



CMA FINAL – PAPER 13 **CORPORATE & ECONOMIC LAWS**

**VOLUME
1**

**SECTION – A: CORPORATE LAWS + IBC
+ C.G.
(50 Marks)**

**NEW SYLLABUS
2022 SYLLABUS**

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COMPANIES ACT, 2013

Meaning through EXAMPLE:



Chotu beta, Ye IBC, 2016 kya hai?

- Chacha Ji, IBC, 2016 ka full form hai INSOLVENCY AND BANKRUPTCY CODE, 2016.
- Ye ek law (कानून) hai.



Chotu beta, Jab bhi koi law banaya jata hai toh kisi na kisi purpose ke saath banaya jata hai. Ye IBC kis purpose / aim ke saath banaya gaya?

- Chacha Ji, Iske liye aapko ek kahani sunni padegi.
- ✓ IBC, 2016, ke aane se pahle ki halat ye thi ki agar koi company Sick (Loss making) ho jati thi toh use Healthy (Profit making) banene ke liye koi 1 separate strong law nahi tha.
- ✓ Balki bahut saare laws the jiske andar apni apni alag alag baat likhi hui thi.
- ✓ Ab agar kisi ek law ki help lekar us sick company ko healthy company me convert karne ki koshish karte bhi the toh dusra law ke provisions uske against me jaate the.
- ✓ Aur is tarah se ya toh us sick company ko profit making me convert karne me bahut time lag jata tha ya phir wo company convert ho hi nahi paati thi and use wind up karna padta tha.





- ✓ Ab chacha ji, jab bhi koi company wind up hoti thi toh sabka loss hota tha. Bahut saare employees unemployed ho jate the.
- ✓ Tab Govt. ko 1 aise law ki need feel hui jo akela hi company ko sick se healthy company bana sake.
- ✓ Tab jakar IBC, 2016, introduced hua.

Chotu beta IBC ke objectives kya hain?



- Chacha ji, agar IBC ke main objectives ki baat karun toh 2 main objectives hain:
- ✓ Revive the sick Company through any possible scheme like: Merger or Takeover;
 - ✓ If not possible to revive the Company, wind up speedily.

Chotu beta aakhir Sick company kya hai?



Chacha ji, Sick co. wo hai jiske accumulated losses us co. ke profits ke equal ya profits se jyada ho gaye ho.
In legal words, If accumulated liabilities of a co. are equal or more than its profits.



Chotu beta, aakhir kisi Sick co. ko Healthy Co. kaise bana sakte hain?

- Chacha ji, iske liye pahle check kiya jata hai ki co. kitni sick (loss making) hai.
- Phir analysis kiya jata hai ki kya co. ko healthy banaya ja sakta hai.
- Phir check kiya jata hai ki kya koi dusri co. isko apne andar merge karne ke liye ready hai ya phir iska takeover karne ke liye ready hai.
- Agar possible ho toh resolution plan banaya jata hai.
- Otherwise company ko wind up karne ka order pass hota hai.



Chotu beta is IBC ke thorough kis kis ko revive kiya ja sakta hai?

- ✓ Company;
- ✓ LLP;
- ✓ Partnership Firm;
- ✓ Statutory Company;
- ✓ Individuals; or
- ✓ Any other body corporate notified by Central Government.
- **NOTE:** CODE NOT APPLICABLE TO FINANCIAL SERVICE PROVIDERS. Such as: Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.



Introduced in India in 2016

To revive Sick Companies (loss making Companies) and make them healthy again (Profit making company), if possible.

Otherwise wind up them.

Sick Company

When accumulated losses of Company becomes Equal or more than profits.

Story of introduction of IBC

Before Insolvency and Bankruptcy Code

No single law but many laws to deal with insolvency and bankruptcy

Delays due to many laws and inadequate process, provisions.

Resulting into winding up of Companies

- Felt need for a single law
 - to speed up the process &
 - Promote and support businesses

Hence, IBC introduced.

OBJECTIVES OF IBC, 2016:

✓ **Main objectives are 2:**

- a. Revive the sick Company through any possible scheme like: Merger or Takeover.
- b. If not possible to revive the Company, wind up speedily.

✓ **Other Objectives:**

- Consolidate and amend all existing insolvency laws in India.
- To simplify and expedite the Insolvency and Bankruptcy Proceedings in India.
- To protect the interest of creditors including stakeholders in a company.
- To revive the company in a time-bound manner.
- To promote entrepreneurship.
- To get the necessary relief to the creditors and consequently increase the credit supply in the economy.
- To work out a new and timely recovery procedure to be adopted by the banks, financial institutions or individuals.
- To set up an Insolvency and Bankruptcy Board of India.
- Maximization of the value of assets of corporate persons.

