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APPLICATIONS BY FINANCIAL AND OPERATIONAL CREDITORS ON THE BASIS OF DECREES OR AWARDS

TRACING THE EVOLUTION OF THE JUDICIAL POSITION

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SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA I AHMEDABAD

Introduction

There cannot be any doubt about the fact that the Insolvency and Bankruptcy Code, 2016 ('**the Code**') has been a truly ground-breaking piece of legislation in the Indian judicial perspective. A rich body of precedents have already been laid down, in the short span of five years or so from the time the Code came into existence, by the judicial authorities, touching upon various issues that have emanated with regard to the interpretation of various provisions of the Code.

However, certain issues in this regard have proved to be especially intriguing, as they may have spawned conflicting judgments before being conclusively settled or may yet remain to be settled as such. One such issue is whether an application by a financial creditor or an operational creditor, under the provisions of the Code, can be maintained on the basis of a decree of Court or an arbitral award (which is executable in India as if it was a decree of a civil court, under the provisions of the Arbitration and Conciliation Act, 1996)[1] obtained by such financial creditor or operational creditor against the corporate debtor being sought to be admitted into the Corporate Insolvency Resolution Process ('**CIRP**') under the aegis of the Code. Another closely linked issue which has troubled the judicial authorities is that even if such an application is maintainable under the Code, whether the period of limitation for the same should be computed from the initial date of default by the corporate debtor or from the date of such decree/award.

The seeds of this fraught issue lie in the definitions of 'claim', 'creditor', 'debt', 'default', 'financial debt', 'financial creditor', 'operational debt' and 'operational creditor'. This paper will therefore commence with a brief look at these important definitions, as defined in the Code. We will also look at whether the Forms in which financial creditors and operational creditors are required to make their applications before the Hon'ble NCLT, being Form 1 and Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('**the Rules**'), throw any light on the question(s) at hand. We will thereafter proceed to trace the evolution of the judicial position on the issue, both on the question of maintainability of an application basis a decree/award as well as the aforementioned issue of computation of limitation, through an analysis of the relevant judgments of the Hon'ble NCLTs, Hon'ble NCLAT and the Hon'ble Supreme Court.

Analysis

1. A few relevant provisions of the Code and a look at the application Forms under the Rules:

Prior to embarking upon a discussion as to whether an application may be brought against a corporate debtor by a financial creditor or an operational creditor on the basis of a decree or an award, it will be apposite to note a few of the relevant provisions of the Code which may explain the genesis of this issue itself:

Section 3(6) of the Code defines a 'claim' as follows:

> *"(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;*
> *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured."*

[1] Section 36(1) of the Arbitration and Conciliation Act, 1996 states as follows:
"36. Enforcement. – (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court." (emphasis supplied)

(emphasis supplied)

Section 3(10) of the Code defines a 'creditor' as follows:

> "*"creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder*;" (emphasis supplied)

Section 3(11) of the Code defines a 'debt' in the following manner:

> *"a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt."*
>
> (emphasis supplied)

Section 3(12) of the Code then goes on to define 'default' in the following manner:

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

From the aforementioned definitions, it becomes apparent that a 'creditor' may have a 'claim' (which may or may not be reduced to a judgment) against another person, and the liability or obligation in respect of such claim is a 'debt' which is owed by such person, i.e. the debtor to the creditor. Further, a 'debt' may also include an 'operational debt' or 'financial debt', as defined thereafter in the Code.

Section 6 of the Code states that when a corporate debtor commits a 'default' within the meaning of the Code, a financial creditor/an operational creditor/the corporate debtor itself may initiate CIRP in respect of such corporate debtor in the manner provided in Chapter II of Part-II of the Code. Part-II of the Code contains the mechanism for the '*Insolvency Resolution and Liquidation of Corporate Persons'*.

It is also apparent, from the definitions reproduced hereinabove, that a 'creditor', within the meaning of the Code, "*includes*" a financial creditor, an operational creditor as well as a 'decree holder'. But does that mean that these terms, i.e. 'financial creditor', 'operational creditor' and 'decree holder' are exclusive of each other or a decree holder can also be a financial creditor or an operational creditor' on the basis of such decree?

A 'financial creditor' has been defined at Section 5(7) of the Code as follows:

> *"any person to whom a financial debt is owed and includes any person to whom such debt has been legally assigned or transferred."*
>
> (emphasis supplied)

A 'financial debt' has been defined at Section 5(8) of the Code in the following manner:

> *"a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–*
> *(a) money borrowed against the payment of interest;*
> *(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

***Explanation**. -For the purposes of this sub-clause, -*
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;"

An 'operational creditor' has been defined at Section 5(20) of the Code as follows:

"a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

(emphasis supplied)

The definition of 'operational debt' is provided at Section 5(21) of the Code in the following manner:

"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."

From a perusal of the definitions of 'financial creditor', 'financial debt', 'operational creditor' or 'operational debt', it is therefore not immediately apparent whether the same would also include a 'creditor' who is a 'decree holder' or not. It is this immediate lack of clarity that has led to the passing of multiple conflicting judgments of this issue, as we will proceed to examine hereinbelow. However, prior to that, we may briefly examine the Forms in which a financial creditor and an operational creditor are required to prefer their applications, being Form 1 and Form 5 of the Rules respectively, to see whether any light can be shed on the issue by the same. It may be seen that at Part-V of Form 1 as well as Form-5, which requires the financial/operational creditor to provide the relevant documentation evidencing the corporate debtor's default towards such financial/operational debt, the Form provides the creditor with the opportunity to adduce "*Particulars of an order of a Court, Tribunal or Arbitral Panel adjudicating on the Default, if any*". It was also observed by the Hon'ble NCLAT, at paragraph 23 of its judgment in *M/s. Annapurna Infrastructure Private Limited.* v. *Messrs. SORIL Infra Resources Limited*[2], that "*the order passed by Arbitral Panel has been cited as one of the document, record and evidence of default*" at Form 5 of the Rules. Therefore, it is evident that that an order/decree/award may be adduced by a financial creditor or an operational creditor as proof of a financial or operational debt that has not

[2] *M/s. Annapurna Infrastructure Private Limited v. Messrs. SORIL Infra Resources Limited,* [Company Appeal (AT) (Insolvency) No. 32 of 2017, before the Hon'ble NCLAT, judgment dated August 29, 2017].

been honoured by the corporate debtor. However, can the non-payment of an adjudicated amount by a corporate debtor to a creditor, pursuant to a decree/award being passed against such corporate debtor, be said to constitute a financial debt or operational debt by itself? We will now proceed to examine how the concerned judicial authorities have attempted to answer this question.

