

Insolvency and Bankruptcy Law in India

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Week 03

Lecture 12

Welcome to all.

Let us recap what we discussed in the previous class. In the previous class, we discussed a few important definitions. We have discussed the definitions of a claim and a corporate person and who is considered to be a corporate person. Then, we discussed the definition of financial service providers and financial services. The person who provides the financial services is called a financial service provider.

Then we have discussed the definition of a financial sector regulator and the definition of a financial product. Then we discussed the definition of debt, which includes financial debt as well as operational debt. So that's why we have discussed the definitions of financial debt and operational debt as well. Today, we are going to discuss the definitions section.

Another important definition is "creditor" under the Act, which is defined under section 3, sub-section 10 of the IBC. Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, who is included in the definition of a creditor?

So, a creditor includes any person to whom a debt is owed. So here, any person who is entitled to receive money from the corporate debtor is called a creditor, which includes various categories of creditors: they may be financial creditors, operational creditors, secured creditors, or unsecured creditors. Sometimes it is possible to imagine I have entered into a contract with a company and I supplied some goods; the company is liable to pay the money to me, and if there is a failure to pay the money, I went to the court of law.

The court of law gave the judgment in my favor, and then I am called the decree holder, so here I am entitled to receive the money from the company. Any person who is entitled to receive money from the company is called a creditor; thus, a creditor means any person to whom debt is owed and includes financial creditors, operational creditors, secured creditors, unsecured creditors, and decree holders.

These are all the various categories of creditors.

The next definition is corporate debtor, which means a corporate person who owes a debt to any person.

In yesterday's class, we discussed the meaning of a corporate person. A corporate person includes a company registered under the Companies Act, a company registered under specific legislation by separate enactment, or any body corporate. These are all the various categories of companies that we have already discussed. So these are all considered to be corporate persons. So, a corporate debtor means a corporate person who owes a debt to any person.

And the next important definition is financial creditor.

So, we have already discussed that "creditor" includes financial creditors in the previous slide. Now, let us discuss who a financial creditor is. A financial creditor means section 5, sub-section 7, which is in part 2. Section 5, sub-section 7, defines the term financial creditor. A financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred.

So, a financial creditor means any person who gave money to the company as financing and is entitled to receive the money. So any person who gave a loan to the company has financial debt. And suppose we take the example: I am the financial creditor. I have assigned my rights to another person. Assignment means the right to receive money.

Whenever I am transferring the right to receive money to another person, such a transaction is called an assignment. So if I am assigning my right to receive money to another person, then that other person is called a financial creditor. This means that any person who gave a loan to the company or any person who is entitled to receive money, if he is transferring his right to another person, that is, assigning his right to another person, is called a financial creditor.

Another important definition is a person, who is called a person; it includes various categories of persons under the act. A person includes an individual natural person, a Hindu Undivided Family (HUF), a company, which means a company incorporated under the Companies Act, a trust, a partnership firm, a limited liability partnership firm, or any other entity established under a statute.

So, if any other entity is established under a statute and includes persons resident outside India. So even this word is very, very important. Why? Here, the word "person" includes both the person resident in India and the person resident outside India. So, it means that a person resident outside India also has a right under this legislation.

Okay, then, the other definition, property section 3, sub-section 27 of the Act defines the term "property".

"Property" includes money, goods, actionable claims, land, and every description of property situated in India, as well as any property which is situated in India or outside India, including every description of interest, whether present, future, vested, or contingent, arising out of or incidental to the property; this is the definition of property. So, if you observe the definition of property, which is very broad in nature, it means that it is a

broader definition, so property includes money. So, money means the legal tender. Okay. So, anything that is legally accepted is called money.

Goods. So if you want to know the definition of goods, you have to refer to the definition given under the Sale of Goods Act, section 2, sub-section 7 of the Sale of Goods Act. Section 2, sub-section 7 of the Sale of Goods Act says that goods include all kinds of movable property other than actionable claims and that include grass or anything that forms part of the land that is agreed to be separable. Any movable property that has commercial value and can be separated from the land, even if it is included in the land, can be considered separately.

For example, coal, which is found in the land and cannot normally be separated, is considered immovable property. But if you have an agreement to separate it from the land to sell iron ore or anything else, then in such cases, such iron ore or coal becomes the goods. So, anything that can be sold is an actionable claim, and you can bring an action before a court of law to recover the money.

And land and every description of the property, so the property can have various names. Okay, so every description of the property situated in India and outside India is here. Please remember that the property may be situated in India or outside India, so why are they defining the property definition here? Suppose the company goes through the CIRP process. It is possible that the company may have property in India or property outside India as well. So, when you are forming the liquidation estate, when the liquidator is appointed, when you are doing the liquidation estate, in the liquidation estate, you are going to consider all this property, whether situated in India or outside India, because everything is an asset, and every description of the interest, including present, future, vested, or contingent.

So, there are various categories of interest that may be present; currently, you have an interest in one particular property, or in the near future, you may have a contingent interest. So if any interest is going to arrive, it will depend on one contingency. So all these things are considered property.

Now let us see. So, there are a few judgments.

