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SUPREME COURT ON IBC

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TIME LIMIT - RECTIFICATION OF DEFECTS, LISTING & ADMISSION OF APPLICATION

TIME LIMIT FOR RECTIFICATION AND ADMISSION IS DIRECTORY

It is pertinent to note that **Section 9 (5) of Insolvency and Bankruptcy Code, 2016** provides the **time limit for admission and rejection of the application** and also the **time limit for rectification of the defect in the application:**

*"**Section 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 sub-clause (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."

In SURENDRA TRADING COMPANY V. JUGGILAL KAMLAPAT JUTE MILLS COMPANY LIMITED AND OTHERS

ISSUE – Whether the stipulated time limit is directory or mandatory in nature?

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NCLAT held that such stipulated time is mandatory in nature.

"The time of seven days prescribed in proviso to sub-section (5) of Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, the 'Code') is mandatory in nature and if the defects contained in the application filed by the 'operational creditor' for initiating corporate insolvency resolution against a corporate debtor are not removed within seven days of the receipt of notice given by the adjudicating authority for removal of such objections, then such an application filed under Section 9 of the Code is liable to be rejected."

NCLAT further held that *"fourteen days period is to be calculated 'from the date of receipt of application'. The NCLAT has clarified that date of receipt of application cannot be treated*

to be the date of filing of the application. Since the Registry is required time to find out whether the application is in proper form and accompanied with such fee as may be prescribed, it will take some time in examining the application and, therefore, fourteen days period granted to the adjudicating authority under the aforesaid provisions would be from the date when such an application is presented before the adjudicating authority, i.e. the date on which it is listed for admission/order."

SUPREME COURT

The Supreme Court dealt this issue in detail and analyzed the relevant provision and explained the entire process of filing upto listing as a **3 staged procedure** and held as under;

"Various provisions of the Code would indicate that there are three stages:

(i) ***First stage is the filing of the application.*** *When the application is filed, the Registry of the adjudicating authority is supposed to scrutinize the same to find out as to whether it is complete in all respects or there are certain defects. If it is complete, the same shall be posted for preliminary hearing before the adjudicating authority. If there are defects, the applicant would be notified about those defects so that these are removed. For this purpose,* ***seven days time is given****. Once the defects are removed then the application would be posted before the adjudicating authority.*

(ii) ***When the application is listed before the adjudicating authority****, it has to take a decision to either admit or reject the application. For this purpose,* ***fourteen days time*** *is granted to the adjudicating authority. If the application is rejected, the matter is given a quietus at that level itself. However, if it is admitted, we enter the third stage.*

(iii) ***Admission of the application, insolvency resolution process commences.*** *Relevant provisions thereof have been mentioned above. This resolution process is to be completed within* ***180 days****,* ***which is extendable, in certain cases, up to 90 days****. Insofar as the first stage is concerned, it has no bearing on the insolvency resolution*

process at all, inasmuch as, unless the application is complete in every respect, the adjudicating authority is not supposed to deal with the same. It is at the second stage that the adjudicating authority is to apply its mind and decide as to whether the application should be admitted or rejected. Here adjudication process starts. However, in spite thereof, when this period of fourteen days given by the statute to the adjudicating authority to take a decision to admit or reject the application is directory, there is no reason to make it mandatory in respect of the first stage, which is pre-adjudication stage.

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.*

24) ***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.*

25) We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the

application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application. The aforesaid process indicated by us can find support from the judgment of this Court in ***Kailash v. Nanhku & Ors., (2005) 4 SCC 480.***

RATIO

Ratio 1-There are 3 stages for every application.

Stage 1 – Scrutiny of the application by the Registry, if no defect then it will go for second stage, if there is a defect then it has to be removed within 7 days.

Stage 2 – If an application is defect free or defect has been removed then it will be listed for hearing on admission within 14 days from the date of existence of defect free application. If it is admitted then it will be in third stage.

Stage 3 – The resolution process has to be completed within 180 days and /or within further extended period of 90 days.

Ratio 2 – *The 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.*

Ratio 3 – The 7 days rectification period prescribed under IBC is directory in nature. However, reasonable justification is a must where such defects are not removed within the stipulated period of time.