EARLIER LAWS:

- ✓ Presidency Towns Insolvency Act, 1909.
- ✓ Provincial Insolvency Act, 1920.
- ✓ Indian Partnership Act, 1932.
- ✓ Recovery of Debts due to Banks & Financial Institutions Act, 1993.

- ✓ Sick Industrial Companies Act, 1985.
- ✓ Companies Act, 1956.
- ✓ SARFESI Act, 2002.
- ✓ Companies Act, 2013.

WITH THE INTRODUCTION OF IBC, THE FOLLOWINGS HAVE BEEN REPEALED:

- ✓ Chapter XX and Chapter XIX of Companies Act, 2013.
- ✓ Part VIA, Part VII and Section 391 of Companies Act, 1956.
- ✓ RDBFI Act, 1993 (Recovery Of Debts And Bankruptcy Act, 1993).
- ✓ SICA Act, 1985.
- ✓ The Presidency Towns Insolvency Act, 1909.
- ✓ The Provincial Insolvency Act, 1920.
- ✓ Chapter XIII of LLP Act, 2008.

APPLICABILITY OF IBC:

- ✓ Company;
- ✓ LLP;
- ✓ Partnership Firm & Individuals (Partners);
- ✓ Statutory Company;
- ✓ Individuals; or
- ✓ Any other body corporate notified by Central Government.
- ✓ Other body corporates as may be notified by Central Government.

NOTE: CODE NOT APPLICABLE TO FINANCIAL SERVICE PROVIDERS:-

- The Insolvency and Bankruptcy Code is not applicable to corporates in finance sector. Section 3(7)

of Insolvency and Bankruptcy Code, 2016 states that “Corporate person” shall not include any financial service provider.

- Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

PREVIOUS YEAR QUESTIONS:

1. Mention about the applicability of IBC, 2016.
2. The insolvency and bankruptcy code, 2016 is not applicable to corporates in finance sector. Explain.

EVOLUTION OF IBC, 2016:

- ✓ In Union Budget 2014 – 2015, Finance Minister announced Bankruptcy Code;
- ✓ On 21st Dec., 2015, Code was introduced in Lok Sabha;
- ✓ On 5th May, 2016, Lok Sabha passed the Code;
- ✓ On 11th May, 2016, Rajya Sabha passed IBC, 2016.
- ✓ On 28th May, 2016, code received assent of President;

ADJUDICATING AUTHORITIES:

1. For Companies or LLP: NCLT (National Company Law Tribunal).
2. For Partnership Firm & Individuals (Partners) or Individuals: DRT (Debt Recovery Tribunal).

NOTE: Appellate authorities:

- ✓ In case of NCLT: Appeal against the order of NCLT will be filed to NCLAT;
- ✓ In case of DRT: Appeal against the order of DRT will be filed to DRAT.

PREVIOUS YEAR QUESTIONS:

Q.: Gupta associates & Firm applied to NCLT to be declared insolvent as the firm is not able to pay off debts to his creditors in present and in coming future. State whether the act of the firm is valid as to the filing of application in terms of jurisdiction.

THE REGULATORY MECHANISM AND REGULATORY BODIES (PILLARS OF IBC):

The regulatory mechanism as per The Insolvency and Bankruptcy Code, 2016 would be based on the following five pillars:

- Adjudicating Authority;
- Insolvency and Bankruptcy Board of India;
- Insolvency Professional Agencies;
- Insolvency Professionals;
- Information Utilities.

IBBI (INSOLVENCY AND BANKRUPTCY BOARD OF INDIA)**❑ Establishment of IBBI:**

- i. Central Government has established IBBI under this code.
- ii. This board is a body corporate and has all characteristics of a Company.
- iii. Head office in New Delhi.

❑ Powers of IBBI:

- i. Manage registration of Insolvency professional agencies, Insolvency professionals, information utilities, etc.

- ii. Specify their eligibility requirements.
- iii. Levy fees and charges for registration.
- iv. Monitor their performances.
- v. Make their bye laws.

❑ **Composition of IBBI:** In terms of section 189 of the Insolvency and Bankruptcy Code, 2016, the Governing Board of IBBI consists of the following 9 members & 1 Chairperson:

- i. Chairperson;
- ii. 3 members amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one of each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio.
- iii. One member nominated by the Reserve Bank of India, ex officio.
- iv. Five other members to be nominated by the Central Government, out of which 3 shall be the whole - time members.

