

Who is not entitled to initiate a CIRP: A Review Study

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Abstract

Introduction:

The initiation of the Corporate Insolvency and Bankruptcy Process (CIRP) is a major step under Sections 7, 9, and 10 of the Insolvency and Bankruptcy Code, 2016¹ (IBC/code). These provisions, with other provisions, provide for the people entitled to initiate the CIRP under IBC. It is understood that Financial Creditors, Operational Creditors, and Corporate Debtors can initiate CIRP. Section 11 of the IBC very comprehensively provides for the few persons who shall not be entitled to initiate the corporate insolvency process. In this paper, an attempt is made to comprehend the persons who are not entitled to initiate the CIRP, supported by judicial pronouncements on the subject. The judicial pronouncements focused on specific cases where winding-up petitions were pending in Courts under the Companies Act, 2013, prior to the enactment of the IBC.

Who is not entitled to initiate the CIRP?

In terms of section 11 of the Code, the following categories of persons are not entitled to initiate the CIRP.

- (a) a corporate debtor already undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or
- (b) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- (c) a corporate debtor having completed the corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (d) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
- (e) a corporate debtor or a financial creditor who has violated any of the terms of a resolution plan which was approved twelve months before the date of making of an application; or
- (f) a corporate debtor in respect of whom a liquidation order has been made.

Further, *in terms of explanation to this section*, for the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

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However, a corporate debtor referred to is not prevented from initiating a corporate insolvency resolution process against another corporate debtor.

Judicial pronouncements as to persons not entitled to make an application:

- (a) a corporate debtor already undergoing the corporate insolvency resolution process - Section 11(a) of the Code:

A corporate debtor once admitted under section 7 and further CIRP is in progress, at whatever stage, cannot file an application.

In the case of **Innovative Industries Ltd. Vs. Kumar Motors Pvt. Ltd. [CA (AT) (Ins.) No. 181 of 2017] NCLAT order dt. 09.02.2018²** it was held that -

- Since the HC already admitted the winding up proceedings and ordered the winding up of the CD, the question of initiation of CIRP against the same CD does not arise.
- In the present case, the High Court has already passed winding orders, and entertaining another petition does not arise
- In view of the aforesaid findings, we are not inclined to interfere with the impugned order.
- We find no merit in this appeal; it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Before arriving at the above conclusion, the Adjudicating Authority examined several notification issues under the code, Companies Act, 2013, Companies Act, 1956, etc, to establish the said view. Some of the observations of the AA in this regard were that -

- The Appellant- 'Innoventive Industries Limited' filed an application under section 7 the 'Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against 'Kumar Motors Private Limited'- ('Corporate Debtor') on the ground that the said Respondent defaulted for making repayment of Rs. 24,06,52,849.50/- along with interest. Company Appeal (AT) (Insolvency) No. 181 of 2017
- The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, rejected the application on the ground of pendency of a winding-up proceedings against the 'Corporate Debtor' and left the question open for consideration whether the application was barred by limitation or under section 11 (b) of the 'Code' or due to pendency of the arbitration proceedings.
- The question that arises for consideration in this appeal is whether an application under Section 7 of the 'I&B Code' can be rejected on the ground of pendency of a winding-up?
- The Adjudicating Authority, having noticed the provisions of Section 434 of the Companies Act, 2013 and Section 255 of the 'I&B Code, as follows:

So, by reading section 255 of the Code and schedule thereto, it is evident that the source for amendment for section 434 of Companies Act 2013 is from section 255 of this code, therefore when it is evident that Section 434 is amended in such a way that High Courts, as prescribed by Central Government, can proceed with pending winding-up matters other than the winding-up matters transferred to NCLT, it has to be construed that the source for saving winding up proceedings pending before High Courts has come from section 255 of this code."

Therefore, the amendment to section 434 of the Companies Act 2013 is based on section 255 of the code, hence the observation.

(b) **Jai Ambe Enterprise Vs. S.N. Plumbing Pvt. Ltd. [MA 78/2018 in CP 1268/I&BC/NCLT/MB/MAH/2017] NCLT, Mumbai order dt. 06.02.2018³** Two parallel insolvency proceedings cannot run against a CD.

(c) **A CD under liquidation is not entitled to make an application to initiate CIRP in terms of section 11(d) of the IBC:**

In the case of Abhay N. Manudhane Vs. Gupta Coal India Pvt. Ltd. [CA (AT) (Ins.) No. 786 of 2019] NCLAT order dt. 01.10.2019⁴ it was established that CD under liquidation is not entitled to make an application to initiate CIRP in terms of section 11(d). In the appeal before NCLAT, it was observed that -