2. Early judicial observations

It may be beneficial to note some early judicial observations on the issue at hand, i.e. whether an application under Section 7[3] or Section 9[4] of the Code could be maintained by

[3] Section 7 of the Code reads as follows:

"*7. **Initiation of corporate insolvency resolution process by financial creditor**.*

(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish –

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b)the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3):

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

[4] Section 9 of the Code reads as follows*:*

"***9. Application for initiation of corporate insolvency resolution process by operational creditor**.*

a financial creditor or an operational creditor respectively on the basis of a decree or an award, before delving into the cases where the judicial authorities were directly called upon to decide on this issue. It may be noted that in this section of the paper, we will only look at some relevant observations made by the judicial authorities on this issue in certain judgments, while dealing with or deciding upon other issues which do not form the crux of this paper.

One such observation was made by the Hon'ble NCLAT in its judgment in *Kirusa Software Private Limited v. Mobilox Innovations Private Limited*[5]. Though in this judgment the Hon'ble NCLAT dealt with what constitutes a 'pre-existing dispute' in the context of applications filed by operational creditors under Section 9 of the Code (and such judgment of the Hon'ble NCLAT was set aside by the Hon'ble Supreme Court subsequently on this point[6]), the Hon'ble NCLAT herein seems to have observed that decree-holders can be considered operational creditors under the ambit of the Code, in the following words:

> *"32. There may be other cases such as a suit relating to existence of amount of*

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) 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, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order–

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no 3 [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or
there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

[5] *Kirusa Software Private Limited v. Mobilox Innovations Private Ltd.,* [Company Appeal(AT)(Insolvency) 6 of 2017, before the Hon'ble NCLAT, judgment dated May 24, 2017].

[6] *Kirusa Software Private Limited v. Mobilox Innovations Private Limited,* (2018) 1 SCC 353.

debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed; an award has been passed by Arbitral Panel, though petition under Section 34 of Arbitration and Reconciliation Act, 1996 may be pending. In such case the question will arise whether a petition under Section 9 will be maintainable particularly when it was a suit or arbitration proceeding is not pending, but stand decided? Though one may argue that Insolvency resolution process cannot be misused for execution of a judgement and decree passed in a suit or award passed by an arbitration Tribunal, but such submission cannot be accepted in view of Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment."

(emphasis supplied)

However, the Hon'ble Supreme Court, in its judgment in *K. Kishan v. M/s. Vijay Nirman Company Private Limited*[7], while deciding upon whether an application under Section 9 of the Code which had been preferred by an operational creditor on the basis of an arbitral award which had been challenged under Section 34 of the Arbitration and Conciliation Act, 1996 ('**the 1996 Act**') by the corporate debtor and where such proceedings were pending adjudication, is maintainable under the provisions of the Code, relied upon its judgment in *Mobilox Innovations*[8] and issued a stern warning regarding the provisions of the Code being misused by decree/award holders in lieu of debt enforcement procedures recognised in law:

"22. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures."

However, subsequently in the *M/s. Vijay Nirman* (supra) judgment, the Hon'ble Supreme Court seems to have recognized that an application by an operational creditor under the Code may be maintainable basis an arbitral award, where such award has become final and not amenable to be challenged any further, in the following words:

"28. We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation."

(emphasis supplied)

3. Some early cases on the issue- a spate of applications based on foreign decrees/awards

Strangely, quite a few of the chronologically earliest cases that this author has come across which directly concerns the issue at hand, i.e. whether an application under Section 7 or Section 9 of the Code based upon a decree/award held by the creditor against the corporate debtor is maintainable, were preferred on the basis of foreign decrees/awards.

In the matter of *V.R. Hemantraj* v. *Stanbic Bank Ghana Limited*.[9], the Hon'ble NCLAT was

[7] *K. Kishan* v. *Messrs. Vijay Nirman Company Private Limited*, (2018) 17 SCC 662.

[8] See supra note at 6.

[9] *V.R. Hemantraj* v. *Stanbic Bank Ghana Limited*, [Company Appeal(AT)(Insolvency) No.213/2018, before the Hon'ble NCLAT, judgment dated August 29, 2018].

faced with a challenge by the corporate debtor to an order of admission passed by the Hon'ble NCLT, Chennai Bench in an application under Section 7 of the Code, wherein the corporate debtor contended that adequate proof of default had not been adduced by the financial creditor and its application was based upon an *ex-parte* decree passed by the High Court of Justice, Queen's Bench Division Commercial Court, which ought not have been allowed by the Hon'ble NCLT. Dismissing such appeal, the Hon'ble NCLAT held as follows:

> *"5. It was further submitted that the document relied upon by 1st Respondent is a 'foreign decree' of the High Court of Justice, Queens Bench Division Commercial Court which is an ex-parte decree. The said decree cannot be treated to be a record of default. It is only a declaration entitling the applicant to a certain sum of money.*
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> *6. However, we are not inclined to accept the aforesaid submission, as a record of decree, is a proof of 'debt' and the record of default is required to be enclosed separately to suggest that no payment has been made in terms of decree.*
> *…*
> *13. Admittedly 'M/s Rajkumar Impex Ghana Ltd', a subsidiary of the Corporate Debtor, was granted medium term loan by 1st Respondent. It is also not in dispute that 'M/s Rajkumar Impex Pvt Ltd' (Corporate Debtor) which is the holding company of 'M/s Rajkumar Impex Ghana Ltd' has executed a guarantee in favour of the 'Stanbic Bank Ghana Ltd'. The guarantee given by the Corporate debtor, is on record. The decree passed by the High Court is an evidence in support of such guarantee. As admittedly the debt amount has not been paid by the Corporate Debtor, the Adjudicating Authority rightly admitted the application."*
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> (emphasis supplied)

The aforementioned judgment of the Hon'ble NCLAT in *V.R. Hemantraj* (supra) was also upheld by the Hon'ble Supreme Court[10].

