Insolvency And Bankruptcy Code- Analysis Of A Selected Few Orders

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INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ('**the Code**') came into force on December 1, 2016 and subsequently most of the provisions of the Code relating to corporate insolvency have been enforced by various notifications issued by the Government of India. The Code has caused a paradigm shift in the insolvency and bankruptcy regime in India with regard to corporate entities as well as individuals.

The preamble of the Code states that it is a comprehensive code which consolidates the laws relating to the reorganisation and insolvency resolution of various entities, including corporate entities, in a time bound manner[1]. From a comprehensive reading of the Code, it is evident that its objective is not only to achieve certainty in recovery of creditors' dues but it also aims to resolve the insolvency of a corporate entity and make it viable for continuation of its business. To this effect, the Code envisages appointment of Insolvency Resolution Profesfsionals ('**IRPs**') registered with the Insolvency and Bankruptcy Board of India who would attempt to resolve the insolvency of such corporate entities in a time bound manner for maximization of the value of assets of such entities.

In the short span of time following the promulgation of the Code, a number of applications have already been instituted to start Corporate Insolvency Resolution Process ('**CIRP**') against different corporate debtors by their creditors, both financial and operational, as well as corporate applicants themselves, before the different National Company Law Tribunals ('**NCLT**')[2] in the country. The Learned National Company Law Appellate Tribunal ('**NCLAT**') has also had the occasion to preside upon a number of appeals from NCLT orders with respect to such CIRP applications and deliver its judgments on the same.

OBJECTIVE OF THE PAPER AND SCHEME

The Code is a nascent piece of legislation without much in the way of settled case law precedents. In that context, the decisions delivered by the NCLTs/NCLAT on various provisions of the Code assume great importance in establishing a jurisprudence regarding the Code.

While the jurisprudence being developed by the Tribunals is of immense help in understanding the ambit of the Code, this paper is an attempt to analyze certain judicial views and pronouncements to understand how the provisions of the

[1] The preamble of the Code reads as follows:-
"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

[2] Section 5(1) of the Code states as follows:-
"5…(1) "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013;"

Code have been interpreted by the Tribunals in particular instances, keeping in mind the spirit of the Code.

For this purpose, at the outset we propose to examine certain relevant provisions of the Code with regard to corporate insolvency, especially what constitutes a 'debt' under the Code, what are the kinds of debts for which a CIRP can be initiated, when can a debtor be said to have committed a 'default' within the meaning of the Code and who is entitled to initiate a CIRP under the Code. Thereafter, in the context of such relevant provisions of the Code with regard to corporate insolvency, we propose to analyse certain recent orders/judgments delivered by the NCLTs/NCLAT and examine how such provisions have been applied and interpreted in such orders/judgments, in alignment with the spirit of the Code.

It is to be noted here that, for the purpose of this paper, we have not considered NCLT orders which have already been overruled by the Learned NCLAT as on the date of this paper.

BRIEF OVERVIEW

Part II of the Code contains the mechanism for the '*Insolvency Resolution and Liquidation of Corporate Persons*'. Section 6 of the Code states that when a corporate debtor commits a 'default'[3], a financial creditor/an operational creditor/the corporate debtor itself may initiate a CIRP in respect of such corporate debtor in the manner provided in Chapter II of Part-II of the Code. As per Section 4(1) of the Code, for Part II of the Code to apply, the minimum amount of the default by the corporate debtor must be Rupees One Lakh.

In terms of Section 7 of the Code, a person, to whom a '*financial debt*'[4] is owed by the corporate debtor, is entitled to initiate CIRP, by filing application in the prescribed form

[3] Section 3(12) of the Code defines 'default' as follows:-

" 3..(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;"

[4] Section 5(8) of the Code defines a 'financial debt' as follows:-

"5…(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes –
(a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) 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 Standards or such other accounting standards as may be prescribed;
(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction
shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

with all relevant details.

