RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

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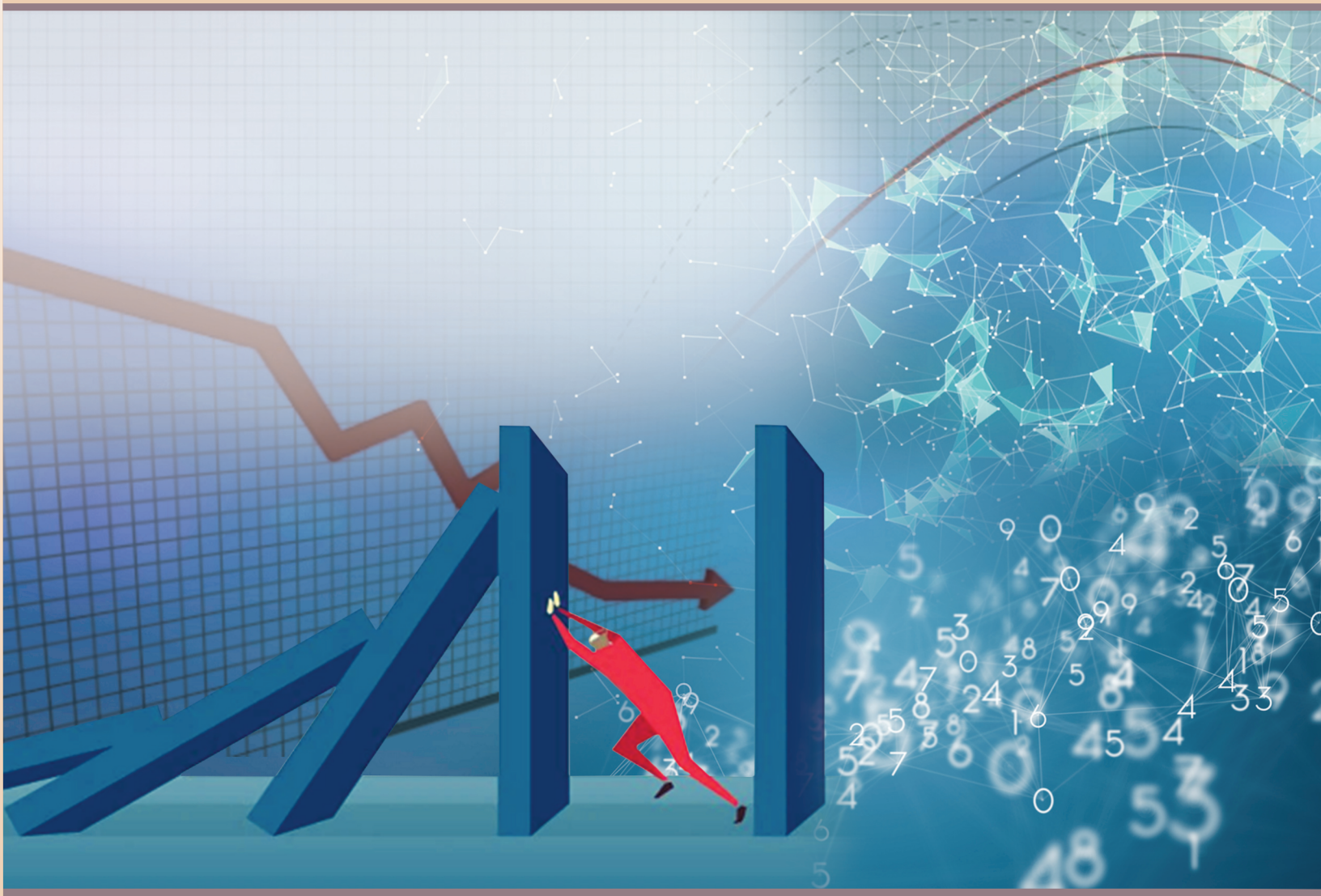


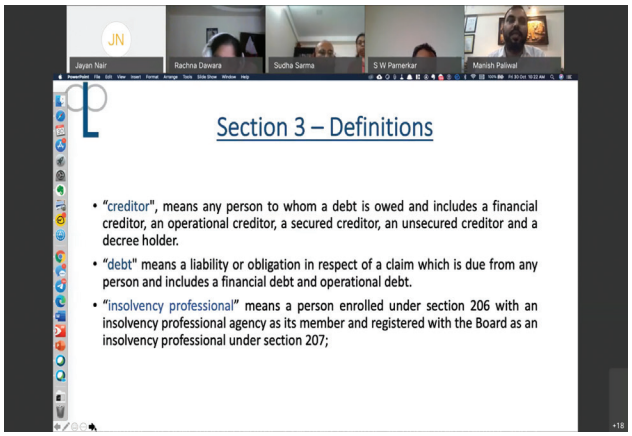
INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

NEWS FROM THE INSTITUTE

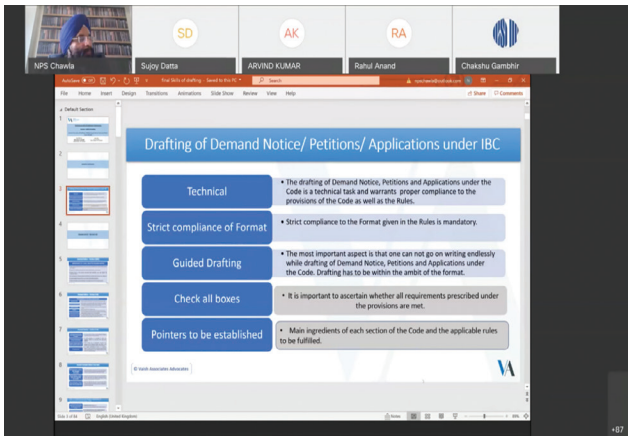
1. LIT UP program- preparation course for Limited Insolvency Examination

LIT UP program-preparation course for Limited Insolvency Examination was organized by ICSI IIP from 4th-6th December, 2020. The aim of the LIT UP program is to enable professionals to pass Limited Insolvency Examination with ease.



2. Workshop on '*Drafting skills for Insolvency Professionals*'

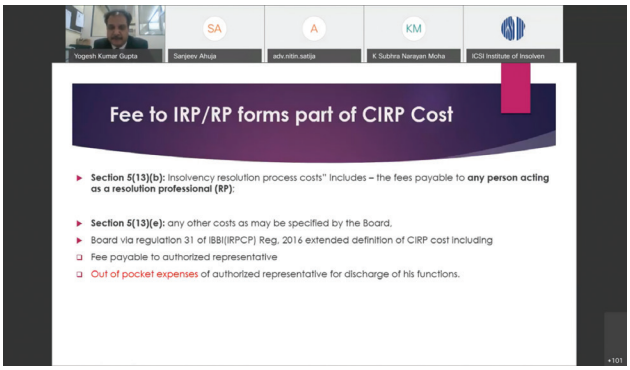
On 12th December, 2020, ICSI IIP organized a Workshop on '*Drafting skills for Insolvency Professionals*'. The workshop was addressed by the experts like Adv. (IP) NPS Chawla and CS (Dr .) K. S . Ravichandran. The workshop was attended by 100 participants.



3. Workshop-cum-Interactive Meet on 'Issues related to IP's fees under IBC'

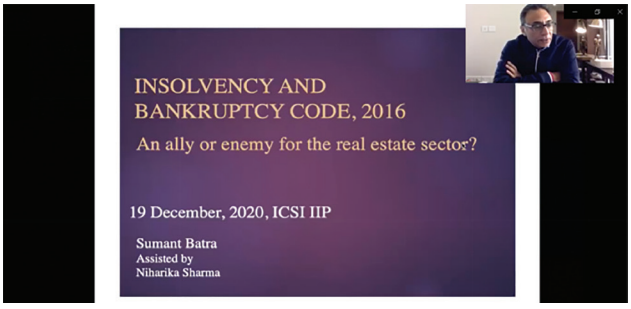
On 17th December, 2020, ICSI IIP organised a workshop-cum-interactive meet to celebrate on the 'issues related to IP's fees under IBC'. Welcome address was given by Dr. Binoy J. Kattadiyil, Managing Director, ICSI IIP. The topic was addressed by Shri. K R Saji Kumar, Executive Director, IBBI, Mr. Sanjeev Ahuja, Insolvency Professional and Mr.

Yogesh Gupta, Insolvency Professional. The workshop was attended by 100 participants.



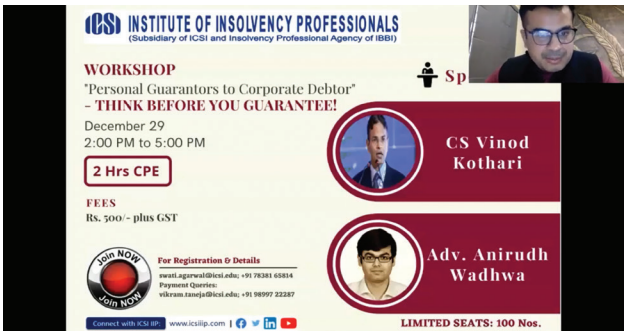
4. A full day workshop on 'Practical approach on Insolvency in Real Estate Sector'.

