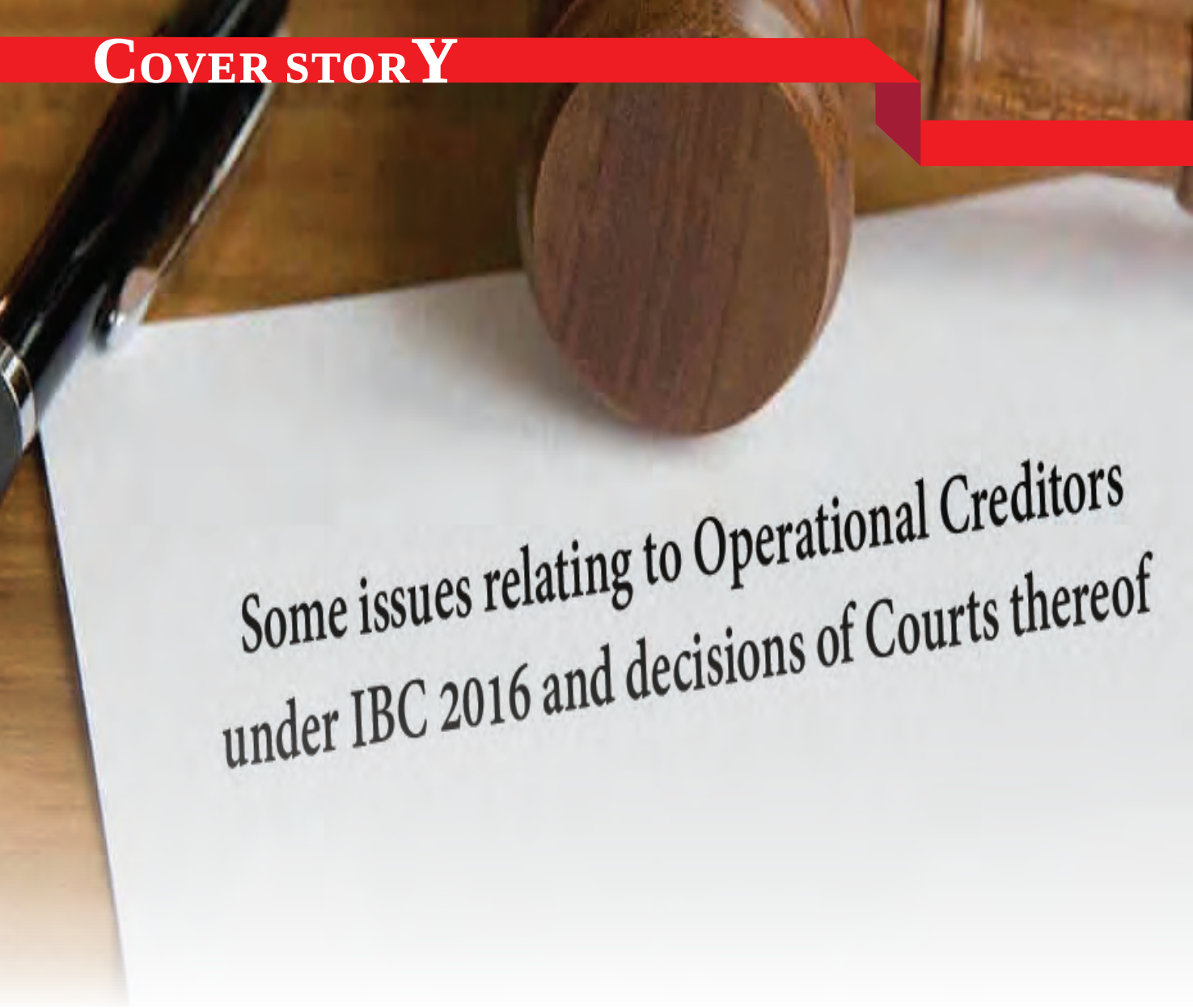

The Insolvency and Bankruptcy Code, 2016 (IBC) has been enacted by the legislation in order to consolidate the insolvency and bankruptcy laws.

The said code being a new legislation is still at its nascent stage and various issues are cropping up in the implementation of the said code. The said issues are being resolved by the intervention of the Courts/NCLT/NCLAT in a speedy manner.