Apart from a financial creditor, an '*operational creditor*'[5], being a person to whom an '*operational debt*'[6] is owed, *inter alia*, on account of goods and services (such 'services' including services provided in course of employment, as expressly mentioned in the definition itself) provided by him to such debtor, is entitled to initiate CIRP, by filing application in the prescribed form with all relevant details, subject to there being no pre-existing dispute in relation to such operational debt. The existence of such operational debt can be proved, *inter alia*, through a decree or an award obtained by the operational creditor against the debtor with regard to the default committed by the debtor in repayment of such debt[7]. It is also pertinent to state here that the Section 9(3)(c) of the Code envisages that along with its application for insolvency resolution, the operational creditor has to furnish "*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*" (emphasis supplied). What constitutes such 'financial institution' within the meaning of the Code has also been defined by the Code[8].

A corporate applicant may also file an application for initiating CIRP when there is a default by a corporate debtor. Who can initiate such CIRP as a '*corporate applicant*'[9] has also been clearly mentioned in the Code.

[5] Section 5(20) of the Code defines 'operational creditor' as follows:-
"5…(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

[6] Section 5(21) of the Code defines 'operational debt' as follows:-
"5…(21) "*operational debt*" *means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*"

[7] Form-V of the *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*, directs the operational creditor, under the heading '*Particulars of Operational Debt (Documents, Records and Evidence of Default)*', to disclose before the NCLT the particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any.

[8] Section 3(14) of the Code defines '*financial institutions*' as follows:-
"3…(14) "financial institution" means –
(a) a scheduled bank;
(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;
(c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and
(d) such other institution as the Central Government may by notification specify as a financial institution;"

[9] Section 5(5) of the Code defines 'corporate applicant' as follows:-
"5…(5) "corporate applicant" means –
(a) corporate debtor; or
(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
(d) a person who has the control and supervision over the financial affairs of the corporate debtor;"

ANALYSIS

Certificates issued by foreign banks deemed to be not issued by a 'financial institution' within the meaning of the Code

In a recent case[10], the Singapore branch of a foreign bank approached the Learned NCLT at Chandigarh for insolvency resolution of a corporate debtor in its capacity as an operational creditor after the original supplier had assigned the debts owed to it by the corporate debtor to such bank. The corporate debtor contended that the certificate issued by the bank stating that no payment had been received by the original supplier or by such bank against the outstanding debt could not be said to be a certificate issued by a '*financial institution*' within the meaning of Section 9(3)(c) of the Code and that the same being a mandatory requirement under the Code, the CIRP application ought to be rejected. The Learned NCLT acceded to such contention of the corporate debtor and rejected the application filed by the foreign bank, *inter alia*, on such basis. This decision has been upheld in appeal by the Learned NCLAT.[11]

A foreign bank does not fit into any of the categories envisaged to be a '*financial institution*' under the Code[12]. Hence, such literal interpretation by the NCLT may not be faulted for being either incorrect, or implausible. However, there are many foreign-based operational creditors, many of whom maintain no accounts with any of the '*financial institutions*' specified in the Code. In the face of the above interpretation, the foreign-based operational creditors would perhaps be facing severe difficulty, if not impossibility, in recovering their dues from India-based corporate debtors. The NCLT has perhaps taken a rather constricted view of the situation, depending on a literal interpretation of the letter of law, rather than a wholesome assessment that would perhaps be in tandem with the spirit of the Code.

The anomaly in this regard is spread far and wide. It maybe pertinent to note here that Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which is the prescribed form for filing of a CIRP application by an operational creditor, directs the operational creditor (at Annexure-III of '*Instructions*' appended thereto) to provide "*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***"(emphasis supplied). It may therefore be argued that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has broadened the ambit of the statutory provision contained in the Code by- a) allowing the operational creditor to provide relevant

[10] *Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd.*, [CP(IB) No.22/Chd/Hry/2017, order dated June 1, 2017].
[11] *Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd.*, [Company Appeals (AT)(Insol) No.96 of 2017, order dated July 17, 2017]

[12] See supra note 8.

