

## Unregistered Partnerships & IBC

written by King Stubb & Kasiva | April 18, 2023



The National Company Law Tribunal (NCLT) in Mumbai reaffirmed its stance on the right of an unregistered partnership to file for insolvency proceedings as an Operational Creditor, overriding the exception created under Section 69(2) of the Indian Partnership Act, 1932<sup>[1]</sup>. Section 69(2) of the IPA, 1932 prohibits a party from instituting any suit to enforce rights arising from a contractual relationship unless the partnership is registered, and the suing partners are listed in the Register of Firms.

In this case, M/s Shree Dev Chemicals Corporation, an Operational Creditor, filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC)<sup>[2]</sup> against Gammon India Limited, the Corporate Debtor, for failure to repay the principal amount and accumulated interest. Gammon India Limited argued that the applicant was barred by Section 69(2) of the IPA, 1932 from proceeding with the application.

Interplay Of Section 69(2) Of The IPA, 1932 & Section 9 Of IBC

The adjudicating authority made it clear that the defense under Section 69(2) would not hold up, as this provision only applies to 'suits' and not 'proceedings', and an application under Section 9 of the IBC is considered as the latter. This position of law was elucidated by the Mumbai bench of NCLT in a similar case of M/s NN Enterprises v. Re/con Infra Projects Limited<sup>[3]</sup>. In that case, the Corporate Debtor's counsel argued that the term "partnership firm" referred to in Section 3(23) of the IBC<sup>[4]</sup> only includes registered partnership firms and not unregistered ones, thus Section 69(2) of the IPA, 1932 bars an application under Section 9 of the IBC.

However, the Operational Creditor's, NCLT Mumbai counsel relied on a judgment of the Calcutta High Court in Shree Balaji Sfee/s v. Gontermann-Peipers (India) Limited<sup>[5]</sup> in the context of winding-up under the Companies Act,

1956, which held that a winding-up petition filed by an unregistered firm cannot be construed as a 'suit' within the meaning of Section 69(2) of the Partnership Act, as it uses the term 'suit' and not 'proceedings'. The word 'suit' has both a broad and narrow meaning, and as per the definition in Prem Nath L. Ganesh Dass v. Prem Nath L. Ram Nath and Ors.<sup>[6]</sup>, a 'suit' is a legal proceeding in a court of justice for the enforcement of a right.

The absence of the term 'proceedings' in Section 69(2) of the IPA, 1932 indicates that the legislature did not intend to include it under this provision. The rule of construction, as observed in Crawford v. Spooner by Lord Brougham<sup>[7]</sup>, is that the Act must be construed from its bare terms, and the court cannot add, amend or make up deficiencies in the legislature's phrasing of an Act. Section 26 of the Insolvency and Bankruptcy Code 2016 implicitly identifies CIRP as a proceeding and not a suit, and the Supreme Court in B.K. Educational Services Private Limited v. Parag Gupta<sup>[8]</sup> and Associates and Sagar Sharma v. Phoenix ARC Private Limited<sup>[9]</sup> also held that applications under the IBC are not considered suits.

The Supreme Court in Gaurav Har Govind Bhai<sup>0</sup>av'e v. Asset Reconstruction Company<sup>[10]</sup> also held that Article 62 of the Limitation Act, 1963 does not apply to IBC proceedings as it only applies to suits. Therefore, the Operational Creditor, NCLT Mumbai concluded that Section 69(2) of the IPA, 1932 applies to suits and not proceedings under the IBC, including the present application.

#### Conclusion

Any modification in the dynamics of a partnership firm, such as adding a new partner or removing an existing one, would require the reconstitution of the firm. This means that changes in the partnership structure would necessitate unanimous consent from all existing partners, in accordance with the contractual agreement between partners and the legal provisions related to minors in a firm. The recent ruling by the adjudicating authority has clarified that Section 69(2) of the Indian Partnership Act, 1932, which is applicable to registered partnership firms, does not apply to applications filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC), as they are considered as 'proceedings' rather than 'suits'.

The Operational Creditor and the Corporate Debtor were partners in a firm, and the Operational Creditor's arguments regarding joint and several liabilities with the other partners or the firm were accepted. However, the Bench concluded that even if the Corporate Debtor's liability is established, the Insolvency and Bankruptcy Code (IBC) does not safeguard the interests or claims of one partner against another partner or the firm.