In *Usha Holdings LLC* v. *Francorp Advisors Private Limited*[11], where the Hon'ble NCLT had rejected a Section 9 application preferred on the basis of a decree passed by a Court in the United States of America against the corporate debtor *inter alia* on the ground that such decree was to be recognized by a competent Court in India as enforceable prior to any legal action on the basis of the same in India, the Hon'ble NCLAT in appeal from such order of the Hon'ble NCLT held that the Adjudicating Authority under the Code had no authority to decide on the legality or viability of a foreign decree, as follows:

> *"14. In the circumstances, we answer the first question in favour of the Appellant and hold that the Adjudicating Authority has no jurisdiction to decide the question of legality and propriety of a foreign judgment and decree in an application under Sections 7 or 9 or 10 of the 'I&B Code'. The second question relating to maintainability is answered against the Appellants, they being not the 'Operational Creditor'."*
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> (emphasis supplied)

However, in its judgment in *Peter Johnson John (Employee)* v. *KEC International Limited*.[12], the Hon'ble NCLAT held that an application under Section 9 of the Code preferred by the operational creditor on the basis of an *ex-parte* decree passed by the

[10] *V.R. Hemantraj* v. *Stanbic Bank Ghana Ltd.*, 2018 SCCOnline SC 3712.

[11] *Usha Holdings LLC* v. *Francorp Advisors Private Limited*, [Company Appeal (AT) (Insolvency) No. 44 of 2018, before the Hon'ble NCLAT, judgment dated November 30, 2018].

[12] *Peter Johnson John (Employee)* v. *KEC International Limited*, [Company Appeal (AT) (Insolvency) No. 188 of 2019, before the Hon'ble NCLAT, judgment dated July 3, 2019].

Labour Court of Kinshasa in the Democratic Republic of Congo, which is a '*non-reciprocating territory*'[13] within the meaning of the Code of Civil Procedure, 1908 ('**the CPC**'), ought to be rejected unless the enforceability of such decree was adjudicated upon by a competent Civil Court in India in keeping with Section 13 of the CPC[14]. The Hon'ble NCLAT held as follows:

> *"8. Learned counsel for Appellant tried in vain to persuade us that the requirement of filing of a suit on the foreign decree in keeping with the mandate of Section 13 of CPC would not preclude the Appellant – Operational Creditor from triggering Corporate Insolvency Resolution Process. This argument, on the face of it, is sound neither in technique nor in substance. One wonders as to how can an Operational Creditor seek initiation of Corporate Insolvency Resolution Process without the debt having crystallized and being payable in law or in fact…It is not disputed that such ex-parte decree of a foreign court would not be executable in India until adjudicated upon by a Civil Court in India within the ambit of Section 13 of CPC and having regard for the same, the Appellant has chosen to file suit before Hon'ble High Court of Bombay, which is still subjudice. Unless the decretal amount is adjudicated upon by the Hon'ble High Court of Bombay as a legally payable claim, the same would not constitute a "Debt" in the hands of Appellant – Operational Creditor and unless the debt is crystallized and payable in law, the issue of default would not be attracted. Admittedly, Appellant is pursuing the litigation before the Bombay High Court in regard to the foreign decree and claim payable thereunder. He cannot be permitted to circumvent the appropriate legal remedy, already pursued, by invoking provisions of Section 9 of I&B Code, thereby defeating the fundamental provisions of law governing execution of a foreign decree obtained in exparte from a court located in a non-reciprocating territory. Such course is neither legally permissible nor warranted as admittedly the matter is not covered under Section 44A of CPC. The argument advanced warrants outright rejection and is accordingly rejected."*
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> (emphasis supplied)

The Hon'ble NCLT, Mumbai Bench, in the case of *Agrocorp International (PTE) Limited* v. *National Steel and Agro Industries Limited*[15], dealt with an application preferred under Section 9 of the Code, the cause of action of which was the non-payment by the corporate debtor of an amount held to payable to the operational creditor in an arbitration seated in the United Kingdom under the Grain and Feed Trade Association ('**GAFTA**') Rules. The corporate debtor contended that any legal action in India relying upon a foreign-seated arbitral award could not be maintainable unless such award was first found to be enforceable under the provisions of Chapter-1 Part-II of the 1996 Act, and thus the operational creditor's application ought to be rejected. The corporate debtor relied upon

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[13] The Explanation to Section 44A of the CPC defines a '*reciprocating territory*' as follows:

""Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and superior Courts, with reference to any such territory, means such Courts as may be specified in the said notification."

[14] Section 13 of the CPC reads as follows:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except--

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of 1 [India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India."

[15] *Agrocorp International (PTE) Limited* v. *National Steel and Agro Industries Limited,* [CP(IB)No. 798/MB/C-IV/2019, before the Hon'ble NC;T, Mumbai Bench, order dated June 9, 2020].

some judgments of the Indian Courts in this regard[16]. However, the Hon'ble NCLT examined Section 46 of the 1996 Act[17] and came to the conclusion that any foreign-seated arbitral award passed by a reciprocating territory (in this case the United Kingdom) was capable of execution in India under Section 44A of the CPC and therefore the same has to be held to be binding upon the parties to the arbitration. As far as the question of the foreign award still being amenable to judicial challenge in the appropriate jurisdiction was concerned, as contended by the corporate debtor relying upon the Hon'ble Supreme Court's judgment in *Messrs. Vijay Nirman* (supra), the Hon'ble NCLT rejected such contention and held as follows:

> *"This Bench is of the considered view that it is not possible to wait indefinitely for the Corporate Debtor to challenge the Arbitral Award, and that it has to decide the present petition on the basis of the admitted positions, that is to say, there is an Arbitral Award passed by a competent Arbitral Tribunal after the consideration of the positions of both the sides, and there is no challenge to the Arbitral Award dated 26 16.04.2018 in a manner known to law. Hence the same cannot be considered as a pre-existing dispute, and the objection of the Learned Counsel for the Corporate Debtor on this count is rejected."*
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> (emphasis supplied)

Without going into the question of whether the admission of the Section 9 application in the *Agrocorp International* (supra) case by the Hon'ble NCLT was a legally valid and correct conclusion or not, this author is of the view that the Hon'ble NCLT, while taking a note of the judgments relied upon by the corporate debtor on the point of whether a foreign award can be considered to be binding upon the parties without the same first being held to be enforceable in India under the provisions of the 1996 Act[18], has not adequately dealt with such judgments and/or contentions of the corporate debtor. Further, Mishra, S. and Srivastava, P., in an article analysing the *Agrocorp International* (supra) judgment, argue as follows:

