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www.indolegalservices.com

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121, Tower 11, Supreme
Enclave, New Delhi- 110091



ashutosh@indolegalservices.com
gaurav@indolegalservices.com



+91- 9871433339; +91- 8588999046



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WHETHER SECTION 11(D) OF IBC BAR LIQUIDATOR OR RESOLUTION PROFESSIONAL TO INITIATE CIRP AGAINST ANOTHER CORPORATE DEBTOR?

An affirmative answer to the question has specifically been rendered by Section 4 of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, brought in force w.e.f. 28.12.2019, through which the relevant provision i.e., Section 11 of the Insolvency & Bankruptcy Code, 2016 (IBC) was amended to include an “Explanation II”, clarifying that nothing in the section shall prevent the Corporate Debtor from initiating Corporate Insolvency Resolution Process against another Corporate Debtor.

Introduction of Explanation II after Section 11(D) of IBC must be credited to the following facts and events:

- i. The plain construction of clause (a) and (b) of the Section 11 of the IBC would indicate that a corporate debtor undergoing a Corporate Insolvency Resolution Process (CIRP) and one who has already undergone a resolution process in preceding twelve months is not entitled to make an application to initiate corporate insolvency resolution process against another corporate debtor;
- ii. Further, Hon’ble National Company Law Appellate Tribunal in the case of *Abhay N. Manudhane Vs. Gupta Coal India Pvt. Ltd.* Company Appeal (AT) (Insolvency) No. 786 of 2019 dated 01.10.2019, held that as per Section 11(d) of the IBC, the Liquidator on behalf of Corporate Debtor cannot initiate Insolvency proceedings under the IBC against other Corporate Debtor, but can initiate other proceedings against such Corporate Debtor like recovery proceedings etc;
- iii. Furthermore, the Adjudicating Authority, Delhi, in the case of *Mandhana Industries Limited v. Instyle Exports Private Limited* (Company Petition No. (IB)-301(ND)/2018) vide order dated 30.08.2018 dismissed the application of Resolution Professional who was proceeding on behalf of a corporate debtor, on the premises that said application is barred by Section 11 of the IBC.

The applicability of said Explanation has also met with certain conundrum as it seems to impart new right to the Resolution Professional and the Liquidator to initiate CIRP against another corporate debtor. But by its nature the explanation has been put to simply clear the intention of legislature in the main provision and does not add or subtract any substantial provision in



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the Act, and therefore it is required to be applied retrospectively from the date of enactment of main provision. That the said proposition has been again and again hammered by the Hon'ble Apex Court and even as recently in the case of *Pioneer Urban Land and Infrastructure Limited vs. Union of India* Judgment dated August 09, 2019 in Writ Petition(s)(Civil) No. 43/2019, whereby it is held that an explanation simply being a clarification does not interfere with or alter the main provision and has to be given a retrospective effect.

It is noted that an objection in the realm of Study on the Principles of Interpretation may accrue, whether the added Explanation II, as discussed, is indeed an “explanation” only? The objection assumes significance in view of the settled law that an “Explanation” neither reverts the meaning of the main provision nor enlarges or shortens the scope of it, but however the one in discussion i.e., Explanation II to Section 11, seems to have completely turn around the plain interpretation otherwise rendered by Section 11(a) & (d), and does not seem to be what simply would be read into the provision. Hence, by testing the explanation on aforesaid anvil the explanation ought to be applied from 28.12.2019. In light of the above, the said interpretation needs to wait for testing time to come and settling the air around Explanation II under Section 11 of IBC.