NOTE:

- ✓ The Chairperson and the other members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and have **special knowledge and experience in the field of law, finance, economics, accountancy or administration.**
- ✓ Chairperson and members are appointed for 5 years and can be re-appointed.
- ✓ But can work upto their maximum age of 65 years.

FUNCTIONS OF IBBI [Imp. For MCQs]

- i. Legislative (Make bye laws for IPA, IP & IU, Levy fees and charges for registration).

- ii. Executive (Monitor their performances).
- iii. Quasi Judicial with respect to Insolvency Professional Agency, Insolvency Professional & Information Utilities (Listen against them).

INSOLVENCY PROFESSIONAL AGENCY

- Established under this code under Section 201 of IBC, 2016.
- Registered with IBBI and obtain certificate to work as IPA.
- More than 1 agency can be registered with IBBI to work as IPA.
- Only Section 8 (NPO) can be registered as IPC.
- Net worth must be Rs. 10 crores or more and Paid up share capital must be Rs. 5 crores or more.
- Should not be subsidiary of a subsidiary.
- IBBI specify the process of its registration and its bye laws.

Functions of IPA:

- i. Grant membership to Insolvency professional.
- ii. Make bye laws for Insolvency Professional.
- iii. Mention its duties.
- iv. Safeguard rights, interests of Insolvency Professional.
- v. Suspend member or cancel membership.
- vi. Redress grievances of members.
- vii. Publish information about its functions, list of members, and performance of its members.

Functions of IPA [Imp. for MCQs]:

- **Regulatory functions:** Drafting detailed standards and codes of conduct through bye-laws, that are

made public and are binding on all members.

- **Executive functions:** Monitoring, inspecting and investigating members on a regular basis, and gathering information on their performance, with the over arching objective of preventing frivolous behaviour and malfeasance in the conduct of IP duties.
- **Quasi-judicial functions:** Addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions.

INSOLVENCY PROFESSIONAL

- Registered under Insolvency Professional Agency.
- IP as intermediaries play a key role in the efficient working of the bankruptcy process.
- Every Insolvency Professional shall abide by the following code of conduct:
 - i. To take reasonable care and diligence;
 - ii. To allow the insolvency professional agency to inspect his records;
 - iii. To submit a copy of the records.

Function of IP: Main work of IP is to try to make resolution plan to revive the company.

INFORMATION UTILITY [SECTION 3(21)]

Section 3(21) of IBC, 2016: Information Utility means a person who is registered with the Board (IBBI) as an information utility under Section 210.

Function of IP: Main work of IU is to go into Sick company and check its accounts and make report about the Financial Situation of Company.

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Process of CIRP (Corporate Insolvency Resolution Process):

1. Filing of application before NCLT;
2. Admission or Rejection of application;
3. Moratorium and Public announcement;
4. Appointment of Interim Resolution Professional;
5. Formation of the Committee of Creditors;

6. Appointment of Resolution Professional;
7. Preparation, Examination and approval of Resolution Plan;
8. Submission of Resolution Plan;
9. If no Resolution Plan – Liquidation.

Minimum Limit of Default to make application for revival (Section 4):

- ✓ Application for CIRP can be filed only if Default is minimum of ₹1 Crore or more.
- ✓ Central Government may by notification specify minimum amount of default of higher value which shall not be more than ₹ 1 Crore.

PREVIOUS YEAR QUESTIONS:

Q.1: When application can be filed to start CIRP?

Ans.:

1. Default must be of Rs. 1 crore or more.
2. If default is less than Rs. 1 crore then no CIRP.
3. CIRP can be commenced
4. If any corporate debtor (Company) makes default in re-payment to creditor (s).

Application for CIRP to NCLT (Section 6):

1. Whenever any Company become sick than firstly application should be made to NCLT.
2. Application for CIRP can be made by:
 - a. Financial Creditor (Section 7);
 - b. Operational Creditor (Section 9);
 - c. Corporate Debtor (Section 10).

PREVIOUS YEAR QUESTION:

Q.: Who can initiate the Insolvency Resolution Process?

Meaning of Financial Creditor [Section 5(7)]: Person to whom money is not repaid by Debtor. Person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

EXAMPLE:

- Bhookha Nanga Bank gave loan of ₹3 Crores to Kallu Mama.
- But Kallu Mama not repaid loan amount to Bank.