A full day Workshop on the topic `*A Practical Approach on Insolvency in Real Estate Sector*' was organized by ICSI IIP on 19th December 2020. The inaugural address for the workshop was given by Dr. M.S. Sahoo, Chairperson, IBBI. The session was addressed by experts like Adv. Sumant Batra, Insolvency Professional and CS S. Prabhakar, Insolvency Professional. The workshop was attended by 100 participants.



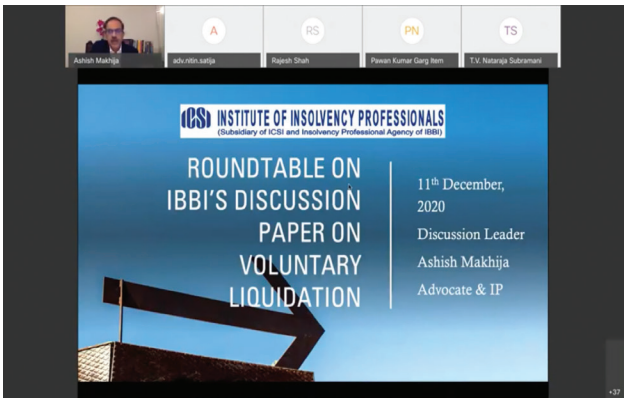
5. A full day workshop on 'Personal Guarantors to Corporate Debtors- Think before you guarantee'

On 29th December, 2020, a full day workshop was organised by ICSI IIP to have a discussion on the practical aspects of personal guarantors to corporate debtors. Mr. Sushanta Kumar Das, DGM, IBBI gave introductory remarks. Mr. Vinod Kothari, Vinod Kothari Consultants and Mr. Anirudh Wadhwa, Wadhwa Law Chambers have been the experts during the workshop.



6. Roundtable Discussion on IBBI Discussion paper on 'Voluntary Liquidation Process'

On 11th December 2020, ICSI IIP organised a virtual round table discussion to have deliberation and invite inputs from the imminent Insolvency Professionals on the IBBI discussion paper on Voluntary Liquidation Process. Mr. Ashish Makhija, Advocate was the speaker in the workshop. The roundtable discussion was well attended by many IPs and also appreciated by IBBI officials.



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For ICSI IIP Members
- **ICSI Institute of Insolvency Professionals**
'ICSI House', 3rd Floor, 22, Institutional Area, Lodhi Road, New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : Peer.mehboob@icsi.edu

'ICSI House' Third Floor, C-36, Sector-62, Noida, Uttar Pradesh 201301
Contact No. : 0120 408 2142

For Non-Members
- **Taxmann Publications Pvt. Ltd.**
59/32, New Rohtak Road,
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At a Glance

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• Judicial Pronouncements 429-460

- **Vijayalakshmi Enterprises v. Malabar Hotels (P.) Ltd.**
  (2021) 124 taxmann.com 176 (NCL-AT) • P-429

Section 7, read with sections 31 and 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether initiation of CIRP would not be equivalent to adjudication of claim for recovery of money which Claimant in respect of disputed claim, allegedly claims to be entitled to - Held, yes -Whether where corporate debtor had already undergone CIRP and while approving Resolution Plan it was held that claim of financial creditor was a disputed claim and was to be paid on basis of outcome of adjudication of legal proceedings, adjudication had to be, in respect of claim, by a Civil Court and other adjudicatory mechanism like Arbitral Proceedings - Held, yes - Whether proceedings under Code are only meant to resolve insolvency issues and not to adjudicate a claim and thereby, appropriate remedy for appellant/financial creditor for adjudication of his disputed claim would not lie in triggering Corporate Insolvency Resolution Process by taking resort to provisions of section 7 - Held, yes (Paras 3 and 4)

- **Mohan Lal Jain v. Lalit Modi**
  (2021) 124 taxmann.com 175 (NCL-AT) • P-431

Section 66, read with sections 65 and 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's - Adjudicating Authorities - Fraudulent or wrongful trading - Whether allegations of preferential transactions as also fraudulent trading/wrongful trading carried on by corporate debtor during insolvency resolution could have been inquired into by Adjudicating Authority (NCLT) and it was not permissible for Adjudicating Authority to abdicate its power and refer matter to Ministry of Corporate Affairs - Held, yes (Para 5)

- **Committee of Creditors of Rosewood Trexim (P.) Ltd., In re**
  (2021) 124 taxmann.com 179 (NCL-AT) • P-434

Section 12 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Time limit for completion of - Whether where appellant, Resolution Professional on account of being in self-isolation and quarantined as a victim of COVID-19 Pandemic was prevented from undertaking further steps for bringing CIRP to logical conclusion, period of time for which Resolution Professional was immobilized as a result of being infected with COVID-19 virus was to be excluded from CIRP period of 180 days and extension of CIRP period by 90 days was to be allowed - Held, yes (Paras 3 and 4)

- **CFM Assets Reconstruction (P.) Ltd. v. Vishram Narayan Panchpor**
  (2021) 124 taxmann.com 177 (NCLT - Mum.) • P-437

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether relevant date for considering withdrawal of CIRP is date of application and nothing else - Held, yes - Whether where CoC had already been constituted, any application for withdrawal of CIRP had to comply with regulation 30A(1)(b) of CIRP regulations read with section 12A of IBC and therefore, Interlocutory Application filed by assignee of financial creditor for seeking indulgence and challenging action of IRP of not filing application of withdrawal of CIRP of corporate debtor was to be dismissed - Held, yes (Para 10)

- **Rajnish Jain *v.* Manoj Kumar Singh – I.R.P.**
  (2021) 124 taxmann.com 213 (NCL-AT) • P-448

Section 18, read with section 25, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Duties of - Whether core duty of Interim Resolution Professional (IRP) is to receive, collate and verify claims which cannot be further delegated to Committee of Creditors (CoC), who in turn cannot be allowed to do same in

purported exercise of commercial wisdom - Held, yes - Whether IRP/Resolution Professional (RP) after collation of claims and formation of CoC is not entitled to suo motu review or change status of a creditor from financial to operational creditor and CoC also has no adjudicatory power to decide as to whether a creditor who files its claim is a financial or operational creditor - Held, yes - Whether however, to maintain an updated list of claims IRP/RP is authorized to add to existing claims or admit or reject further claims received collating them and thus update list of creditors accordingly - Held, yes (Paras 26, 27, 38, 58 and 59)

Section 5(8), read with section 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether a financial debt is a debt together with interest, if any, which is disbursed against consideration for time value of money and it may further be money that is borrowed or raised in any of manners prescribed in section 5(8) - Held, yes -Whether therefore, to qualify as a financial creditor, basic element of disbursal to corporate debtor, of amount against consideration of time value of money, needs to be found in genesis of any debt being claimed as 'financial debt' before it could be treated so, under section 5(8) - Held, yes (Paras 51 and 52)

- **Rajendra Narottamdas Sheth *v.* Chandra Prakash Jain**
  (2021) 124 taxmann.com 181 (NCL-AT) • P-450

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 19 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether perusal of section 19 of Limitation Act, shows that where payment is made on account of a debt or interest before expiration of prescribed period by person liable to pay, a fresh period of Limitation shall be computed from time when payment was made - Held, yes - Whether section 19 is not subject to any qualification/ exception that after Account is declared NPA, if debtor makes payments on account of debt, section would not be applicable - Held, yes - Accounts of corporate debtor were classified as Non-Performing Assets (NPA) on 30-9-2014, by bank and thereafter bank filed DRT Proceedings for recovery - However, amounts still remained unpaid, hence, bank filed application on 25-4-2019 under section 7 against corporate debtor which was admitted by Adjudicating Authority - Appellants filed reply on behalf of corporate debtor, claiming that since Account was classified as NPA on 30-9-2014, application filed in 2019 was time-barred as date of default had to be calculated from date of NPA and date of NPA does not shift - However, it was found that various repayments were indeed made by corporate debtor even after Bank declared their Accounts as NPA - Adjudicating Authority found that there were not merely repayments but also Acknowledgements - Whether therefore, fresh period of limitation shall be computed from time these payments were made - Held, yes (Paras 24 to 27)

- **Venus Recruiters (P.) Ltd. *v.* Union of India**
  (2020) 121 taxmann.com 346 (Delhi) • P-451

Section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether purpose of avoidance of preferential transactions is clearly for benefit of creditors of corporate debtor - Held, yes - Whether after a Resolution Plan is approved, no benefit would come to creditors - Held, yes - Whether once CIRP process itself comes to an end, an application for avoidance of preferantial transactions cannot survive or be adjudicated - Held, yes - Whether after a Resolution Plan is approved, corporate debtor comes under control of new management/Resolution Applicant and RP's mandate ends and RP cannot indirectly seek to give a benefit by pursuing an application for avoidance of preferantial transactions - Held, yes - Whether if CoC or RP takes a view that there are transactions which are objectionable in nature, order in respect thereof would have to be passed prior to approval of Resolution Plan - Held, yes - Whether unless provision is made in final Resolution Plan, NCLT also has no jurisdiction to

P.K. Malhotra
ILS (Retd.) and Former
Law Secretary
(Ministry of Law & Justice,
Govt. of India)

From Chairman's Desk

Incredible things can be done simply if we are committed to making them happen

...Sadhguru Jaggi Vasudev

Dear Professional Members,

The month of December is perhaps an opportune moment for us to reflect on the challenges that we faced as well as the lessons that we learnt during the course of the year. It is perhaps everyone's experience that owing to the extra-ordinary and unprecedented circumstances (due to the outbreak of COVID-19 pandemic), the whole world underwent a very difficult period, and all assumptions got thrown out of the window as uncertainty gripping us very tight.

