

Mode of Service of IBC applications and duty of fair disclosure of dispute - NCLAT Decides

Publication as a mode of service of an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ["IBC"] is to be the last resort, to be adopted only when the modes of service by Registered post, Speed Post and even **EMAIL** fails and if it appears that the Debtor is deliberately avoiding service. This sequence was unclear till settled recently by the Hon'ble National Company Law Appellate Tribunal ["NCLAT"] in the case of **Prakash Kalash (Shareholder and Member of Suspended BOD, M/s Gurusukh Vintrade Service Pvt. Ltd.) v M/s Apeejay Surrendra Park Hotels Ltd. & Anr.** vide Judgment Dated 23.9.20 Reported [\[2020\] ibclaw.in 88 NCLAT](#).

The background dispute arose between the Company that owned a Hotel and the Company that provided Operation and Management service at the Hotel. The latter, claiming to have outstanding service dues, proceeded to initiate Insolvency proceedings against the former by issuing a demand notice under Section 8 of IBC (claiming to be Operational Creditor of the Company) first, followed by a Section 9 application for initiation of Corporate Insolvency Resolution Process ["CIRP"] against the Owner Company.

There seemed to be multiple historical letters and emails of inter-party dispute wherein the Owner Company accused the Applicant Service Provider of poor performance (including lack of employee training, statutory non-compliance, false revenue reporting, fund siphoning, poor management and service, lethargy etc.) and the Operational Creditor reverted (with accusations of lack of fund support and payment of service dues). Interestingly, the Operational Creditor did not enclose any of these in their application before the Hon'ble National Company Law Tribunal ["NCLT"]. For two Companies which have constantly communicated with each other via email, the Applicant Creditor also surprisingly reported inability to serve the Owner Company with either the mandatory Section 8 demand notice OR a copy of the Section 9 application either via Registered Post or Speed Post. Without considering the option of E-mail based Servicing, the NCLT proceeded to direct service of application by way of newspaper publication. Having done the same, the matter was proceeded Ex-Parte and the NCLT was pleased to admit the Insolvency Application.

Shocked by the sudden loss of control of management and having come to know of the proceedings only then, the Order of the NCLT was challenged by an Erstwhile Director of the Owner Company before the NCLAT. In the appeal prosecuted through **Adv. Krishnamohan K Menon of Mimansa Law Offices**, the Owner Company challenged the Order of the NCLT for want of proper service as per Rules 5 and 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ["IBAA Rules"]. Relying upon the judgment of the Hon'ble Supreme Court in **Neerja Realtors (P) Ltd. v. Janglu, (2018) 2 SCC 649**, it was argued that publication as a mode of service should be the last resort and that too only if the conventional modes of service including registered post, speed post and EVEN EMAIL, fails. It was also argued that the applicant had failed in their duty of

fair disclosure by suppressing all the inter-party dispute letters before the NCLT and therefore not only is the NCLT order liable to be set aside but the applicant creditor is to be prosecuted under Section 76 of the IBC. The Respondent defended the NCLT Order on the premise of delayed challenge, proper service by way of publication when registered post was returned with insufficient address and finally by mentioning that the relevant documents were produced before the NCLT.

The NCLAT, seeing merits in the argument of the appellant, held that the NCLT order and the consequent CIRP proceedings were bad in law and hence liable to be set aside. It was held that the service was improper as the proper mode of Service as per Rules 5 and 6 of IBAA Rules were not followed. Relying upon the judgment of the Hon'ble Supreme Court in the Neerja Realtor's case, it was also held that In- Sequentia, an attempt must be made to serve by way of Registered Post/Speed Post followed by E-mail. Publication as a mode of service is permitted only if the other options are exhausted and if it appears that the Debtor is deliberately avoiding service. Further, the Hon'ble NCLAT was also pleased to find that the various inter-party emails produced by the Appellant show that there was a bona fide pre-existent dispute as held by the Hon'ble Supreme Court in Mobilox's case [\[2017\] ibclaw.in 01 SC](#) and hence the Section 9 application was itself not maintainable. On this premise the Order of the NCLT was set aside and the CIRP process was closed.