> *"The reliance placed on section 44A of the CPC is incorrect. Section 44A allows for the execution of decrees passed by a court in a reciprocating territory. While the concept of a 'reciprocating territory' is applicable to the execution of judgments given by a court in a foreign territory, the section expressly excludes its application to foreign awards. This is because there is a separate mechanism under the Arbitration Act to determine the enforcement of a foreign award before it can be executed. Since the Arbitration Act is lex specialis, its procedure cannot be bypassed by the CPC."*[19]
>
> (emphasis supplied)

The above seems to be a plausible view given the express exclusion of arbitral awards

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[16] The judgments relied upon by the corporate debtor in this regard were those in *Noy Vallesina Engineering SpA* v. *Jindal Drugs Limited,* pronounced by the Hon'ble Bombay High Court and reported at (2006) 5 BomCR 155 and *Sea Stream Navigation Limited v. LMJ International Limited,* pronounced by the Hon'ble Calcutta High Court and reported at (2013) SCCOnline Cal 1940.

[17] Section 46 of the 1996 Act reads as follows:

*"**When foreign award binding**. – Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award."* (emphasis supplied)

[18] Section 48 of the 1996 Act provides the conditions for enforcement of a foreign award recognized by Chapter-I of Part-II of the 1996 Act.

[19] *'NCLT's Riddled Take on Enforcement of Foreign Awards under the IBC'*, Misra, S. & Srivastava, P., available at https://indiacorplaw.in/2020/09/nclts-riddled-take-on-enforcement-of-foreign-awards-under-the-ibc.html, last visited on January 30, 2022.

from the scope of Section 44A of the CPC[20] as well as the provisions contained in the 1996 Act regarding enforcement of foreign awards.

In the next section of this paper, we will look at and analyse the judgments passed by the judicial authorities on the issue of maintainability of an application under the Code, preferred on the basis of a decree or an award against the corporate debtor, where such decrees or awards were passed by Courts/Tribunals in India.

4. Maintainability of applications preferred on the basis of decrees or awards

As has been noted hereinabove, the Hon'ble NCLAT in the *Messrs*. *SORIL Infra Resources Limited*. (supra) judgment had observed that an arbitral award is a valid record or evidence of default by a corporate debtor with regard to an operational debt. In that case, the Hon'ble NCLAT had also held that pendency of an application under Section 37 of the 1996 Act would not constitute a 'pre-existing dispute' with regard to an operational debt, before the Hon'ble Supreme Court overruled that position of law and held that pendency of an application under Section 34 or Section 37 of the Code would amount to a 'pre-existing dispute' as the operational debt cannot be held to have been crystalized, in its judgment in *Messrs. Vijay Nirman* (supra), as noted above. Be that as it may, the Hon'ble NCLAT also seems to have indicated in the following words in the *Messrs. SORIL Infra Resources Ltd*. (supra) judgment, without having ruled directly on the issue, that non-payment of an arbitral award itself may give rise to an operational debt under the Code:

> "*On the other hand, as apparent from Form 5 of Rules, 2016 for the purpose of I&B Code, and Arbitral Award has been held to be a document of debt and non-payment of awarded amount amounts to 'default' debt. Therefore, the aforesaid decision referred by learned counsel for the respondent is of no help to the respondent*."
>
> (emphasis supplied)

In the case of *HDFC Bank Limited* v. *Bhagwan Das Auto Finance Limited*[21], wherein the Hon'ble NCLAT was called upon to decide on the challenge posed by the financial creditor to an order of rejection of an application under Section 7 of the Code by the Hon'ble NCLT, Kolkata Bench, it was *inter alia* held by the Hon'ble NCLAT that any reliance on an arbitral award obtained by the financial creditor against the corporate debtor could not prove 'default' by the corporate debtor, as an application under Section 7 of the Code was not maintainable basis the same. It was in fact observed by the Hon'ble NCLAT that:

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[20] Section 44A of the CPC reads as follows:

"*44A. **Execution of decrees passed by Courts in reciprocating territory**. –*

(1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1.-- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and superior Courts, with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.-- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment." (emphasis supplied)

[21] *HDFC Bank Limited v. Bhagwan Das Auto Finance Limited,* [Company Appeal (AT) (Insolvency) No. 1329 of 2019, before the Hon'ble NCLAT, order dated December 12, 2019].

> *"6. If it is treated as application under Section 7 for execution of award, in said case it is to be held that the application was filed with malicious intent not for purpose of resolution of insolvency or liquidation. However, we are not giving such finding in case of the Bank and hold that the application under Section 7 was barred by limitation."*
>
> (emphasis supplied)

In the case of *Akram Khan* v. *Bank of India Limited*[22], the Hon'ble NCLAT, while setting aside an order of admission in a Section 7 application passed by the Hon'ble NCLT, Mumbai Bench, wherein the financial creditor had *inter alia* relied upon a decree passed by the Ld. Debts Recovery Tribunal ('**DRT**') in its attempt to prove the 'default' of the corporate debtor, held as follows:

> *"11. The aforesaid facts also suggest that the application under Section 7 of the I&B Code was filed for the purpose of execution of the Decree passed by the Debts Recovery Tribunal in favour of the 'Financial Creditor' for the purpose other than for the resolution of insolvency, or liquidation and is covered by Section 65."*

However, the Hon'ble NCLAT seems to have performed an about-turn, albeit only for a while as would be seen hereinbelow, in its position as to whether an application under Section 7 of the Code can be maintained on the basis of a decree, in its judgment in *Ugro Capital Limited* v. *Bangalore Dehydration and Drying Equipment Company Private Limited*[23]. In this case, while allowing an appeal from an order of the Hon'ble NCLT whereby the application was rejected by the Hon'ble NCLT, Bengaluru Bench, it was observed as follows:

> *"The Adjudicating Authority has raised the questions on not taking any steps for filing execution application, even though Review Application is pending. Adjudicating Authority has erroneously rejected the application based on pending review application and for not taking any steps for execution of the decree. Adjudicating Authority was not required to question the reasons for not taking steps for executing the decree in Civil Court. Since the amount is payable to the Financial Creditor and based on the decree passed by the Court, the Financial Creditor was legally entitled to file a petition under Section 7 of the I & B Code.*
>
> *It is important to point out that the definition of creditor provided in Sec 5(10) of the I&B Code provides that "Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder."*
>
> *Based on the decree of the Court this petition was filed U/S 7 of the Code. Since the definition of word creditor in I&B Code includes decreeholder, therefore if a petition is filed for the realisation of decretal amount, then it cannot be dismissed on the ground that applicant should have taken steps for filing execution case in Civil Court*."
>
> (emphasis supplied)

It may however be noted that it appears, from a perusal of the aforesaid judgment of the Hon'ble NCLAT in *Ugro Capital* (supra), that the Hon'ble NCLAT's previous judgments on the issue, i.e. those in *Bhagwan Das Auto Finance* (supra) and *Akram Khan* (supra) were not cited before the Hon'ble NCLAT in this case and thus the same were not considered

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[22] *Akram Khan v. Bank of India Limited,* [Company Appeal (AT) (Insolvency) No. 1092 of 2019, before the Hon'ble NCLAT, judgment dated December 12, 2019].