Conclusion: In this case: Kallu Mama: Debtor, Bank: Financial Creditor.



Meaning of Operational Creditor [Section 5(20)]: Person who has paid money in advance for having goods which are not delivered. Person to whom operational debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

EXAMPLE:

→ Paid money in advance for having 1000 Packets of Amul Butter.

← Not giving products



Conclusion: In this case:
Mohit Bansal Classes: Operational Creditor.
Amul: Corporate Debtor.

Q.2:

RKG Infrastructure Ltd. were incurring continuous losses and its financial position went bad to worse. Now, the Company is undergoing a corporate resolution process. Dinesh who is one of the senior employee of the company has not been paid his salary for 3 months amounting to Rs. 4.5 crores.

He files an application for initiating corporate insolvency resolution process with an Adjudicating Authority.

Analyze and state whether Dinesh is entitled to make an application to initiate corporate insolvency resolution process.

Ans.:

1. As per Section 4 of the Insolvency & Bankruptcy Code, 2016, if corporate debt is more than Rs. 1 crore corporate insolvency resolution and liquidation process can be initiated.
2. As per Section 6, where any corporate debtor commits a default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.
3. As per Section 5(20), Operational Creditor includes a person to whom an operational debt is owed.
4. As per Section 5(21), Operational Debt includes means a claim in respect of employment.
5. Thus, employee of company to whom salary more than Rs. 1 crore is due can initiate corporate insolvency process being operational creditor of the company under the Insolvency & Bankruptcy Code, 2016.

Initiation of Corporate Insolvency Resolution Process by Financial Creditor: Section 7

1. A financial creditor can initiate action himself or jointly with other financial creditors or any other person on behalf of financial creditors to NCLT, against a corporate debtor when a default occurs.
2. Application to NCLT by Financial Creditor must be made in Form no. – 1 along with the fees of Rs. 25,000.
3. Along with the application following documents must be attached:
 - a. Copy of the application filed to the Corporate Debtor at its registered office by speed post or registered post or any other authorized courier.
 - b. The Financial Creditor shall furnish the name of the resolution professional proposed to act as an interim resolution professional with the written communication obtain in Form - 2 (If any).
 - c. Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
4. The Adjudicating Authority shall, within **14 days** of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.
5. Where the NCLT is satisfied that –
 - a. A default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
 - b. Default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

NOTE: Provided that the NCLT shall, before rejecting the application, give a notice to the applicant to rectify the defect in its application within **7 days** of receipt of such notice from the Adjudicating Authority.

6. The corporate insolvency resolution process shall commence from the date of admission of the application.
7. Admission or Rejection of application must be intimated to the Financial Creditor and Corporate Debtor (only in case of admission) within 7 days.

NOTE:

- ✓ An application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten percent. of the total number of such creditors in the same class, whichever is less.
- ✓ Financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent. of the total number of such allottees under the same real estate project, whichever is less.
- ✓ Applicant shall serve a copy of application to the registered office of Corporate Debtor and to the Board by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

EXAMPLE:



Gave loan of ₹3 Crores to Laundry wala co. for 5 years.

After expiry of 5 years, not repaid loan amount.





- Dekho ji, hamara amount wapas nahi aa raha hai.
- Toh iska matlab Laundrawala co. shayad sick ho gayi hai.
- Isliye hum ab CIRP ke liye application lagane wale hain NCLT ko.
- But because law bolta hai isliye NCLT ke pass application lagane se pahle aapko (Regd. Office of IBBI & Corporate Debtor) application file kar rahe hain.



- Filed application for CIRP in FORM NO. 1 along with ₹25,000 to NCLT.

Are aapko pata nahi hai kya, application ke saath me kuch documents bhi attach karne hote hain.



- Ji sir pata hai, isliye application ke saath following documents attach kiye hain:
- Copy of the application filed to the Corporate Debtor at its registered office;
 - Name of Interim Resolution Professional (if any);
 - Record of Default by Laundrywala.



- Theek hai, hum Information Utility ko Laundrywala Co. me bhejte hain and use report banana ko bolte hain.
- Agar Information Utility ki report se ye clear hota hai ki Laundrywala ne such me default ki hai toh aapki application accept ho jayegi.
- Otherwise reject.

After report of Information Utility



NCLT checked about the record of default of Financial Creditor within 14 days from the date of admission.

- Found application and all other documents were complete;
- So accepted the application and intimated to Financial Creditor (Bank) and Corporate Debtor (Laundrywala), within 7 days.