As regards the IBC space, this landmark legislation (IBC), which was crafted and put in place with a very solemn and important objective which is to put in place a legal mechanism to facilitate rescue of businesses which face stress, and which made huge strides in its way (as acknowledged by all), had to be put on a suspension mode. This decision to suspend

certain IBC provisions, which was taken by the Government keeping in view then the prevalent circumstances, did raise certain eyebrows initially as it was looked upon by certain experts as an unnecessary move, however, as we moved forward and the merits and virtues of the decision surfaced themselves, a consensus of opinion amongst all stakeholders was achieved. Such suspension (*vis-à-vis* some of the provisions concerning initiation of CIRP) though put in place for an initial period of 6 months, had to be extended for another 3 months, and now, realising a need for further extension, the MCA, *vide* its notification dated 22nd December, 2020 has made suspension to extend till 24th March, 2021. On an assessment of the situation, the Government in its rightful wisdom, has decided to extend the suspension to help businesses cope with lingering difficulties posed by the pandemic. It may be worthwhile to note that this is the final extension possible under the present language of the provision (s. 10A), and therefore, any further extension would perhaps require an amendment in the language of the provision.

As the unlock phase is now setting in, businesses have got back onto a reset mode. This is a big positive move for the economy which is reflecting itself in cash flows returning back in different sectors. In effect, with almost every industry having gone through a major stress (due to the pandemic), and the entire year having witnessed IBC suspension (since nobody could be compelled or drawn towards insolvency process for problems that had nexus with the pandemic disruptions), our future really depend on our sense of resilience and determination and the steps that we take in that direction. There are thousands of cash trapped firms which need a handholding in order to tide over challenges posed by the pandemic, and thus, all measures taken by the Government were aimed at helping them to survive without the fear of getting dragged to NCLT. In its ultimate analysis, the efficacy of a regulatory law like the IBC which is meant to *inter alia* ensure efficiency in allocation of resources would also depend on whether it is able to adjust itself to the changing circumstances. In the circumstances influenced by the pandemic, it is only to be expected that many *viable businesses* shall suffer from liquidity issues, and sending them to insolvency process for default in payment by them is not likely to serve the purpose of the legislation.

The other major initiative taken by the Government to deal with the present challenging circumstances is to make the nation move onto the path of becoming an *atmanirbhar Bharat or a self-reliant India*. The initiative which is not a mere slogan but it has concrete steps to be taken has been rightly conceived as *a shot in the arm* which has already started paying huge dividends for the nation. The pursuit of being *Atmanirbhar* has shown the seeds for a new course of long-term development, and is serving as a pivot on which India can emerge as a hub for both manufacturing activities as well as investment. World over, as the protectionist tendencies are increasing, there is an increasing need to minimise one's dependency on other economies, and thus, with this resurgence in protectionist policies (as witnessed in recent years), certain bold and calibrated steps are needed to ensure the vision of our *Atmanirbhar Bharat Abhiyan*. Infact, I believe that there has never been a more propitious moment in our nation's history for these decisive steps, especially considering the phenomenon of rebalancing of power which is taking place in the world, and in such a situation India is undoubtedly being looked-upon at as a very strong partner in the fight against Covid-19 pandemic. I may also add that it is very crucial for all stakeholders to align themselves with Government's vision, and act together in a swift manner so that together we are able to usher in a strong self-reliant nation.

In the direction of building a Digital India for maximising availability of different government services on electronical platform, a major step has been taken. The initiative of establishing e-court (in respect of NCLTs) which was conceptualised in the year 2017, has now made a further step, such that, apart from e-filing, the NCLT Benches (which have implemented e-filing) will now implement Automatic Case Number Generation. This new system shall be made mandatory from the start of the new year 2021, and all new filing shall have to be made @ https://efiling.nclt.gov.in/.

I am very positive on the good times ahead. I believe that it shall not only be rewarding, but shall also guide us on our journey ahead.

Please keep a good care of yourself!

Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

Every problem is a gift—without problems we would not grow

– Anthony Robbins

Decision-making is not a simple exercise; it is always fraught with a danger of being irresponsibly analysed *post-facto*, or even misunderstood, and attributed with different intentions (depending on the analyst's inclinations). Be that as it may, we have to keep working in the direction of building a better future for which a logical mind always helps to avoid unsavoury controversies in the process.

With the above prologue, and in view of the fact that we have now reached the end of a very challenging year, may I express my deep admiration and also congratulate the stakeholders (of our present Insolvency and Bankruptcy law regime in India) for the firmness and dedication with which they have moved to ensure that we all succeed in achieving our common objectives enshrined under the IBC. As we construct the road ahead for IBC, which was very aptly described as a *leap of faith* and *a journey into an unchartered territory* by Dr.

Sahoo (Chairperson, IBBI), undoubtedly there shall be challenges galore. As the saying goes, *no one has ever achieved anything truly significant in any sphere of life without being absolutely devoted to what they are doing*, I am sure that with a solemn determination to succeed in our endeavour, we are bound to *come off in flying colours*.

The IBBI, in pursuance of its objective and in discharge of its mandate being the chief regulator under the IBC, had framed and recently circulated a discussion paper on the subject "*Engagement of Professionals in a Corporate Insolvency Resolution Process*". In the context of the crucial role that has been endowed upon an IP (in the entire resolution process) of not only protecting and preserving value of CD's assets, but also managing CD's affairs as a going concern, the discussion paper analysis different requirements that must be satisfied before an IP engages any professional member for the purposes of carrying out CD's affairs as a going concern. An IP is required to act objectively in all his professional dealings; he must make sure that all his decisions are clean and blemishless, by avoiding any conflict of interest, or undue influence or even coercion by any party, whether directly connected with the insolvency proceedings or not. An IP's action has to be above suspicion; his actions must be like caesar's wife. The IP, being in such a responsible position, is expected to avoid any negative attention or scrutiny. He being in position of authority must avoid even the implication of impropriety. The IP, who has the authority to appoint accountants, legal or other professionals, is required to adhere to the guidelines as may be specified by the IBBI. Further, s. 240, IBC empowers the IBBI to make regulations to provide for the manner of appointing accountants, lawyers, and other advisors under s. 25(2)(d) of the Code. Therefore, an IP must act with objectivity in his professional dealings by ensuring that his decisions are made without any bias and are devoid of any conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not. He must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interests during an assignment. An IP is also required to ensure that not only the fee payable to him is reasonable, but also other expenses incurred by him are reasonable, though, what is reasonable is context specific and it is not amenable to a precise definition. Furthermore, it is always advisable that an

IP must maintain written contemporaneous records for any decision taken by him/her, along with the reasons thereof, and the information and evidence in support of such decision. This will enable a reasonable person to take a view on the appropriateness of his decisions and actions.

In order to take-up this subject for a thread-bare discussion and invite all constructive suggestions thereof from the Professional Members, a round-table was conducted by your institute (ICSI IIP) in the month of December. We were elated and are grateful for the overwhelming participation in the webinar. The suggestions received were duly compiled and have been forwarded to the IBBI for its consideration.

We look forward to continue to receive your support and guidance in all our future endeavours!

Wishing you all a lot of good wishes for the upcoming New Year 2021!

CORPORATE INSOLVENCY RESOLUTION PROCESS BY OPERATIONAL CREDITOR UNDER IBC, 2016

Pawan Garg
FCS, Insolvency Professional

1. Introduction

Part-II of the Insolvency and Bankruptcy Code, 2016 (the Code) deals with the Insolvency Resolution Process for 'Corporate Persons'. Under this part of the Code, Financial Creditors u/s 7, Operational Creditors u/s 9 and Corporate Applicants u/s 10 may file an application to initiate Corporate Insolvency Resolution Process (CIRP) against a defaulting Corporate Debtor.

In this article, we are discussing the pre-requisites for filing an application u/s 9.