accounts from a '*bank*' or a '*financial institution*' maintaining the accounts of the operational creditor; and b) making such requirement directive and not mandatory through usage of the phrase '*if available*'. However, interestingly, the Learned NCLT and Learned NCLAT, relying upon the decision of the Learned NCLAT in *Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.*[13], held that the statutory requirement under Section 9(3)(c) of the Code is in the nature of a mandatory compliance and therefore the operational creditor was in violation of such requirement. Such interpretation, as adopted by the Learned NCLT, has evidently not accorded much importance to the use of the terms '*banks/financial institutions*' and '*if available*' as contained in the statutory rules. This interpretation, therefore, has resulted in making institution of a CIRP application by an operational creditor having no accounts with any of the '*financial institutions*' specified at Section 3(14) of the Code[14] practically impossible, even though such operational creditor is otherwise compliant with all other requirements of the Code.

Ascertainment of exact 'amount claimed to be in default'-prerogative of the Tribunal?

In certain judgments passed by the NCLTs and the Learned NCLAT, it can be noted that the Tribunals have assumed a duty of ascertaining the exact amount claimed to be in default by the creditor though the Code does not impose a duty upon the Tribunals to do so. In an appeal preferred by a corporate debtor[15] from an order of the Learned NCLT at Mumbai which had admitted a CIRP application by the financial creditor, the Learned NCLAT allowed such appeal and observed that the impugned order suffered from non-application of mind because the Member had failed to ascertain the exact amount in default yet admitted such CIRP application. Such observation was made by the Learned NCLAT on the basis of the fact that the amount claimed to be in default as mentioned in the demand notice which had been issued to the debtor by the financial creditor prior to initiation of the CIRP, differed from that mentioned in the CIRP application instituted by the financial creditor. It was further observed that the debtor had admittedly failed in the repayment schedule under the loan agreement to pay a specific installment amount, but the financial creditor, in its CIRP application, had claimed the entire principal unmatured amount to be in default. Since the same had not become due as per the repayment schedule, the same ought to have been rejected.

Section 3(12) of the Code defines '*default*'[16] and clearly envisages that non-payment of installments or part of any debt also constitutes 'default'. Section 7(5)(a) of the Code states that the adjudicating authorities will admit the CIRP application when it is *inter alia* satisfied that a default has occurred and the application is complete in all respects[17]. In

[13] *Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.,* [Company Appeal (AT)(Insolvency) No. 28 of 2017, judgment dated May 19, 2017].
[14] See supra note 8.
[15] *M/s. Starlog Enterprises Ltd. v. ICICI Bank Ltd.,* [Company Appeal (AT) Insolvency No. 5 of 2017, judgment dated February 17, 2017].
[16] See supra note 2.
[17] Section 7(5)(a) of the Code states as follows:-

this case, it may be argued that there was clearly a 'default' within the meaning of the Code as there was non-payment of an installment as per the loan repayment schedule by the debtor. Even if there was a mismatch between the amounts claimed to be in default in the demand notice vis-a-vis the CIRP application, there was admittedly a default in repayment of debentures which had matured, by the debtor to the financial creditor, and that fact alone could have been the cornerstone for admission of the CIRP application as arguably, the Code does not envisage the Tribunals to ascertain the exact amount in default as long as occurrence of default is proved. A reading of the Code would suggest that it is the prerogative of the Resolution Professional to ascertain the exact amount of claim, while the Adjudicating Authority's role is to admit the application subject to there being a default by the debtor within the meaning of the Code[18].

A similar interpretation of the provisions of the Code can be observed in the order of the Learned NCLT at Mumbai in *Urban Infrastructure Trustee Ltd. v. Neelkanth Township and Construction Pvt. Ltd.*[19], where it was held that in the CIRP application there was a mismatch between the amount claimed in default and the amount regarding which the default was said to have occurred. The amount mentioned for which default was said to have occurred was lower than the amount claimed to be in default by the Petitioner. For the reasons mentioned in the preceding paragraph, it may be argued that such order may not be consistent with the spirit of

"*7…(5) Where the Adjudicating Authority is satisfied that –*
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application;"(emphasis supplied)

