

“Insolvency and Bankruptcy Code in India: Game Changer for Corporate Employees and Rights of Corporate Employer”

Dr. Sagar Suresh Dhole

(L.L.B University Merit, MBA (Industrial relations and International Business Management),

PhD (Business Management and Compliance)- Nagpur University.

Recommended by the UPSC (Union Service Public Commission) in 2016.

Appointed as “Welfare Administrator” in the Office of the Director General (Labour Welfare), Ministry of Labour and Employment; Government of India

Abstract

Advent of Insolvency and Bankruptcy Code 2016 has arrayed a new horizon for Employee working in Companies in India. Employees are now empowered to claim their dues in fast track manner through National Company Law Tribunal (NCLT). The exquisiteness of this law is that the exceptions are specifically laid down in law, in order to protect the interest of organisation, as well as the principle of equity. This Code has also marked a crucial provision whereby corporates working in India must be more diligent and follow regulation as violation could be catastrophic. From Employee perspective the provisions under IBC is prudent saviour; and from Corporate perspective it is caution note. Law proposed fast track recovery of undisputed dues from defaulters Corporates; and further employees will be first in line to get their share from liquidation of assets of such defaulters Corporates. Employees' rights (and) creditors' rights have been dramatically strengthened and as a result, if indeed there is a default event, employees are first in line to be able to secure (there rights). Under this Code, employees and workmen are considered as the operational creditor. If a Company fails to pay salaries and/or other payable dues to its employees or workmen and the total payable amount is more than INR 1 lac, then the employees can file the application against the Company with the NCLT for initiation of the process of recovery. Organisations entering any merger and acquisition should conduct additional due diligence on this matter in order to avoid any incognito impact. There is no impact on Organisational rights to recovery due amount from its employee in case of any misconduct or any breach of confidentiality or other employer-employee dispute. Elite efforts are made in this article to explain the indispensable caution to be taken by Companies for employee related matters, exquisiteness of this law and procedural aspect under Insolvency and Bankruptcy Code in India.

Key words: Employee claims, Insolvency and Bankruptcy Code IBC, Workmen, Employee, Employment Law, Operational Creditors, Insolvency and Bankruptcy Code in India.

1. Workmen and Employee under IBC for Corporates:

- A. Workmen or employees come under operational creditor or financial creditor.
- The workmen and employee whose past payments are due comes under the definition of operational creditor. As per section 5(21) of the IBC 'Operational Debt' means a claim in respect of the provision of goods or services including employment or debt in respect of the repayment of the dues arising under any law for the time being in force and payable to central government or any state government or any local authority.¹
 - Where sub section 36 of section 3 of IBC code, 2016 defines term 'Workmen': Workmen shall have same meaning as assigned to it in clause (s) of section 2 of the industrial Dispute act, 1947(14 of 1947).

It is now very important to understand who can be termed as an employee for the purpose of initiating proceedings under IBC.

B. For clear understanding a general interpretation may be that, an employee is a person who has been hired by the employer to perform a particular job or specific labour of the employer. So the essential criteria that are being looked upon here may be:

- I. There is a specific wage or salary.
- II. The work being done is under control of the employer or is being regulated by him.
- III. There is an existing implied or written contract in relation to this work being carried out and the employer and the employee have consented to the same.

C. Pre-Requisites For Approaching

Before filing any petition before NCLT for recovery of unpaid salaries, the employee must ensure beforehand that-

- I. The person must be an employee of the company against which his payment is pending.
- II. He must owe an operational debt against the defaulter company.
- III. The minimum amount of salary due to the person must be one lakh rupees.

2. Claims with respect to Employment come under purview of Operational Debt:

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “Code”) provides that all the “employees and workmen” must be considered within the meaning of the Operational creditors as defined under Section 5 (20) of the IB Code which states that:

“Operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”²

Default means non-payment of debt when whole or any part of instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

The following person could initiate the Recovery Process; on the admission of a default by the Corporate Person:

¹<http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

²<http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

- A Financial Creditor (means any person to whom a financial debt (Loan) is owed)
- An Operational Creditor (means a person to whom an operational debt is owed)

“Operational Debt” means a claim in respect of the provision of

- Goods or
- Services
- Employment or
- A debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;³

So for this we need to understand the definition of Operational Debt as defined under Section 5 (21) of the Code which states that:

So from the definition it is clear that if there is any due arising in the course of employment then that will be considered as the operational debt and the person to whom the operation debt is owed i.e. the employee shall be treated as the Operational Creditor.