The claim and cause of action arising from transactions between the partners, making the petition legally unsustainable. This interpretation is in line with the Mumbai bench of the National Company Law Tribunal (NCLT) decision in a similar case earlier this year. The NCLT noted that while the term 'suit' has a broad legal significance, it has a narrower procedural meaning, and the absence of the term 'proceedings' in Section 69(2) indicates that the legislature did not intend to include IBC applications under this provision. The NCLT also referred to previous Supreme Court rulings that have treated IBC applications as petitions and not suits. This ruling has brought clarity to the right of unregistered partnerships to file for insolvency proceedings under the IBC as operational creditors and has upheld the true spirit of the legislation despite the limitations imposed by Section 69(2) of the

Partnership Act.

FAQs

Can an unregistered partnership firm file for insolvency proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC), despite the prohibition under Section 69(2) of the Indian Partnership Act, 1932?

Yes, an unregistered partnership firm can file for insolvency proceedings under Section 9 of the IBC, despite the prohibition under Section 69(2) of the Indian Partnership Act, 1932. The Mumbai bench of the National Company Law Tribunal (NCLT) has clarified that Section 69(2) of the Partnership Act applies to 'suits' and not 'proceedings', and an application under Section 9 of the IBC is considered as a proceeding, not a suit. This interpretation is supported by previous Supreme Court rulings that have treated IBC applications as petitions and not suits.

Does Section 26 of the Insolvency and Bankruptcy Code, 2016 (IBC) implicitly identify Corporate Insolvency Resolution Process (CIRP) as a proceeding and not a suit?

Yes, Section 26 of the IBC implicitly identifies CIRP as a proceeding and not a suit. The NCLT has referred to Section 26 of the IBC, which uses the term 'proceedings' in relation to CIRP and has concluded that the legislature did not intend to include IBC applications under the prohibition of Section 69(2) of the Indian Partnership Act, 1932, as it only applies to suits. This interpretation is also supported by previous Supreme Court rulings that have treated IBC applications as petitions and not suits.

Does Article 62 of the Limitation Act, 1963 apply to insolvency and bankruptcy proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC)?

No, Article 62 of the Limitation Act, 1963 does not apply to insolvency and bankruptcy proceedings under the IBC. The Supreme Court in *Gaurav Har Govind Bhai Oav'e v. Asset Reconstruction Company* has held that Article 62 of the Limitation Act, 1963 only applies to suits and does not apply to IBC proceedings, as they are considered petitions and not suits. Therefore, the limitation period for filing applications under the IBC is not governed by Article 62 of the Limitation Act, 1963.

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[1] Indian Partnership Act 1932, s

69(2), <[https://www.mca.gov.in/Ministry/actsbills/pdf/Partnership\\_Act\\_1932.pdf](https://www.mca.gov.in/Ministry/actsbills/pdf/Partnership_Act_1932.pdf)> as accessed on 14<sup>th</sup> April 2023.

[2] Insolvency and Bankruptcy Code, 2016, s

9, <<https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>> as accessed on 14<sup>th</sup> April 2023.

[3] *M/s NN Enterprises v. Re/con Infra Projects Limited* (2020) 2 SCC 456 SC.

[4] Insolvency and Bankruptcy Code, 2016, s

3(23), <<https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>>> as accessed on 14<sup>th</sup> April 2023.

[5] *Shree Balaji Sfee/s v. Gontermann-Peipers (India) Limited*, (2011) 3 SCC 150 SC.

[6] *Prem Nath L. Ganesh Dass v. Prem Nath L. Ram Nath and Ors.*, (1970) 1 SCC 543 SC.

[7] *Crawford v. Spooner*, 6 Cranch (10 U.S.) 13 (Supreme Court 1806)

[8] *B.K. Educational Services Private Limited v. Parag Gupta*, (2012) 11 SCC 142 SC.

[9] *Associates and Sagar Sharma v. Phoenix ARC Private Limited*, (2019) 8 SCC 416 SC.

[10]Govind Bhai Oav'e v. Asset Reconstruction Company, (2016) 8 SCC 487 SC.  
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