[18] This finds further support in the order of the Learned NCLT at Chandigarh in *Punjab National Bank v. M/s. James Hotels Pvt. Ltd.* [CP(IB) No. 15/Chd/CHD/2017, order dated April 27, 2017] where the debtor raised a dispute regarding the manner of calculation of the outstanding debt by the financial creditor and alleged that the amount claimed to be in default was much inflated than what it ought to be. The Learned NCLT at Chandigarh did not give credence to such argument and stated that as long as there was a 'default' by the debtor within the meaning of Section 3(12) of the Code, it was not for the Tribunal to determine the exact amount of default. The Learned NCLT also referred to Regulation 14 of the *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016,* which states as follows:-
"***14. Determination of amount of claim***

(1)Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.
(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision." (emphasis supplied)

Similarly, where a mismatch in the default amount in the financial creditor's books of accounts vis-à-vis the CIRP Form filed by the financial creditor was pointed out by the corporate debtor, the Learned NCLT at Mumbai in *Punjab National Bank v. Charbhuja Industries Pvt. Ltd.* [C.P. No. 1024/I&BP/NCLT/MAH/2017, order dated June 19, 2017] held as follows:-
"*The amount shown in this statement of account is different from the default amount mentioned in the Form because default amount was mentioned as on 27.12.2016, nonetheless it makes no difference to initiate proceedings under Section 7 of the IB Code for it will again be verified by the Insolvency Resolution Professional, at the time of claim verification. Moreover, there is no mandate in Section 7 for crystallization of default amount, thereby this Bench is satisfied that the Financial Creditor has filed all the requisite documents to satisfy this Bench that this Corporate Debtor availed loan thereafter defaulted in making repayment.*"(emphasis supplied)

[19] *Urban Infrastructure Trustee Ltd. v. Neelkanth Township and Construction Pvt. Ltd.*, [C.P. No. 21/I&BP/NCLT/MB/MAH/2017, order dated March 1, 2017].

the Code.

On the other hand, however, one must not lose sight of the fact that an application where there is a mismatch between the amounts claimed to be in default in the demand notice vis-a-vis the CIRP application, is arguably not complete in all respects[20], and therefore liable to be dismissed.

CIRP instituted by 'Corporate Applicant'- refusal to admit

In a CIRP application moved by a 'corporate applicant'[21], the Learned NCLT at Delhi in its order in *Krishna Kraftex Pvt. Ltd. v. Krishna Kraftex Pvt. Ltd.*[22] held that such application was inadmissible because despite its huge accumulated debt, no claim had been raised upon the corporate applicant, which in this case was the corporate debtor itself, by its creditors and it could not be said to have committed a default, which is a pre-requisite under Section 10(1) of the Code[23]. It was further observed that the NCLTs must be careful in admitting such applications because otherwise it would lead to promoters of companies taking out huge loans to make ill-gotten gains and then get the company declared insolvent to escape any recovery proceedings as well as civil imprisonment for themselves.

On consideration of Section 3(12) of the Code[24], it can be seen that an entity is said to have committed a 'default' when it has not paid a debt when the same has become due and payable. It is not necessary that such non-payment is in pursuance of a demand of repayment raised by a creditor. Even if no such demand is raised, simply not paying a debt when the same has become due constitutes 'default' under the Code. Further, Section 10(1) of the Code states that a corporate applicant can file a CIRP when the corporate debtor has committed a 'default', and does not mention any requirement of any demand having been raised for the same. In the facts of the instant case, there was admittedly huge amount of debt whose repayment period had expired and therefore the corporate debtor was clearly in 'default' within the meaning of the Code. Therefore the observation of the Learned NCLT at New Delhi that in the absence of demand there could not be said to be any default have travelled beyond the literal interpretation of the Code[25]It may also

[20] See supra note 17.
[21] See supra note 7.
[22] *Krishna Kraftex Pvt. Ltd. v. Krishna Kraftex Pvt. Ltd.,* [C.P. No.(IB)-78(ND)/2017, order dated May 15, 2017].
[23] Section 10(1) of the Code states as follows:-
"10. (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority."(emphasis supplied)