OR

Found application and all other documents were not complete, So gave 7 days to rectify the same.

If rectified, will approve.

OR

If not rectified, will reject and will intimate within 7 days to Financial Creditor only.

Conclusion:

- Agar application reject hui toh sirf aapko (Financial Creditor) ko btaya jayega.
- But agar accept hui toh Toh aapko (Financial Creditor) and Laundrywala co. (Corporate Debtor) dono ko btaya jayega.

PREVIOUS YEAR QUESTIONS:

Q.1: Mr. Ganesh, a creditor filed an application for corporate insolvency process. He does not propose for appointment of an interim resolution professional in the application. State the provisions given by the code in the given situation. State the term of such appointed IRP.

Ans.: IBC, 2016, provisions state that:

1. An Operational Creditor can file application to NCLT to revive concerned Company.
2. Operation Creditor has an option to refer name of Interim Resolution Professional.
3. But if no name is suggested by Operational Creditor, NCLT can appoint I.R.P.
4. NCLT will ask IBBI to appoint I.R.P.
5. IBBI should appoint I.R.P. within 10 days from the date of reference.

Q.2:

Discuss the provisions relating to initiation of corporate insolvency resolution process by financial creditor under the Insolvency & Bankruptcy Code, 2016.

Ans.: Discussed Above already.

Q.3: MF Capital Pvt. Ltd. accepted Inter – Corporate deposits from JS Financial Services Pvt. Ltd. MF Capital Pvt. Ltd. is a non – banking Financial Company with asset size of ₹200 crores which has obtained a certificate from RBI for carrying on the business of providing financial services. As there was a default in repayment of deposits, JS Financial Services Pvt. Ltd. filed an application with the NCLT u/s 7 of the IBC, 2016. Examine the validity of application.

Ans.: No, because IBC is not applicable on NBFC.

Q.4: Rose Garden Ltd. filed its financial statements for the year ending 31st March, 2019, with ROC, Chennai which disclosed that the liabilities amounted to ₹3.87 crores as against the assets of 1.37 crores. On the basis of scrutiny of the financial statements, the Registrar filed an application for CIRP under IBC, 2016 against the company that the company is unable to pay its debts on the ground that the value of liabilities far exceeded the value of assets. Examine whether the company has any case to defend against the application filed by the Registrar.

Ans.: No, because application for CIRP cannot be filed by ROC.

Q.5: The Financial Creditor, Mr. Raman, was an investor and a debenture holder of “Optionally Convertible Debenture Bond (OPDB) payable on maturity, issued by the M/s Asset Ltd. (Corporate Debtor). The Zero interest OCD bands amounting to ₹ 2 crores matured in 2016. The liability to redeem the debentures on maturity along with a redemption premium lay on the debtor, which was not made. Mr. Raman filed the CIRP before NCLT. Advise in the light of the given facts, the following situations:

- i. Do the redemption of debenture payable on the maturity date amounts to debt?
- ii. State whether Mr. Raman is eligible for filing of application for initiation of CIRP?

Ans.: Mr. Raman (Debentureholder) is not entitled to file application because as per clauses (a) and (b) of Sub - Section (6A) of **Section 21**:

- ✓ If Financial Debt is in the form of securities or deposits and the terms of financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors.
 - ✓ Than application must be filed by:
 - Not less than 100 Debenture holders;
- OR**
- Not less than 10% of total Debenture holders

WHICHEVER IS LESS.

NOTE: Application will be filed by Debenture Trustee on behalf of Debenture holders.

Meaning of Dispute [Section 5 (6)]: It includes suit or arbitration proceedings relating to:

- a. Existence of amount of Debt;
- b. Quality of Goods or Service;
- c. Breach of representation or warranty.

Q.6: RKG Infrastructure Ltd. were incurring continuous losses and its financial position went bad to worse. Now, the Company is undergoing a corporate resolution process. Dinesh who is one of the senior employee of the company has not been paid his salary for 3 months amounting to Rs. 4.5 crores. He files an application for initiating corporate insolvency resolution process with an Adjudicating Authority.

Analyze and state whether Dinesh is entitled to make an application to initiate corporate insolvency resolution process.

Ans.:

- ✓ As per Section 4 of the Insolvency & Bankruptcy Code, 2016, if corporate debt is more than ₹ 1 crore corporate insolvency resolution and liquidation process can be initiated.
- ✓ As per Section 6, where any corporate debtor commits a default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.
- ✓ As per Section 5(20), operational creditor includes a person to whom an operational debt is owed.
- ✓ As per Section 5(21), operational debt includes means a claim in respect of employment.
- ✓ Thus, employee of company to whom salary more than Rs. 1 crore is due can initiate corporate insolvency process being operational creditor of the company under the Insolvency & Bankruptcy Code, 2016.

