

# *De Jure*

*August 4, 2017*

The dilemma of settlement in matters under  
the Insolvency and Bankruptcy Code, 2016

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## Introduction

The Insolvency and Bankruptcy Code, 2016 ("Insolvency Code") has made its advent felt already to most of the corporate entities. The Insolvency Code in its early days has already seen various interpretations by the National Company Law Appellate Tribunal ("NCLAT") and the National Company Law Tribunal ("NCLT").

In so far as the aspect of allowing the settlement of dispute inter-se between the corporate debtor and the financial creditor/operational creditor arising out of the insolvency petition are concerned, the NCLAT and the NCLT have ruled that a corporate debtor cannot seek withdrawal of the insolvency petition, post its admission, on the ground that the disputes between the corporate debtor and financial creditor/operational creditor are mutually settled. In a recent judgement of the Supreme Court of India ("Supreme Court") in the matter of Lokhandwala Kataria versus Nisus Finance and Investment Manager LLP<sup>1</sup>, the Supreme Court has exercised its discretionary powers under Article 142 of the Constitution of India, in order to allow the parties to settle their dispute.

## Ruling of the NCLT, the NCLAT and Supreme Court of India

The issue whether an application filed under the Insolvency Code could be withdrawn after such application was admitted by the NCLT first came up before NCLT, Kolkata in the matter of *Parker Hannifin India Private Limited versus Prowess International Private Limited*<sup>2</sup>. In this matter the corporate debtor, post admission of the insolvency petition, filed an application for withdrawal of the insolvency petition on the ground that the parties have amicably settled the matter and the operational creditor does not want to pursue the insolvency petition. The NCLT, Kolkata, after analysing the Insolvency Code observed that after the admission of the insolvency petition the nature of such petition changes to representative suit and the *lis* does not remain only between operational creditor and corporate debtor. Thus, the NCLT, Kolkata ruled that once the corporate insolvency resolution process was commenced, the petitioner did not have the right to withdraw the insolvency petition on the ground that the disputes between them were settled.

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<sup>1</sup> Civil Appeal No. 9279 of 2017; order dated July 24, 2017.

<sup>2</sup> I.A. No. 2226/KB/2017; order dated May 29, 2017.

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A similar issue came up before the NCLAT, whereby in two of the matters viz. *Lokhandwala Kataria Construction Private Limited versus Nisus Finance and Investment Manager LLP*<sup>3</sup> and *Mother Pride Dairy India Private Limited versus Portrait Advertising & Marketing Private Limited*<sup>4</sup>, the Appellate(s) were seeking dismissal of admission order passed by the NCLT on the ground that parties (*i.e. financial creditor & corporate debtor*) had settled the matter. The NCLAT in both the matters rejected the appeal.

Since both the matters, Lokhandwala's case and Mother Pride's case, had discussed similar issues, we have discussed the Lokhandwala's case. In this matter, the appellate (*i.e. the corporate debtor*) had filed an appeal before the NCLAT impugning the order passed by the NCLT, whereby the insolvency petition filed against the corporate debtor was admitted. Both parties urged the NCLAT that since the disputes between the parties were settled, the admission order passed against the corporate debtor by the NCLT must be set aside.

The NCLAT observed that such settlement, inter-se between the corporate debtor and the financial creditor, cannot be a ground to interfere with the order passed by the NCLT and thus dismissed the appeal.

The NCLAT's observations were based on the following aspects:-

- Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016<sup>5</sup> ("**AAA Rules**") allowed the operational/financial creditor to withdraw the insolvency petition only before the admission of such insolvency petition. Thus, once an insolvency petition is admitted by the NCLT it was not open for the operational/financial creditor to withdraw the same and the matter could not be closed until the claim of all the creditors of the corporate debtor were satisfied.

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<sup>3</sup> Company Appeal (AT) (insolvency) No. 95 of 2017.

<sup>4</sup> Company Appeal (AT) (insolvency) No. 94 of 2017

<sup>5</sup> "8 Withdrawal of Application- The Adjudicating Authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."

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- Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (*i.e. the inherent powers of the NCLAT*)<sup>6</sup> was not adopted under the Insolvency Code, 2016. The appellate had urged the NCLAT to exercise its inherent power to set aside the impugned order on the ground that parties had settled the matter.

Lokhandwala Kataria Construction Private Limited challenged the order of NCLAT before the Supreme Court of India. The Supreme Court, *prima facie*, concurred with the view of the NCLAT that the inherent powers could not be utilised by the NCLAT. However, the Supreme Court exercised its discretionary powers under Article 142 of the Constitution of India and, *inter-alia*, accepted the consent terms on its record.

## Our View

It will be interesting to observe how the NCLAT/NCLT would see this order of the Supreme Court. It is clear from the Rule 8 of the AAA Rules that post admission of the insolvency petition the NCLT does not have power to allow withdrawal of the insolvency petition. However, the Supreme Court under exercise of its power under Article 142 of the Constitution of India has, *inter-alia*, allowed the parties to withdraw the insolvency petition on the ground of settlement.

The rules of procedure for the Insolvency Code will be keenly watched and the corporate debtors would hope that the NCLT and the NCLAT are given the inherent powers. However, in light of Rule 8 of the AAA Rules, it would be interesting to see whether NCLT/NCLAT (assuming such inherent powers are adopted under the Insolvency Code) would allow a settlement between the parties under exercise of their inherent powers. Till then perhaps the parties settling the insolvency petition would have to approach the Supreme Court and test whether it exercises the inherent powers to allow withdrawal of the insolvency petition.

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<sup>6</sup> 11. Inherent powers.- Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.

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