[23] *Ugro Capital Limited* v. *Bangalore Dehydration and Drying Equipment Company Private Limited,* [Company Appeal (AT) (Insolvency) No. 984 of 2019, before the Hon'ble NCLAT, judgment dated January 22, 2020].

or distinguished in the instant judgment.

Be that as it may, the Hon'ble NCLAT seems to have then again reverted to the position that an application under Section 7 or Section 9 of the Code cannot be maintained on the basis of a decree or an award. In its judgment in *G Eswara Rao* v. *Stressed Assets Stabilisation Fund*[24], the Hon'ble NCLAT observed as follows:

> "*25. In "Binani Industries Limited vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018" decided on 14th November, 2018, this Appellate Tribunal has held that 'Corporate Insolvency Resolution Process' is not a recovery proceeding. It is not a 'litigation' nor it is an auction.*
>
> *26. By filing an application under Section 7 of the I&B Code, a Decree cannot be executed. In such case, it will be covered by Section 65 of the I&B Code, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action.*"
>
> (emphasis supplied)

The Hon'ble NCLAT heavily relied on its aforesaid judgment in *G Eswara Rao* (supra) to reiterate, in the judgment in *Digamber Bhondwe* v. *JM Financial Asset Reconstruction Company Limited*[25], that a decree holder cannot come within the ambit of 'financial creditor' or 'operational creditor', in the following words:

> *"19. We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution and Liquidation For Corporate Person", & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II.*"
>
> (emphasis supplied)

Once again, in its judgment in *Sh. Sushil Ansal* v. *Ashok Tripathi*[26], the Hon'ble NCLAT placed heavy reliance on its judgment in *G. Eswara Rao* (supra) and held, in a case where the application preferred by the financial creditor under Section 7 of the Code was based on a Recovery Certificate[27] issued by the Uttar Pradesh Real Estate Regulatory Authority ('**UP RERA**') against an errant real estate developer being the corporate debtor, as follows:

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[24] *G Eswara Rao* v. *Stressed Assets Stabilisation Fund*, [Company Appeal (AT) (Insolvency) No. 1097 of 2019, before the Hon'ble NCLAT, judgment dated February 7, 2020].

[25] *Digamber Bhondwe* v. *JM Financial Asset Reconstruction Company Limited,* [Company Appeal (AT) (Insolvency) No. 1379 of 2019, before the Hon'ble NCLAT, judgment dated March 5, 2020].

[26] *Sh. Sushil Ansal* v. *Ashok Tripathi,* [Company Appeal (AT) (Insolvency) No. 452 of 2020, before the Hon'ble NCLAT, judgment dated August 14, 2020].

[27] Section 40 of the Real Estate (Regulation and Development) Act, 2016, states as follows:

"40. (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regualtions made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

A Recovery Certificate is issued under the aforementioned provisions of the Real Estate (Regulation and Development) Act, 2016.

> "*22. It has already been noticed in this Judgment that the 'UP RERA', which ordered recovery of amount of Rs.73,35,686.43/- owed to Respondent Nos.1 and 2 in terms of its order dated 10th August, 2019 has forwarded the Recovery Certificate to the Competent Authority for effecting recovery in the manner and as an arrear of land revenue from the Corporate Debtor. In the backdrop of this factual situation, Respondent Nos. 1 and 2 can safely be held to have approached the Adjudicating Authority only with a view to execute the decree in the nature of Recovery Certificate and recover the amount due thereunder. No conclusion other than the one that Respondent Nos. 1 and 2 were seeking execution of the Recovery Certificate issued by RERA and did not file the application under Section 7 of the 'I&B Code' for purposes of Insolvency Resolution, would be available in the facts and circumstances noticed hereinabove. This conclusion is further reinforced by the fact that the Recovery Certificate issued by RERA had been forwarded to the Competent Authority for effecting recovery as arrears of land revenue and the process was underway when Respondent Nos.1 and 2 sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor. It is indisputable that the Recovery Certificate sought to be executed is the end product of an adjudicatory mechanism under the 'Real Estate (Regulation and Development) Act, 2016' and realisation of the amount due under the Recovery Certificate tantamounts to recovery effected under a money decree though mode of execution may be slightly different. In this view of the matter, we are of the considered opinion that the application of Respondent Nos.1 and 2 under Section 7 of 'I&B Code' was not maintainable. It is accordingly held that in their projected capacity as decree-holders Respondent Nos. 1 and 2 could not maintain an application under Section 7 as 'Financial Creditors'*."
>
> (emphasis supplied)

In the facts of the case of *Mr. Prabuddha Sarkar* v. *Messrs. Ascent Buildtech Private Limited*[28] also, the financial creditor had obtained a decree from the UP RERA against the corporate debtor, being a builder, and upon such decree not being honoured, put the same into execution and obtained a Recovery Certificate from the UP RERA against the corporate debtor. The corporate debtor challenged such Recovery Certificate before the Hon'ble Allahabad High Court in a writ petition, whereupon the corporate debtor was directed to deposit a certain amount within a certain timeline by the Hon'ble High Court, which also the corporate debtor failed to do. Thereafter, the financial creditor preferred an application under Section 7 of the Code, which was resisted by the corporate debtor on the strength of the aforementioned judgment of the Hon'ble NCLAT in *Sushil Ansal* (supra). However, the Hon'ble NCLT, New Delhi Bench, was pleased to admit such application after observing that here the application had not been preferred on the basis of the Recovery Certificate only, as the same had been put into execution independently by the financial creditor, and rather the same was only adduced as evidence of the default by the corporate debtor. The judgment in *Sushil Ansal* (supra) was distinguished as follows:

> *"17. Considering the documents on records and submissions made, it prima facie shows that the debt, which had crystalized with respect to the refund of the allotment money as ordered by the UP-RERA, Lucknow, and again confirmed by the Hon'ble Allahabad High Court, which remained unpaid leading to default of payment of the financial debt. Admittedly, the applicant is a decree holder, of a decree passed of UP-RERA Lucknow. In the present case the application under Section 7 is not filed only on the basis of the decree but the applicant has acted one step forward and executed the decree before UP-RERA Lucknow wherein execution order has been passed confirming the payment of debt due to the*

[28] *Mr. Prabuddha Sarkar* v. *Messrs. Ascent Buildtech Private Limited*, [Company Petition No. IB 3085/ND/2019, before the Hon'ble NCLT, New Delhi Bench Court-IV, order dated May 31, 2021].

