ADJUDICATING AUTHORITY: THE SCOPE OF JURISDICTION FOR INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS

Owing to the presence and simultaneous functioning of multiple contrary legal arrangements, the Ministry of Law and Justice, Government of India chose to provide a coherent and unified framework to resolve the financial distress faced by the registered entities as well as the individuals. The Insolvency and Bankruptcy Code, 2016 ('**the Code**') was notified in the Gazette of India on 28th May 2016 and came into force in December 2016 with the intent of providing one consolidated and codified legislation for resolving the insolvencies and bankruptcies faced by the corporates, individuals and partnership firms, in a time bound manner and for maximization of value of their assets.

The Code prescribes a comprehensive procedure towards resolution – i.e., Corporate Insolvency Resolution Process ('**CIRP**') which is initiated at the instance of a creditor or the debtor itself and is required to be completed in accordance with the time limit prescribed in the Code. The process involves appointment of a regulated Insolvency Professional who is given substantial powers to keep the entity as a going concern. The process involves collation of claims of the creditors, formation of a Committee of Creditors ('**CoC**') and thereafter, inviting Prospective Resolution Applicants ('**PRA**') to file Resolution Plan(s) aimed at the revival of the Corporate Debtor undergoing CIRP.

The Code also describes and circumscribes the role of the National Company Law Tribunal ('**the Adjudicating Authority**') in the aforesaid proceedings. The present article shall mainly focus on the jurisdiction, powers and restrictions on the powers designated to the Adjudicating Authority before the initiation of CIRP proceedings in respect of corporates.

1. GENERAL PRINCIPLE OF JURISDICTION

Halsbury's Laws of England recognize and lay down the general principle of jurisdiction which must *inter alia* be observed by the Adjudicating Authority while adjudicating the applications filed during the CIRP proceedings. It states that:

"*The term jurisdiction has been used by the Courts in different senses. A body will lack jurisdiction in the narrow sense, if it has no power to adjudicate upon the dispute, or to make the kind of decision or order in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a manner which is procedurally irregular or, in a Wednesbury sense, unreasonable, or commits any other error of law.*"[1]

2. DEFINITION OF ADJUDICATING AUTHORITY

Section 5(1) of Part II of the Code deals with 'Insolvency Resolution and Liquidation for Corporate Persons'. It specifies that 'Adjudicating Authority' for the purpose of Part II means **National Company Law Tribunal** constituted under Section 408 of the Companies Act, 2013.

Section 408 of the Companies Act, 2013 deals with the constitution of the Adjudicating Authority and states that the Central Government shall constitute a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to exercise and discharge such powers and functions as are, or may be conferred on it under this Act or any other Act or any other law for the time being in force.

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[1] Fourth Edition, Volume 1; Page 161

3. ELIGIBILITY OF THE APPLICANT

3.1 The foremost criteria to be seen by the Adjudicating Authority is whether the person making the application meets the minimum threshold amount prescribed under the Code and whether it is eligible under the Code to file such an application.

3.2 Earlier, as per Section 4, the minimum amount of default required for filing an application for initiation of CIRP was Rs. 1 lakh. It is pertinent to mention that in view of the challenge faced by the country on account of Covid-19 virus and resultant difficulties faced by the corporate persons, *vide* notification dated 24.03.2020, **the Ministry of Corporate Affairs, Government of India, has raised the minimum threshold for default to Rs. 1 crore to trigger the Code**, in order to prevent the CIRP against Micro, Small and Medium Enterprises (**'MSMEs**').

3.3 Persons who are **not entitled to file an application for initiation of CIRP proceedings** are stipulated in Section 11 and include the following:

- A Corporate Debtor (a company, a limited liability partnership or any other person incorporated with limited liability) already undergoing CIRP proceedings;
- A Corporate Debtor in respect of whom the CIRP process has been completed 12 months preceding the date of making the application;
- A Corporate Debtor or a financial creditor who has violated any terms of the Resolution Plan approved 12 months before the date of making the application;
- A Corporate Debtor in respect of whom liquidation order has been passed.

