinafter referred as CIRP), Insolvency and Bankruptcy

1. Introduction & Essentials of Section 9 of the Code

Section 9 may appear to be but it is a complex provision in terms of the various conditions it carries to be satisfied before invoking the same and henceforth making these conditions to be the essentials of Section 9. Following are the essentials of Section 9 of the Code:

i. There shall be the delivery of the notice or invoice demanding payment under sub-section (1) of Section 82;

ii. There shall be default of payment by the corporate debtor as per the said notice or invoice as under point (i) within ten days from the date of receiving such notice or invoice;

iii. The application under Section 9 shall be filed in Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 accompanied by a fee of Rs.2000/-[3] before the concerned bench of National Company Law Tribunal.

iv. The operational creditor alongwith such application shall furnish the following:-

a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and
d) such other information as may be specified.

v. The operational creditor alongwith the application under Section 9(1) shall also make proposal of the name of a resolution professional to be appointed as an interim resolution

[2] "Section 9(1), 9(5)(i)(c) and 9(5)(ii)(c) of the Code.
[3] Schedule of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016".

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professional. It is pertinent to note that there must be no disciplinary proceeding pending against such resolution professional.

vi. The applicant filing the application under Section 9 shall dispatch the copy of the application filed before the Adjudicating Authority vide registered post or speed post to the registered office of the corporate debtor.[4]

vii. The rules governing the procedure for filing the application under Section 9 have been provided under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

viii. Following documents as peer Rules,2016[5] shall be annexed:

ix. Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

x. Copies of all documents referred to in this application.

xi. Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

xii. Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

xiii. Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

xiv. Proof that the specified application fee has been paid.

2. Issues

There are various issues that arose for consideration before the various forums including NCLT, NCLAT and Supreme Court. Being a new law, the Code is evolving each and every day removing the lacunas in the Code.

a. Whether the notice under Section 8 can be send by the lawyer of the operational creditor?
b. Whether the time barred claims can be entertained by NCLT?
c. Whether in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory?
d. What would constitute the existence of dispute?
e. What is the difference between Section 7 and 9 of the Code?

[4] "Rule 6(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
[5] Form 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016".

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f. Whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the adjudicating authority is mandatory and directory in nature?
g. Whether arbitration proceedings can be initiated by the corporate debtor once the moratorium period starts?
h. Whether the purchaser of a real estate would be an operational creditor or a financial creditor?

3. Judgments

i. **Macquarie Bank Limited v. Shilpi Cable Technologies Limited (Supreme Court), Civil Appeal No. 15135 of 2017, decided on December 15, 2017**

The questions that arose before the Hon'ble Apex Court for consideration in this particular case was firstly to conclude whether in relation to an operational debt, the provision contained in Section 9(3) (c) of the Code is mandatory and secondly if a demand notice under Section 8 of the Code of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

It was held by the Hon'ble Supreme Court that:

"33. Insofar as the second point is concerned, the first thing that is to be noticed is that Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Forms 3 and 5 extracted hereinabove, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code. The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is significant……..

It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

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36. Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order."

ii. *B.K. Educational Services Private Limited v Parag Gupta and Associates,* Supreme Court (Civil Appeal No. 23988 of 2017), decided on 11.10.2018

The question which came before Hon'ble Supreme Court in this case was that whether the Limitation Act would apply to the applications under Section 7 and 9 of the Code to which the Hon'ble Apex Court categorically answered in positive and held that the Limitation Act would apply on the applications by the financial and operational creditors under Section 7 and 9 of the Code. While deciding the matter the Apex Court made the following observations:

- The Court observed the Report of the Insolvency Law Committee (Committee) of March 2018 (Report) to carve out the intention of the Code and held that the intention of the Code could not have been to give a new lease of life to stale and time-barred claims, but was solely to clarify that Limitation Act is been applicable to the Code.
- NCLT, which was established under the Companies Act is the 'Adjudicating Authority' under the Code, and Section 433 of the Companies Act makes Limitation Act applicable to the NCLT and as it makes it applicable to applications under Section 7 and 9 of the Code as well.
- Section 238A of the Code being procedural in nature is a clarification of the law and therefore, it is retrospective. The Court observed that the amendment of Section 238A would not serve its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.
- The Court noticed that the expressions 'due' and 'due and payable' under Sections 3(11) and 3(12) refer to a default which is a non-payment of a debt that is due in law, i.e., such debt is not barred by limitation, and even Sections 7 and 8 of the Code make it clear that CIRP can be initiated by a financial or operational creditor in relation to debts which have not become time-barred.

