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FILING OF SECTION 9 OF IBC ON THE BASIS OF AN ARBITRAL AWARD/MONEY DECREE

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Abstract

Since its enactment in May 2016, the Insolvency and Bankruptcy Code (IBC) has significantly transformed the landscape of insolvency resolution in India. Designed to streamline the process of insolvency and bankruptcy, the IBC aims to maximize asset value, promote entrepreneurship, ensure the availability of credit, and balance the interests of all stakeholders. Among its various provisions, Section 9 stands out as a crucial mechanism for operational creditors seeking to initiate the Corporate Insolvency Resolution Process (CIRP) against defaulting corporate debtors.

This article focuses on the practical application of Section 9 by operational creditors, particularly in the context of enforcing a money decree. The ability to file for CIRP based on a money decree provides operational creditors with a potent tool to recover dues efficiently, thereby reinforcing the IBC's overarching goal of timely and equitable resolution of insolvencies. Through an in-depth analysis, this article explores the procedural nuances, legal precedents, and strategic considerations involved in leveraging Section 9, offering valuable insights for practitioners and stakeholders navigating the complexities of the IBC framework.

Who is an Operational Creditor

Operational creditors are entities or individuals whose claims arise from transactions involving the provision of goods or services, including employment i.e. to those an operational debt is owed by a corporate debtor. This category encompasses a wide range of creditors, from suppliers and service providers to employees, vendors and utility providers.

Before an operational creditor can initiate CIRP under Section 9, certain preconditions must be met. The preconditions being the existence of a debt owed by the corporate debtor to the operational creditor for goods or services provided, including any dues arising from employment, that the corporate debtor must have defaulted on the payment of this debt and had failed to dispute the claim within the stipulated 10 days of a demand notice issued by the operational creditor to the corporate debtor under Section 8 of IBC.

The operational creditor then can proceed to file an application for initiating CIRP with the National Company Law Tribunal (NCLT). However, the rights of an operational creditor are limited compared to those of a financial creditor to initiate CIRP against a corporate debtor. This can be concluded from the provision of Section 9(5)(ii)(d) of the IBC, which states that an application under Section 9 filed by an operational creditor shall be rejected if notice of dispute has been received by the operational creditor or if there is a record of dispute in the information utility. This has been clarified by the Supreme Court in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Private Limited*⁹⁰⁸ where the Supreme Court held that the existence of the dispute or the suit or arbitration proceeding must be pre-existing i.e. it should have existed before the receipt of the demand notice or invoice.

⁹⁰⁸ *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited* Civil Appeal No. 9405 of 2017 **PARA 51**

Contingency Due To Applicability Of Limitation Act

The Supreme Court in *B.K. Educational Services Private Limited v. Parag Gupta*⁹⁰⁹ has held that the Limitation Act has been applicable to IBC from its inception, the IBC being governed by Article 137 of the Schedule to the Limitation Act, the period of limitation for making such an application under Section 9 of IBC is three years from the date of accrual of the right to sue, i.e. the date of default. This was followed in the landmark judgement *Dena Bank (Now Bank Of Baroda) v. C. Shivakumar Reddy*⁹¹⁰

However, Section 18 of the Limitation Act further provides that the limitation period is extended if a written and signed acknowledgment of liability is issued by a party against whom a right or property is claimed, such as a borrower, guarantor, or security provider. In *Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.*⁹¹¹ the Supreme Court through Justice Indira Banerjee held that the IBC does not exclude the application of Section 18 of the Limitation Act and that there is no reason to suppose that Section 18 of the Limitation Act does not apply to proceedings under Section 7 or Section 9 IBC. This was further followed in the landmark judgement *Dena Bank (Now Bank Of Baroda) v. C. Shivakumar Reddy*⁹¹²

Thus, a pertinent question arises that whether an arbitral award/money decree in favour of a creditor would extend the limitation period for filing an application under Section 7 or 9 for the initiation of CIRP. This has been answered through various landmark judgements.

Extension of Limitation Period for a Financial Creditor

To answer our question its important to note the following judgments of the Supreme Court

⁹⁰⁹ B.K. Educational Services Private Limited v. Parag Gupta (Civil Appeal No.23988 of 2017) **PARA 42 & 43**

⁹¹⁰ Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy (Civil Appeal No. 1650 of 2020) **PARA 99**

⁹¹¹ Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.(Civil Appeal No. 9198 of 2019) **PARA 66**

⁹¹² Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy (Civil Appeal No. 1650 of 2020) **PARA 112**

In *Dena Bank (Now Bank Of Baroda) v. C. Shivakumar Reddy*⁹¹³ the Supreme Court held that a judgment 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 IBC for initiation of the CIRP within three years from the date of the judgment or decree or the date of issuance of the certificate of recovery. This was followed in *Kotak Mahindra Bank Limited v. A. Balakrishnan*⁹¹⁴ where the Supreme Court held that a liability in respect of a claim arising out of a recovery certificate would be a "financial debt" within the meaning of clause (8) of Section 5 IBC and consequently, the holder of the recovery certificate would be a financial creditor within the meaning of clause (7) of Section 5 IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the recovery certificate.