> *applicant. Further, the corporate debtor has challenged the said execution order of UP-RERA, Lucknow which is pending before the Hon'ble Allahabad High Court wherein the directions are passed against corporate debtor to pay the principal amount within 2 weeks of the receiving of the said order. Hence, the amount of debt as confirmed by the Hon'ble Allahabad High Court ordering to be pay the same has reached finality, no stay against the said order is placed before us. Thus, the amount paid by the applicant to the corporate debtor against the allotment of apartment, which falls under the category of financial debt has remained unpaid. Though the Hon'ble Allahabad High Court is ceased* (sic) *of the matter, for deciding the quantum of interest to be paid, while ordering to pay the principal amount which was allotment money paid by the applicant, bringing the applicant under the umbrella of financial creditor. Thus, in our view, the present applicant though original decree holder, has not filed this application under Section 7 of the code, for execution of decree but to demand the financial debt due and failing which the insolvency resolution of the corporate debtor. The judgment passed by the Hon'ble NCLAT in Company Appeal (AT)(Insolvency) No. 452 of 2020, titled Sushil Ansal Vs. Ashok Tripathi & Ors will not have direct bearing on present case and the applicant qualifies as financial creditor. It also mentioned that the said order has been challenged before the Hon'ble Supreme Court for considering the issue as to whether decree holder fulfills the norms prescribed for being a part of the committee of creditors by virtue of their being financial creditors, as mentioned in its order dated 09.10.2020."*
>
> (emphasis supplied)

It may be apposite to mention here that the judgment of the Hon'ble NCLAT in *G. Eswara Rao* (supra) was overruled by the Hon'ble Supreme Court in its judgment in *Asset Reconstruction Company (India) Limited* v. *Bishal Jaiswal*[29], albeit on a different issue, while that in *Digamber Bhondwe* has also been stayed by the Hon'ble Supreme Court[30] at the time of this paper being authored.

However, the Hon'ble NCLAT, in its judgment in *Ashok Agarwal* v. *Amitex Polymers Private Limited*.[31], was pleased to set aside the impugned order of the Hon'ble NCLT, New Delhi Bench, whereby an application preferred under Section 9 of the Code by an operational creditor on the basis of a consent decree passed by the Ld. Additional District Judge, Saket Court, New Delhi, was held to be not maintainable. While setting aside such order of the Hon'ble NCLT, the Hon'ble NCLAT took note of a plethora of judgments cited by the operational creditor whereby it had been held, by the Courts in India, that an action for execution as a decree as well as a winding up petition on the basis of the same decree, could be maintained side by side in the pre-Code regime. The Hon'ble NCLAT also took note of the fact that the judgment in *Sushil Ansal* (supra) had been stayed by the Hon'ble Supreme Court. The Hon'ble NCLAT therefore went on to hold as follows:

> *"43. Considering the fact that the Appellant/Operational Creditor in the Company petition in IB 185/ND/2019 before the National Company Law Tribunal, the Principal Bench had come out with a plea that the Respondent/Corporate Debtor owes a sum of Rs.8,85,000/- and for which a demand notice dated 11.3.2019 was issued to the Respondent/Corporate Debtor for which no reply was issued by the Respondent/Corporate Debtor to the Appellant/Operational Creditor and this Tribunal taking note of the prime fact that the Appellant/Operational Creditor is a 'Decree Holder' as per the 'Consent Decree' passed on 25.10.2018 in Civil Suit*

[29] *Asset Reconstruction Company (India) Limited* v. *Bishal Jaiswal*, (2021) 6 SCC 366.

[30] Please see order dated July 30, 2020, passed by the Hon'ble Supreme Court in *JM Financial Asset Reconstruction Co. Limited.* v. *Digamber Bhondwe* in Civil Appeal No. 2759/2020.

[31] *Ashok Agarwal* v. *Amitex Polymers Private Limited.*, [Company Appeal (AT) (Insolvency) No. 608 of 2020, before the Hon'ble NCLAT, judgment dated February 5, 2021].

No.6912 of 2016 by the Learned Additional District Judge, Saket Court, New Delhi, this Court comes to an irresistible and inescapable conclusion that a 'Decree Holder' is no way excluded from the purview of the ambit of the term 'Operational Creditor' as per Section 5(20) of The Insolvency and Bankruptcy Code 2016 and the contra view taken by the 'Adjudicating Authority' in the impugned order is clearly held by this Tribunal as an unsustainable one in the eye of Law.

…

47. Section 3(10) of The Insolvency and Bankruptcy Code 2016 defines 'Creditor' and even in the said definition a 'Decree Holder' cannot be excluded to file an Application under the Code. Going by the definition 3(10) of 'Creditor', it includes 'Financial Creditor', 'Operational Creditor'."

(emphasis supplied)

The controversy as to whether an application under Section 7 of the Code can be preferred basis a decree or an award seems to have been laid to rest by the judgment of the Hon'ble Supreme Court in *Dena Bank (now Bank of Baroda)* v. *C. Shivakumar Reddy*[32]. In this case, the Hon'ble NCLT, Bengaluru Bench, had allowed an application under Section 7 of the Code, where the cause of action was *inter alia* based on non-payment by the corporate debtor of the amount specified in a decree and subsequent Recovery Certificate issued by the Ld. DRT against the corporate debtor. The Hon'ble NCLAT had set aside such order of admission passed by the Hon'ble NCLT. Upon such order of the Hon'ble NCLAT being challenged before the Hon'ble Supreme Court, the same was set aside by the Hon'ble Supreme Court and it was held therein as follows:

"129. It is true that the finding of Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited (supra) was rendered in the context of Section 434(1)(b) of the Companies Act 1956, which provided that a company would be deemed to be unable to pay its debts if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company was returned unsatisfied in whole or in part.