2. CIRP initiated under IBC, 2016

The Code empowers the **Operational Creditor** (**'OC'**) to initiate CIRP against a corporate debtor who has defaulted in the payment of an operation debt and even after the receipt of **demand notice**, has **neither made the payment nor disputed the demand notice**.

The Code has classified the creditors into two categories:

1. Financial Creditor
2. Operational Creditor

An **'Operational Creditor'** under the Code means *'any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred'*. It may be noted that when a creditor has both a financial

transaction as well as an operational transaction with the Corporate Debtor, the creditor will be considered a financial creditor in respect of the financial debt and operational creditor to the extent of the operational debt.

`**Operational Debt'** means `*a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*.' It is evident from the definition that operational debt only includes claims in respect of goods, services (including employment) and Government dues arising under any law. If a claim does not fall under any of the three categories, the claim cannot be classified as an operational debt and claimant cannot initiate proceedings u/s 9 even if the claim is due and payable and should pursue remedies available under other laws.

The code further provides for delivery of a **'Demand Notice'** along-with a copy of invoice demanding payment of the default amount to the corporate debtor. While a financial creditor is not required to issue any demand notice for initiating CIRP, it is a mandatory condition precedent for initiating CIRP by an operational creditor. The requirement is apparently to give a final opportunity to the corporate debtor to pay *(if not in dispute)* before it is pushed in to the CIRP and a time-window of 10 days is provided u/s 8(2). It may be noted that u/s 9(3)(a), the Operational Creditor is required to annex copy of invoice / demand notice to the application filed u/s 9.

In the matter of *Era Infra Engg. Ltd. v. Prideco Commercial Projects (P.) Ltd.* [2018] 91 taxmann.com 219 (NCL-AT), the National Company Law Appellate Tribunal (NCLAT) examined whether the CIRP Order passed by the Hon'ble Adjudicating Authority; subsequent appointment of Insolvency Resolution Professional; and declaration of moratorium period on the basis of an application filed by Operational Creditor under Section 9 of I&B Code, 2016 was correct as the Operational Creditor had not issued demand notice as required under Section 8 of the Code. The creditor however had, in past served a demand notice under Section 271 of Companies Act, 2013 and was relying on the said demand notice for the purpose of compliance.

It was held that:

1. Serving of notice under Section 271 of Companies Act, 2013 cannot be considered as demand notice u/s 8(1) of the Code;

2. Application u/s 9(1) can only be filed after the expiry of a period of 10 days from the date of delivery of notice u/s 8(1) in the prescribed Form. If

demand notice is not served **on** the corporate debtor, the mandatory requirement of expiry of stipulated 10 days period is not fulfilled and hence application u/s 9 cannot be filed.

3. If demand notice is not annexed to the application as required u/s 9(3)(a), the application is defective and the Adjudicating Authority is bound to reject the application as this defect cannot be rectified.

The order of the Adjudicating Authority admitting the application was set aside and all further orders like moratorium, appointment of RP were quashed and actions taken by the IRP were declared illegal.

The Code further provides that application by an operational creditor to initiate CIRP will not be admitted if a **'Dispute'** with respect to the debt exists between them. The transactions between the Operational Creditor and the Corporate Debtor are generally recurring and subject to periodical reconciliation. Hence, the possibility of existence of dispute in case of an operational debt is much higher compared to a financial debt. Apparently that is the reason why the Legislature is included in the concept of dispute under the Code.

As per **Section 5(6)**, `**Dispute**' includes a suit or arbitration proceedings relating to —

a. the existence of the amount of debt;

b. the quality of goods or service; or

c. the breach of a representation or warranty

As the definition of Dispute is inclusive and not exhaustive, this has been examined and deliberated in a number of judicial deliberations as to what constitutes a Dispute. While as per the definition, arbitration proceedings could only be with respect to sub-clause a, b or c, there can be other disputes which may require further investigation. As long as the dispute is real, and not sham, illusory or hypothetical, it would fall within the scope of dispute under section 9 of the IBC.

Further section 8(2)(a) states that the dispute must be pre-existing. The apparent objective is to prevent the Corporate Debtor from raising *mala fide* disputes after receipt of the demand notice with the sole objective to stop the CIRP proceedings by raising a dispute.

The Hon'ble Supreme Court, in the case of *Mobilox Innovations (P.) Ltd. v. Kirusa Software Pvt. Ltd.* [2017] 85 taxmann.com 292/144 SCL 37 held that the adjudicating authority need not go into the merits of the dispute and as long as a dispute truly exists, it must reject the application. The Adjudicating Authority while determining the admissibility of application u/s 9 must consider following:

1. if there is an 'operational debt', as defined under the Code
2. if the documentary evidence furnished with the application establishes that debt is due and payable and has not yet been paid; and
3. if a dispute between the parties exists before the receipt of the demand notice of the unpaid operational debt.

Further, in the case of ***K Kishan v. Vijay Nirman Company Pvt. Ltd.*** [2018] 97 taxmann.com 495/150 SCL 110, the Hon'ble Supreme Court held that an arbitration award passed in favour of the operational creditor will remain a disputed debt unless finally adjudicated upon.

Section 9(5) of the Code mandates that the Adjudicating Authority shall within 14 days of the receipt of the application, either admit or reject the application. It further provides that the Adjudicating Authority shall, before rejecting an incomplete application, give 7 days' time to the applicant to rectify the defect. However, it has been held that both the 14 days period to accept or reject the application and 7 days period to rectify the defect are procedural in nature and not mandatory.

3. Observations

The code provides for a time-bound resolution process and emphasis is on the revival of companies rather than liquidation. The circumstances and process to initiate the CIRP by the operational creditor have been laid down in clear terms in sections 8 and 9. It has been observed that the adjudicating and the appellate authorities have been very particular about the procedural requirements and in many cases, applications have been rejected due to non-compliance with the said requirements. Thus, procedural formalities and timelines must be kept in mind while initiating action under the Code.

Disclaimer: This article is for informational purposes only. The views and opinions expressed herein are personal and readers are advised to seek legal advice before acting on the subject matter.

INTERPLAY OF GST AND INSOLVENCY LAWS

Dr. Sanjiv Agarwal,
FCA, FCS, ACIS (UK)
Insolvency Professional

As per the World Bank's 'Doing Business Report 2020', India provides an example of successful implementation of reorganization procedures. India established an insolvency regime in 2016 which made it easy for secured creditors to seize companies in default of their loans. The most common way for secured creditors to recover the debt was through very lengthy and burdensome foreclosure proceedings that lasted almost five years, making efficient recovery almost impossible. Insolvency and Bankruptcy Code, 2016 (IBC) introduced the option of reorganization (corporate resolution insolvency process) for commercial entities as an alternative to liquidation or other mechanisms of debt enforcement, reshaping the way insolvent firms could restore their financial well-being. With the reorganization procedure available, companies have effective tools to restore financial viability, and creditors have access to better tools to successfully negotiate and have greater chances to revert the money loaned at the end of insolvency proceedings. Since its implementation, more than 2,000 companies have used the new law. Goods and Services Tax was introduced in India just a year after IBC, i.e., w.e.f. 1st July, 2017.

As per IBC, law, as soon as a company fails to make a payment above Rs 1 lakh, the financial/operating creditors can initiate the Corporate Insolvency Resolution Process (CIRP). The limit has been recently raised to Rs 1 crore, due to the COVID-19 pandemic. A defaulting company is termed as a 'corporate debtor' under IBC and the management of the company's assets gets transferred to the Interim Resolution Professional (IRP) and subsequently to the Resolution Professional (RP).

This takeover of management and assets of the Corporate Debtor makes the IRP/RP take over the compliances to be

made by the company under other various laws as well. One such law is that of Goods and Services Tax Laws.