[24] See supra note 2.
[25] In this regard, it is worth mentioning the order of the Learned NCLT at Mumbai, in *Swift Shipping and Freight Logistics Pvt. Ltd.*, [C.P. No.249/I&BP/NCLT/MAH/2017, order dated April 19, 2017]. In that case, while adjudicating upon a CIRP application instituted by the corporate debtor in its capacity as a 'corporate applicant', noted that the payables by the company far exceeded its receivables and the balance sheet showed an accumulated loss of around Rs.14,00,00,000/-. Though no demand raised by any creditor on the company was mentioned by the corporate applicant in such case, the Learned NCLT at Mumbai held that such figures clearly establish the conclusion that the

seem that the rationale behind the test prescribed in the said order regarding non-admission of such CIRP to avoid a scenario where unscrupulous promoters avail of loans and then get the company declared insolvent before any demand can be raised may also be questionable. If a dishonest promoter wants to utilize this mechanism to make ill-gotten gains and sidestep such test, all he has to do is wait for a creditor to raise a notice of demand, dishonor the same and simply approach the NCLT for initiation of CIRP under Section 10 of the Code. Therefore, it is not evident how non-admission of the same when there is a default but before any demand notice has been raised will prevent dishonest promoters from indulging in such mala-fide activities. It must not be forgotten that the objective of the Code, as discussed hereinabove, is not only recovery of debts for creditors but also to ensure that a company facing certain insolvency can resolve such situation and get back on its feet. Where a company is clearly unable to pay its debts and risks total dysfunction, non-admission of its CIRP application resolves neither objectives of the Code. A very literal interpretation of the letters of any law may sometimes seem to agitate against the spirit thereof, and the Code is certainly no exception.

corporate debtor was unable to pay its debts and has committed '*default*' in paying its liabilities within the meaning of the Code.

Solvency of corporate debtor held as ground for rejection of CIRP application by operational creditor

The services provided in the course of employment are included among 'services' in respect of which an 'operational debt' may be incurred by a corporate debtor[26]. Therefore employees of a company are *prima facie* at liberty under the Code to approach the NCLTs in their capacity as 'operational creditors' for insolvency resolution of such company where it has defaulted in making payments of such employees' dues. The Learned NCLT at Delhi had the occasion to adjudicate upon such an application moved by an employee of a corporate debtor which had defaulted in making payments of such employee's dues in *Ms. Vidul Sharma v. M/s. Technopak Advisors Pvt. Ltd.*[27] Though the Learned NCLT entered a finding that certain dues of the employee were indeed outstanding, it went on to hold that since the corporate debtor was a running concern and was solvent, the CIRP mechanism could not be used as a recovery mechanism and did not admit the application. The employee was given liberty to pursue any other remedy accordance with law.

Here it may be stated that solvency or the state of operations of the corporate debtor has nowhere been contemplated as a ground for consideration by the NCLTs at the stage of admission of an application by an operational creditor.

[26] See supra note 6.

[27] [C.P. No. (IB)-53 (PB)/2017, order dated June 27, 2017].

Section 9(5) of the Code clearly lays down the conditions to be considered by the NCLTs for admission/rejection of an application by an operational creditor[28] and the state of solvency or business operations of the corporate debtor does not find any mention in such conditions. Further, it may be pertinent to mention that as Section 9(5) of the Code provides that the Adjudicating Authority, upon satisfaction of the conditions enshrined therein, *shall* admit the application, as opposed to Section 7(5) of the Code, (which deals with admission of an application filed by a Financial Creditor), that provides that the Adjudicating Authority, upon satisfaction of the conditions enshrined therein, *may* admit the application, it may be argued that the conditions envisaged in Section 9(5) of the Code are comprehensive and no additional consideration, including whether the company is solvent may be read into it.

Since in the instant case there was admitted default in repayment of the employee's dues and no contravention of the conditions envisaged at Section 9(5) of the Code was mentioned by the Learned NCLT for rejection of the application, a rejection of an application by an operational creditor simply because the corporate debtor was solvent and a running concern, may not at all be a literal interpretation of the Code.

