

A Person under Insolvency & Bankruptcy Code, 2016: Definition and judicial pronouncements - A Review

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Abstract

In every Act or Code certain provisions are cardinal provisions, which are the basis for the entire Act or Code. Similarly in the case of Insolvency and Bankruptcy Code, 2016 (Code) the definition of a person under section 3(23) is vital for the purpose of filing application under the Code. The article traces the definition of a person under the Code and the relevant case laws to establish the implications and interpretations. The Sole trader is not a person and whereas a trade union is a person.

Key Words: Persons, Hindu undivided family, partnership, persons resident in India.

Every legislation has its own definition under legislation and jurisprudence emerged over a period. Comprehending both the definition and judicial pronouncements would be essential primarily for compliance for stakeholders. The understanding becomes critical in certain definitions to establish the legal implications. This paper makes an attempt to comprehend the definition under the Insolvency and Bankruptcy Code, 2016¹ (Code) and judicial pronouncements in respect of various cases to have comprehensive understanding of the person under the Code.

Definition under the Code:

In terms of Section 3(23) of the Code, a “person” includes the following: -

- a) an individual;
- b) a Hindu Undivided Family;
- c) a company;
- d) a trust;

- e) a partnership;
- f) a limited liability partnership; and
- g) any other entity established under a Statute; and includes a person resident outside India;

To have understanding of a person resident outside India, it is desired to have understanding of firstly “person resident in India” and then “person resident outside India as provided under sub-section 24 of Section 3 and Sub-Section 25 of Section 3 of the Code. As per Section 3(24) of the Code, a “person resident in India” shall have the meaning as assigned to such term in Section 2(v) of Foreign Exchange Management Act, 1999 (FEMA)² and includes a person resident outside India. As per Section 3(25) of Code a “person resident outside India” means a person other than a person resident in India.

As regards section 2(v) of FEMA the same provides as under:

(v) “person resident in India” means—

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) a person who has gone out of India or who stays outside India, in either case— (a) for or on taking up employment outside India, or (b) for carrying on outside India a business or vocation outside India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than— (a) for or on taking up employment in India, or (b) for carrying on in India a business or vocation in India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period; (ii) any person or body corporate registered or incorporated in India, (iii) an office, branch or agency in India owned or controlled by a person resident outside India, (iv) an office, branch or agency outside India owned or controlled by a person resident in India;

The FEMA was formerly known as Foreign Exchange Regulation Act, 1974, after the focus of regulation is shifted to management, hence the FEMA.

Judicial pronouncements:

1. In the case of R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd. [IB- 722/ND/2019] NCLT, New Delhi order dt. 23.09.2019³, it was held that a sole proprietary concern, not being a ‘person’ under section 3(23) of the Code and also when there is a preexisting dispute, cannot file application under section 9 of the Code.

The findings of the said case further establish that -

- It is to be noted here that a proprietorship concern is not a legal person and it cannot authorize any person, moreover the application is filed by a proprietorship concern.
- primarily the definition of a person under section 3(23) needs to be complied.

- Thus, not being a legal concern, the proprietorship concern cannot sue and be sued unless it is represented by a proprietor.

2. Also, in *In Miraj Advertising Corporation vs. Vishaka Engineering* 115 (2004) DLT 471⁴ it was that -

- proprietorship firm is not a legal entity - it is only the proprietor of the firm who is a legal entity and as such the petition should have been filed by the sole proprietor in his name on behalf of his sole proprietorship firm.

- It was further held by the learned trial court that the present suit had been brought in the name of M/s. Miraj Marketing Corporation through one authorized representative Mr. Amitabh Sharma who was not the proprietor and no authority of Mr. Amitabh Sharma was proved on record.

This judgement was referred in the case of in the case of *R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd.* [IB-722/ND/2019] NCLT, New Delhi order dt. 23.09.2019⁵

3. A trade union is considered as a person. Accordingly in the case of *JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. & Ors.* [Civil Appeal No. 20978 of 2017] SC order dt. 30.04 2019⁶ that -

- trade union' is an entity established under a statute i.e. the Trade Unions Act, 1926 and is therefore, a 'person' under section 3(23) of the Code.

- Application by operational creditor. —(1) An operational creditor, shall make an application for initiating the corporate insolvency

- In this Part, unless the context otherwise requires, Sec 5(20) "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.

- Section 5 (21) of the code⁷ defines operational debt as follows: "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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.

- Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 states that an operational credit shall make an application for initiating the corporate insolvency resolution process against a corporate debtor. An operational creditor refers to any persons as defined under Section 2(23) of the code.

- On a reading of the relevant statutory provisions (as referred in several provisions of industrial disputes and trade unions Act), what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Sections 3(23) of the Code.

- This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorized to make such claim on behalf of a workman.

- Further, a registered trade union recognized by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act.

4. It was held in *Shri Shakti Dyeing Works Vs. Berawala Textiles Pvt. Ltd.* [CP (IB) No. 854/NCLT/AHM/2019] NCLT, Ahmedabad order dt. 25.01.2021⁸ that -

- On perusal of the records it is found in the application filed in NCLT that the head "name of the Operational Creditor" it is written as "M/s. Shri Shakti Dyeing Works".

- A proprietorship concern does not fall within the purview of "person" as per section 3(23) for the purpose of filing an application under section 9 of the Code. Proprietorship concern cannot sue and be sued unless it is represented by a proprietor.

Accordingly, it was held in the aforesaid case by the Court that -

- on perusal of the records it is found that in form 5 under the head "name of the Operational Creditor" it is written as "M/s. Shri Shakti Dyeing Works".

- It is to be noted here that a proprietorship concern is not a legal person and it cannot authorize any person, moreover the application is filed by a proprietorship concern.

- Thus, not being a legal concern, the proprietorship concern cannot sue and be sued unless it is represented by a proprietor. On this count alone the application is bad and is not maintainable.

Conclusion:

A person under the code, 2016 need to comply with section 3(23) of the code. Accordingly, it was held that a proprietorship which does not fall under Section 3(23) of the code is not considered as a person. However, a trade union is considered as a person because a trade union is established under the statute under section 3(23)(g) of Code

Reference:

1. Act 1 of 2016
2. Act 2 of 1999
3. *R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd.* [IB- 722/ND/2019] NCLT, New Delhi order dt. 23.09.2019, quoted by Frequently Asked Questions on the IBC, 2016 (Revised January 2022 Edition) published by Committee on IBC, ICAI, New Delhi, 2022.
4. *Miraj Advertising Corporation vs. Vishaka Engineering* 115 (2004) DLT 471.
5. *R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd.* [IB- 722/ND/2019] NCLT, New Delhi order dt. 23.09.2019⁵
6. *JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. & Ors.* [Civil Appeal No. 20978 of 2017] SC order dt. 30.04 2019, quoted by Frequently Asked Questions on the IBC, 2016 (Revised January 2022 Edition) published by Committee on IBC, ICAI, New Delhi, 2022.
7. Act 1 of 2016
8. *Shri Shakti Dyeing Works Vs. Berawala Textiles Pvt. Ltd.* [CP (IB) No. 854/NCLT/AHM/2019] NCLT, Ahmedabad order dt. 25.01.2021, quoted by Frequently Asked Questions on the IBC, 2016 (Revised January 2022 Edition) published by Committee on IBC, ICAI, New Delhi, 2022.