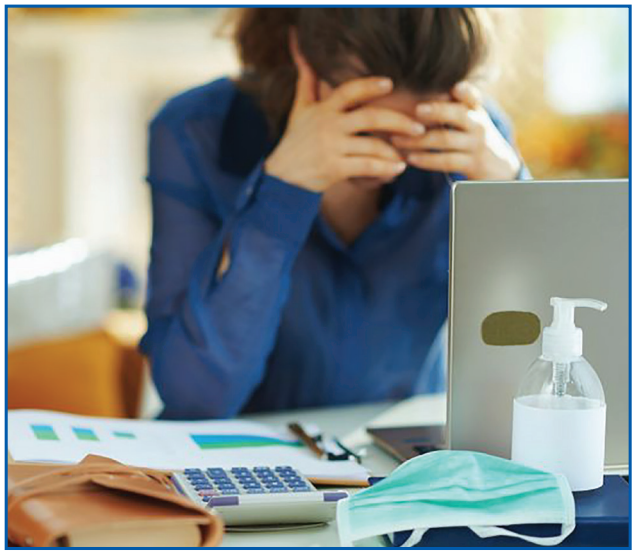
1. ISSUES UNDER GST LAW

Since its inception, IBC has transformed by way of several amendments brought facing practical difficulties once the law was implemented. However, some gaps remain regarding the treatment and transparency under GST Law. IBC proposes a concept of 'Resolution Plan' wherein an applicant proposes a plan to take over the corporate debtor as a going concern. Further, the interim resolution professional is required to take necessary action to protect and preserve the value of property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

The question of discharging of GST liability on such a transfer/sale as a going concern has not been addressed under IBC-may be it was not envisaged at that point of time. However, in the case of *Rajashri Foods Pvt. Ltd.*, In re [2018] 93 taxmann.com 417/68 GST 457 *(AAR, Kar.))*, the issue was discussed and the concept of going concern was interpreted as "*A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. In the instant case, the Applicant has not furnished any documentary evidence to establish that the Applicant is a going concern except their admission that its an ongoing business and the transaction proposes to transfer all the assets and liabilities to the new owner. It implies that the business will continue in the new hands with regularity and a nature of permanency.*" The Authority held that the transaction of transfer of business of one of the units of the Applicant in the nature of a going concern does not amount to supply of service as per definition of supply u/s 7 of the GST law.

Notification No. 12/2017- Central Tax (Rate), dated 28 June, 2017 which provides for exemptions under GST also stipulates that no GST is payable on services by way of transfer of a going concern, as a whole or an independent part thereof. The same was the position under Service Tax regime also.

While 'supply' is defined in section 7 of



CGST Act, 'taxable supply' means a supply of goods or services or both which is leviable to GST. The terms 'supply' has been defined in an inclusive manner and includes:

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business

(b) import of services for a consideration whether or not in the course or furtherance of business

(c) the activities specified in Schedule I, made or agreed to be made without a consideration

Further, activities or transactions specified in Schedule III and such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified. Such supplies shall be taxable subject to exemptions notified under the Act.

Another issue of concern is the taxation of services provided by Resolution Professional (RP). IBC provides no direction as to treatment of these services provided by an Insolvency Professional in the entire process but taxability has to be determined under tax laws. A RP is not only the captain of a sinking ship, he/she is also the captain that has to bring the ship to shore. GST law provides 'Insolvency, and receivership services' classified under the heading 9982 40 and are chargeable at the GST rate of 18%. Along with taxation rates for RPs, the other professionals that the RP hires in the insolvency process such as a lawyer, accountants, registered valuers etc. are also subject to levy of GST on such services as per the GST rates applicable to the services they provide. The same is true for liquidation and all the professionals hired in the liquidation process.

The corporate debtor also gets Input Tax Credit (ITC) under the GST law u/s 16-17 of the GST Act, 2017. However, such ITC is subject to certain conditions and restrictions. GST law also envisages that all past dues should be cleared in order to claim the benefit of Input Tax Credit (ITC). However, this becomes difficult for companies undergoing insolvency. In a matter before Chennai Bench of NCLT, T.R. *Ravichandran, v. Asstt. Commissioner (ST)* [2020] 113 taxmann.com 401 (NCLT-Chennai), NCLT held that since tax authorities are Operational Creditors in the insolvency process, they can make their claims to the RP instead of insisting the RP to pay the pre-admission dues before accepting tax liabilities. NCLT stated that a corporate debtor can access its GST Portal Account for filing GST Returns generated after the commencement of the corporate insolvency resolution process period before clearing the pre-CIRP dues and that blocking the access to the GST Portal will result in barring the corporate debtor to generate bills related to GST. NCLT also stated that if the corporate debtor is allowed to run on going concern basis then it should be allowed to pay taxes as well.

Yet another controversy revolves around registration u/s 22-27 of GST Act. Every taxable person is required to be registered under the GST law. The issue is who should

get registered. The corporate debtor, the petitioner, insolvency professional or the liquidator?.

The gaps in the Insolvency regime of India *vis-à-vis* indirect taxes and its treatment is something that has not yet been fully clarified or settled even by way of judicial precedents as was previously done with a lot of issues such as that of voting, operational creditors, homebuyers, constitutionality etc. and hence requires to be addressed either by way of amendments to the IBC Regulations or/and GST law/rules.

2. CBIC NOTIFICATION AND CIRCULAR

Central Board of Indirect Taxes and Customs (CBIC) had issued a Notification No. 11/2020-CT dated on 23rd March, 2020 for the procedure. Subsequently, a Circular No. 134/04/2020-GST was also issued to clarify the issues in relation to GST in the Insolvency Process.

The Notification provided for special procedures for corporate debtors, the management of whose affairs is being undertaken by an RP, which are to be followed from the date of the appointment of the RP. It prescribes that, 'The said class of *persons shall, with effect from the date of appointment of IRP/RP, be treated as a distinct person of the corporate debtor, and shall be liable to take a new registration (hereinafter referred to as the new registration) in each of the States or Union territories where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP'*. It lays down the procedure for GST Registration w.r.t. the corporate debtor shall, with effect from the date of appointment of RP, be treated as a distinct person of the corporate debtor and IRP/RP shall be liable to take a new registration in each of the States or Union Territories in which the corporate debtor was previously registered, within thirty days of the appointment of their appointment.

In relation to the issues relating to Input Tax Credit (ITC) being faced by the Corporate Debtors and its customers, in case of it being a going concern, the Notification clarified that ITC on invoices received since the appointment of RP, but bearing the GST Identification Number (GSTIN) of the erstwhile Corporate Debtor, shall be available to the said Distinct Person, notwithstanding the time limit specified under the GST law for availing such ITC or the fact that such invoices do not appear in Form GSTR-2A of such person. With respect to the consumers, they shall be allowed to avail ITC on invoices issued using the GSTIN of the erstwhile corporate debtor. This shall be applicable for supplies received in the period between the date of appointment of RP and the date of registration of such Distinct Person, notwithstanding the fact that such invoices do not appear in Form GSTR-2A of such customers.

On registration, it provided for class of persons who shall follow specific procedure for registration from the date of appointment as RP or IRP from the date of appointment. Such persons with effect from the date of appointment of IRP/RP, be treated as a distinct person of the corporate debtor, and shall be liable to take a new registration (hereinafter referred to as the new registration) in each of the States or Union territories where the corporate debtor

was registered earlier, within thirty days of the appointment of the IRP/RP. In cases where the IRP/RP has been appointed prior to the date of this notification, he shall take registration within thirty days from the commencement of this notification, with effect from date of his appointment as IRP/RP.

On the issue of returns being filed, it was reiterated that any amount deposited in the cash ledger of the earlier GSTIN by the IRP/RP is available for a refund from the date of appointment of IRP till the date of notification specifying a special procedure for corporate debtors undergoing insolvency.

With the providing of clarity on the procedural and registration aspects of the GST filing and return process, the questions that remain unanswered were shed light on through a Circular by providing answers to question like the treatment of GST pre and post CIRP. Some important aspects that the Circular clarified on are as follows:

- RP is not under an obligation to file returns pertaining to the pre-CIRP period. However, the RP shall be liable to furnish returns, make payment of taxes and comply with all other provisions of the GST laws during the CIRP period.
- The dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC.
- The IRP/RP will be liable to furnish returns, make payment of tax and comply with all the provisions of the GST law during CIRP period.
- To avail ITC of invoices issued to the erstwhile Corporate Debtor in case IRP/RP has been appointed before issuance of the notification, are required to file their first return as per Section 40. They can claim ITC on such supplies subject to the conditions specified under Chapter V of the CGST Act and rules made thereunder.
- Any amount deposited in the cash ledger by the IRP/RP, in the existing registration, from the date of appointment of IRP/RP to the date of notification specifying the special procedure for corporate debtors undergoing CIRP, shall be available for refund to the erstwhile registration under the head refund of cash ledger.

3. CONCLUSION

It is a fact that the objective of the Code is **"***to consolidate and amend laws relating to reorganization and insolvency of corporate persons, partnership firms, and individuals in a time bound manner***"**. The Code has undergone several amendments since inception. Though the Government has been taking timely measures by issuing necessary guidelines/ clarifications for various issues, however, it is quite evident that there are certain ambiguities that still exist in the procedures prescribed under Notification and Circular for Companies undergoing CIRP. The procedure prescribed by CBIC has been notified because of decisions of

the Adjudicating Authorities, such as that of the Chennai bench in the case of *T. R. Ravichandran* (Supra), wherein the NCLT had directed the revenue authorities to permit the corporate debtor to file GST returns and discharge GST from the date of CIRP, without insisting upon payment of past unpaid dues. While CBIC has done its best to provide a straight procedure lane, there are still a lot of challenges in the path of GST and IBC. Some challenges and ares that still need clarity are those of transitioning the ITC already available in the credit ledger of old registration, multiple registrations in a single State, provisions in GST law to adjust the refund against the tax liabilities due with *CD*, procedure to be followed in case of CIRP withdrawal under Section 12A or liquidation etc.