FINANCIAL DEBT – SECTION 5(8): “Financial Debt” means a debt alongwith interest & includes:

- money borrowed against the payment of interest;
- any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- the amount of any liability in respect of any lease or hire purchase contract;
- receivables sold or discounted other than any receivables sold on non-recourse basis;

NOTE: Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

Q.7: Mr. SP booked office space with Elegant Construction Limited. At the time of booking Rs. 36 lakhs was paid. Remaining amount of Rs. 10 lakhs was paid at the time of taking delivery. He entered into a Memorandum of Understanding (MoU) with the company having various terms and conditions of the sale/allotment. According to the MoU, Elegant Construction Limited was required to build and deliver the possession of the unit within 2 years from the date of execution of the MoU. It also stipulated payment of an assured return of Rs. 82,000 per month (subject to TDS u/s 194A of IT Act, 1961) till possession of the unit was delivered to Mr. SP. Elegant construction Limited failed to pay the assured return. Thereafter, Mr. SP filed an application for initiating insolvency resolution process.

Decide about the validity of the said application in view of the provisions of Insolvency and Bankruptcy Code, 2016 as regards the definition of a financial creditor under Section 5(7) read with Section 5(8) of the Code.

Ans.: Default is less than ₹1 crore. So, petition is not valid and CIRP will not start.

Q.8: Best Bank, a financial creditor sent a demand notice for a claim of Rs. 10.2 crores on XYZ Limited, a corporate debtor on 6th February 2018. When the petition was filed before NCLT under Insolvency and Bankruptcy Code, 2016, Best Bank claimed that the XYZ Limited has defaulted Rs. 29.8 crores instead of original amount of Rs. 10.2 crores. NCLT appointed an interim insolvency resolution professional. XYZ Limited made an appeal with NCLAT demanding that the Best Bank's claim is not maintainable as there is a difference in the amount mentioned in the demand notice and the application filed under the Code. Decide whether the contention of XYZ limited is correct. Also, state who can file Corporate insolvency Resolution Process under the Code?

Ans.: Yes, XYZ is correct.

Q.9: Creative India Limited owes a sum of Rs. 2,80,00,000 to S, who assigns this debt to his two creditors, Mr. R – to the extent of Rs.1,40,00,000 and Mr. M - to the extent of Rs.1,40,00,000. Mr. M makes a demand for his money from the company by giving a legal notice. The company could not meet Mr. M's demand or otherwise satisfy him till the expiry of four weeks from the date of notice. Mr. M, therefore, moves to NCLT with an application for initiation of Insolvency and Bankruptcy Code, 2016, decide whether an application filed by Mr. M can be accepted by NCLT.

Ans.: Yes, because default is more than ₹1 crore.

Pre – Condition for Filing by Operational Creditor (Section 8):

1. Before initiating CIRP Operational Creditor has to send Demand Notice in Form - 3 to the Corporate Debtor for demanding payment of outstanding amount.
2. Demand Notice must accompanied with all the invoices, emails, conversations between Operational Creditor and Corporate Person and any evidences which can be taken on records after initiating CIRP.
3. Demand Notice must be served in proper format mentioned in Form - 3 and copy of invoices under Form - 4.
4. Demand Notice can be send to the Corporate Debtor by registered post or speed post, by e-mail to the directors or partners or key managerial persons of the Corporate Persons.
5. Demand Notice must also be send to an information utility.
6. It is the onus of Corporate Debtor to make reply to the Demand Notice served by the Operational Creditor within 10 days of the receipt of the Demand Notice.
7. The purpose to make reply of Demand Notice is to bring in the knowledge of the Operational Creditor regarding the existence of dispute for the same or related subject matter in any other forum of court or tribunal before receipt of the Demand Notice.
8. And if the Corporate Debtor had make the payment of the Operational Debt, then it must attach the copy of record of encash cheques and record of bank accounts with its reply.

Initiation of Corporate Insolvency Resolution Process by Operational Creditor - Section 9:

1. After the completion of threshold of 10 days from the delivery of the Demand Notice and no reply has been given by the Corporate Debtor on the occurrence of default, the Operational Creditor can file an application to initiate CIRP against the Corporate Debtor with Rs. 2000.

