

# INSOLVENCY INSIGHT

Whether dissenting financial creditor entitled to the minimum value of security interest is referred to a larger bench

Hon'ble Supreme Court upheld the constitutional validity of provisions relating to Individual and Partnership Insolvency

No admission of insolvency petition without hearing both sides on merit

Optionally Convertible Debentures (OCDs) are Financial Debt within the meaning of Section 5(8)(c) of IBC



**Whether dissenting financial creditor entitled to the minimum value of security interest is referred to a larger bench**

The Hon'ble Supreme Court in the case of DBS Bank Limited Singapore v Ruchi Soya Industries Ltd. & Anr, Civil Appeal no. 9133 of 2019 diverged from the interpretation of section 30(2)(b)(ii) of IBC, 2016 adopted by the coordinate bench in the case of India Resurgence ARC Private Limited v. Amit Metaliks Ltd. & Anr.

This is a case where a secured financial creditor dissented from the pari pasu distribution of the Resolution Plan and challenged the distribution mechanism before NCLT. The Learned NCLT and Hon'ble NCLAT dismissed the appellant's challenge to the distribution mechanism.

The Hon'ble Supreme Court on appeal, in interpreting section 30(2)(b)(ii) of IBC, 2016, held that dissenting creditors are entitled to receive as money the amount they would have received had there been liquidation proceedings under section 53 IBC.

Hon'ble Supreme Court held that the view in India Resurgence ARC Private Limited wherein it interpreted 'value receivable' as the amount under the Resolution Plan, contradicting the interpretation in Jaypee Kensington Boulevard Apartments Welfare Association, where the value receivable equates to the extent of the security interest.

The Hon'ble Supreme Court clarified that dissenting financial creditors are entitled only to the sum of the amount of security held by them, without the right to enforce the security to prevent nullification of the resolution plan.

**Hon'ble Supreme Court upheld the constitutional validity of provisions relating to**

**Individual and Partnership Insolvency**

The Hon'ble Supreme Court in the case of Dilip B Jiwrajka v Union of India & Ors., Writ Petition (Civil) No. 1281 of 2021 upheld the constitutional validity of Sections 95 to 100 of the Insolvency and Bankruptcy Code 2016.

The aforesaid provisions provide for the initiation of insolvency proceedings against individuals and partnership firms as codified in Part III of the IBC. The petitioners assailed the constitutionality of the provisions on the anvil that they violate Articles 14 and 21 of the Constitution of India.

The Hon'ble Supreme Court adopted a three-stage analysis, in which first it functionally analyzed, the functional disparities between Part II and Part III of the IBC, the role distinctions of resolution professionals in corporate versus individual insolvency, the divergent impacts of moratoriums under Section 14 of Part II and interim-moratoriums under Section 96 of Chapter III of Part III and the varying roles of adjudicating authorities in applications under Part II and Part III.

The Hon'ble Supreme Court delineated the resolution professional's limited power to access only pertinent information relevant to insolvency proceedings, respecting the right to privacy under Article 21.

The Hon'ble Supreme Court emphasized on providing an opportunity for a hearing under Section 100, even though it is not explicitly mentioned in the provision.

The Hon'ble Supreme Court clarified that the resolution professional's function under Part III is facilitative, focusing on information collection rather than adjudication. The resolution professional is mandatorily required to maintain confidentiality and comply with the principles of natural justice.

**No admission of insolvency petition without hearing both sides on merit**

The Hon'ble Supreme Court in the case of *Maneesh Pharmaceuticals Ltd. v Export Import Bank of India and Ors.* Civil Appeal No 8135 of 2023 dated 15/12/2023 has held that NCLAT cannot direct NCLT for section 7 admission without a thorough evaluation of rival contentions in insolvency proceedings.

This is a case where section 7 was dismissed for debt being barred by limitation. The Hon'ble NCLAT the NCLT's decision. Upon appeal, the Hon'ble Supreme Court, in its judgment dated 4 July 2023, dismissed the appeal against the NCLAT's decision. Against this, review application was filed in Hon'ble Supreme Court.

Following this, restoration application was filed before NCLT to restore Section 7 application. The Learned NCLT allowed the restoration application but declined to adjourn the proceedings on the ground of the pendency of the review petition. This led to an appeal at the NCLAT. The Hon'ble NCLAT directed the NCLT to admit the Section 7 application, prompting the appellant's appeal to the Supreme Court.

The Hon'ble Supreme Court noted that when NCLAT set aside the order of NCLT it did so in its entirety including the determination of the existence of debt. The order of Hon'ble NCLAT only dealt with whether the debt was time-barred or not.

A stray observation by Hon'ble NCLAT cannot be regarded as a conclusive determination on merits. The Hon'ble Supreme Court concluded that it was inappropriate for the NCLAT to direct the NCLT to admit the application under Section 7 straightaway without an evaluation of the rival contentions on merits.

**Optionally Convertible Debentures (OCDs) are Financial Debt within the meaning of Section 5(8)(c) of IBC**

The Hon'ble NCLAT in the case of *Santosh Kumar v ASK Trusteeship Services Pvt. Ltd. and Anr.* Company Appeal (AT) (Insolvency) No.1575 of 2023 decided on 10/01/2024 held that 'OCDs,' are categorized as 'financial debt' under the Indian Insolvency and Bankruptcy Code, based on the provisions outlined in Section 5(8)(c).

This is a case where the suspended director of the Corporate Debtor challenged the order of the Adjudicating Authority/ NCLT admitting a Section 7 application filed by Financial Creditor. The Financial Creditor subscribed to unlisted OCD issued by the Corporate Debtor.

The Corporate Debtor disputed the nature of OCD and their relationship with regards to the Financial Creditor.

The Hon'ble NCLAT relying on the judgment of the NCLAT in *MAIF Investments India Pte. Limited v Ind Bharath Energy (Utkal) Limited* observed that the OCDs were in the nature of debt and not equity. It noted that in terms of Section 5(8)(c), any amount raised according to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument, comes within the meaning of 'financial debt'. Therefore, the 'OCDs' are issued against the time value of money and therefore per se, constitute 'financial debt' in the light of Section 5 (8)(c) of the I&B Code.



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