130. We see no reason why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC."

(emphasis supplied)

While the Hon'ble Supreme Court has thus recognized that an application under Section 7 of the Code is maintainable on the basis of a decree or an award, whether the same can be said of an application under Section 9 of the Code remains to be conclusively settled, especially in context of the various contradictory judgments of the Hon'ble NCLAT in this regard, as discussed hereinabove. Further, in a standalone context, the aforementioned observation of the Hon'ble Supreme Court at paragraph 130 of the *Dena Bank* (supra) judgment that non-payment pursuant to "*a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt"*, seems to suggest that irrespective of whether the debt initially was in the nature of a financial debt or operational debt, once the same has been reduced to judgment and thereafter not honoured by the corporate debtor, a cause of action would arise under Section 7 of the Code for the creditor. However, the same would be tantamount

[32] *Dena Bank (now Bank of Baroda)* v. *C. Shivakumar Reddy,* (2021) 10 SCC 330.

to changing the nature of the debt (in case the initial debt was covered within the definition of 'operational debt' within the meaning of the Code), which seems like an implausible proposition. Perhaps, such observation is clarified by and is to be read with a subsequent portion of the judgment, wherein the Hon'ble Supreme Court noted that a judgment and/or decree in favour of the financial creditor would give rise to a fresh cause of action to initiate proceedings under Section 7 of the Code, as follows:

> *"143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process…"*
>
> (emphasis supplied)

5. The issue of computation of period of limitation in applications filed on the basis of decrees/awards

It is now settled beyond doubt that the provisions of the Limitation Act, 1963 ('**the Limitation Act**') are applicable to proceedings under the Code[33]. However, when such an application is based upon a decree/award, apart from the issue of maintainability of such application which we have discussed in the previous section, another closely related issue also arises as to what would be the date from which the period of limitation for such proceedings are to be computed, i.e., whether the same is to be computed from the date of the decree/award or the date of initial default by the corporate debtor.

One of the earliest cases where the Hon'ble Supreme Court was called upon to decide on this issue was the case of *Vasdeo R. Bhojwani* v. *Abhyudaya Co-Operative Bank Limited*[34]. In the facts of this case, the financial creditor Bank had declared the account of the corporate debtor as non-performing asset ('**NPA**') in 1999 and obtained a Recovery Certificate from the Ld. DRT against the corporate debtor in the year 2001. Thereafter, the financial creditor filed an application under Section 7 of the Code, which was admitted by the Hon'ble NCLT and upheld on appeal by the Hon'ble NCLAT, on the basis of the financial creditor's contention that non-payment of such amount as specified in the said Recovery Certificate amounted to a continuing wrong and therefore the provisions of the Limitation Act would not be attracted in this case. The Hon'ble Supreme Court, while allowing the appeal of the corporate debtor, relied on its judgment in *Balkrishna Savalram Pujari* v. *Shree Dhyaneshwar Maharaj Sansthan*[35], wherein the difference between a continuing wrong and the continuance of the effects of a wrongful act were elucidated, and held as follows:

> *"4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which limitation would be saved in the present case. This contention is effectively answered by a judgment of three learned Judges of this Court in Balkrishna Savalram Pujari and Others vs. Shree Dnyaneshwar Maharaj Sansthan & Others, [1959] Supp. (2) S.C.R. 476. In this case, this Court held as follows:*
>
> > *"… …. In dealing with this argument it is necessary to bear in mind that s.23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing*

[33] Section 238A of the Code states as follows:

"***238A. Limitation.*** *–*

The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

[34] *Vasdeo R. Bhojwani* v. *Abhyudaya Co-Operative Bank Limited,* (2019) 9 SCC 158.

[35] *Balkrishna Savalram Pujari* v. *Shree Dhyaneshwar Maharaj Sansthan,* 1959 Supp(2) SCR 476.

> *source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that s.23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued..." (at page 496)*
>
> *5. Following this judgment, it is clear that when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking."*
>
> (emphasis supplied)

While the Hon'ble NCLAT, in some subsequent judgments on this issue (which we will discuss hereinbelow) relied on the aforementioned judgment in *Vasdeo R. Bhojwani* (supra) to hold that the computation of limitation should begin from the date of initial default by the corporate debtor and not that of a decree/award, it may be argued that the Hon'ble NCLAT fell into error in such cases by failing to note that in the *Vasdeo R. Bhojwani* (supra) judgment the Hon'ble Supreme Court, at paragraph 5 (quoted hereinabove) clearly observed that the period of limitation in that case began running from the date of the Recovery Certificate, which was issued in 2001, and not the date of the initial default by the corporate debtor, i.e. when its account was declared NPA by the financial creditor Bank in the year 1999.

In the *Akram Khan* (supra) judgment, the Hon'ble NCLAT *inter alia* relied upon the judgment of the Hon'ble Supreme Court in *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd*.[36], and held that the period of limitation could only be computed from the date of the corporate debtor's account being declared NPA by the appellant Bank in that case, and not from the date of the decree being passed by the Ld. DRT as had been contended by the appellant/financial creditor Bank. However, it appears that the Hon'ble NCLAT failed to note that in the *Gaurav Hargovindbhai Dave* (supra) case, the applications filed by the financial creditor had been rejected by the Ld. DRT and therefore there was no scope of computation of limitation period from the date of decree, as no such decree in favour of the financial creditor had been passed in that case.

However, in the *Ugro Capital* (supra) judgment, wherein the Hon'ble NCLAT buckled the trend (at that time) to hold that an application under Section 7 of the Code was maintainable basis a decree passed by the Hon'ble Delhi High Court, it also went on to hold that the period of limitation was to be computed from the date of such decree and not from the date of initial default by the corporate debtor, in the following words:

> *"In terms of Article 137 of The Limitation Act, 1963, for filing Application under Section 7 of the I & B Code three years from the date the right to apply accrued for the first time on 06th August, 2015 when the Application of Respondent seeking an enlargement of time has been dismissed and the entire suit amount had been*

[36] *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd.,* (2019) 10 SCC 572.