- On 01.10.2019, this appeal has been preferred by the Liquidator of Gupta Coal India Pvt. Ltd. ('Corporate Debtor') against the order dated 30th May, 2019, passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench.
- By the impugned order, the application under section 60(5) of the code was preferred by the Liquidator for the institution of suit or other legal proceedings on behalf of the 'Corporate Debtor' under Liquidation in the Courts/ Tribunals situated within the jurisdiction of NCLT ordering Liquidation has been rejected.
- [Under section 60(5)(c) of the code, the tribunal has been conferred with the jurisdiction to entertain and dispose of any question of law or facts "arising out of or in relation to the Insolvency resolution or liquidation process of Corporate Debtor].
- Learned Counsel appearing on behalf of the Appellant referred to Section 33(5) of the Code to suggest that 'no suit or other legal proceeding shall be instituted by or against the corporate debtor', provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority'.
- It is submitted that in this background, the Appellant intends to file an application under section 9 of the code, against different companies, there being a debt payable to the present 'Corporate Debtor' against other companies or against other 'Corporate Debtors'.
- However, such submission was not accepted in view of the specific prohibition under Section 11(d) of the Code. Section 11(d) of the code is a corporate debtor in respect of whom a liquidation order has been made. Explanation. For the purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.
- From clause (d) of section 11, it is clear that a 'Corporate Debtor' in respect of whom a liquidation order has been made is not entitled to make an application to initiate a 'Corporate Insolvency Resolution Process' under Chapter II of the code, which deals with the liquidation process.
- That means it cannot file any application under sections 7 and 9 of the code.
- In the circumstances, if the Adjudicating Authority has refused to grant permission to file an application under Section 9 of the Code. The appeal was accordingly dismissed.

(d) Section 11 of the code does not come in the way of admission under section 7 of the code, where a winding up order is not issued on a petition under the Companies Act:

It was held in the case of Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd. [Civil Appeal No. 818 of 2018] SC order dt. 22.01.2019⁵, that -

- On January 22, 2019, the Hon'ble Supreme Court of India in the matter of Forech India Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [Civil Appeal No. 818 of 2018] has held that a financial creditor's application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") is an independent proceeding which must be decided in accordance with the provisions of the Code notwithstanding the winding up petitions filed against the same corporate debtor under the provisions of Companies Act, 1956. The instant case arose from an operational creditor's appeal to continue with a winding-up petition filed by such operational creditor in the year 2014.

The relevant extract of the Supreme Court orders in respect of the said petition⁶ is as under:

- "This section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made.

- From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9, as the case may be, as has been held by the Appellate Tribunal.
- Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant.
- However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application, which has been admitted by the Tribunal, is clearly an independent proceeding which must be decided in accordance with the provisions of the Code."

(e) Upholding Amendments to sections 11 and 32 A of the Code - Constitutional validity established:

In the case of Manish Kumar Vs. Union of India & Anr. [Writ Petition (C)No.26 of 2020 with other writ petitions] SC order dt.19.01.2021⁷ the petitions were collectively presented by several petitioners challenging the amendments to Code - vide section 7(1) and Sec 32A of the Code.

The Insolvency and Bankruptcy Code (Amendment) Act, 2020, among others, inserted three provisos to section 7(1), an additional explanation to section 11, and section 32A in the code. These provisions were challenged in this writ petition under Article 32 of the Constitution of India. The Hon'ble Supreme Court, its 465-page judgement, while upholding these amendments, made important findings and observations and issued directions.

The crux of the same relates to :

- The intention of the legislature was always to target the CD only insofar as it purported to prohibit application by the CD against itself, to prevent abuse of the provisions of the Code.
- It could never be the intention to create an obstacle in the path of the CD, in any of the circumstances contained in section 11, from maximizing its assets by trying to recover the liabilities due to it from others.
- The judgment was very elaborate, with more than 400 pages, and comprehensive substantiation on how and why the amendments were made and their constitutional validity and relevance.

Conclusion:

The code prescribes that a person is not entitled to apply for CIRP under section 11 of the code. The paper focused on section 11 of the code and other relevant sections, substantiation of the judicial pronouncements. The paper dealt with certain circumstances where a winding order is issued. The judicial pronouncements also covered cases where petitions were filed under the Companies Act, 2013, with implications under Section 11 of the Code. Once a winding-up order is issued, certain persons are not entitled to file an application under CIRP.

References:

1. Act 31 of 2016.
2. Innoventive Industries Ltd. Vs. Kumar Motors Pvt. Ltd. [CA (AT) (Ins.) No. 181 of 2017] NCLAT order dt. 09.02.2018.
3. Jai Ambe Enterprise Vs. S.N. Plumbing Pvt. Ltd. [MA 78/2018 in CP 1268/I&BC/NCLT/MB/MAH/2017] NCLT, Mumbai order dt. 06.02.2018, quoted by Frequently Asked Questions on the IBC, 2016 (Revised January 2022 Edition), published by Committee on IBC, ICAI, New Delhi, 2022.
4. Abhay N. Manudhane Vs. Gupta Coal India Pvt. Ltd. [CA (AT) (Ins.) No. 786 of 2019] NCLAT order dt. 01.10.2019.
5. Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd. [Civil Appeal No. 818 of 2018] SC order dt. 22.01.2019.
6. Ibid.
7. Manish Kumar Vs. Union of India & Anr. [Writ Petition (C)No.26 of 2020 with other writ petitions] SC order dt.19.01.2021.
8. <https://taxguru.I/corporate-law/analyis-sc-judgment-case-manish-kumar-vs-uoi.html>.