However, keeping in mind that the objective of the Code is not only to achieve certainty for recovery of creditors' dues but resolution of the insolvency of a corporate entity and make it viable for continuation of its business, a solvent, going concern may not need any assistance of the process envisaged under the Code.

Whether a decree of Court can be construed as an 'operational debt'

In *M/s. Deem Roll-Tech Ltd. v. M/s. R.L. Steel & Energy Ltd.*[29], the Learned NCLT at Delhi observed, at paragraph 9 of its

[28] Section 9(5) of the Code reads as follows:-
"*9…(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."

[29] *M/s. Deem Roll-Tech Ltd. v. M/s. R.L. Steel & Energy Ltd.*,[C.A. No. (IB) 24/PB/2017, order dated March 31, 2017].

order, that a decree obtained from a civil Court in relation to the amount claimed by the Petitioner to be in default was not an 'operational debt' within the meaning of the Code. It was held that the NCLT cannot be converted into an executing court and the petitioner who obtains such a decree must get it executed before the appropriate civil courts.

Section 3(11) of the Code defines '*debt*' as a liability or obligation in respect of a '*claim*' which is due from any person, including a financial debt and operational debt. The term 'claim' has been defined at Section 3(6) of the Code[30] and such definition includes within its ambit a right to payment, whether or not the same is reduced to judgment. Therefore, on a conjoint reading of Section 3(6) and 3(11) of the Code, it can be inferred that an 'operational debt' may also include an obligation upon a party to make a payment which has been reduced to a judgment. In other words, if an operational creditor has obtained a decree against the debtor in respect of goods or services provided by him to such debtor, the same should constitute an 'operational debt' within the meaning of the Code. This is further supported by Form-V of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which expressly directs, under the heading '*Particulars of Operational Debt (Documents, Records and Evidence of Default)*', the operational creditor to disclose before the Adjudicating Authority the particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any. Therefore, the Code itself contemplates that an order of a court/tribunal/arbitral panel with regard to a default committed by the debtor can itself constitute an 'operational debt'. Therefore, the aforesaid observation of the Learned NCLT at paragraph 9 may slightly travel beyond the provisions of the Code and the Rules[31]. However, we must not lose sight of the fact that allowing an operational creditor to move the NCLT under the provisions of the Code, on the strength of a decree against the debtor in respect of goods or services provided by him to such debtor could very well set a precedence where the NCLT is flooded with applications on the basis of decrees/orders already obtained in various forums, without the operational creditors attempting to execute the orders/decrees in the executing courts.

[30] Section 3(6) of the Code states as follows:-
"3…(6) "claim" means –
(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"(emphasis supplied)

[31] In *Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.*[Company Appeal (AT) (Insolvency) 6 of 2017, judgment dated May 24, 2017], the NCLAT, after referring to Form-V of the *Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016*, has stated that an application under Section 9 of the Code will be maintainable on the basis of a decree of a civil Court or an arbitral award, where such decree or award is shown to be a debt for the purpose of default on non-payment.

Interpretation of the term 'dispute' under the Code

In its order in *Raman Seth & Anr. v. M/s. Unitech Hi-Tech Developers Ltd.*[32], it was observed by the Learned NCLT at Delhi that where the operational creditor had moved the Learned National Consumer Disputes Redressal Commission, New Delhi before initiating the CIRP against the Debtor, the same constituted a 'dispute' within the meaning of the Code due to which such CIRP could not be triggered.

