

Can a Resolution Professional Initiate CIRP on behalf of a Corporate Debtor?

The Insolvency and Bankruptcy Code, 2016 has been undergoing a crucial jurisprudential evolution. With the amendments being brought on daily basis, the Insolvency and Bankruptcy Code, 2016 has not failed in keeping the industry on toes.

Addressing the above issue, The Hon'ble National Company Law Tribunal in *Mandhana Industries Limited v. Instyle Exports Private Limited* and National Company Law Appellate Tribunal in *Abhay N. Manudhane Vs. Gupta Coal India Pvt. Ltd.* (CA(AT) (Ins) No. 786/2019) has held that in terms of Section 11(d), a Corporate Debtor under liquidation is not entitled to make application to initiate CIRP.

Taking into consideration the above judgments it is abundantly clear that a CD undergoing CIRP cannot initiate CIRP against another CD.

However the above position has been changed with the arrival of "Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019" w.e.f. 28.12.2019.

Relevant Sections:- Section 60(5) and Section 11 of Insolvency and Bankruptcy Code, 2016

Section 60(5) of the IBC, 2016 gives the power to the Resolution Professional to initiate legal proceedings against any person but only before the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located thereby giving an overriding jurisdictional rights to National Company Law Tribunal over other Adjudicatory Authorities.

60 (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

If we apply the Literal Rule of Interpretation the word "Application" used in Section 60(5)(a) would also include an application under Section 7 and Section 9 of the IBC,2016 and hence would give power to the Corporate Debtor to move an application against other Corporate Debtor u/s 7 and 9.

Now, Section 11 of the Insolvency & Bankruptcy Code, 2016 deals with the persons who are not entitled to make an application for initiating CIRP.

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:—

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

The above Section unequivocally states that a Corporate Person undergoing CIRP cannot make an application against other Corporate Debtor under Section 7 and 9 of the Insolvency and Bankruptcy Code, 2016.

When 60(5) is read with Section 11 a conflict between them is apparent and the National Company Law Tribunal and Appellate Tribunal has resolved such conflict by giving an overriding effect to Section 11 which is evident from the various Judgments passed by the Hon'ble Tribunal in various judgments.

However after the arrival of “Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019” w.e.f. 28.12.2019 Explanation II has been added to Section 11 to the effect that Section has given power to the Corporate Person to initiate CIRP against other Corporate Debtor

[Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.]

Hence the amendment has clarified the intent of the legislature which was never to impose any fetters or bar on a corporate debtor undergoing CIRP to initiate CIRP against other Corporate Debtor.