So if the amount was not paid to the operational creditor then he can file a case against the corporate debtor under section 9 of the code but before that he has to comply with the procedure of sending demand notice in the form of FORM 3 and FORM 4 to the corporate debtor and provide them time duration of 10 days.

If the corporate debtor has not paid the amount of debt even after sending the demand notice then the operational creditor can initiate corporate insolvency resolution process under section 9 of IB Code.

3. Statutory Provisions

- I. Section 8 and Section 9 of Insolvency and Bankruptcy Code, 2016
- II. Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016
- III. Rule 9 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016
- IV. In accordance with Rules 20,21,22,23,24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.⁴

This section lays down procedure which differs from the procedure applicable to financial creditors. As operational debt (such as trade debts, salary or wage claim) tends to be small amounts or are recurring in nature and may not be accurately reflected on the records of information utility¹. (Section 3(21): "information utility" means a person who is registered with the Board as an information utility under section 210 ;)⁵.

4. Initiation of Corporate Insolvency Proceedings

A) Proceedings prior to filings with NCLT

³<http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

⁴<http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

⁵<http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

- I. **FIRST:** The operational creditor is required to serve a demand notice to the corporate debtor mentioning that his payment is pending in lieu of the work done or the services provided.
- II. After waiting for 10 Days, if he does not receive either his payment or notice of pendency of any suit, he can file an application to the NCLT for initiating a corporate insolvency resolution process against the operational debtor.

Documents:

The documents with the application for initiating the process are:

- I. A copy of pay in slips, Bank Statement, Offer letter, appointment letter and other documents which help in identifying that there is an undisputed debt.
- II. An affidavit stating that there is no notice given by the debtors in respect of any dispute related to unpaid amount.
- III. A copy of the bank certificate from the financial institutions of the creditor stating that no amount has been paid by the debtor to the creditor as unpaid operational debt.

Time Limit Working as An Early Remedial Mechanism

It is mandated upon NCLT that an order regarding acceptance or rejection of this application is to be passed within 14 days of receipt of the application from the operational creditor.

It is also provided that the corporate resolution process needs to be completed within 180 days from the date of the admission of the application, but on the application of the resolution professional, NCLT is empowered to extend the period beyond 180 days.

Exception of Admission

There are various exceptions in the admission of the application as well but there are 2 major exception in the case of operation creditor application such as:

- I. Pending Suit,
- II. Disputed debt

There is the prima facie exception that:

If there is any suit pending in the other court, then the application cannot be filed under the NCLT

OR

If the amount of operational debt is disputed, then also the application cannot be admitted.

5. Proceedings under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

- I. Demand Notice issued in Form No. 3 (annexure attached) or Copy an invoice demanding payment in Form No. 4 (annexure attached)
- II. As per Rule 5(2) of, the demand notice or a copy of invoice shall be sent to corporate debtor by post, by hand or email and the copy of demand notice shall be forwarded to information utility.
- III. Within the PERIOD OF 10 DAYS from the date of notice so served mentioned aforesaid, the corporate debtor will inform the Operational Creditor of the existence of dispute regarding the debt claim or of the repayment of the debt.

It ensures informal negotiations between such creditors and corporate debtors, who may result in restructuring of the debt outside the formal proceedings, whose debt are usually smaller

- IV. On expiry of ten days; aforesaid and on not receiving any notice of the dispute or payment due from corporate Debtor; Operational creditor shall initiate CIRP, in such manner accompanied with such fees as prescribed.