BANK CERTIFICATE & LAWYERS DEMAND NOTICE

ATTACHMENT OF DOCUMENTS AT THE TIME OF FILING OF APPLICATION

The **Section 9 (3) of Insolvency and Bankruptcy Code, 2016** specifies the **Documents required at the time of filling of application by operational Creditor:**

"Section 9 (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.

This resulted into various disputes regarding the necessity of documents and what is validity of a notice by an advocate

In MAQUARIE BANK v. SHILP CABLE TECHNOLOGIES LIMITED

ISSUE – What are the mandatory documents under Section 9 (3) of IB Code and whether an advocate notice is valid under Section 8?

NATIONAL COMPANY LAW TRIBUNAL

NCLT held that the demand notice shall be delivered by the Operational Creditor and not by their advocate.

The NCLT rejected the petition holding that Section 9(3) (c) of the Code was not complied with as no Bank Certificate accompanied the application filed under Section 9 of the Code.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

This was upheld by the NCLAT as well. NCLAT further held that an advocate/lawyer or chartered accountant or a company secretary or any other person **in the absence of any authority** by the 'operational creditor', and if such a person does not hold any position with or in relation to the 'operational creditor', cannot issue notice under Section 8 of the Code, which otherwise can be treated only as a lawyer's notice/ pleader's notice **as distinct from notice under Section 8** of the Code. Aggrieved by the order of the NCLAT the appellant appealed to the Supreme Court of India.

SUPREME COURT

The Supreme Court overruled the NCLAT's order and held that a lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt.

When section 30 of the Advocate Act and Section 8 and 9 of the Code are read along with Adjudicating authority rules and forms, it would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

"The court held that "*the expression 'an operational creditor may on the occurrence of a default deliver a demand notice…' under Section 8 of the code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules."*

The Supreme Court also held that *"the provision contained in Section 9(3) (c) of the Code is mandatory for initiating insolvency proceedings. The court looked into the expression* ***'shall'*** *given in Section 9(3). As per the court, this would amount to a situation where in serious general inconvenience would be caused to innocent persons and therefore they concluded* ***that Section 9(3) (c) would have to be construed as being directory in nature."***

The court also observed that it is clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code.

The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. This becomes clearer when we go to sub-clause (d) of Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

RATIO

Ratio 1 - A lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt under Section 8 of the Code.

Ratio 2 - Requirement of Bank Certificate under Section 9(3) (c) of the Code is not mandatory but only a directive in relation to an operational debt.

MEANING OF DISPUTE

MEANING OF DISPUTE AND INTERPRETATION THEREOF

The word "Dispute" is very important for the maintainability of every application filed under Section 9 of the IB Code. The first acid test for an admission of an application is whether there is a dispute or otherwise.

Section 9 (5) (ii) states that

"The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(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"*

In other words, if there is an existence of dispute between the operational creditor and the Corporate Debtor then the adjudicating authority may reject the application.

Dispute is defined under Section 5 (6) of the IB Code as;

*"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;

It must be also noted that the term "includes" is a very wide term as the dispute includes various aspects but not limited to certain aspects only.

The definition of dispute also resulted many situations where Court had to draw a line of demarcation finally.

In MOBILOX INNOVATIONS PVT LTD V. KIRUSA SOFTWARE PVT. LTD.

ISSUE – What is to be construed as a dispute?

NATIONAL COMPANY LAW TRIBUNAL

In this case the Corporate Debtor had sub-contracted his work to the Operational Creditor and a Non-Disclosure Agreement (NDA) was also executed between the parties. The Corporate Debtor withheld the payments to the Operational Creditor contending that there was a breach of the Non- Disclosure Agreement. The Operational Creditor filed a demand notice which was replied to by the Corporate Debtor stating that there exists a bon fide dispute between the parties regarding the breach of the NDA. The Operational Creditor filed an application under section 9 of the Code.

The NCLT Mumbai Bench held that since the default of payment was disputed by the Corporate Debtor therefore the petition is rejected.

NATIONAL COMPANY LAW APELLATE TRIBUNAL

In appeal before the NCLAT, the following was held:

The term dispute as defined in sub-section (6) of Section 5 cannot be limited to proceedings within the limited ambit of a suit or arbitration and the term "includes" ought to be read as "means and includes" and therefore the definition is inclusive.

The definition of dispute must relate to the specified nature in clause (a), (b) and (c) of Sub-section (6) of section 5 but such dispute is not capable of being discerned only in the form of suit or arbitration.

