

Insolvency and Bankruptcy Law in India

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Week 03

Lecture 14

Welcome to all.

Today, as part of the course on Insolvency and Bankruptcy Law in India, we are going to discuss the concept of Introduction to IBC and the Initiation of CIRP. Before discussing today's concept, let us recap what we discussed in the previous class. So, in the previous class, we discussed the CIRP flowchart, whereby we explained how the CIRP process will be initiated, from the application until the liquidation of the company. When the CIRP process is initiated, it can be initiated by either a financial creditor, an operational creditor, or a corporate creditor. Then, the adjudicating authority will admit the application. Subsequently, they will appoint the resolution professional, and the COC will be formed. After that, you will approve the resolution plan. If the resolution plan is approved, you will implement the resolution plan; otherwise, you will go for the liquidation of the company. So, the flow chart we discussed in the previous class.

Then, subsequent to that, we have discussed the governing sections, that is, section 6, who can initiate the CIRP process, and sections 7, 8, 9, and 10. Then we discussed in detail who can initiate the essentials to be established for the admission of a corporate debtor. So, whenever you want to initiate the CIRP process against the corporate debtor, we have to satisfy certain essentials. So, these are the essentials we discussed in the previous class. Now let us look at the procedure.

Until now, we have discussed the section. Now let us look at the procedure in detail: how to make the application by the financial creditor under section 7 of the act. The application under section 7 may be preferred by any creditor, either singularly or jointly. The application can be made by a single creditor, or it can be made by joint creditors as well. The form that is prescribed is in rule four of the Insolvency and Bankruptcy Application to the Adjudicating Authority Rules.

The prescribed form is form number one. Now let us look at form number one. So please look at the form number; this is the form number. Okay, so form number one. Okay, so please look at form number one for the application by the financial creditor to initiate the corporate insolvency resolution process.

Okay, so this is how you are going to make an application with NCLT, okay, to the NCLT address from your address. Okay, so hereby, sir/madam, we are hereby submitting the application to initiate the CIRP process. These details you are supposed to provide, okay? So, the name of the financial creditor and the date of incorporation of the financial creditor. So, suppose if the financial creditor is a company, then what is the date of incorporation of the financial creditor? Identification number of the financial creditor. Then the address of the registered office of the financial creditor.

That means I am supposed to give my own details. Okay. The name and address of the person authorized to submit the application. So, Vakalatnama. If there is any Vakalatnama, who is authorized? The name and address of the person resident in India authorized to accept services, service of process on its behalf, must be provided.

That means someone should be authorized. Suppose we take the example of the financial creditor if they happen to be a non-resident in India. That is a resident outside India. Then there should be someone who is accepting any notices, whatever they are. So, if you are sending or serving any notices, someone should be there to accept them.

You have to provide the details. Then you have to provide the returns of particulars of corporate data. Here, you are going to give the details of the name of the corporate data identification number, so here identification means identification number, which is the CIN number. The date of incorporation here is where you are going to provide the CIN number (Corporate Identification Number), the date of incorporation when it was incorporated, the nominal share capital, and the paid-up share capital. Alternatively, you can include the details of guarantee clauses as per the memorandum.

For example, if the company is limited by guarantee, then guarantee clauses will be present; if the company is limited by shares, then obviously you are going to have the nominal share capital and paid-up share capital. The address of the registered office of the company, the details of the corporate data as per the notification, the assets and income class of the creditors, or the amount of the rate category of the corporate person must be provided whenever applicable. Then part 3 of the application particulars of the proposed interim resolution professional, as we have already discussed, requires us to provide the name of the interim resolution professional. Okay, so what is her name, what is his name, what is the address, mail ID, and his registration number? Okay, so please remember that all the insolvency professionals are registered with IBBI, so they will have a registration number. This registration number must be provided.

Okay, then you are supposed to give the financial debt. So please remember the total amount of debt granted, the dates of the disbursement, and when the amount is granted to the corporate debtor when it is disbursed, because that is important. Okay, when it is disbursed, that means it should reach the corporate debtor, and the amount claimed to be

in default, as well as the date on which the default occurred. So, attach the working for the computation. Okay, so how much is the amount? What is the default amount? Okay, how much are you claiming? Everything must be given here.