Furthermore the High Court of Madras in *Cholamandalam Investment and Finance Company Ltd. Vs. Navrang Roadlines Private Limited*⁹¹⁵ has provided clarity as it held that liability arising out of an arbitral award or a court decree would be categorised as either financial or operational debt depending on the nature of the underlying claim which would stand crystallised through the arbitral or court proceedings. This sends a clear message that an arbitral award constitutes a record of the financial debt/operational debt.

The position was confirmed by NCLT in *SREI Equipment Finance Ltd. V. Shweta Housing and Hospitality*.⁹¹⁶ The NCLT supported by *Kotak*

⁹¹³ Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy (Civil Appeal No. 1650 of 2020) **PARA 141**

⁹¹⁴ Kotak Mahindra Bank Limited v. A. Balakrishnan (2022 SCC OnLine SC 706) **PARA 28 & 86**

⁹¹⁵ Cholamandalam Investment and Finance Company Ltd. Vs. Navrang Roadlines Private Limited [0.S.A (CAD) No. 115 of 2022] // MANU/TN/8793/2022 **PARA 12**

⁹¹⁶ SREI Equipment Finance Ltd. V. Shweta Housing and Hospitality [C.P. No. (IB) 132/MB/C-III/2022] **PARA 23, 24, 25**

*Mahindra Bank Limited v. A. Balakrishnan*⁹¹⁷ allowed the petition to initiate CIRP on the basis of fresh limitation period arising out of the arbitral award passed in the favour of financial creditor thus initiating CIRP against the Corporate Debtor.

It is to be noted that the above-mentioned judgments specifically talk about the filing of an application under Section 7 of IBC by a financial creditor and not an operational creditor who files under Section 9 of IBC. Thus, the question before us that whether an operational creditor can file a Section 9 application on the basis of an arbitral award/money decree in its favour and would the arbitral award/ money decree extend the limitation period.

Filing A Section 9 Application On The Basis Of An Arbitral Award/Money Decree

The answer to our question can be inferred from *Ramjee Power Construction Limited v. Jharkhand Bijli Vitran Nigam Limited*⁹¹⁸ in which an arbitral award had been passed in the favour of the operational creditor and had been challenged under Section 34 of the Arbitration & Conciliation Act. The challenge was later dismissed by the Apex Court. The operational creditor hence filed an application under Section 9 on its basis. The NCLT had held that the calculation of the fresh limitation period was rightly claimed from the date of order of the Apex Court, though dismissed the application as the corporate debtor had filed fresh civil suit against the operational creditor. Hence

However it is pertinent to note the Supreme Court's decision in *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*⁹¹⁹ in which the Supreme Court clarified its position as to whether an arbitral award challenged under Section 34 of the Arbitration and Conciliation Act, can serve as the basis for an action under Section 9 of IBC. The position of the Apex Court was that a challenge to an arbitral award constitutes a

dispute under Section 8 of the IBC thus the application is liable to be rejected under the provision of Section 9(5)(ii)(d) of the IBC and that the operational creditors could not use IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures.

Hence one can conclude that an operational creditor can file a Section 9 Application on the basis of an arbitral award/money decree provided that such should not have been challenged.

Concluding Remark

The landscape of initiating CIRP under Section 9 of the IBC whether prompted by an arbitral award or a money decree, has undergone a profound transformation owing to the interplay of judicial interpretations and procedural stipulations. The trajectory of this evolution can be traced through pivotal cases such as *Dena Bank (Now Bank Of Baroda) v. C. Shivakumar Reddy* to *SREI Equipment Finance Ltd. v. Shweta Housing* and *K. Kishan v. Vijay Nirman Company Pvt. Ltd* to *Ramjee Power Construction Limited v. Jharkhand Bijli Vitran Nigam Limited*.

In these seminal rulings, the courts have not only offered solace and reassurance to creditors navigating the complexities of insolvency proceedings but have also played a pivotal role in advancing the core objectives of the IBC. By providing clarity on the applicability of limitation periods, delineating the rights and obligations of operational and financial creditors, and ensuring adherence to procedural fairness, these judicial interventions have fostered a more equitable and efficient insolvency resolution framework.

Furthermore, the practical interpretation of the IBC by the judiciary has bolstered confidence in the efficacy of the legal system, thereby promoting a conducive environment for investment and entrepreneurship. Through their adjudications, the courts have struck a delicate balance between protecting the interests of all stakeholders involved in the insolvency

⁹¹⁷ by *Kotak Mahindra Bank Limited v. A. Balakrishnan* (2022 SCC OnLine SC 706)

⁹¹⁸ [2024 SCC OnLine NCLT 1746] **PARA 9.14 & 9.18**

⁹¹⁹ *K. Kishan v. Vijay Nirman Company Pvt. Ltd* (Civil Appeal Nos. 21824 and 21825 of 2017) [MANU/SC/0872/2018] **PARA 13**



resolution process while upholding the overarching goals of maximizing asset value, promoting entrepreneurship, and ensuring the availability of credit.

As we navigate the dynamic landscape of insolvency law in India, it is imperative to recognize the indispensable role played by the judiciary in shaping and refining the contours of the IBC. Moving forward, continued collaboration between the judiciary, legislature, and stakeholders will be essential to address emerging challenges, foster innovation, and uphold the principles of fairness and justice in insolvency proceedings.