4. SECTION 7 APPLICATION

4.1 Who May file a Section 7 Application?

The Adjudicating Authority has to ensure that an application under Section 7 may be filed by a financial creditor itself or jointly with other financial creditors or by a class of financial creditors. Vide the Insolvency and Bankruptcy Code (Amendment) Act, 2020, in case of real estate allottees, such application shall be filed jointly by not less than 100 of such allottees or 10% of the total number of such allottees, whichever is less. It is required to be filed in Form 1, as provided under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

4.2 Admission or Rejection of a Section 7 Application

Existence of default and completion of application

4.2.1 Section 7(5) of the Code stipulates that upon receiving such an application, the Adjudicating Authority is required to admit or reject it within 14 days of the receipt of thereof. It also provides for the parameters to be looked into by the Adjudicating Authority for admission or rejection of an application. It is significant to mention that the said period of 14 days has been held to be directory by the Hon'ble Supreme Court in the matter of Surendra Trading Company V/s Juggilal Kamlapat Jute Mills Company Ltd. and Ors., which has been subsequently discussed in this Article.

4.2.2 During this period, the Adjudicating Authority is required to ascertain the existence of default from the records of an information utility or on the basis of the evidence produced by the financial creditor. It is also required to ensure that during this period, the Corporate Debtor is given an opportunity to point out that a default has not occurred in the sense that the "debt", *which may also include a disputed claim*, is not due.

4.2.3 Once the Adjudicating Authority is satisfied that there is a financial debt, which is more that Rs. 1 Crore and there is a default, the application must be admitted after giving a limited notice to the Corporate Debtor. However, if the application is incomplete, the Adjudicating Authority may give notice to the applicant to rectify the defect within 7 days of receipt of such notice. The abovementioned position of law was reaffirmed by the Hon'ble Supreme Court in the matter of ***Innoventive Industries Ltd. V/s ICICI Bank and Ors.***[2] wherein it was observed that the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under Sub-section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

No opinion formation as to the possibility of revival of the Corporate Debtor

4.2.4 At this stage, the Adjudicating Authority is not required to form an opinion as to whether it would be feasible to initiate the CIRP proceedings or whether it would be possible to revive the Corporate Debtor in any given set of circumstances. The said tenet of law was reiterated by the Hon'ble National Company Law Tribunal ('**NCLAT**') *vide* its judgement in the recent case of ***Vineet Khosla V/s Edelweiss Asset Reconstruction Company Ltd. and Ors.***[3] wherein it was observed that the Adjudicating Authority at the stage of admission of a Section 7 application is merely required to ascertain the existence of default and the completion of the application. It was further held that the Adjudicating Authority is not required to ponder upon the question to the effect that whether or not resolution for a given Company would be possible or not and whether or not it would be possible to keep it a going concern.

4.2.5 The Hon'ble NCLAT restated the said mandate of law in the matter of ***Hardeep Singh Sawhney V/s Sawhney Builder Pvt. Ltd.***[4], wherein it was observed that the Adjudicating Authority dealing with a Section 7 application is not required to look into any other aspect for 'Admission' of the application except that it is satisfied with an act of default and had enquired that the application was complete and any disciplinary proceedings were pending against the prospective IRP.

Quantification of debt not required at the stage of admission of an application

4.2.6 It is a settled position of law that at this stage, the Adjudicating Authority is not required to quantify the exact amount of debt at the stage of admission of a Section 7 application once it is satisfied that the minimum threshold for default is met. In the matter of ***Mr. Gouri Prasad Goenka V/s Ex-Chairman of NRC Ltd. V/s Punjab National Bank*** [5], wherein the order of admission of a section 7 application was *inter alia* challenged on the basis of quantification of debt, the Hon'ble NCLAT observed and held that the quantum of debt payable does not fall for consideration of the Adjudicating Authority at the time of admission of an application. The only requirement is that the minimum outstanding debt should be to the tune of Rs. 1 crore. The actual amount of claim is to be later ascertained by the Resolution Professional after collating claims and then verifying them.

[2] AIR 2017 SC 4084 (Supreme Court)
[3] Company Appeal (AT) (Insolvency) No. 441 of 2019 (NCLAT)
[4] Company Appeal (AT) (Insolvency) No. 1147 of 2019 (NCLAT)
[5] Company Appeal (AT) (Insolvency) No. 28 of 2019 (NCLAT)

Caution in case of application by Real Estate Allottees

4.2.7 However, in case an application is filed by real estate allottees, it is pertinent to highlight the stance taken by the Hon'ble Supreme Court in the matter of ***Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India & Ors.***[6] wherein it was observed and held that after prima facie default is made out on an application under section 7 of the Code, the burden shifts on the promoter/real estate developer to point out that:

(a) the allottee is himself a defaulter and not entitled to any relief, entailing a dismissal of the application;

(b) the insolvency resolution process has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency;

(c) the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment;

(d) the allottee does not want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is very difficult to accede that trigger-happy allottees would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death.

Hence, in such cases, the Adjudicating Authority admits the application, unless such burden of proof is successfully discharged by the real estate developer – i.e., the Corporate Debtor.