Then part 5: particulars of financial debts, documents, records, and evidence of the default. Okay, so these things must be given. Okay, particulars of the security held. Then particulars of an order of the copy. Okay, these things again we are going to discuss in detail.

Okay, record of the default with information utility, so these are all the basic other things to be given. Okay, details of the succession certificate, latest and complete copy of the financial contract reflecting all amendments and waivers to date, record of the default. Okay, so all these things you are supposed to give. Okay, so like this you are going to give the declaration, then signature. Okay, so this is how you are going to make an application.

Okay, this is the format in which you are supposed to give. Okay, so this is the standard format. Then you are supposed to edit as per your requirement. Okay, so you are supposed to enter the data, then submit the application with the NCLT. Then, I think you are clear with the concept of the prescribed form number one.

Okay, so you are supposed to make an application in form number one. Then, whenever you are making an application, as we have already discussed, the application under section 7 can be made by an individual financial creditor, that is, singly as a singular entity or jointly. Okay, so an individual application or a joint application. Okay, so when you are making a joint application, we have to consider certain points. Okay, so certain questions can be raised: whether all creditors joining to file the application should be financial creditors, because you are saying that you can make a joint application.

When I am saying that a joint application does it mean that all the creditors must be financial creditors only? We are going to answer this. Okay, this question you have to answer. Then, whether the debts and defaults due to each creditor must be above the threshold limitation, that is under section 4 of the Act, the threshold limitation is a minimum of 1 crore. Okay, so only if the amount, if the default amount, is more than 1 crore, then only you can file an application. Suppose we take the example; I have 10 creditors.

Okay, so together they are filing an application. Does it mean that each and every creditor must have been given a minimum of 1 crore, or is the default amount a minimum of 1 crore? You have to answer this question. Okay, then where the claim of one of the several creditors joining to file an application is barred by the limitation? So please remember, as we have already discussed. Okay, for every debt, there is a limitation. Generally, a three-year limitation will apply, so within three years, you have to claim.

Please remember one of the fundamental principles, in layman's language, is that the law is not going to protect those who are not aware of their rights. As a person, when you are giving a loan, you should be aware of your rights. If the other person fails to pay the money, you should react immediately and file a case. If you fail to file the case within three years, the law will presume that you are not aware of your rights, and we are not going to protect them. That is the concept of the limitation period.

If you fail to file the application within the limitation, there is a possibility in one scenario. Let us take one scenario: a total of 10 creditors are there. Out of the 10 creditors, one creditor's amount is already time-barred, meaning the due date has already passed. Since, three years have already been completed, he cannot file now. If the other creditors want to file together, can they do so even though one of the creditors has a time-barred debt? So, these are all the things that you have to observe.

Issue number one: what is the issue? Should all creditors joining to file an application be financial creditors? So, must all the creditors be financial creditors? Yes. Okay, in the case of Anil Kumar Jain versus Vardhaman Rollers Mill Pvt. Ltd. NCLAT held that financial creditors and operational creditors cannot jointly file an application under Section 7. Why? Because Section 7 exclusively deals with financial creditors.

So, when the section uses the word "jointly," and the heading states "Application by the Financial Creditors," if you look at the section heading or the title of the section, "Application by the Financial Creditors," that's why when they use the term "joint application," it means a joint application by the financial creditors, but not by all categories of creditors. So only financial creditors can come together. So, financial creditors and operational creditors cannot file an application under this section jointly; that is not possible. And the second issue, let us go back to the second question mark. So, what is the second question? Whether the debts and defaults due to each creditor should be above the threshold limitation means that each creditor must have a debt amount of at least 1 crore.

Now, the answer is in the case of Vishnu Oil Mills Private Limited versus Union of India. The division bench of the Rajasthan High Court held that two or more creditors, as they used the term two or more creditors, whose dues do not meet the threshold value under section 4, may file a joint application. So, what is required is that when you are filing a joint application, together you are expected to have a minimum of one crore. So it is not that each and every creditor should have 1 crore rupees.

