

According to section 447 of the Companies Act, 2013:

Any person who is found to be guilty of **fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower**, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud

Provided where the fraud in question involves **public interest**, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both

10.17 Factors to be considered while deciding the amount by Court/Tribunal (Section 446A)

The court or the Special Court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:—

- (a) size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest;
- (d) nature of the default; and
- (e) repetition of the default.

10.18 No Compliance by One person company or small company (Section 446B)

If a One Person Company or a small company fails to comply with the provisions of

Section 92 i.e. Submission of Annual Return

Section 117 i.e. Submission of copy of resolution or agreement with ROC

Section 137 i.e. Submission of financial statement with ROC

such company and officer in default of such company shall be punishable with fine or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one-half of the fine or imprisonment or fine and imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections.

IBC.2016

15.16 Persons not eligible to be resolution applicant [Sec 29A]

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is a promoter or in the management or control of such person, —

- (a) is an undischarged insolvent;
- (b) has been identified as a wilful defaulter in accordance with the guidelines of the Reserve Bank of India;
- (c) whose account is classified as non-performing asset and period of one year or more has lapsed from the date of such classification and who has failed to make the payment of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of the resolution plan;
- (d) has been convicted for any offence punishable with imprisonment for two years or more; or
- (e) has been disqualified to act as a director under the Companies Act, 2013;
- (f) has been prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- (g) has indulged in preferential transaction or undervalued transaction or fraudulent transaction in respect of which an order has been made by the Adjudicating Authority under this Code;
- (h) has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this Code;
- (i) where any connected person in respect of such person meets any of the criteria specified in clauses (a) to (h).

Explanation. — For the purposes of this clause, the expression “connected person” means—

- (i) any person who is promoter or in the management or control of the resolution applicant; or
 - (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
 - (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).
- (j) has been subject to any disability, corresponding to clauses (a) to (i), under any law in a jurisdiction outside India.

Surendra Trading Company v. Juggilal Kamlatpat Jute Mills Company Limited and Others (Supreme Court)

In this case, the question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory.

The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the adjudicating authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory.

However, the Supreme Court differed in its perspective and held as follows:

Principle contained while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

However, if the objections are not removed within seven days, the applicant while refiling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application.

Alchemist Asset Reconstruction Company Limited v. M/s Hotel Gaudavan Private Limited & Ors.

It was held by Supreme Court that

An arbitration proceeding cannot be started after imposition of moratorium and that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium shall not be valid

M/s Innoventive Industries Ltd. vs. ICICI Bank

The application was filed by ICICI as a financial creditor of Innoventive, under Section 7 of the IBC, on account of default made by Innoventive in payment of amounts due under certain credit facilities availed from ICICI.

It was *inter alia* argued by Innoventive that as its liabilities stood suspended pursuant to a relief order passed by the Government of Maharashtra under the Maharashtra Relief Undertaking (Special Provisions Act) 1958 (MRUA) no amounts were due and payable by it to ICICI and hence, Section 7 application cannot be admitted. Rejecting the argument *inter alia* on the basis that the IBC had an overriding effect over the MRUA, NCLT admitted ICICI's application, declared moratorium and appointed an Interim Resolution Professional (IRP).

The NCLT order was challenged by Innoventive before the National Company Law Appellate Tribunal (NCLAT).

It also held that there is no repugnancy between MRUA and IBC as they both operate in different fields. However, since IBC has an overriding effect, it shall prevail over the provisions of MRUA.

Against the NCLAT order, an appeal was filed before the Hon'ble Supreme Court by Innoventive. One of the preliminary issues addressed by the Supreme Court was whether the appeal is maintainable as it had been filed by the erstwhile directors (in the name of Innoventive).

The Supreme Court held that once an IRP is appointed to manage the company, the erstwhile directors, who are no longer in the management, cannot maintain the appeal on company's behalf - and since in the present case, Innoventive was the sole applicant - the appeal was not maintainable.