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The Code has stipulated strict time lines which have to be adhered to by all the stakeholders. The Courts / Adjudicating Authority etc. being mindful of the time lines are also making all efforts to give an early hearing and early decision on various issues so as to ensure that the time lines set out in the Code are adhered to inspite of various complex issues being raised.

In the said code for the first time the word "Operational Creditor" has been used. The Code defines Operational creditors as being those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority.

As per the scheme of the code i.e. Under Section 8 & 9 an operational creditor, as defined, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), may deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8 (1)). Within a period of 10 days of the receipt of such a demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute.

From the bare reading of Section 8 & 9 it becomes clear that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist prior to the receipt of the demand notice. In case the operational debt has been paid then in such a case the corporate debtor has to intimate to the operational creditor that the said demand has been paid and give the payment details thereof. It is only incase that the corporate debtor is unable to make payment of the outstanding operational debt within the said period of 10 days or furnish proof to the operational creditor of having paid the said alleged outstanding operational debt earlier. In case there is a dispute then the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8 (2) (a).

In case the operational creditor does not receive the payment from the corporate debtor within 10 days of receipt of notice nor does it receive any notice of dispute, then the operational creditor can trigger the insolvency process.

It, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational

“In case the operational debt has been paid then in such a case the corporate debtor has to intimate to the operational creditor that the said demand has been paid and give the payment details thereof. It is only incase that the corporate debtor is unable to make payment of the outstanding operational debt within the said period of 10 days or furnish proof to the operational creditor of having paid the said alleged outstanding operational debt earlier”

creditor the existence of a dispute, if any.

Once an application Under Section 9 of the Code has been filed before the Adjudicating Authority then it has to examine and determine:

i. Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority has to follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9 (5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

One of the basic point of contention has been with regard to the definition of the word "Dispute". This controversy has finally been put to rest by the order of the Hon'ble Supreme Court of India passed in the matter of ***"Mobilox Innovations Private Limited Versus Kirusa Software Private Limited" (Civil Appeal No.9405 of 2017).***

Controversy also arose with regard to the right of audience by the corporate Debtor prior to passing of any order against it. This question was heard and decided by the Honble NCLAT in the matter of M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. In (Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017) wherein it held:

> *66..... Therefore, it will be imperative for the "adjudicating authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principal natural justice."*

The code also sets out certain timelines both for the persons who approach the Adjudicating Authority and also cast's an obligation upon the Adjudicating Authority to dispose off the application filed by the applicants for initiation or proceedings under the code in a time bound manner. The timelines set out under the code were put to test in the matter of ***Juggilal Kamlapat Jute Mills Company Limited Civil*** wherein the Hon'ble NCLAT held that the period of 14 days as mentioned under the code during which period the Adjudicating Authority is required to admit the petition and also appoint interim resolution professional (IRP) i.e. within a period of 14 days is not mandatory but directory in terms of Section 16 of the code. In the said order the learned NCLAT further held that the period of 7 days given to the applicant for rectifying defects as pointed out by the Registry is mandatory.

This order of the learned NCLAT was taken up in Appeal to the Hon'ble Supreme Court of India in the matter of ***Surendra Trading Company Versus Juggilal Kamlapat Jute Mills Company Limited & Ors***. **(Civil Appeal No.8400/2017)**. The Hon'ble Supreme Court in the said order has inter alia held as under:

> "23. 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....."

Another interesting question which arose for determination before the Hon'ble Supreme Court was about the interplay of 'Maharashtra Relief Undertaking (Special Provisions) Act (Bombay Act XCVI of 1958), viz a viz the Insolvency & Bankruptcy Code of 2016. The Hon'ble Supreme Court after hearing the parties held as under:

The code also sets out certain timelines both for the persons who approach the Adjudicating Authority and also casts an obligation upon the Adjudicating Authority to dispose off the application filed by the applicants for initiation or proceedings under the code in a time bound manner.

"54.On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

55. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in 97 much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go 98 ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. Also, Section 238 of the Code reads as under:

"Sec.238. Provisions of this Code to override other laws.-

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code."

"M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr." (Civil Appeal No. 833-8338 of 2017).

Thus, we will note that the code inspite of being at infancy stage is invoking serious questions which are all being answered in a speedy manner and towards fulfillment of the objectives of the code. MA

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