Documents and records to be submitted

Sr. no	Details	Prescribed Forms
01	Application by Operational Creditor against Corporate debtor to Initiate CIRP. Creditor Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016	Form 5 (Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)
02	Copy of demand notice or invoice already being served to corporate debtor. an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt	Form 3 or Form 4 Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
03	Written communication by proposed interim resolution to act as resolution professional in (where applicable) Accompanied by certificate confirming the eligibility of resolution professional	Form 2 Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
04	FORM D Proof of claim by workmen or employee FORM E Proof of claim by Authorized Representative of workmen or employee along with Affidavit	Form (Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016)
05	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 (a) the records available with an information utility, if any; or (b) other relevant documents, including – i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues; ii) evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or	Existence of debt to be established and proved by documents

	(iii) An order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any. (iv) Financial accounts.	
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Adjudicating Authority:

NCLT on receipt of application along with records and documents shall within 14 days ascertain the existence of the default and may either admit or reject the application on the following basis:

Sr	Admission & Communication of Application	Rejection & Communicate of Application
01	Default has occurred or	No Default has occurred or
02	Application is complete	Application is incomplete
03	There is no repayment of the unpaid operational debt.	There is repayment of the unpaid operational debt
04	The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor	The invoice or notice for payment to the corporate debtor has not been delivered by the operational creditor
05	No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility	Notice of dispute has been received by the operational creditor or there is record of dispute in the information utility
06	No disciplinary proceedings pending against the proposed resolution professional as the case may.	Any disciplinary proceedings pending against the proposed resolution professional as the case may.
	NCLT before rejecting the application shall give notice to the applicant to rectify the defect in his application with 7 days of receipt such notice from NCLT.	

Rights of Employer and Exquisiteness of Law

The exquisiteness of this law is that the exceptions are specifically laid down in law, in order to protect the interest of organisation as well as the principle of equity.

There are various exception in the admission of the application as well but there are 2 major exception in the case of operation creditor application such as:

I. Pending Suit; II. Disputed debt

There is the prima facie exception that: If there is any suit pending in the other court, then the application cannot be filed under the NCLT; Or

If the amount of operational debt is disputed, then also the application cannot be admitted.

Exercise of this armament may be beneficial for aggrieved employees but may leave impact on organisation as well as other employees. Hence reciprocating obligations rest with both

employer and aggrieved employees and this armament should be perceived with rational exercise of mutually exclusive authority and its impact.

Respective Employee Managers, Human Resources, Finance and Legal Department need to exercise exclusive caution while dealing with Employee matters.

Paulo Coelho has cited in his one of the quote that “Discipline and freedom are not mutually exclusive, rather mutually reliant on each other, Without disciplined freedom, even the finest society will sink into depth of chaos” –Thus the mutual responsibly rest with both employer company as well as employee. Such law cannot be perceived to any aspect of misuse of harassment by the employee.

Conclusion and Case Laws

Insolvency and Bankruptcy Code, 2016 though grant redressal to the employees, however it also pose relief to employer company through exceptions. Undisputed amount or pending suits are not subject to proceedings under Insolvency and Bankruptcy Code . The Balance of power has been sublimely maintained so the employee appears with clean hand and Code is subject to equity.

Provisions under Insolvency and Bankruptcy Code, 2016 may pose as an armament in the hands of the aggrieved employees against Companies debtors to recover its debts. Impact of such warhead could be catastrophic to a Company. Company has to be cautious and make sure to prevent such hassle or delay in payment to employees. Workmen and Non-Workmen category both are included in the code hence it is indispensable for Corporate to have appropriate pay-out policies and adequate systems in place. Corporate needs to ensure that appropriate measures are in place to avoid misuse by the employees as well. Here the documentation part retain by the corporate is very crucial for effective defence. Organisations entering any merger and acquisition should conduct additional due diligence on this matter as well to avoid any incognito impact. This IBC code renders employees as well as workmen of the company a prodigious opportunity with a simpler and fast Track procedure to recuperate their dues by approaching NCLT as against the Corporate.

Insolvency and Bankruptcy Code, 2016 is a Game Changer for the aggrieved Employee well as for corporate. Powers are vested with the Operational creditors also along with corporate debtors to initiate insolvency process against the corporate debtor. The Code promises to bring about far-reaching reforms with a thrust on creditor driven insolvency resolution. The aim of the code is early identification of financial failure and redressal for same. The unique regime envisages a structured and time-bound process for insolvency resolution and liquidation, which should significantly impact debt recovery rates and revitalize the ailing the new horizon to aggrieved employees and caution note to corporate. Exercise of this armament may be beneficial for aggrieved employees but may leave impact on organisation as well as other employees. Hence reciprocating obligatory part rest with both employer and aggrieved employees and should be perceived along with exercise of respective mutually exclusive authority and its impact. Organisations entering any merger and acquisition should conduct additional due diligence on this matter in order to avoid any incognito impact. There is no

impact on Organisational rights to withhold or recovery the amount payable to its employee in case of any misconduct or any breach of confidentiality or other employer-employee dispute. Specific exceptions are laid down in the law which upholds the interest of equity and avoid misuse by employee.