Conclusion

4.2.8 Hence, it appears that at this stage of adjudication, as per Section 7(5), the Adjudicating Authority is merely required to take into consideration the following:

i. Minimum threshold limit is met.
ii. Application is complete in all respects.
iii. Ascertainment of existence of default.
iv. Date of default must be within the period of limitation.

It transpires that the Adjudicating Authority is bound to admit the application upon being satisfied of the parameters mentioned above and is merely passing administrative orders at the time of admitting or rejecting a Section 7 application and not required to apply its mind towards any other fact which might be significant in a given fact situation.

5. SECTION 9 APPLICATION

5.1 Who may file a Section 9 application?

This application is to be filed by an operational creditor under Section 9 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form.

5.2 Steps involved in filing a Section 9 application

5.2.1 The filing of an application involves the following two steps:

i. Issuance of Demand Notice to the Corporate Debtor (Section 8)

[6] 2019 (6) ABR 257 (Supreme Court)

ii. Filing of an Application before NCLT (Section 9)

5.2.2 The Scheme of Section 8 and 9 of the Code provide that an operational creditor, upon occurrence of a default – i.e., non-payment of debt or any part thereof, may deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the Corporate Debtor.

5.2.3 Within a period of 10 days of the receipt of such demand notice or copy of invoice, the Corporate Debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute.

5.2.4 In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the said 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the Corporate Debtor or send an attested copy of the record that the Operational Creditor has encashed a cheque or otherwise received payment from the Corporate Debtor.

5.2.5 It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the CIRP by filing an application before the adjudicating authority under Section 9.

5.3 Admission or rejection of a Section 9 Application

5.3.1 As per Section 9(5), the Adjudicating Authority must admit a Section 9 application upon satisfaction of the following:

i. The application must be complete in all respects.

ii. No payment of unpaid operational debt.

iii. Delivery of invoice or notice for payment to the Corporate Debtor by the Operational Creditor as provided under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

iv. No notice of dispute was received by the Operational Creditor and there is no record of dispute in the information utility.

v. No pending disciplinary proceedings against the proposed IRP.

5.3.2 The Adjudicating Authority may reject the application in case any of the above criteria are not fulfilled. However, the Code makes it mandatory that before rejecting an application, the Adjudicating Authority is obligated to give a notice to the applicant to rectify the defects in the application within 7 days of receipt of a notice from the Adjudicating Authority.

Ascertainment of pre-existing dispute

5.3.3 The term dispute has been defined in **Section 5(6)** of the Code as follows:

"**dispute**" includes a suit or arbitration proceedings relating to–

(e) the existence of the amount of debt;

(f) the quality of goods or service; or

(g) the breach of a representation or warranty;

5.3.4 It is pertinent for the Adjudicating Authority to reject the application if:

- Notice of dispute has been received by the operational creditor, or
- There was a record of dispute in the information utility.

Such notice must make it plausible for the operational creditor that there is existence of dispute or that a suit or arbitration proceedings are pending between the parties.

5.3.5 The Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited V/s Kirusa Software Private Limited***[7] observed and held that at the time of admitting or rejecting a Section 9 application, all that the Adjudicating Authority is required to see is:

- Whether there is a plausible contention that requires further investigation, and
- Whether the dispute was a patently feeble legal argument or an assertion of facts unsupported by evidence.

It was further held that that at this stage, the Adjudicating Authority is not required to examine the merits of the dispute. So long as the dispute truly exists in fact, and was not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application. The aforementioned mandate of law was reiterated by the Hon'ble NCLAT in the matter of ***Aalborg CSP A/S V/s Solar Atria Cleantech Private Limited*** [8].

Serious disputes which require adducing of evidence

5.3.6 It is a settled position of law that while adjudicating upon a Section 9 application, the Adjudicating Authority is exercising summary jurisdiction. Hence, a matter wherein it is called upon to decide a pre-existing dispute between the parties and the facts and circumstances of the case necessitate adducing of evidence, it is not within the purview of the Adjudicating Authority to proceed further. The said position of law has been reaffirmed by the Hon'ble NCLAT in the matter of ***Anjani Gases V/s B.P. Projects Pvt. Ltd.***[9] wherein there was a serious dispute between the parties in existence prior to the issuance of Demand Notice. It was observed and held that the Code prescribes a summary time bound procedure and the Adjudicating Authority and the NCLAT itself exercise summary jurisdiction while entertaining a Section 9 application. Further, in cases of serious disputes which call for adducing of evidence, the matter must be decided by competent authority and not by the Adjudicating Authority in a summary proceeding.