The Government of the day ought to intervene to provide provisions that shed light on the path to be taken while dealing with GST Laws pre and post CIRP and the Adjudicating Authority to fill the gaps and ensure harmony in the provisions.

Banking in the IBC Era: Beyond Forensic Audit - A Suggestion

S.Shivaswamy,
Insolvency Professional
Ex-banker and a retired Top Executive Grade officer from Public Sector Bank
Insolvency Professional
Email ID: - shivaswamys2@gmail.com

IBC hailed as one of the 2 biggest reforms unleashed by the Modi Government- the other being GST- will be completing its 4th year in Dec'20 on a satisfactory note. But unlike GST which evoked sharp criticism from various business groups and bodies, the criticism if any, about IBC remained confined to the Court rooms or the close-door academic discussions of Professional Institutions. The very fact that IBBI kept close watch on the evolving scenarios and went on recommending timely amendments whenever warranted speaks volume about the importance IBBI/Govt. attach to its success. It can't be denied that IBC struck at the root of vested interests, consolidated over the years on the back of system opacity and raw greed, that was damaging the very core of the economy. If there was any hidden agenda at the conspicuous silence from the certain outfits it is destined to remain so in future as well. IBC could well have been hailed as unqualified success but for the unfortunate intervention by COVID-19 driven pandemic and other systemic hurdles it faced.

The urgency for framing IBC was basically necessitated by the mounting NPAs in the Banks's books and crippling effect it had on their ability to lend. The available remedy in the form of DRT and SARFAESI proved to be ineffective and loaded heavily in favour of the debtors. The Law makers very consciously and wisely brought about paradigm shift in Debtor/Creditor relationship by making the resolution process under IBC Creditor centric besides denying the Debtors any decisive say in the insolvency proceedings. Along with secured Financial Creditors viz. Banks/FIs other Operational Creditors like suppliers of goods and services besides employees also stood benefited. Though it can always be argued that in many cases the resolution amount just fractionally above the cut off limit of liquidation

value, was deliberately engineered, one can't overlook the fact that big ticket resolutions such as that of Essar Steels and Bhushan Steels wouldn't have been possible outside IBC framework. The intent of Law makers was clearly designed to help resolution and any foul play by some black sheep can't be held against them.

Though Banks have been the biggest beneficiaries of IBC Bankers are a greatly worried lot today. The implications of Sections 43, 45, 49 & 66 dealing with avoidance of transactions.

- Preferential, Undervalued, Extortionate and Fraudulent- collectively referred as PUFE has a far-reaching consequence to the Bankers than it apparently suggests. The Resolution Professional or Liquidator with full access to Corporate Debtor's books/ records and aided by Forensic Auditors can unearth the past shady dealings of the unscrupulous Creditors. Such reports also highlight how over the years the Corporates had made a fool of the Bankers by forcing them to sink more and more money only to feather their own nest. Availing loans from the Banks on bogus sales based on round tripping, under/ over invoicing Sales/Purchase to engineer losses, passing off huge loans to relatives and associates only to be written off at a later date, besides dilution of own stake in the business have been unearthed warranting criminal proceedings against them. Such revelations have been too startling to believe and only confirm the suspicions Bankers had always harboured. But what has left Bankers a worried lot is the re-examination of staff accountability in respect of all such fraudulent transactions where they had been Associated even unwittingly.

To be fair to the Bankers, they had no means to detect such fraudulent transactions, given the limited access they had to the Corporate's books of account. They had to accept whatever information was presented by the Corporate Debtor or available in public domain without doubting the veracity of same. There are inherent limitations in such approach that are designed to work only in an ideal Debtors/Creditors relationship based on trust. The revelations under Section 66 pertaining to Fraudulent Transactions are clearly in violation of the trust and criminal in nature. To what extent a Banker can be held responsible for only acceding to a request from an existing customer for further accommodation or considering a proposal for Project Finance after due diligence?

Whereas it is for the Bank Management and RBI to adopt pragmatic approach to such issues it is necessary to consider the impact of Section 66 on the future of Banking institutions and their approach to lending. Whether a Banker will be willing to stick his neck out and lend when his actions are likely to be questioned in future based on the findings of Forensic Auditors! Is it the duty of a Banker to assume the role of an investigator even before dispensing the Credit? What if the borrower/Corporate Debtor chooses to be a good boy only to turn incorrigibly bad after tasting the fruits of success courtesy Bank loan? These are all pertinent questions that need to be addressed by the concerned authorities – RBI & Deptt. of Financial Services-to inspire sense of confidence & self-belief in minds of the Banker about his assigned role.

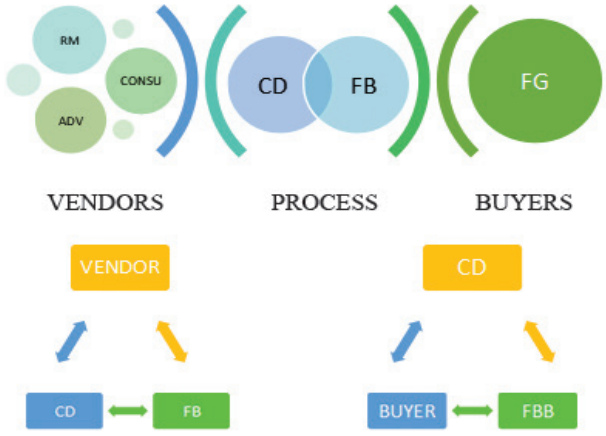
Banking in a very simple term is just borrowing and lending at a certain margin that takes care of their operational cost and also

leaves some surplus. In Britain during the early days of Banking evolution, it was referred as 4-8-4 business. It meant Banker borrowed at 4%, lent at 8% and went out to play golf at 4.00 pm. Banking was a purely commercial transaction and Banker took care to cover their risk by adequate collaterals in the form of paper securities, gold and mortgages etc. However, in India Banking institutions particularly those in Public Sectors are also asked to discharge social responsibility though it sounds bit incongruous in the domain of Commercial transactions. The decision to lend or not is no doubt left to the commercial wisdom of the Manager but the PSBs are made to explain the shortfall in lending to targeted group. During the early 70s in the wake of nationalisation of Banks, RBI acting on the recommendations of Tandon/Chore committees imposed restrictions on lending to Corporates by stipulating minimum margin by way of Equity contributions and discipline over level of assets holdings. However, the Corporates more often than not failed to meet stipulations but got away by paying nominal penalties. RBI also made Bankers responsible for the end use of funds by debtors without clarifying as to how Banks could ensure it.

Another distinctive feature of Bank finance lies in its approach to dispense over 90% of Credit against hypothecation in the form of Cash Credit with a charge on the Current/ floating assets. In case of Project Finance, the funds are released against the assets to be created in future out of such funds. Though Tandon/Chore Committee reports in early 70s had recommended gradual switch over to financing Book Debts it never actually worked that way due to various systemic hurdles. In the new millennium RBI advised Banks to open their war chest to finance the Infra boom in the economy estimated to be growing @ 8%. The unscrupulous Corporates fully aware of the limitations of Bank/FIs in their supervision techniques siphoned off the money to create personal assets. Banks are being crushed by mountains of NPAs which is estimated between 8-9% and still growing. Let's assume for a moment that Banks are able to clean their books through IBC and other measures and reduce NPAs to manageable level of below 3%. What next? Whether Bankers can regain their confidence and once again repose faith in the same set of Corporates who in the past circumvented the lending norms by doctoring their books? Whether Bankers can once again release Crores of Rupees that may lead to creation of toxic assets again?

It is high time RBI realises the limitations of current system and changes the approach to lending from Asset Based Finance to Liability Linked through financing of bills by Vendors. Though the concept looks bit complicated it is not a new thing. It is similar to Trade Receivable Discounting System (TReDS) with a difference that instead of Discounting Houses buying the Trade Invoices with recourse, under the proposed Liability Linked Vendor Payment System (LLVPS) the Vendor/Trader will be paid only by the Asset Financing Bank without recourse. LLVPS will be more like import bill payment without LC. Under this method Asset Financing Bank will pay the bill by debiting his client's account with suitable margin. The Financing Bank Can sanction Working Capital Limit based on his client's total Liabilities to vendors less margin than on the projected level of Assets. Such a system will preclude CD to utilise both the stream of finance by playing

one against the other. Beside Vendors will not have to wait endlessly for payment for his supplies and help him considerably shorten working capital cycle. On the other hand, buyer/CD will get RMs and other Consumables for his operation and will be more disciplined in his operations. It will be in his interest to start production and convert his RMs into FG for sale. He can then step into the shoes of vendor and get paid for his genuine supplies. The Banker will have greater a control over the working of the unit financed without much hassle. A welcome side effect would be the system of assured payment to MSME/Vendors thus solving their Working Capital finance. The working of proposed LLVPS has been illustrated in the following diagram for better appreciation.