What is the meaning of property? Property includes all licenses and permissions for corporate data. Let me give you one example. There is one company, maybe a private company, that has a license to operate in the wine business. That license is then considered property. Maybe one company has a license to conduct mining activities. Such a license is called property. So, the spectrum license given to the corporation would be an asset. Why? Because when I have the spectrum, it is obviously an asset in the company's case. So a spectrum license to a corporator would be an asset because it increases the value of the company. It was held in the case of Union of India versus Vijay Kumar V. Iyer by the NCLAT. NCLAT held that the spectrum license given to the corporate debtor would be a license that would form part of the liquidation estate. And the Supreme Court, in the case of Victory Iron Works Limited versus Jitendra Lohia, held that assets include property, even leasehold

rights held by the CD. CD means corporate debtor here. So, leasehold rights held by the corporate debtor constitute assets of the CD. So, if you have any leasehold rights, maybe I have one lease; I have the right to have possession of the land or the right to have possession of the building.

So, such a right is called my asset. Information memorandum: Section 5 sub-section 10 defines it as an information memorandum prepared by the resolution professional under section 29 sub-section 1. So please remember that in the subsequent lessons, we will discuss this information memorandum; a separate lesson is dedicated to its contents.

Let me briefly tell you when the resolution professional is appointed during the CIRP process. When he is appointed, he will prepare the information memorandum.

This information memorandum will be published, and any resolution applicant can read it; it's like information about the company, its assets, its liabilities, recent profits, and all data relating to the company will be included in the information memorandum.

Recently, NCLAT gave a judgment stating that the information memorandum should also contain details about carrying forward losses. So that means you should specifically state how much carry-forward of losses there is in your company. So, are you carrying forward the losses? Everything you have is to give the information. So based on the information, the resolution applicant will read the information accordingly; he will give the quotations.

So, there is a significance to the information memorandum. Anyway, in subsequent lessons, we are going to discuss in detail the contents of the information memorandum.

So, the next definition is the initiation date. What is the initiation date? Section 5, sub-section 11. Initiation date means the date on which a financial creditor, corporate applicant, or operational creditor as the case may be makes an application to the adjudicating authority for initiating the corporate insolvency resolution process or PPIRP, the pre-packaged insolvency resolution process, as the case may be.

So, what is the initiation date? First of all, let me give you a brief introduction to who can initiate the proceedings under IBC. In subsequent lessons, we will again discuss each section in detail, but under IBC, insolvency proceedings can be initiated by three categories of persons: financial creditors, operational creditors, and the corporate debtor itself. So we will discuss the terms and conditions subsequently. When you are filing an application to the adjudicating authority, please remember that "adjudicating authority" means NCLT here. Before the adjudicating authority, before NCLT, when you are filing an application for the CIRP process. So, the date you file is called the initiation date because everything will start on that date.

Next definition: the important definition of the insolvency commencement date in section 5, sub-section 12. This is also another important date that you have to remember. Insolvency commencement date means the date of admission of the application for initiating the corporate insolvency resolution process by the adjudicating authority under section 7,

section 9, and section 10. As we have already discussed, the CIRP process and the insolvency process can be started by either a financial creditor, an operational creditor, or a corporate creditor.

So, when they initiate, that means when they file an application, the adjudicating authority considers certain points. A checklist is present, and the adjudicating authority will verify whether everything is satisfied. We are going to subsequently discuss the factors to be considered by the adjudicating authority while allowing the application under this act. So, once the adjudicating authority admits the application, the insolvency commencement date is from that date onwards. So, why is it so important? Because we have time limitations of 180 days under the IBC, Insolvency and Bankruptcy Code.

So, all these things will start from the date of insolvency commencement. Generally, it is called T. So, from T onwards, T plus 20, T plus 7, or something like that. So, from this date onwards, when the adjudicating authority admits the application made by the financial creditor FC, OC, or CD, it is okay. OC means operational creditor; CD means corporate creditor.

So, if any application is made by the FC, OC, or CD, then the adjudicating authority, after verifying the documents, is going to admit it. So once it is admitted and accepted, the application from that date is called the insolvency commencement date. Suppose I am selling some goods or rendering some services; obviously, I am supposed to receive some money, so the creditor in this case is called an operational creditor. An operational creditor is someone to whom operational debt is owed in the course of day-to-day activities. Whenever I engage in day-to-day activities, such as sales or rendering services, if any liability arises, then such liability is referred to as operational debt.

So, who is included? "Operational debtor" means a person to whom operational debt is owed and includes any person to whom such debt has been legally assigned. Suppose, take the example: I have delivered some goods to a company. Obviously, in this case, I am considered an operational creditor. I have assigned this right to someone else, and then even such a person is also called an operational creditor.

Next definition: financial institution. Section 3, sub-section 14. A financial institution means a scheduled bank. Financial institution, as defined in section 45 I of the RBI Act, Reserve Bank of India Act, and Public Financial Institution, as defined in Clause 72 of Section 2 of the Companies Act 2013. And such other institutions as the central government may, by notification, specify as financial institutions. So, a financial institution means that prima facie it is a commercial bank, a bank, a scheduled bank, or any financial institution as defined under the RBI Act, or a public financial institution.