2. The application must be in Form - 5 and must be accompanied by all following required documents:
 - i. Copy of Invoice or Demand Notice delivered by Operational Creditor to Debtor;
 - ii. An Affidavit to effect that no notice given by corporate debtor relating to dispute;
 - iii. Copy of certificate from Financial Institutions maintaining accounts confirming that payment of unpaid operational debt is available (filing this certificate is mandatory if it is available);
 - iv. Any other proof confirming Non – Payment;
 - v. An Operational Creditor may propose Name of Resolution Professional who will work as Interim Resolutional Professional.
3. If the Operational Creditor proposes the interim resolution professional, then he has to obtain the written communication in Form - 2 for appointment.
4. The Adjudicating Authority shall, within **14 days** of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the Operational creditor.
5. Where the NCLT is satisfied that –
 - a. A default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
 - b. Default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

NOTE: Provided that the NCLT shall, before rejecting the application, give a notice to the applicant to rectify the defect in its application within **7 days** of receipt of such notice from the Adjudicating Authority.

6. The corporate insolvency resolution process shall commence from the date of admission of the application.
7. Admission or Rejection of application must be intimated to the Operational Creditor and Corporate Debtor (only in case of admission) within 7 days.

Point to Remember: From Point no. 4 – Process is same as of Financial Creditor.

PREVIOUS YEAR QUESTIONS:

Q.1: Standard International Ltd. who is a foreign trade creditor having its office in Hong Kong wanted to file a petition under IBC, 2016, on default of the debtor in India. It moved a petition u/s 9 of the code seeking commencement of CIRP. The foreign company was not having any office or bank account in India. Because of this, it could not submit a certificate from a Financial Institution as required under the case. Whether the petition is permissible under the IBC, 2016?

Ans.: Section 9 says if Operational Creditor has any certificate from Bank or F.I. then it must be filed otherwise it is not mandatory.

Hence, Standard International Ltd. can file application and it is permissible.

Q.2: Mr. MS an operational creditor, filed an application with the adjudicating authority (NCLT, Delhi) to initiate the Corporate Insolvency Resolution Process (CIRP) against TR Limited, and the application was accepted. On 10th July, 2022, NCLT, Delhi appointed Mr. VS to act as Interim Resolution Professional of TR Limited. After the appointment, Mr. VS issued the public announcement on 12th July, 2022 of initiation of CIRP Process and called for submission of claims. On 20th July, 2022, the committee of

creditors was constituted by Mr. VS.

Thereafter, Mr. MS wants to withdraw his application under section 12A of Insolvency and Bankruptcy code, 2016. However Mr. VS denied filing a withdraw application stating the Committee of Creditors has already been constituted.

Referring to the provisions of IBC, 2016, answer the following with reference to the above facts.

- i. Is Mr. VS right to deny Mr. MS to file a withdrawal application with NCLT, Delhi? Explain in detail.
- ii. Would your answer differ in case the committee of creditors is not constituted?
- iii. Who is the authority to pass the final order of withdrawal application?

Ans.:

- i. Pursuant to the provisions of IBC, 2016:
 - An Operational Creditor who have already filed an application to NCLT, can withdraw the same.
 - To withdraw filed application, Operational Creditor will ask to Interim Resolution Professional to file application to NCLT for withdrawal.
 - If Committee of Creditors (COC) is already constituted than 90% approval of COC must be accorded.
 - If NCLT get satisfied from the application and reason of withdrawal, will order for withdrawal.
- ii. Yes. If Committee of Creditors is not constituted than application for withdrawal can be filed directly to NCLT without taking prior approval of COC.
- iii. NCLT is final authority to pass order for withdrawal.

NOTE: If applicant is aggrieved from the order of NCLT, appeal can be made to NCLAT against the order of NCLT.

Q.3: Rose Garden Ltd. was incurring continuous losses and its financial position went bad to worse. Black Stone (Private) Ltd., a trade creditor, issued notice under Section 271 of the Companies Act, 2013 for winding up of Rose Garden Ltd. on the ground that Rose Garden Ltd, was unable to pay its debts. After some time, Black Stone (Private) Ltd. being an operational creditor filed a petition before the Adjudicating Authority to initiate insolvency process under the insolvency and Bankruptcy Code, 2016. Demand Notice and copy of invoice were not served to Rose Garden Ltd. since a notice was earlier issued for winding up. All other formalities were complied with. The Adjudicating Authority initiated Insolvency Resolution Process by admitting the application and appointed Resolution Professional. After complying required formalities, the Adjudicating Authority issued orders for moratorium and other relief within the stipulated time. Being aggrieved by the order of Adjudicating Authority, Rose Garden Ltd. (Corporate debtor) filed an appeal before NCLAT under the Insolvency and Bankruptcy Code, 2016. Determine will the Company succeed in its appeal?