In the first diagram on the top the whole manufacturing process have been fitted in 3 different silos. The inputs in the form of RM/Consumables & Advances by buyers are mixed and processed by CD with the help of financing bank (FB). Finished goods are sold to buyers. Only CD is in total control of the affairs and other important players are dependent on CD's action to recover their investment. This is how the system is working presently. In the 2nd diagram on the left the 2-way working of proposed LLVPS is illustrated. In this system Vendor supplies RM to CD and send Invoice after acceptance to his Banker. The Banker after verifying the purchase debits CD's account and remits the proceeds to Vendor. Now CD will have to complete the manufacturing process without wasting his time and supply the product to buyer. The CD steps into the shoes of a Vendor, as shown in the diagram on the right, and recovers money from buyers' financing Bank.

However, to implement this proposed system RBI/DFS will have to get legislative clearance to lend Invoices status of a negotiable instruments. This will obviate the necessity of Vendor preparing fresh set of Bill of Exchange. By making minor modification in the GST Software an additional copy of negotiable Invoice can be generated containing necessary details such as Vendors/ Buyers Bank Account No and payment terms. On receipt of goods the CD will acknowledge the same in the system. On receipt of Invoice from the Vendor, FB will debit CD's account and remit the funds. The same process will be carried over in the supply chain movement. The above suggested method can be initially implemented in case of OEM dealers/vendors and thereafter replicated to other sectors/groups.

Apart from the above suggested method of financing, the RBI will have to revisit the post sanction follow up measures and introduce necessary changes in the digitised environment. These include verification of equity holding, Inter relationship with Associates besides check on the fraudulent transactions through round tripping. A separate list of issues red flagged should be reviewed at quarterly interval.

Committee of Creditors under IBC 2016

CMA Satyanarayana Veera Venkata Chebrolu,
Insolvency Professional
E-mail- chvvsniob@yahoo.co.in

This article is intended to understand formation and composition of Committee of creditors (CoC), role of CoC in the matter of appointment of RP/Liquidator, approval of CoC for certain actions, and its role in the matter of approval of resolution plan. Some of the claims made by creditors whether fall under the definition of financial debt or not also discussed.

Background

The IBC Code, 2016 shifts the control of a corporate debtor on its failure to service a debt, when it is admitted into Corporate Insolvency Resolution Process (CIRP), to creditors represented by Committee of Creditors (CoC) for resolving its insolvency. CoC in other words decides the fate of the corporate debtor. Prior approval of CoC is needed for various actions that are to be initiated by Insolvency Professional during CIRP. In this article the role of Committee of Creditors constituted under CIRP is discussed.

1. Formation and Composition of CoC

It is the duty of the Interim Resolution Professional to constitute a committee of Creditors (CoC) after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor. Regulation 17 (1) requires the IRP to file a report certifying constitution of the CoC to the Adjudicating Authority within 2 days of verification of claims received under sub-regulation (1) of regulation 12.

The committee of creditors shall comprise of all financial creditors of the corporate debtor. According to proviso to section 21(2) of the Code, a related party to whom corporate debtor owes a financial debt shall not have any right of representation,

participation or voting in a meeting of the committee of creditors though they are members in the committee.

The right to attend meetings of the CoC also limited to operational creditors having a debt of at least 10% of the total debt of the corporate Debtor as per section 24(3C). Thus based on the verified claims as of the date of the notice if there is no operational creditor who has aggregate dues in excess of ten per cent of the debt of the corporate debtor no notice needs to be issued to operational creditors under Section 24 of the Code.

Operational creditors are granted representation in the CoC as per regulation 16(1) only in the event Corporate Debtor does not have any financial creditors or where all financial creditors are related parties of the corporate Debtor and in that event the committee shall consist of members as under:

(a) Eighteen largest operational creditors by value, provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors.

(b) One representative elected by all workmen other than those workmen included under (a) above.

(c) One representative elected by all employees other than those employees included under (a) above.

Thus the committee of creditors shall comprise all financial creditors of the corporate debtor whether secured or unsecured. Certain type of creditors will not fall under the definition of financial creditors as per section 5(7) of the IBC 2016. Hence it is necessary to ensure that all the creditors with whom CoC is going to be constituted are falling under the definition of financial creditors. Operational creditors are granted representation in the CoC only in the event Corporate Debtor does not have any financial creditors.

Examples of some of the claims by creditors which will not fall under the definition of financial debt are as under:

i **Advances without proper loan documents does not fall under financial debt:** In the case of *Prayag Polytech Pvt Limited* v. *Gem Batteries Pvt Ltd* (NCLAT, New Delhi 713 of 2019 dated 24.9.2019). In this case it is held that the 'Financial contract' as defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. The appellant has failed to show any record showing financial debt to be there. Hence NCLAT stated that "as such, we are unable to find any fault in the impugned order while rejecting Section 7 application."

ii **Third party security holder is not a financial creditor:** Section 5(8) of the IBC does not include mortgage within its definition and requires disbursement against the consideration of time value of money.

The Supreme Court on 26.2.2020 (in appeal) upheld the judgment of the NCLT, Allahabad and ruled that the Jaypee Associates Limited (JAL), parent company of Corporate

Debtor lenders cannot be treated as financial creditors of Jaypee Infratech Limited (JIL), Corporate Debtor.

The Supreme Court's reasoning is that financial creditor must prove that the corporate debtor owes a financial debt to such financial creditor which the JAL lenders failed to show and a third party security provider is only interested in realizing the value of its security and not concerned with the revival of a corporate debtor.

iii **Loans/Borrowings from promoters/ Relatives of promoters without interest :** For an interest free loan to fall under the ambit of Financial Debt, a Financial Creditor needs to establish that the amount was disbursed against 'consideration for time value of money'. The question as to what amounts to 'time value of money' depends on the facts and circumstances of each case.

Vivek Gupta v. *Proactive Plast Pvt. Ltd.* [2017] 87 taxmann.com 199/144 SCL 455 (NCLT-New Delhi). In this case a sum of Rs.1,81,00,000/- was given as a loan by the Financial Creditor to the corporate Debtor. It is stated that the as per their mutual understanding the said loan to be repaid with interest @18% per annum. The Financial creditor is a director and shareholder. The terms for raising bank loan necessitated investment of margin money. This was done by all the promoters and is reflected as unsecured loan.

The Hon'ble tribunal rejected the application on the ground that the claim does not fall within the definition of financial debt nor it is an unsecured loan payable on demand. There is no demand promissory note executed nor there is any agreement for payment of any interest.

iv **Guarantors to Corporate Debtor after repaying the dues by them:** *Neeraj Bhatia v. Davinder Ahluwalia* [2018] 90 taxmann.com 418/146 SCL 305 (NCL-AT)

In the above case the Corporate Debtor requested the Guarantors, through its Directors, to make payment to the lender banks and seek the release of the property owned by them which was pledged and mortgaged by them as guarantee. A total sum of Rs.1.05 Crores was paid by the guarantors towards the credit of the loan and finance facilities, availed by the 'Corporate Debtor'. On the non-payment of the amount by the corporate debtor the guarantors have invoked IBC as financial creditors.

Hon'ble NCLAT held that there is nothing on record to suggest that the amount has been disbursed in favour of corporate debtor against consideration for the time value of money. The guarantors have also failed to bring on record any evidence to suggest that the

money was borrowed or raised by the corporate debtor under any other transactions including sale or purchase or other mode having commercial effect of borrowing.

Based on the above reasoning Hon'ble NCLAT held that the applicants do not come within the meaning of 'Financial Creditor' and the application under Section 7 at their instance was not maintainable.

v. **Creditors in respect of disputed debts:** The Insolvency and Bankruptcy Code, 2016 is silent on the appropriate authority which would exercise adjudicatory functions to adjudicate the disputed claims.

The Supreme Court, however, in *Essar Steel* allowed a resolution plan to admit disputed claims at the notional value of INR 1, which would have to be paid contingent to the outcome of proceedings after the value of the claim has been determined by the appropriate forum.

vi. **Guarantors in respect of un-invoked guarantees:** A corporate guarantee that has not been invoked remains a contingent liability.

In the case of *Axis Bank Limited, v. Edu Smart Services Private Limited* [2017] 87 taxmann.com 99 (NCLT-New Delhi). Axis Bank Limited submitted its claim on 11.07.2017 for Rs.396.76 crores being the amount guaranteed by the Corporate Debtor vide corporate guarantee furnished in favour of Educom Solutions Limited. The IRP on 20.07.2017 informed the CD stating that the claim cannot be verified as the corporate guarantee had not been invoked and the liability of the corporate debtor i.e. respondent to the Axis Bank Limited, the applicant thus is contingent. After receipt of the communication the applicant has invoked the corporate guarantee on 21.07.2017.