This is the second issue. Then let us go back once more. What is the third issue? Where the claim of one of the several creditors joining to file an application is barred. So, is it admitted? Try to answer. Let us try to answer. In the case of Manish Kumar versus Union of India, the Supreme Court held that the mere fact that the claim of one out of several

creditors is barred by limitation should not be a bar to admitting the application, because when you say that each and every creditor's claim must not be barred by limitation, you are adversely affecting the rights of the creditor.

Therefore, the law is very clear; merely because one creditor's claim is barred by time does not mean that he cannot join the application. He can join; he can join the application. Now, there is a possibility that the financial creditors who are in class can make an application. This was recently inserted, actually, because home buyers are considered to be financial creditors. So, under section 21, sub-section 6a, clauses a and b, an application for initiation of CIRP against the CD shall be filed jointly by not less than 100. Suppose you are making a joint application in the case of a class of financial creditors, so it is not general financial creditors; it is about the class of financial creditors. If any class of financial creditor wants to file a case or an application before the NCLT, then a minimum of 100 members must be present, or at least 10% of the total number of such creditors must file an application; this is useful in the case of real estate. In real estate, home buyers are considered to be financial creditors. Recently, there has been a Supreme Court judgment. The Supreme Court stated that homebuyers are treated as financial creditors.

So, this amendment act is accordingly there. So, homebuyers are considered to be financial creditors if there are 100 or more homebuyers. Okay, or if they account for 10 percent of the total number of such creditors, okay, 10 percent of the home buyers, okay, then in such cases, they can file an application before the NCLT under this section. So, in the case of Manish Kumar versus Union of India, why was Section 21, Subsection 6(c), Clause (a), and Clause (b) inserted? The Supreme Court, in the case of Manish Kumar versus Union of India, upheld the objectives of the section. So, what are all the objectives? Why are you enabling them to file a joint application to prevent multiple individual applications? Because if you don't allow joint applications, what will happen is that each and every creditor will file an individual application, which unnecessarily increases the burden on the judiciary. That's why, to prevent multiple individual applications, this section was inserted, safeguarding the interests of hundreds or even thousands of allottees who may oppose the application of a single home buyer.

Suppose we take the example where you are filing a case against a big real estate company individually; obviously, when you are filing an application for insolvency or liquidation of a large real estate company and you are a small home buyer, the company may claim that you are filing the application with malicious intention and that your application must be rejected. So that's why, to protect the interests of such small people, because in the case of big infrastructure projects, there can be thousands of allottees, they have created this provision whereby they may not be in a position to fight the case individually; okay, so in such cases, together they can form a trust. This trustee or any authorized person can jointly file a case or an application before the NCLT under this act.

This is the purpose of the legislation, and this is why they have inserted it through the amendment act. Safeguarding the interests of hundreds or even thousands of allottees is one purpose.

Then, balance the interests of the members of the same class and subclass. Each subclass is different. So, if you take the example of home buyers, different categories can exist. So, each and every subclass must be treated separately, and they should be given protection accordingly. We have to balance the interest, so we are enabling these classes to file a case against the company.

Then the process becomes smoother and cost-effective because, if each and every person is filing the case individually, the legal cost will obviously increase. So as to ensure that legal costs are not increased and that the process is very smooth. So they may appoint the trustee together, and this trustee can file the case on behalf of all these creditors. This is one reason they introduced the concept of Application by the financial creditor in a class. As we have already discussed, whenever you make an application, there should be a debt and a default.

Then how do we prove that there is a debt and default? So, section 7, subsection 3 provides that an application by FC shall furnish the following. So, whenever you file an application before the NCLT, the financial creditor furnishes the details below. So, record of the default. So, a record of default with the information utility or such other record or evidence of default as the case may be.

So, whenever there is a default, it is there. So, this record will be forwarded to the information utility. There is a system called Information Utility where you are going to get all the data, so you are supposed to give the record of default. With the information utility, you can extract the data, and you can give it along with the application or such other record or evidence of default. So how will you prove the evidence of default? We are going to discuss it.

And the name of the resolution professional is required. You are supposed to provide the name of the resolution professional who is to act as the interim resolution professional (IRP). Then, any other information as we have discussed. This is what we have already discussed. Now, how do you provide a default? What is considered to be a record of default? So, the record of default includes a certified copy of entries. Suppose we take the example: I paid some money to the corporate debtor.