Conclusion

5.3.7 Therefore, the Adjudicating Authority, when examining an application under Section 9 of the Act will have to determine:

i. Whether the operational debt meets the minimum threshold limit.
ii. Whether the application is complete in all respects.
iii. Existence of default.
iv. Whether the date of default is within the limitation period.
v. Existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute.

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Hence, the pith and substance of the matter is that at this stage, the Adjudicating Authority is only required to examine the above parameters for admission or rejection of a Section 9 application. No more. No less.

[7] AIR 2017 SC 4532 (Supreme Court)
[8] Company Appeal (AT) (Insolvency) Nos. 167 & 168 of 2019
[9] Company Appeal (AT) (Insolvency) No. 661 of 2019

6. SECTION 10 APPLICATION

6.1 Who May file a Section 10 Application?

Where a Corporate Debtor has committed a default, any of the following may file an application under Section 10 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 6 accompanied with the documents prescribed in the Code:

i. corporate debtor; or
ii. a member or partner of the corporate debtor who is authorised to do so; or
iii. an individual who is in charge of managing the operations and resources of the corporate debtor; or
iv. a person who has the control, and supervision over the financial affairs of the corporate debtor;

6.2 Admission or rejection of a Section 10 Application

The Adjudicating Authority is required to admit the application if:

i. Minimum threshold limit is met,
ii. The application is complete, and
iii. No pending disciplinary proceedings against the proposed IRP.

Therefore, the Adjudicating Authority shall reject the application, if either of the above two conditions is not satisfied. However, before rejecting the application, the Adjudicating Authority is obligated to send a notice to the applicant to rectify the defects within a period of 7 days from the date of receipt of such notice.

7. NON-ADHERENCE TO TIME PERIOD OF 14 DAYS FOR ADMISSION OF APPLICATION AND 7 DAYS FOR RECTIFICATION OF DEFECTS

7.1.1 The two time period stipulated in Section 7, 9 and 10 – i.e., the period of 14 days prescribed for admission or rejection of the application and the period of 7 days for removal of defects in the application are significant but only directory and not mandatory. However, the Adjudicating Authority must make an expeditious attempt at admitting or rejecting the application within the said period of time. Similarly, the Applicant must try to remove the defects within the said period of time.

7.1.2 The position of law with respect to the above has been elaborately clarified by the Hon'ble Supreme Court in the matter of ***Surendra Trading Company V/s Juggilal Kamlapat Jute Mills Company Ltd. and Ors.***[10] clarified that where an application is not disposed of within the said period of 14 days, the Adjudicating Authority must record the reasons for not being able to do so in writing and make a request to the President of NCLAT for extension of time, who may, after taking the reasons so recorded into account, extend the period by a period not exceeding 10 days, as provided under Section 64(1) of the Code. It was further observed that the period of 7 days provided for removal of defects in the application of the applicant is directory and not mandatory. However, if the defects are not removed within 7 days, then at the time of refiling the application, the applicant shall have to file another application showing sufficient cause for the delay in removal of defects. If the Adjudicating Authority is not satisfied with the reasons placed on record, it shall have the right to reject the application. However, such a rejection would be merely **an administrative order** and not a rejection based on merits and the applicant shall

[10] 2018(2) ABR 324 (Supreme Court)

be entitled to file a fresh application. Therefore, it has been held that though such a period of 7 days is not mandatory but the defects may be removed by the applicant as soon as possible.

8. Communication of Order

The Adjudicating Authority is obligated to communicate the order admitting the application to the applicant and to the Corporate Debtor. However, in case of rejection of a Section 7 application, the order is required to be communicated only to the Financial Creditor, within 7 days of the passing of the order. On the other hand, in case a Section 9 application is rejected, it is required to be communicated to both the Operational Creditor and the Corporate Debtor.

9. Conclusion

The Scheme of the Code and the line of judgements passed by numerous authorities make it apparent that upon receipt of an application by a creditor or the debtor itself, the Adjudicating Authority has a limited jurisdiction in terms of being satisfied of the compliances prescribed under the Code. It is not within its purview to ponder upon the aspects such as whether the Corporate Debtor would end up in resolution or in liquidation. The only factual backdrop that it can look into is circumscribed to existence of default, completion of application and ensuring no pendency of proceedings against the proposed IRP.

It appears that the Adjudicating Authority is merely performing an administrative function and that an applicant cannot be shown the door without adjudication of his application on merits if he has complied with all the statutory compliances.

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