In this regard, it is pertinent to state that Section 8(2)(a) of the Code casts a duty upon the debtor to bring to the operational creditor's notice the existence of disputes[33], if any, upon the receipt of the demand notice under Section 8(1) of the Code. Clearly it could not have been the intention of the legislature for the debtor to bring to the operational creditor's notice a prior dispute that has been instituted by the creditor itself. Section 9(5)(d) states that the CIRP could be admitted by the Adjudicating Authority if, *inter alia*, "*no notice of dispute has been received by the operational creditor*"[34]. This is further apparent from the definition of '*dispute*' contained at Section 5(6) of the Code[35]. Clearly such definition contemplates a dispute raised by the debtor against the creditor regarding the existence of the amount claimed to be in default by the creditor or a breach in the terms and conditions of an agreement by the creditor, including shortfall in the quality of goods or services provided by the creditor. While, the Learned NCLAT has had the occasion to decide what exactly constitutes a 'dispute' under the Code[36], such discussion has revolved around a dispute raised by the debtor against the creditor as a defence against admission of CIRP and not the other way round. Had there been a dispute raised by the Corporate Debtor before the NCDRC in the nature of an affidavit in reply to the consumer complaint, the NCLT could have rightly recognized a 'dispute' under the Code, and hence refused to admit the CIRP. However, the mere pendency of a consumer complaint before the NCDRC

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[32] *Raman Seth & Anr. v. M/s. Unitech Hi-Tech Developers Ltd .*,[C.P. No. (IB)-32(ND)/2017, order dated March 31, 2017].

[33] Section 8(2)(a) of the Code reads as follows:-

"8…(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –

(a) 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;"(emphasis supplied)

[34] Section 9(5)(d) of the Code states as follows:-

"9…(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, –

…(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility;"(emphasis supplied)

[35] Section 5(6) of the Code reads as follows:-

"5…(6) "dispute" includes a suit or arbitration proceedings relating to –

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;"

[36] See order dated July 28, 2017 of the Learned NCLAT in *M/s. Uttam Galva Steel Limited v. M/s. D. F. Deutsche Forfait AG and Anr.* [Company Appeal (AT) (Insolvency) 39 of 2017] and judgment dated May 24, 2017of Learned NCLAT in *Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.*[Company Appeal (AT) (Insolvency) 6 of 2017].

does not necessarily constitute a 'dispute' and the refusal to admit the CIRP on such basis is an extremely conservative approach to the Code to say the least.

Interpretation of the definition of 'operational creditor'

In its two orders in *Eknath K. Aher v. Royal Twinkle Star Club Ltd.*[37] and *Sayali S. Rane v. M/s. Cytrus Check Inns Ltd.*[38], the Learned NCLT at Mumbai admitted two CIRP applications against two corporate debtors, such applications being instituted by individuals who had purchased holiday plan certificates from such companies and the said companies had defaulted in refunding a certain amount towards such purchase of holiday plan certificates by the petitioners. It was held that such default had created an 'operational debt' within the meaning the Code in favour of the petitioners. It may be recalled that an 'operational creditor' is a person to whom an 'operational debt' is owed and such 'operational debt' is defined to be a claim in respect of provision of goods or services[39]. Here, the petitioners had not provided any goods or services to the debtors and therefore their claim cannot be said to fall within the ambit of an 'operational debt' as envisaged by the Code. The petitioners' claims were merely towards refund arising from purchase of holiday plan certificates from the debtor companies by the petitioners. While such claim may constitute a debt, the same does not constitute an 'operational debt' as defined under the Code and the petitioners are not 'operational creditors' within the meaning of the Code. Therefore, it may be slightly difficult to conceive why the CIRP applications were admitted in the first place.

However, it may be fair to point out in this regard that in both the cases, the corporate debtors did not take a defense of the petitioners not being 'operational creditors' within the meaning of the Code to the Learned NCLT nor did they oppose the admission of the CIRP applications on this ground. It may be interesting to see a case in future where such defence is actually taken.

A refund claim of deposit/performance deposit in a project contract does not qualify as a debt under the provisions of the Code. However, where a question arose before the Learned NCLT at Chennai as to whether the advance amount paid by the Petitioner to Respondent under a Framework Agreement is 'operational debt' within the meaning of Section 5(21) of the Code, the Bench, after considering the facts, held that the advance amount paid by the Petitioner to the Respondent is in respect of rendering services and therefore it is an Operational Debt[40]. On the other hand, the Learned NCLT at Delhi, in a number of decisions, has taken a view that any advance paid under an agreement between the parties does