Imagine I am the banking institution; I gave a loan to the corporate debtor. So there will be an entry in the books of accounts. Subsequently, there should be the opposite entry if they are repaying; the opposite entry must be there in the books of accounts, so it is missing. So, the certified copy of the entries in the relevant books of accounts shows that

I have paid the money. So, what is the evidence that I have paid the money? Now, there should be bankers' books.

As per the Bankers' Books Evidence Act, you can submit the bank statement, a certified copy of entries in the relevant account of the bankers' books. And please remember, when you are submitting the bank statement, it need not be signed. Though the section uses the term "certified copy," as per the Bankers' Books Evidence Act, it need not be signed. So, even electronically generated self-attestation will be sufficient. Then an order of the court or tribunal that has adjudicated upon the non-payment of a debtor may state that you have given some money to the opposite person, who is a company, as a financial debt.

Then, if that company failed to make the payment, you went to the court of law, which gave the order in your favor, stating that the corporate debtor is liable to make the payment. So, the court order is there, stating that the corporate debtor is liable to pay a specific amount. Therefore, that court order is also one of the pieces of evidence. Then please remember that we have to keep in mind one point: the period for appealing against such an order has expired. If the appeal period is there, you cannot file because the opposing party may always appeal.

So, you have to wait until the expiry of the appeal period. Then, there are disputed debts and financial debts, so I think you are clear on the concept of debt now. Let us discuss disputed debt and financial debt. Now there are two categories of debt: disputed debt and financial debt. So, in the case of a financial creditor, financial debt must be present. So whether the debt is disputed or not, when you raise the point or claim money from the company, stating that you owe me so and so, you are supposed to pay so and so; as a financial creditor, you are filing an application.

Then he may raise a dispute. So, will it be important? Okay, so the Supreme Court's decision in Innoventive Industries versus ICICI Bank is one of the landmark judgments you are supposed to remember. In Innoventive Industries versus ICICI Bank, the Supreme Court observed that disputed debt is not relevant in the case of an FC application. Though it is relevant in the case of an application by the OC. When this occurs, an operational creditor can file an application under the IBC, and whenever there is a disputed debt, you cannot file an application. So, in the subsequent lessons, we are going to discuss the essential conditions to be satisfied when an operational creditor wants to file a case, so the disputed debt is relevant in the case of an operational creditor.

So, when any disputed debt is present, an operational creditor cannot file an application, but this is not relevant to a financial creditor; in the case of a financial creditor, the existence of the debt is sufficient. The existence of the debt is sufficient, whether that is disputed or not; this is not relevant. So, disputed debt is not a bar to the admission of an

application under Section 7. It was held in the case of Vineet Khosla versus Edelweiss Asset Reconstruction Company Limited that disputed debt is not a bar to the admission of an application under Section 7. Okay, so even though you haven't disputed the disputed debt, you can file an application under section 7, but you cannot file an application under sections 8 and 9; that is not possible.

Okay, then the disposal of the application should be within 14 days from the date of initiation. If you look at section 7, subsection 4, we have already discussed the section, which states that the NCLT shall, within 14 days, accept the application or reject it. Whenever they exceed this timeframe, they have to provide an explanation. Now, when the section or the legislation uses the word "shall," does it mean that it is really a "shall," or do we have to interpret it as a "may"? Because there is a difference between "shall" and "may. So, the question is whether you have to interpret it as shall or as may.

So, it was clarified. So, the NCLT needs to ascertain the existence of default. Whether there is a default or not, you have to ascertain within 14 days. There is a time limitation. Now, if the NCLT is unable to ascertain within the time limitation, and if you are unable to ascertain whether there is a default or not, then the NCLT is required to record the reasons. Why are they unable to? Maybe because the records are not available. Okay, maybe the application is not supported by sufficient data. Maybe you don't have the proper data in the information utility. So, if data is not available, then in such cases, you are supposed to give the reasons.

Now, in the case of Surendra Trading Company versus Juggilal Jute Mills Company Limited, the Supreme Court held that though the section uses the word "shall," it is directory in nature. The Supreme Court stated that it is directory in nature, which means it is only "may"; you cannot interpret it as "shall. " You have to interpret the section as "may." So, whether discretion is available or not, it has already been proved that discretion is available. Under section 7, subsection 5 of the Act, the Tribunal may accept or reject the application; the Tribunal has the freedom to either accept or reject the application. And here, if you are looking at the 14 days, okay, so within 14 days, they may not give the decision.