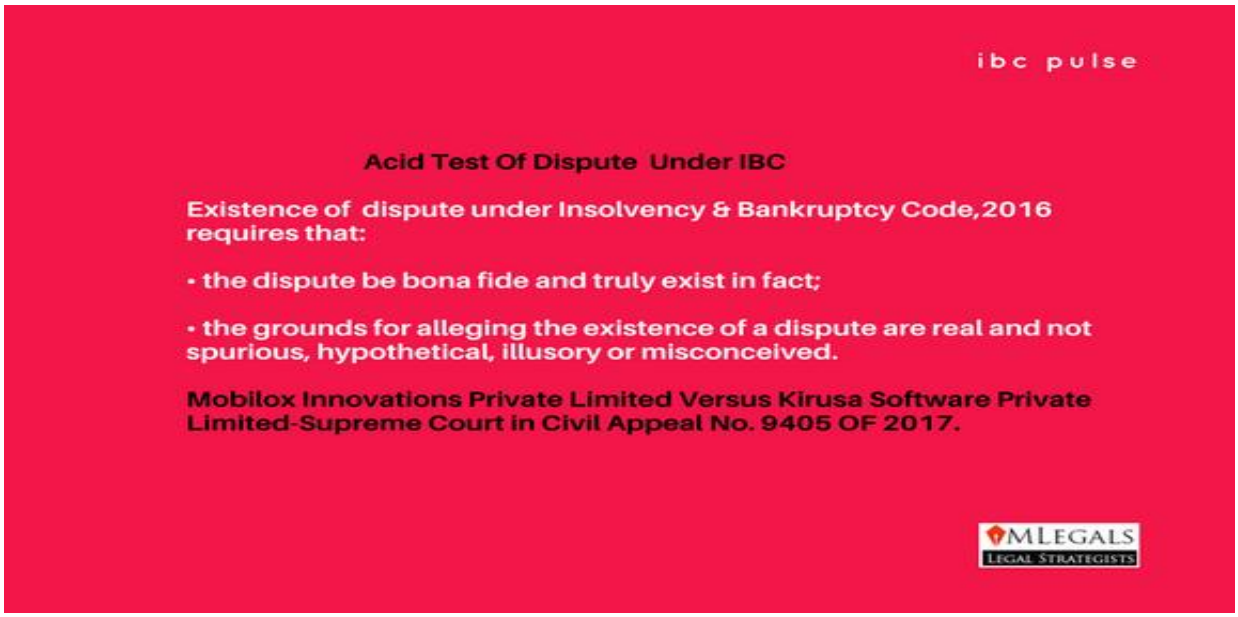
The NCLAT held that the Adjudicating Authority acted mechanically by rejecting the application and the dispute raised by the Corporate Debtor in the present case was vague and allowed the appeal.

SUPREME COURT

The Apex Court held that

"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

……..



45. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.

46. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved.

Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present

insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls. 47. We, therefore, allow the present appeal and set aside the judgment of the Appellate Tribunal. There shall, however, be no order as to costs."

RATIO

Ratio 1- The parameter to ascertain as to whether there is a dispute or otherwise can be summarized as below:

i. The dispute be bona fide and truly exist in fact;

ii. The grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

iii. The dispute should be natural and not a made to believe dispute.

LIMITATION

LIMITATION ACT VERSUS IB CODE

It is known that IB Code came into effect from 01.12.2016. It has no specific provision for limitation in initiation of insolvency process under the Act.

However, the limitation period is prescribed under the Limitation Act for every suit instituted, appeal preferred, and application made under the law.

Since, IB Code was introduced, there has been dispute as to whether IBC can override Limitation Act in absence of any specific provision of limitation incorporated therein.

Issue – Whether the limitation act applies on IB code or not?

NATIONAL COMPANY LAW TRIBUNAL

In the case of ***M/s. Deem Roll-Tech Limited v. M/s. R.L. Steel & Energy Ltd.*** (31.03.2017), wherein the Principal Bench had taken a view that the period of limitation would be applicable as the claim made by the Operational Creditor was barred by limitation and was being made after the expiry of period of 3 years.

In NEELKANTH TOWNSHIP & CONSTRUCTION PVT LTD V. URBAN INFRASTRUCTURE TRUSTEES LTD.