We have various categories of institutions: public financial institutions, scheduled commercial banks, and NBFCs. So, these are all the various categories of institutions that are considered to be financial institutions. Next definition: dispute. This is a very, very important definition.

Dispute is defined under Section 5, sub-section 6. Dispute includes a suit or arbitration proceedings. So, a dispute can be a suit. So, it means whenever you file a case, that is, a suit or arbitration proceedings relating to the existence of the amount of debt. So, the arbitration proceedings or suit can be related to existence.

So, someone might argue that I am not liable to pay. So, while one person may argue that you are liable to pay, another may argue that you are not. So, there is a dispute as to the existence. The existence of the amount itself is in question, or else the quality of the goods. The dispute can be related to the quality of the goods or services, or a breach of a representation or warranty. While doing the sales, generally puffing statements will be there; in the majority of cases, the seller may give many puffing statements.

If there is any statement that is in the nature of a warranty. Whenever there is a breach of representation or warranty, the opposite person will obviously have a right over the other person. So, whenever there is a suit or arbitration proceedings related to these matters, it is called a dispute.

So, whether the pendency of criminal proceedings will amount to a dispute or not? In the case of Thotappa Nainar Muhammad Siraj Deen versus Intex Technologies India Limited, the NCLAT held that the pendency of criminal proceedings did not constitute a pre-existing dispute. Why? Because of the IBC. Within the ambit of the dispute, we are going to include only civil disputes; we don't include the criminal proceedings because criminal proceedings are totally different. So, if any criminal proceedings are pending, then such criminal proceedings cannot be considered a dispute.

Okay, then, the mere filing of an application under the MSME Act does not constitute a dispute; however, there is a provision for filing an applicable reference application under sections 17 and 18 of the MSME Act.

So, when any MSME files a reference or an application for reference under sections 17 or 18, such application is not considered to be a dispute. Then, NCLT held in the case of iValue Advisors Pvt Ltd versus Srinagar Banihal Expressway Ltd. In this case, NCLAT held that the mere filing of an application for reference under the MSME Act is not considered to be a dispute under the IBC. Suppose there are proceedings against one company under Section 138 of the Negotiable Instruments Act. So, Section 138 of the Negotiable Instruments Act deals with the dishonor of checks or check bounces and check bounce cases.

So, if there are any proceedings, will it amount to a pre-existing dispute or not? Yes, it amounts to a pre-existing dispute. It was held by NCLAT in the case of A. D. Electro Steel Company Private Limited versus Anil Steels that when any case is pending before the court of law under section 138 of the Negotiable Instruments Act, such proceedings are considered to be a pre-existing dispute. Suppose any civil suits are pending; in such cases, will it be considered a pre-existing dispute? Yes.

The pendency of a civil suit for the recovery of money is considered to be a pre-existing dispute within the meaning of the IBC. It was held by the NCLAT in a landmark judgment,

Landmark Reality versus Siroya Developers Pvt. Ltd. In this case, it was held that if a civil suit is pending before the civil court for recovery of the money, it is considered to be a pre-existing dispute. Then, a secured creditor, who is a secured creditor? Secured creditor means a creditor in whose favor a security interest is created.

So, any person who has a security interest in the assets of the company is considered to be a secured creditor. Then, what is a security interest? We should understand what a security interest is. Section 3, subsection 31, defines the term "security interest." Security interest means the right, title, or interest in, or a claim to, the property, so I may have a right over the property; some right, I may have a title that is ownership, or I may have some interest, or I may have some claims over the property. So, in favor of the creditor, a transaction is created that secures payment or performance of an obligation and includes a mortgage, charge, hypothecation, assignment, encumbrance, or any other agreement or arrangement securing payment or performance of any obligation of any person.

In simple language, suppose I am giving a loan to someone; I am giving a loan to a company. The company is creating a charge on its assets in my favor, so I am considered to have a security interest. Whenever I have any right, title, or interest in any property, the right may be created in the form of a mortgage, which can be a mobile property, a charge, a hypothecation, or an assignment. So, whatever the mode you are creating, I have a right over the property; in such cases, I am considered to have the security interest. So, provided that the security interest shall not include a performance guarantee, okay.

Suppose that when I am giving a performance guarantee in favor of another person, stating that such and such a person will perform properly, if he fails to perform, then I am going to compensate you, I am going to pay the compensation. In such cases, that is called a performance guarantee. So, the performance guarantee is not included within the meaning of security interest.

In today's lesson, we have discussed a few important definitions, such as the definition of creditor, the definition of corporate debtor, the definition of financial creditor, and the definition of person. So, who is considered to be the person we have discussed? Then we discussed the definition of a corporate debtor, which is a person who can file an application under the IBC.

A financial creditor is one of the persons who can file an application under IBC. Then we discussed the definition of property, another important definition. Then we discussed the insolvency commencement date, which is considered to be the insolvency commencement date. In the subsequent lessons, we are going to discuss the timelines, where the timelines are calculated from the insolvency commencement date. Then we have discussed the definition of dispute and the definition of secured creditor and security interest.

Thank you.