So, there are two points? You have the option to either accept the application or reject the application; that is one point. This admission of application and rejection of application must be given within 14 days; that is, another point you have to consider. So, both are different. So, in the previous slide, I am talking about how, within 14 days, you have to inform. So, when you are admitting or rejecting, as per the section, you are supposed to intimate within 14 days, but that 14 days is discretionary in nature; that is only directory. That means you may take more time. Practically, in the majority of cases, accepting the application itself may take a minimum of six months. So, there is a practical reality. Because of so many reasons, once it is admitted, do you have the freedom to admit or

reject? So, are discretionary powers available for the NCLT to admit or reject the application, or are we going to discuss it?

So, under Section 7, Subsection 5, the tribunal may accept or reject the application. Here, there is a discretionary power system. It is here that the word may shall be interpreted as may only. So, in the previous slide, the word shall be interpreted as “may.” “So, I think I am clear. Okay. So, in the previous slide, we have the section that uses the word “shall.” There, the word “shall” shall be interpreted as “may.” In the present slide, the word used is “may.” The section uses the word “may”; here, “may” has to be interpreted as “may” only; it cannot be “shall.

So, the tribunal may accept or reject the application. So whenever they want to reject, if there are any defects, then the tribunal shall give an opportunity to rectify the application. When a financial creditor makes an application, if there are any discrepancies or defects, the tribunal shall give the applicant an opportunity to correct them. Then SC, the Supreme Court, in the case of Vidarbha Industries Power Limited versus Axis Bank. So in the legislation, the word used is “may.

So here they are interpreting “may” as “may only.” The NCLT can exercise discretionary powers based on the relevant facts and circumstances. Because the legislation itself gives the discretionary powers, the NCLT has discretionary power. Based on the relevant facts, they have to verify if there is a checklist. So, whether there is a debt, whether there is a default, whether evidence is there, whether a professional is appointed or not, and whether there are any disciplinary proceedings against him.

So, all this checklist they have to observe. After observing everything, it is up to the discretion. So, if the NCLT is of the opinion that this case or this application is filed before the NCLT only to unnecessarily trouble the corporate debtor, the possibility is there. Unnecessarily creating problems for the corporate debtor may be one of the financial creditors filing an application. So, if there is a case, the NCLT may reject it. That is why there are discretionary powers, and the NCLT is supposed to decide based on the relevant facts and circumstances.

In the case of Deepak Vegpro Private Limited versus Srihari Agro Industries Limited. So, NCLAT held that NCLT is mandated to exercise discretion in dismissing the application. So, whenever the NCLT wants to reject the application, they have to use their discretionary power very carefully. If you reject without proper grounds, you are affecting the rights of the financial creditor. That’s why you have to exercise your discretion properly.

So, is mere change in management a ground for dismissal of the application? No. So, suppose we take the example when you are filing an application as a financial data creditor against the corporate debtor. Meanwhile, there is a change in the management,

maybe because of the takeover or other reasons. So, does that mean you are not entitled to file an application? No. A mere change in the management is not a ground for dismissal of an application under section 7 of the Act.

Let us recap what we have discussed today. In today's lesson, we have discussed the initiation of CIRP by the financial creditor and how to initiate the CIRP by the financial creditor. Then the application by the financial creditor in the class we have discussed. Then we discussed the evidence of debt and default. So, how do we prove the debt, and how do we prove the default we have discussed? Then we have discussed the disputed debt and financial debt.

Then we have discussed the disposal of the application within 14 days from the date of initiation. This means that once the application is made by the financial creator before the adjudicating authority, the adjudicating authority is expected to dispose of the application within 14 days. We have also discussed the discretion available under section 7, subsection 5, to admit or reject the application under section 7. We have examined whether the adjudicating authority has any discretionary powers once the application is made by the financial creator, and if so, to what extent these powers exist, when to admit the application, and when to reject it.

We have discussed this in this lesson.

Thank you.