Case laws:

- 1) In the case of Nitin Gupta vs M/s Applied Electro-Magnetic Pvt. Ltd. Company petition No. (IB) 334(ND)/2017, an application had been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 by an employee of the Respondent Company, for non-payment of salary amount of Rs. 46,77,124/-. The respondent in its reply accepted a non-payment of salary amount Rs. 28,84,160/- and raised objections for the balance amount. The Court admitted the application on the ground that there had been a part admission of the salary due and the non-payment of such due has caused default by the Respondent Company. The Court went into examining the Definition of “operational debt” under Section 5(21) and “Operational Creditor” under Section 5(20) of the Code and held that the applicant being in employment in the respondent company, providing services under such employment falls under the purview of Operational Creditor and hence the dues arising fall under the definition of operational Debt. Respondent company who has admitted a debt of Rs. 28,84,160/- falls under the definition of corporate debtor. Secondly the Debt was not completely Time-barred as objected by the Respondent Company. The Code provides for admission of a claim of Rs. 1,00,000/- and above. The Current claim is much above the given limit and hence liable to be admitted. The issue regarding ‘existence of a dispute’ has also been rejected by the Tribunal, as the respondent Company could not substantially prove of a case pending before the Deputy Labour Commissioner.” Mere Repudiating the claim in the reply without material particulars can be termed as vague, got up and to evade the liability.” As regards to the objection of Quantum of the claim, the court held as follows: “ This forum is not here to adjudicate as to how much is “due”. In any case the respondent corporate debtor would be entitled to raise objection regarding the claim amount before the COC or the Resolution Professional.” The material issue is that the claim is above the statutory limit and has been defaulted in terms of payment. The provisions of Section 9(3)(a) to (c) have been complied with. Hence, the application is admitted.
- 2) In the case of Mr. N Subramanian vs M/s Aruna Hotels Limited, CP/597/(IB)/CB/2017, an application had been filed by an Ex-employee, claiming arrears of Salary due amounting to Rs.1,87,75,631/- since the year 1999 under Section 9 of the Insolvency and Bankruptcy Code, 2016, before the Division Bench at NCLT, Chennai. The Employee had left the job on 30.06.2013. In spite of repeated assurances given by the respondent company, the due amount had not been settled. A letter by the Respondent dated 30.09.2014 assuring payment of salary, list of arrears and a 9% interest for late payment has also been put on record by the applicant along with its petition. The demand Notice

had been sent to the respondent Company on 29.06.2017 and the reply to such notice had been made on 06.07.2017 stating that the salary had been paid and only a gratuity amount of Rs. 5,85,577/- was pending.

The respondent also stated that the claim was barred by limitation and that they had already made a Payment of Rs.2,10,00/- on 31.07.2015 via 'Payment Voucher'. The said voucher had been rejected by the Tribunal on the ground of fraud as it was visible to the naked eye that the hand writing in the columns were different.

Secondly, the Respondent Company had approached the City Civil Court in Chennai on 06.07.2017 and filed an OS No.36/33/2017 against the Operational Creditor to declare the previous letter and notice communications as null and void and grant a permanent injunction on the creditor from relying on the same letters, including the letter of 30.09.2014. The Court rejected this objection stating that the Suit had been filed after the Demand Notice being sent to the respondent. Hence, filing of such civil suit by the Corporate Debtor was only to Camouflage/circumvent the initiation of the Corporate Insolvency Resolution Process by the Creditor against the Corporate Debtor. Lastly the objection that the claim is time barred has also been rejected, as the letter dated 30.09.2014 contains a list of all the arrears along with interest payment at the rate of 9% for delayed payment. Thus, the claim has been admitted on the ground that the Corporate Debtor defaulted in the payment of salaries due.