> *decreed or in the alternative the right to apply accrued on 07th July, 2015 when the Respondent defaulted to make the first instalment of Rs.1 crore. Admittedly, the Application under Section 7 of the I & B Code was filed on 27th June, 2018 i.e. well within three years of limitation calculated from 06th August, 2015 or 07th July, 2015 as the case may be. It is also made clear that for the purpose of the Article 136 of the Limitation Act i.e. for execution or for purpose of Article 137 of the Limitation Act i.e. for filing Application under Section 7 of the I & B Code, the period of limitation is to be calculated from the date of decree becoming enforceable."*
>
> (emphasis supplied)

The Hon'ble NCLAT, however, in the *G. Eswara Rao* (supra) judgment, *inter alia* relying upon the Hon'ble Supreme Court's judgment in *Gaurav Hargovindbhai Dave* (supra), once again held that computation of limitation period must be from the date of the corporate debtor's account being declared NPA and not from the date of the decree passed by the Ld. DRT upon which the financial creditor was relying:

> *"24. In the present case, the 'Corporate Debtor' defaulted to pay prior to 2004, due to which O.A. No.193 of 2004 was filed by Respondent ('Financial Creditor'). A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by Debts Recovery Tribunal on 17th August, 2018, only suggests that debt become due and payable. It does not shifting (sic) forward the date of default as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and Decree dated 17th August, 2018 with pendent lite and future interest at Company the rate of 12% per annum could have been executed only through an execution case."*
>
> (emphasis supplied)

A similar position was also taken by the Hon'ble NCLAT in its judgment in *Digamber Bhondwe* (supra), wherein heavy reliance was placed on its earlier judgment in *G. Eswara Rao* (supra). The Hon'ble NCLAT, in the *Digamber Bhondwe* (supra) judgment once again *inter alia* relied upon the Hon'ble Supreme Court's judgments in *Gaurav Hargovindbhai Dave* (supra) and *Vasdeo R. Bhojwani* (supra), though such reliance may be argued to have been misplaced, as mentioned hereinabove. It is also curious to note that in its judgments in *G. Eswara Rao* (supra) and *Digamber Bhondwe* (supra), the Hon'ble NCLAT did not consider its earlier judgment in *Ugro Capital,* where a completely contrary view had been taken, though perhaps the same could be due to the fact that such judgment was not cited before the Hon'ble NCLAT during the course of arguments.

However, this controversy regarding the date from which the limitation period is to be computed as far as an application based on a decree/award under Section 7 of the Code is concerned, like the controversy as to the maintainability of such an application, seems to have been settled by the Hon'ble Supreme Court in its judgment in *Dena Bank* (supra). In holding that the limitation period for such an application is to be computed from the date of the decree/award, the Hon'ble Supreme Court explained as follows:

> *"136. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate.*
>
> *137. The Appellant Bank was thus entitled to initiate proceedings under Section 7 of the IBC within three years from the date of issuance of the Recovery*

Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May, 2020."

(emphasis supplied)

Therefore, it is apparent that in case of an application under Section 7 of the Code which is preferred basis a decree/award obtained by the financial creditor against the corporate debtor, the period of limitation is to be computed from the date of such decree or award. However, as discussed hereinabove, the maintainability of such an application under Section 9 of the Code is yet to be settled conclusively in view of contradictory judgments of the Hon'ble NCLAT. In case such applications under Section 9 of the Code are conclusively settled as maintainable under the aegis of the Code, the same rationale as adopted in the *Dena Bank* (supra) judgment should be applicable therein too and therefore the period of limitation in such cases, it may be argued, should also be computed from the date of the decree or award on the basis of which such application has been preferred.

Concluding Remarks

It is now settled, by virtue of the Hon'ble Supreme Court's judgment in the *Dena Bank* (supra) matter that an application under Section 7 of the Code is maintainable even if the same is preferred on the basis of a decree, order, judgment or award that has finally adjudicated upon the corporate debtor's liability to the financial creditor. However, the same cannot yet be said conclusively of an application under Section 9 preferred basis a decree, order, judgment or award, because of the aforementioned contradictory judgments passed by the Hon'ble NCLAT on this issue. However, with the judgment in *G. Eswara Rao* (supra) being overruled by the Hon'ble Supreme Court (albeit on a different point) and that in *Digamber Bhondwe* (supra)[37] being stayed, the Hon'ble NCLAT's judgment in *Amitex Polymers* (supra) should hold the field in this regard, and therefore such an application under Section 9 of the Code should also be maintainable. This is also supported, it may be argued, by the rationale adopted by the Hon'ble Supreme Court in the *Dena Bank* (supra) judgment and the same should also be applicable to applications filed under Section 9 of the Code on the basis of a decree or an award.

However, on this note it may be recalled that the Hon'ble Supreme Court, in the *M/s. Vijay Nirman* (supra) judgment as well as its more recent judgment in *Messrs. Jai Balaji Industries* v. *D.K. Mohanty*[38], had issued a warning as to the provisions of the Code being misused as a substitute for debt enforcement mechanisms by decree-holder creditors, and especially operational creditors, against judgment-debtors. At the same time, perhaps such an outcome was inevitable considering the extreme difficulties faced by decree-holders in India in enforcing such decrees against the judgment debtors through regular enforcement mechanisms, as noted by the Hon'ble Supreme Court in a number of judgments, most recently in *Messer Griesheim GmbH (now called Air Liquide Deutschland GmbH)* v. *Goyal MG Gases Private Limited*[39].

In view of the above, it is indeed a very difficult balance to strike for the judicial authorities involved, and it would be interesting to observe in the coming days how they strike such a balance between a decree or an award being used by a financial or operational creditor for genuine insolvency resolution purposes vis-à-vis as an attempt to exert pressure upon the corporate debtor to extract their payments, instead of opting for debt enforcement mechanisms recognized in law.

[37] See supra notes at 29 and 30.

[38] *Messrs. Jai Balaji Industries* v. *D.K. Mohanty*, [Civil Appeal No. 5899 of 2021, before the Hon'ble Supreme Court of India, order dated October 1, 2021].

[39] *Messer Griesheim GmbH (now called Air Liquide Deutschland GmbH)* v. *Goyal MG Gases Private Limited.*, [Civil Appeal No. 521 of 2022, before the Hon'ble Supreme Court of India, judgment dated January 28, 2022].

This paper has been written by the Disputes Team comprising Soorjya Ganguli (Partner) and Somdutta Bhattacharya (Principal Associate) with inputs from Pooja Chakrabarti (Partner).

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