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- Rejecting the argument that applying Limitation Act may lead to an anomalous situation, the Court held that even though there is one appellate forum under three statutes, each appeal would be decided keeping in mind the provisions of the particular Act in question.
- The Court also held that Section 60(6) of the Code, which provides for exclusion of period of moratorium in computing the period of limitation for a suit or application against a corporate debtor, would have been wholly unnecessary if the intention of the Legislature was to exclude the application of Limitation Act from the Code.
- While examining section 433 of the Companies Act and Section 238A of the Code, the Court observed that both these provisions make the Limitation Act applicable 'as far as may be', and thus, in the event the Code specifically provides for certain limitation periods, the same would override the Limitation Act.

iii. Mobilox Innovations Private Limited v. Kirusa Software Private Limited (Supreme Court), Civil Appeal No. 9405 of 2017 decided on 21.9.2017

In this judgment the Hon'ble Apex Court clarified the essentials of the application under Section 9 for triggering the CIRP process under the Code as follows :

a. occurrence of a default;
b. delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and
c. the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

The Apex Court also dealt with the issue of dispute under the Code and held as follows:

"43. According to learned counsel for the respondent, the definition of "dispute" would indicate that since the NDA does not fall within any of the three sub-clauses of Section 5(6), no "dispute" is there on the facts of this case. We are afraid that we cannot accede to such a contention. First and foremost, the definition is an inclusive one, and we have seen that the word "includes" substituted the word "means" which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice – Section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the

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three subclauses, either directly or indirectly. We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). The correspondence between the parties would show that on 30th January, 2015, the appellant clearly informed the respondent that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of the NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved. On 10th February, 2015, the respondent referred to the NDA of 26th December, 2014 and denied that there was a breach of the NDA. The respondent went on to state that the appellant's claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs.19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and ……".

iv. **Alchemist Asset Reconstruction Company Limited v. M/s Hotel Gaudavan Private Limited & Ors. (Supreme Court), Civil Appeal No. 16929 of 2017, decided on October 23, 2017**

It was clarified by the Hon'ble Supreme Court vide this particular judgment that an arbitration proceeding cannot be started after imposition of moratorium and that that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

v. **Innoventive Industries Ltd. v. ICICI Bank & Anr. (Supreme Court), Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017**

This decision of the Hon'ble Apex Court played a major role in establishing the distinction between Section 7 and 9 of the Code. It was held in this judgement that:

"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 subsection (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

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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."

vi. **Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Others (Supreme Court), Civil Appeal No. 8400 of 2017 decided on September 19, 2017**

The doors of the Hon'ble Supreme Court were knocked to decide that whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory and the precise question was whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the adjudicating authority was a hard and fast time limit which could never be altered. The NCLAT had held that the said 7 days period cannot not be extended, whereas, insofar as the adjudicating authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory. Supreme Court differed with the said view of NCLAT and held as follows:

"We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections

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are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application."

"Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

4. SUGGESTION AND CONCLUSION:

India has acquired another routine of corporate and individual bankruptcy by administering the Indebtedness and Bankruptcy Code (IBC) in 2016. The ending up of organizations under the Organizations Act 2013 has been significantly amended and united under IBC. The procedure of bankruptcy goals has been compulsorily conveyed under the IBC preceding making the organizations enter the way of liquidation. The timescales have been abbreviated with the end goal to diminish the procedure, with an intend to chop down the agony endured by partners and advertisers. The basic leadership process has been consigned to a specialist court with the desire for quicker turnaround. In principle, it looks fantastic. Be that as it may, the endeavours to actualize the new routine don't coordinate the goal behind it. In reality, they miss the mark generously. Corporate bankruptcy in India has gone up throughout the years.

As of March 2015, the quantity of closed companies were evaluated be 268,142. Of this, the number of liquidations and disintegrations was inauspiciously low at 3.8% of the companies closed.