[37] *Eknath K. Aher v. Royal Twinkle Star Club Ltd* .,[C.P. No. 895/I&BP/NCLT/MB/MAH/2017, order dated May 2, 2017].
[38] *Sayali S. Rane v. M/s. Cytrus Check Inns Ltd* .,[C.P. No. 896/I&BP/NCLT/MB/MAH/2017, order dated May 2, 2017].
[39] See supra note 5 and 6.
[40] *M/s Nupower Private Limited Vs. M/s Cape Infrastructures Pvt. Ltd.*,[C.P. No. TCP/3(IB)/2017, order dated July 7, 2017].

not qualify as an 'operational debt', as it does not satisfy the requirements of Sections 5(20) and 5(21) of the Code.[41]

A similar issue also came up for consideration before the Learned NCLT at Ahmedabad, in *M/s. Nagai Power Private Limited V. M/s. GEI Industrial Systems Limited*[42], wherein it was contended that the Applicant was not an 'operational creditor', since the advance amount paid by the Applicant to the Respondent in terms of a Letter of Award did not qualify as an 'operational debt'. The Bench, in view of the conflicting decisions of the Learned NCLT, Chennai and the Learned NCLT, Delhi, has referred the matter to a Larger Bench on the issue of whether an advance amount is an 'operational debt' or not. It may be interesting to see how the Larger Bench interprets the issue.

Insistence by the NCLT on proposing the name of an Interim Resolution Professional

It is observed that certain NCLTs have been make observations or insisting on compliance with certain conditions. In this context, it can be mentioned that the Learned NCLT at Kolkata, in its order in *M/s. Naresh Kumar & Co. Pvt. Ltd. v. M/s. Kalyanpur Cements Ltd.*[43], observed that while all the other conditions for admission of the CIRP application were fulfilled, the operational creditor had to propose the name of an IRP before the same could be admitted. The Learned NCLT went on to direct the creditor to propose the name of an IRP, along with the requisite compliances, within 7 (seven) days of such order for the same to be admitted.

Section 9(4) of the Code states that an operational creditor, while initiating the CIRP, *may* propose the name of a resolution professional to act as IRP[44]. The use of the word 'may' as opposed to 'shall' is deliberate and does not seem to enjoin a compulsory duty upon the operational creditor to propose the name of a resolution professional to act as IRP. In fact, Section 16(3) of the Code expressly states what are the steps supposed to be taken by the NCLTs for appointment of an IRP where an application has been filed by an operational creditor without proposing the name of an IRP[45]. Therefore, the Learned NCLT may not have directed the operational creditor to propose the name of an IRP prior to admission of its

[41] *M/s. Mukesh Kumar & Anr. v. M/s. AMR Infrastructures Ltd*, [C.P. No. (IB)/30(PB)/201, order dated March 31, 2017].
[42] [C.P. (IB) No. 36/9/NCLT/AHM/2017, order dated June 20, 2017].
[43] *M/s. Naresh Kumar & Co. Pvt. Ltd. v. M/s. Kalyanpur Cements Ltd.*,[C.P. No. 186/2017, order dated April 19, 2017].

[44] Section 9(4) states as follows:-
"9… (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."(emphasis supplied)
[45] Section 16(3) of the Code states as follows:-
"16…(3) Where the application for corporate insolvency resolution process is made by an operational creditor and –
(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him."(emphasis supplied)

application in this case. It may however be mentioned here that it is possible that the NCLT exercised its discretion and passed such order in the interest of expeditiousness and ease of process. However, as the Code provides for an option to suggest the name of an IRP, the NCLT should also have left a choice to exercise such option to the parties.

CONCLUDING REMARKS

The Code is a nascent statute and there are clearly divergent views on many aspects of its provisions emerging from the different NCLTs. Mostly the Tribunals have delivered orders/judgments providing remarkable clarity on the interpretation of many provisions of the Code relating to corporate insolvency. However, as expected, as in the case of new legislations, there are varied interpretations of certain provisions, as also the scopes of extent thereof. However, one may sincerely hope that with passage of time, insolvency jurisprudence would crystallize into a more concrete form in the right direction, completely in tandem with the content and spirit of the Code.

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