The Supreme Court undertook an in-depth examination of IBC provisions dealing with corporate insolvency resolution and *inter alia* laid down the following principles:

- **On Section 7**

Supreme Court held that for triggering Section 7 (1) of the IBC, a default could be in respect of default of financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor.

The Supreme Court contrasted the IBC provisions relating to applications by financial and operational creditors. It held that under Section 8(1), an operational creditor is required to deliver a demand notice on the occurrence of a default and under Section 8(2), the corporate debtor can bring to the notice of the creditor, existence of a dispute or the record of pendency of a suit or arbitration proceedings, which is pre-existing. Existence of such a dispute will make the application of operational creditor inadmissible.

Supreme Court has opined that Section 7 application can be filed by a financial creditor for default on another financial debt. So far, such cases have not been filed in NCLTs. Given the moratorium on recovery actions, so long as a financial creditor is being paid on time, there is no incentive for such creditor to file for CIRP on account of default of

another financial debt. The incentive would only come if its debt is due later but the creditor fears that the company will not be able to service the debt when the time comes. It remains to be seen whether the Supreme Court ruling will give rise to increased applications by financial creditors for default on another's debt.

On account of Court's finding that the erstwhile directors cannot maintain an appeal on behalf of the company, appeals against admission orders of the NCLT will now need to be filed by the erstwhile management in their individual capacity (as shareholders or erstwhile management, aggrieved with the order). One interesting question that is likely to come up in coming weeks is the fate of existing appeals before the NCLAT and even decided applications where appeals have been filed by the erstwhile directors or promoters in the name of the company.

While the ruling primarily deals with Section 7, the Court also makes certain observations on Section 8 of the IBC. Importantly, it observes that under Section 8 (2), the corporate debtor can bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings and that such dispute must be pre-existing, i.e. existing before receipt of demand notice or invoice by the corporate debtor

Kirusa Software Private Limited vs. Mobilox Innovations Private Limited

17.3 Eligibility to be a member of a recognised stock exchange [Rule 8]

(1) No person shall be eligible to be elected as a member if—

- (a) he is less than 21 years of age;
- (b) he is not a citizen of India;

Provided that the governing body may in suitable cases relax this condition with the prior approval of the Securities and Exchange Board of India;

(c) he has been adjudged bankrupt or a receiving order in bankruptcy has been made against him or he has been proved to be insolvent even though he has obtained his final discharge;

(d) he has compounded with his creditors unless he has paid sixteen annas in the rupee;

(e) he has been convicted of an offence involving fraud or dishonesty;

(f) he is engaged as principal or employee in any business other than that of securities or commodity derivatives except as a broker or agent not involving any personal financial liability unless he undertakes on admission to sever his connection with such business:

Provided that no member may conduct business in commodity derivatives, except by setting up a separate company which shall comply with the regulatory requirements, such as, networth, capital adequacy,

margins and exposure norms as may be specified by the Forward Market Commission, from time to time:

(g) [***]

(h) he has been at any time expelled or declared a defaulter by any other stock exchange;

(i) he has been previously refused admission to membership unless a period of one year has elapsed since the date of such rejection.

→ Additional Conditions

(2) No person eligible for admission as a member under sub-rule (1) shall be admitted as a member unless:—

(a) he has worked for not less than 2 years as a partner with, or an authorised assistant or authorised clerk or remisier or apprentice to, a member; or

(b) he agrees to work for a minimum period of 2 Years as a partner or representative member with another member and to enter into bargains on the floor of the stock exchange and not in his own name but in the name of such other member; or

(c) he succeeds to the established business of a deceased or retiring member who is his father, uncle, brother or any other person who is, in the opinion of the governing body, a close relative:

Provided that the rules of the stock exchange may authorise the governing body to waive compliance with any of the foregoing conditions if the person seeking admission is in respect of means, position, integrity, knowledge and experience of business in securities, considered by the governing body to be otherwise qualified for membership.

