

**Independence and Impartiality of Resolution Professionals Under Indian Law:  
Filling the Gaps or Creating Law?**

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**Introduction**

Under the Indian [Insolvency and Bankruptcy Code, 2016](#) (“**Code**”), a resolution professional (“**RP**”) is required to conduct the Corporate Insolvency Resolution Process of a company undergoing insolvency, including managing the Corporate Debtor during the period of Corporate Insolvency and engaging with potential Resolution Applicants for resolution of the debt. Any person may be an RP, provided he is enrolled with an insolvency professional agency and registered with the Insolvency and Bankruptcy Board of India (“**IBBI**”). The [IBBI \(Insolvency Resolution Process for Corporate Persons\) Regulations, 2016](#) (“**Regulations**”) state that an insolvency professional is eligible to be appointed as an RP, provided he is independent of the corporate debtor. No other eligibility criteria have been prescribed for being appointed as an RP, either under the Code or the Regulations. However in a surprising turn of events, the National Company Law Tribunal (“**NCLT**”) [directed substitution of an Interim Resolution Professional](#) who was a former employee of one of the corporate creditors. This [decision was subsequently upheld](#) by the National Company Law Appellate Tribunal (“**NCLAT**”). This article seeks to analyze whether such substitution is founded in law or is merely a knee-jerk reaction to the allegation of bias leveled by the Corporate Debtor (“**Respondent**”).

**NCLT’s Decision**

The Respondent had approached NCLT’s Principal Bench in Delhi, objecting to the appointment of an ex-employee of the Financial Creditor as an RP. It prayed for substitution of the RP due to an apprehension of bias on its part. The RP was an ex-employee of the Financial Creditor but did not have any proven incidence of bias. Moreover, he was not currently employed with the Financial Creditor. The RP had been working with the Financial Creditor for a period of 39 (thirty-nine) years but was now merely a pensioner. It may be noted that such long employment tenures are common in Public Sector Banks in India.

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## Independence and Impartiality of Resolution Professionals Under Indian Law

However, the Tribunal ruled that there was an apprehension of bias against the appointment of the proposed RP and ordered his substitution. This decision was challenged by the Financial Creditor before the NCLAT.

### **NCLAT's Decision**

The NCLAT, in [State Bank of India v. Ram Dev International Ltd.](#), laid down the principles for disqualification of an RP. The Appellate Tribunal had observed that an RP will be disqualified if he is an employee or is on the payroll of the Financial Creditor, or if he is an interested party with well-founded bias and disciplinary proceedings against him.

The Appellate Tribunal in the present case, relying on the principles laid down in its ruling in *Ram Dev International*, held that merely because the RP draws pension from the Financial Creditor, he will not be equated with an employee on its payroll. However, the Appellate Tribunal reasoned that even though the RP was not disqualified or ineligible to act under the Regulations and the Code, the substitution is appropriate, considering there was an apprehension of bias against the ex-employee being appointed as an RP.

In doing so, the Appellate Tribunal relied upon the following factors: (i) the duration of the RP's former employment with the financial creditor; and (ii) the filing of the appeal, by the financial creditor, against the Tribunal's order, directing substitution of the RP. These factors, by themselves, are not sufficient to demonstrate bias. In India, it is [settled law](#) that bias must be based on the material on record, rather than mere possibility of bias, except where provided for by legislation. Therefore the existence of bias cannot be assumed while directing the substitution of an RP, when the possibility of such existence is not backed by the material on record. The NCLAT decision errs on this count.

### **Conclusion**

Indian legislative provisions do not disqualify a former employee of a creditor from acting as an RP. The legal matrix is the same in many other jurisdictions. In the United Kingdom, both the [Insolvency Act, 1986](#) and the [Insolvency Rules, 1986](#) do not contain an express provision disqualifying a former employee of a creditor. The legal provisions in the [United States](#) and [Singapore are similar](#).

## Independence and Impartiality of Resolution Professionals Under Indian Law

It is our view that the NCLAT has overstepped its boundaries and substituted itself for the legislature by disqualifying an individual from acting as an RP, without the relevant law providing for such disqualification. It is [common practice in India](#) for retired bankers to be appointed RPs and this ruling by the Appellate Tribunal may affect the resolution of several cases, including the \$5 billion Videocon Industries case, where a retired banker has been appointed as an RP. This is further exacerbated in light of the fact that the financial creditor i.e. State Bank of India, is one of the largest employers in the country, thereby potentially disqualifying all former employees from acting as RPs where the creditor is a party.

Even though the order is well-intended, it runs the risk of being used as a tool to delay and unnecessarily opens up the floodgates in cases where the RPs can be substituted on the mere apprehension of bias. The Appellate Tribunal's ruling is over-restrictive since it limits an unidentified class of all ex-employees of the Financial Creditors from being appointed as RPs. This is in stark contrast to the [Indian Arbitration Act](#) which restricts ex-employees, only for a certain period of time from retirement, from being appointed as an arbitrator in an arbitration involving their past employer. The Appellate Tribunal's ruling effectively imposes a blanket restriction on all ex-employees from being appointed as RPs, for an indefinite period of time. As a result, ex-employees of financial creditors, even though not disqualified under law, will be deemed unfit to act as an RP. One may hope that the Supreme Court of India will reverse this ruling, if appealed.