Ans.: As per Section 9, Operational Creditor before filing application to authority for CIRP, must serve demand notice to Corporate Debtor but in this case it is not done by Operational Creditor (Black Stone Pvt. Ltd.).

Hence, CIRP should not start and appeal of Rose Garden Ltd. Is valid.

CASE LAW: Era Infra Engineering v Prideco Commercial Projects Pvt. Ltd.

Q. 4: M/s TAS Constructions Private Limited, an operational creditor, on 2nd April, 2018 being the default date issued a demand notice through speed post to M/s Dheeraj Constructions Private Limited, an unpaid operational/corporate debtor demanding payment of its invoice dated 19th March, 2018 for Rs. 5,60,00,000 (15 days payment terms) towards supply of certain works contract services as per the

provisions of Section 8(1) of the Insolvency and Bankruptcy Code, 2016 and rules framed there under. Dheeraj Constructions Private Limited on receipt of the demand notice informed the operational creditor, that vide their e-mail dated 30th March, 2018, addressed to the company and all its directors, they have disputed the invoice on the quality of the services rendered and were withholding payment till the dispute is settled but without initiating any legal proceedings under any law for the time being in force. The operational creditor on expiry of the period of 10 days from the date of delivery of the demand notice and non-payment of its dues approached the Adjudicating Authority for the initiation of the corporate insolvency resolution process under Section 9(1) of the Insolvency and Bankruptcy Code, 2016. Will the application of the operational creditor filed under Section 9(1) read with Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 be permitted?

Ans.: No, because within 10 days Corporate Debtor gave satisfactory answer.

CASE LAW: MobiloX Innovations Private Limited Vs. Kirusa SoftWare Private Limited and Innoventive Industries Vs ICICI Bank

Q.5: Nature India Limited filed a petition under Insolvency and Bankruptcy Code, 2016 with National Company Law Tribunal (NCLT) against Tulip Limited and the petition was admitted. After that, Nature India Limited wanted to withdraw the petition based on a settlement arrived between the parties. Whether it is permissible to withdraw the petition after it has been admitted? Decide.

Ans.: Already Discussed above.

Initiation of Corporate Insolvency Resolution Process by Operational Creditor – Section 10:

- 1. Corporate Debtor has to make an application in Form - 6 with fees of Rs. 20,000 only before the Adjudicating Authority.**
- 2. Before initiating CIRP, a special resolution must be passed by the shareholders of the Corporate Debtor.**
- 3. If Corporate Debtor is a LLP, then resolution must be passed by at least three - fourth of the total number of partners of Corporate Debtor.**
- 4. The application must be accompanied with the information relating to:**
 - a. Its books of accounts;**
 - b. Information relating to resolution professional proposed to be appointed as an interim resolution professional,**
 - c. The aforementioned resolution passed;**
 - d. And any other information.**
- 5. Within 14 days of the receipt of the application, the Adjudicating Authority shall admit or reject the application. If the application is rejected, time period of 7 days must be given by the Adjudicating Authority to rectify or amend the application.**
- 6. The Adjudicating Authority shall, within 14 days of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the Corporate Debtor.**
- 7. Where the NCLT is satisfied that –**
 - a. A default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or**

- b. Default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.
- 8. Admission or Rejection of application must be intimated to the Corporate Debtor within 7 days.

COMMENCEMENT OF INSOLVENCY RESOLUTION PROCEEDINGS:

- ✓ The corporate insolvency resolution process shall commence from the date of admission of the application.
- ✓ It is referred as Corporate Insolvency Resolution Date.

PERSONS NOT ENTITLED TO MAKE APPLICATION FOR CIRP – SECTION 11: The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process:

- a. a corporate debtor undergoing a corporate insolvency resolution process or a prepackaged insolvency resolution process; or
- b. a financial creditor or an operational creditor of a corporate debtor undergoing a prepackaged insolvency resolution process; or
- c. a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- d. a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

- e. 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
- f. a corporate debtor in respect of whom a liquidation order has been made.

NOTE:

- ✓ For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.
- ✓ For the purposes of this section, it is hereby clarified that nothing in this section prevent a corporate debtor referred above to in clauses (a) to (f) from initiating corporate insolvency resolution process against another corporate debtor.