CONTENTION BY CORPORATE DEBTOR ON LIMITATION (BEFORE NCLT AND NCLAT)

The 3 – year limitation period for seeking remedy for the debenture certificates has already expired since the date of its maturity as the debt related to years 2011, 2012 and 2013.

NATIONAL COMPANY LAW TRIBUNAL

NCLT vide its order dated 25.04.2017 in its order categorically dealt on limitation that since the debtor company is a private limited company and for these OCDs cannot be transferred like in a public company. And further a non-payment on its maturity takes way its marketable nature and does not require a stamp duty.

Question of time-barred debts is 'ex-facie' and therefore such argument is baseless. It need not be profoundly said that admission appearing in the financial statement is an

acknowledgement covered by S.18 of Limitations Act. It is 'in-rem' in nature and construed as existence of debt.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

The NCLAT gave a categorical finding on limitation as below:

"There is nothing on record that Limitation Act, 2013(1963) is applicable to I & B Code 2016 and debtor failed to lay hand as to what provision which suggests such applicability. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B code to suggest that the Law of Limitation Act, 1963 is applicable. The IB Code, 2016 is not an Act for recovery of money claim, it related to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default and having continuous course of action, the argument that the claim of money by Respondent is barred by limitation cannot be accepted.*

SUPREME COURT

It held that:

"We do not find any reason to interfere with the order dated 11.08.2017 passed by the National Company Law Appellate Tribunal, New Delhi.

In view of this, we find no merit in the appeal. Accordingly, the appeal is dismissed keeping the question of law viz. whether the Limitation Act would apply to this proceeding, open."

CONCLUSION

The Supreme Court has kept this issue open as it has not given any finding on this.

INTERESTING ASPECT

The Limitation Act was enacted as a guiding factor to put a time frame within which any available legal remedy is to be exercised especially where an enactment is not having any specific provision towards limitation.

It must be noted that Section 3 of Limitation Act, 1963 reads as under;

"3. Bar of limitation

(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act— (2) for the purposes of this Act—"

(a) a suit is instituted— (a) a suit is instituted—"

(i) in an ordinary case, when the plaint is presented to the proper officer; (i) in an ordinary case, when the plaint is presented to the proper officer;"

(ii) In the case of a pauper, when his application for leave to sue as a pauper is made; and (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and"

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator; (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;"

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted— (b) any claim by way of a set off or a

counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—"

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded; (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;"

(ii) in the case of a counter claim, on the date on which the counter claim is made in court; (ii) in the case of a counter claim, on the date on which the counter claim is made in court;"

(c) An application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

The limitation factor has a reference under Section 60(6) and 179(3) of I&B Code, 2016 which are almost similar in wording.

However a quick reference can be made to Section 60(6) as below:

"Notwithstanding anything contained in the Limitation Act or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

CRUCIAL FACTORS

Additionally, what will be the outcome by Supreme Court on the possible interpretation finally is not known at this point of time. However, it must be understood that any interpretation shall be subjected to the following crucial factors as well:

1. **It is also a fact that all enactments are prospective in its applicability unless the intent and object of the legislation is to give any retrospective effect.**
2. **It is also a trite law that no person can sleep over his/her right and come to Court for a remedy after infinite time.**
3. **If any enactment lacks a categorical provision of limitation then it shall be resorted to Limitation Act, 1963 otherwise the Limitation Act will become redundant.**

At the same, the insolvency process is an independent process with different objective and can be initiated at any given point of time. But, the proceedings and passing the bar of limitation shall be dependent upon further 3 legs as below:

1st Leg of Claim – Section 3(6)

2nd Leg of Debt – Section 3(611)

3rd Leg of Default – Section 3(12)

These need to be read together as well while concluding on any aspect including limitation if it is to be made applicable.

Though there cannot be a blanket no for applicability of limitation on I & B Code, 2016 but all factors have to be read, understood, analyzed and implemented to carry out the harmonious object and intent of the legislation

Hence, it may be in the totality of provisions as stated above, the question of applicability of Limitation Act, 1963 on I & B Code,2016 must have been kept open in Neelkanth Township and Construction Pvt. Ltd. by the Supreme Court.

SETTLEMENT

LEGALITY OF WITHDRAWAL AFTER A SETTLEMENT

It is pertinent to note that **Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016** provides of withdrawal of application as under;

*"**Rule 8- Withdrawal of application**.—The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."*

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

The NCLAT refrained to use its inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 under the ground that it cannot do so after an admission.