(3) No person who is a member at the time of application for recognition or subsequently admitted as a member shall continue as such if—

(a) he ceases to be a citizen of India:

Provided that nothing herein shall affect those who are not citizens of India but who were members at the time of such application or were admitted subsequently under the provisions of clause (b) of sub-rule (1) of this rule, subject to their complying with all other requirements of this rule;

(b) he is adjudged bankrupt or a receiving order in bankruptcy is made against him or he is proved to be insolvent;

(c) he is convicted of an offence involving fraud or dishonesty;

(d) [***]

Omitted

(e) [***]

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(f) he engages either as principal or employee in any business other than that of securities or commodity derivatives except as a broker or agent not involving any personal financial liability, provided that—

(i) the governing body may, for reasons, to be recorded in writing, permit a member to engage himself as principal or employee in any such business, if the member in question ceases to carry on business on the stock exchange either as an individual or as a partner in a firm,

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(ii) in the case of those members who were under the rules in force at the time of such application permitted to engage in any such business and were actually so engaged on the date of such application, a period of three years from the date of the grant of recognition shall be allowed for severing their connection with any such business,

(iii) nothing herein shall affect members of a recognised stock exchange which are corporations, bodies corporate, companies or institutions referred to in items (a) to (k) of the proviso to sub-rule (4).

(4) A company as defined in the Companies Act, 1956, shall be eligible to be elected as a member of a stock exchange if—

- (i) such company is formed in compliance with the provisions of section 322 of the said Act;
- (ii) a majority of the directors of such company are shareholders of such company and also members of that stock exchange; and
- (iii) the directors of such company, who are members of that stock exchange, have ultimate liability in such company;

unlimited liab. of directors

Provided that where the Securities and Exchange Board of India makes a recommendation in this regard, the governing body of a stock exchange shall, in relaxation of the requirements of this clause, admit as member the following corporations, bodies corporate, companies or institutions, namely:—

- (a) the Industrial Finance Corporation, established under the Industrial Finance Corporation Act, 1948;
- (b) the Industrial Development Bank of India, established under the Industrial Development Bank Act, 1964;
- (c) the Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956;
- (d) the General Insurance Corporation of India constituted under the General Insurance Corporation (Nationalisation) Act, 1972;
- (e) the Unit Trust of India, established under the Unit Trust of India Act, 1963;
- (f) the Industrial Credit and Investment Corporation of India, a company registered under the Companies Act, 1956;
- (g) the subsidiaries of any of the corporations or companies specified in (a) to (f) and any subsidiary of the State Bank of India or any nationalised bank set up for providing merchant banking services, buying and selling securities and other similar activities.
- (h) any bank included in the Second Schedule to the Reserve Bank of India Act, 1934;
- (i) the Export Import Bank of India, established under the Export Import Bank of India Act, 1981;
- (j) the National Bank for Agriculture and Rural Development, established under the National Bank for Agriculture and Rural Development Act, 1981; and
- (k) the National Housing Bank, established under the National Housing Bank Act, 1987.

(4A) A company as defined in the Companies Act, 1956, shall also be eligible to be elected as a member

of a stock exchange if—

- (i) such company is formed in compliance with the provisions of section 12 of the said Act;
- (ii) such company undertakes to comply with such financial requirements and norms as may be specified by the Securities and Exchange Board of India for the registration of such company under section 12 of the Securities and Exchange Board of India Act, 1992 ;

(iii) [* * *]

(iv) the directors of the company are not disqualified from being members of a stock exchange under clause (1) except sub-clause (b) and sub-clause (f) thereof or clause (3) except sub-clause (a) and sub-clause (f) thereof and the Directors of the company had not held the offices of the Directors in any company which had been a member of the stock exchange and had been declared defaulter or expelled by the stock exchange; and

(v) not less than two directors of the company are persons who possess a minimum two years' experience:

- (a) in dealing in securities; or ✓
- (b) as portfolio managers; or ✓
- (c) as investment consultants. ✓

(5) Where any member of a stock exchange is a firm, the provisions of sub-rules (1), (3) and (4), shall, so far as they can, apply to the admission or continuation of any partner in such firm

(Simple Interpretation-Eligibility of Individual partner shall be checked which shall meet the criteria as mentioned above for individual category)