



# INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

## IBC Case Law Capsule

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**M/s Consolidated Construction Consortium Limited Vs. M/s Hitro Energy Solutions Private Limited**  
**Civil Appeal No 2839 of 2020**

**Date Of Supreme Court's Judgment: 04<sup>th</sup> February 2022**

### **Facts of the Case: -**

This Appeal was filed under Section 62 of the IBC, 2016 and arises out of the judgment of the National Company Law Appellate Tribunal 'NCLAT' by which it reversed the decision of the National Company Law Tribunal, Chennai Bench (Adjudicating Authority 'AA'). The Facts of the case are that AA had admitted an application filed by the Appellant, under Section 9 of the IBC for the initiation of the CIRP against the Respondent. While admitting the application, the AA held that the Respondent's Memorandum of Association, proved that it took over a proprietary concern, Hitro Energy Solutions, and that the proprietary concern owed the Appellant an outstanding operational debt. Further, the AA declared a moratorium under Section 14 of the IBC vide its order.

The NCLAT set aside the order of the AA and dismissed the application of the Appellant filed under Section 9 of the IBC and released the respondent from the ongoing CIRP. Further in support of its conclusions, the NCLAT held that Firstly, the Appellant was a 'purchaser', and thus did not come under the definition of 'operational creditor' under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; Secondly there was nothing on record to suggest that the Respondent has taken over the proprietary concern and Thirdly, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24<sup>th</sup> June 2013 and cheques were issued on advance basis.

The Apex Court issued a notice and stayed the operation of NCLAT's judgment. It further stated that the issues arising before it were as follows: -

- Whether the appellant is an operational creditor under the IBC even though it was a 'purchaser'?
- Whether the Respondent took over the debt from the proprietary concern?
- Whether the application under Section 9 of the IBC is barred by limitation?



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## Supreme Court's Observations: -

The Apex Court regarding the first question stated that in the present case, the phrase “in respect of” in Section 5(21) of IBC has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the CD, which ultimately lead to an operational debt and the appellant clearly sought an operational service from the Proprietary Concern. Further, when the contract was terminated the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.

Regarding the second question, the Apex Court stated that the dispute resolved around the MoA of the Respondent whereby the MOA stated that one of its main objects is to take over the Proprietary Concern. However, the respondent produced a resolution passed by its Board of Directors, purportedly resolving to not take over the Proprietary Concern. In this regard the respondent provided no proof that the procedure prescribed Companies Act 2013 was followed to amend the MoA. Hence the MOA of the respondent remained unchanged and conclusive proof that the respondent took over the Proprietary Concern and was liable to re-pay the debt to the appellant.

Regarding the Third question, the Apex Court held that the application under Section 9 of the IBC was not barred by limitation as a letter was addressed by the Appellant to the proprietary concern on 27 February 2017, demanding the payment and the same was replied by the proprietary concern on 2 March 2017, finally refusing to make re-payment to the Appellant.

## Order: -

The Apex Court in view of the above allowed the appeal and consequently set aside the order of the NCLAT.

**Case Review:** - *Appeal Allowed.*

*Link on IIPI Website: -*

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