SUPREME COURT

The Supreme Court, in SLPs filed before it, allowed the withdrawal of application under IBC after invoking the powers as extended under Article 142 of The Constitution of India.

"Article 142 – Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself

Recently, the Supreme Court had dealt with the aforesaid issue in the following cases:

In IMPEX FERRO TECH LIMITED V. AGARWAL COAL CORPORATION PRIVATE LIMITED 33687/2017

"We utilize our powers under Article 142 of the Constitution of India to put a quietus to the matter before us. We take the Terms of Settlement dated 17.11.2017 entered into between the parties on record and also record the undertaking of both the parties to abide by the Consent Terms. With this, the present Special Leave Petition is disposed of.

The judgment of the National Company Law Tribunal will accordingly be substituted by the present order."

In LOKHANDWALA KATARIA CONSTRUCTION PVT. LTD. V. NISUS FINANCE AND INVESTMENT MANAGERS LLP 9279/2017

"By the impugned order dated 13.07.2017, the National Company Law Appellate Tribunal was of the view that the inherent power could not be so utilized. According to us, prima facie this appears to be the correct position in law.

However, since all the parties are before us today, we utilize the powers from Article 142 from the Constitution of India to put a quietus to the matter before us. We take the Consent Terms dated 28.06.2017 and 12.07.2017 entered into between the parties on record and also record the undertaking of the appellant before us to abide by the Consent Terms in toto. The appellant also undertakes to pay the sums due on or before the dates mentioned in the aforesaid Consent Terms.

In MOTHERS PRIDE DAIRY INDIA PVT. LTD. V. PORTRAIT ADVERTISING AND MARKETING PVT. LTD. 9286 / 2017

"Though we find that the order passed by the National Company Law Appellate Tribunal is correct, yet we think it is a fit case to exercise power under Article 142 of the Constitution and accept the settlement that has been entered into between the parties. As we are accepting the settlement, the proceeding pending before the National Company Law Tribunal, stands disposed of."

EFFECT OF MORATORIUM

Section 14 of the IB Code states that

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor."

Section 14 mandates that no suit or proceeding can be instituted in any court of law, tribunal, arbitration panel or other authority if the insolvency proceedings commence and moratorium comes into effect.

In ALCHEMIST ASSET RECONSTRUCTION COMPANY LTD V. HOTEL GAUDVAN PVT LTD 16929 / 2017

NATIONAL COMPANY LAW TRIBUNAL

After admission of an application of the Financial Creditor by the NCLT Principal Bench Delhi (NCLT) and commencement of moratorium under Section 14 (a) of the Code, the Respondent 1 instituted arbitration proceedings with Respondent 2.

The NCLT by an order dated 31.05.2017, held that given the moratorium is imposed no arbitration proceeding could go on.

A Writ Petition was filed IN Supreme Court against this order, which was admitted only to the extent of the challenge to the vires of the Insolvency Code, is pending. A Special Leave Petition against this order was dismissed on 26.04.2017

DISTRICT COURT

A first appeal was filed before the District Judge Jaisalmer, Rajasthan under Section 37 of the Arbitration and Conciliation Act 1996 and by an order dated 6.07.2017, the appeal was asked to be registered and notice was issued awaiting a reply.

SUPREME COURT

The Court held that:

"The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1) (a) expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors.

This being the case, we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of the Arbitration Act are being entertained.

Therefore, we set aside the order of the District Judge dated 06.07.2017 and further state 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."

RATIO

Ratio1-

Section 14 bars and restricts any institution or continuation of suit or proceedings against the Corporate Debtors if an application is admitted under the IB Code by NCLT.

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ABOUT AMLEGALS

AMLEGALS is a leading full service law firm in India.

We have a specialised team in IBC, GST, Arbitration, Contract, IPR & Debt recovery cum management.

Our law firm has focus on the following:

i. Pro-active research based advisory,
ii. Non-litigation &
iii. Litigation

We advise & practice in **every law of India.**

AMLEGALS thrusts upon prevention of dispute rather than waiting for dispute to erupt and initiate a fight against litigation.

AMLEGALS with a long term vision is committed to prevent dispute as a legal team always!

OUR TEAM

Our Team comprises of seasoned advocates and associated company secretaries, cost accountants & chartered accountants.