Hon'ble NCLT has observed in the above case that CIRP commenced on 27.06.2017 and the corporate guarantee was invoked on 21.07.2017 which is much after the insolvency commencement date. Therefore the RP would not be in a position to verify the claim as it will not be reflected in the books of account which are supposed to be updated as on 27.06.2017. Thus debt became due only when the corporate guarantee invoked on 21.07.2017.

Therefore the applicant – Axis Bank Limited would not quality for consideration of its claim as it has become due and payable after insolvency commencement date.

vii. **Decree holders:** In the matter of *Sushil Ansal v. Ashok Tripathi* [2020] 118 taxmann.com 569 Hon'ble NCLAT held that 'decree-holder' is undoubtedly covered by the definition of 'Creditor' under Section 3(10) of the IBC. However, such an entity "would not fall within the class of creditors classified as 'Financial Creditor' unless the

debt was disbursed against the consideration for the time value of money or falls within any of the clauses thereof as per the definition of financial debt".

2. Role of CoC in the matter of appointment of RP & Liquidator:

The first meeting of the Committee of Creditors shall be held within seven days of the constitution of committee of creditors. In terms of section 22(1) the CoC may in their first meeting by a majority vote of not less than 66% either resolve to appoint the IRP as a RP or to replace the IRP by another resolution professional.

However if RP is not appointed in the first meeting by replacing IRP, whether he can be appointed in subsequent CoC meetings, has been clarified by NCLAT in ***Bank of India v. Nithin Nutritions Pvt. Ltd.*** [2020] 118 taxmann.com 343. It has been held in this case that the CoC has the requisite powers to propose change of the IRP even in meetings subsequent to the first meeting mentioned in section 22(2) of IBC. There is no requirement that they should furnish reasons for the change.

Section 27 (1) of IBC, 2016 states that a Resolution Professional may be replaced by CoC at any time during Corporate Insolvency Resolution Process.

With regard to recording reasons or adverse comments for removing /replacing RP, the issue has been dealt with by the Hon'ble NCLAT in the matter of '***State Bank of India v. Ram Dev International Limited*** [2018] 97 taxmann.com 58 where in it was held that the CoC is not required to record its reasons at the time of change of Resolution Professional in terms of Sec. 27 of the IBC 2016.

Liquidator: Section 34 of the IBC, which relates to appointment of a liquidator, stipulates that upon passing of the liquidation order, the RP appointed for the CIRP shall act as the liquidator, unless the adjudicating authority decides to replace the RP on the grounds provided in section 34(4), *i.e.* the resolution plan submitted by the RP was rejected due to non-compliance with the requisites of section 30(2) or the Insolvency and Bankruptcy Board of India (IBBI) has recommended the replacement, for reasons to be recorded in writing.

However unlike removal/replacement of RP under CIRP, after the liquidation order is issued, the committee of creditors has no role to play and that they are simply claimants, whose matters are to be determined by the liquidator and cannot move an application for removal of liquidator in the absence of any provisions under the law. This was held by Hon'ble NCLAT in *Punjab National Bank v. Kiran Shah,* [2020] 117 taxmann.com 427.

Therefore, in the absence of any such provision that gives effect to the removal of a Liquidator application for removal in case of need can be made to NCLT under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

3. Approval of CoC for certain actions:

The Committee of Creditors (CoC) has a crucial role in approving various actions to be initiated by RP. Section 28(1) of code lays down the actions where approval of CoC is required for further carrying out the process such as the following:

a) Resolution Professional not to raise any interim finance in excess of the amount as may be decided by the Committee of Creditors in their meeting

b) Create any security interest over the assets of the corporate debtor

c) Change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

d) record any change in the ownership interest of the corporate debtor;

e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting

f) undertake any related party transaction

g) amend any constitutional documents of the corporate debtor

h) delegate its authority to any other person

i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties

j) make any change in the management of the corporate debtor or its subsidiary

k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business

l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Where any action under section 28(1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this code.

Further regulation 29 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 allows resolution professional to sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case. However a sale of assets under this Regulation shall require the approval of CoC with 66% voting.

Present Requirement of voting percentage in committee of creditors for different decisions is as under:

S.No.	Decision	Required voting % in CoC	Relevant section
1	Extension period of CIRP	66	Section 22
2	Withdrawal of application for CIRP under section 12A	90	Regulation 30 A(4)
3	Replacement of RP	66	Section 22
4	Approval or rejection of a Resolution plan	66	Section 30(4)
5	Actions under section 28	66	Section 28
6	Sale of unencumbered asset(s) other than ordinary course of business	66	Regulation 29
7	All other decisions	51	Section 21(8)

4. Role of CoC in the matter of approval of resolution plan:

Hon'ble Supreme court held time and again that the decision of the Committee of Creditors in the approval of the Resolution Plan is paramount and Adjudicating Authority does not have power to go into the evaluation aspects of the Resolution Plan.

The committee shall evaluate the resolution plans received under regulation 39(2) as per evaluation matrix, record its deliberations on the feasibility and viability of each resolution plan and vote on all such resolution plans simultaneously.

Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes. Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:

Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting, provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.

Illustration: The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under:

Voting outcome	% of votes in favour of		Status of approval
	Plan A	Plan B	
1	55	60	No Plan is approved, as neither of the Plans received requisite votes. The committee shall vote again on Plan B, which received the higher votes, subject to the timelines under the Code.
2	70	75	Plan B is approved, as it received higher votes, which is not less than requisite votes
3	75	75	The committee shall approve either Plan A or Plan B, as per the tie-breaker formula announced before voting.

The role of CoC in approving resolution plan has been highlighted in various judgments :

1. **Commercial decision of CoC is paramount**: In the case of *IMR Metallurgical Resources AG (Company) v. Ferro Alloys Corporation Ltd.* [2020] 118 taxmann.com 544, the Hon'ble NCLAT held "It is a settled position of law that approval or rejection of resolution plan depends upon the commercial wisdom of the CoC, which involves evaluation of the resolution plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable. The powers of the Adjudicating Authority under Section 31 of the Code is limited to the matters covered under Section 30(2) of the Code when the Resolution Plan does not conform to the stated condition. Therefore, the Appellant cannot question the commercial wisdom of the CoC".

2. **Viability and feasibility of a resolution plan to be examined by CoC**: In *Bhaskara Agro Agencies v. Super Agri Seeds Pvt. Ltd.* (Company Appeal (AT) (Insolvency) No. 380 of 2018: The Hon'ble NCLAT in this case, held that the adjudicating authority cannot sit in appeal over the decision of Committee of Creditors. They are the experts to find out the viability and feasibility of plan and the matrix. Further it was also stated that "As the factors are technical in nature which can be determined by experts like the 'Financial Creditors', we are not inclined to sit in appeal over the decision of the 'Committee of Creditors' to find out whether one or other 'Resolution Plan' is viable and feasible or not. We find no merit in this appeal.'

3. **CoC to record the reasons for approving or rejection one or another resolution plan:** Interestingly NCLAT in *Rajputana Properties Pvt. Ltd. v. Ultra Tech Cement Ltd.* [2019] 108 taxmann.com 88 opined that "Committee of Creditors should record reasons (in short) while approving or rejecting one or other resolution plan. Views if any, expressed by the (suspended) Board of Directors or it's Partners, Operational Creditors or its representatives and Resolution Applicant(s),are also required to be taken into consideration by the Committee of Creditors before approving or rejecting one or other resolution plan. The views so expressed by any of those who are watching the proceeding should also be recorded (in short). "

4. **Resolution plan approval:** *Maharashtra seamless Ltd. v. Padmanabhan Venkatesh* [2020] 113 taxmann.com 421/158 SCL 567 (SC): Held that no provision in the Code or Regulation has been brought to the notice under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. It is also held that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once a resolution plan is approved by the CoC, the statutory mandate of the Adjudicating Authority under section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of the sub-section (2) and (4) of Section thereof. Hence it is stated that no breach of the said provisions have been found in the order of the Adjudicating Authority in approving the resolution plan.

5. **Recommending liquidation:** The Hon'ble NCLAT, in *Praveen Kumar Nand Kumar* v. *VSL Securities Pvt. Ltd.* in CA No. 1/2020 in CA No. 308/2000, dated 9.6.2020, observed "the decision of the CoC recommending liquidation of the corporate debtor after proper evaluation of the assets and liabilities of corporate debtor with no Resolution Plan forthcoming would be a business decision falling within the domain of commercial wisdom of the CoC which is not amenable to judicial review."

   Thus the committee of Creditors has very important role to play in the entire process of Corporate Insolvency Resolution Process.

Source: *IBC Code, 2016, regulations and case laws/AA orders on the subject.*

Disclaimer*: The content of this article is intended only for general information purpose.* Any conclusions or opinions are based on the individual facts and circumstances of a particular matter and therefore may not apply in other matters. *Specialist advice should be sought about specific circumstances.*

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INSIGHTS

MCA Report on Pre-Pack Insolvency Resolution Framework: A Summary

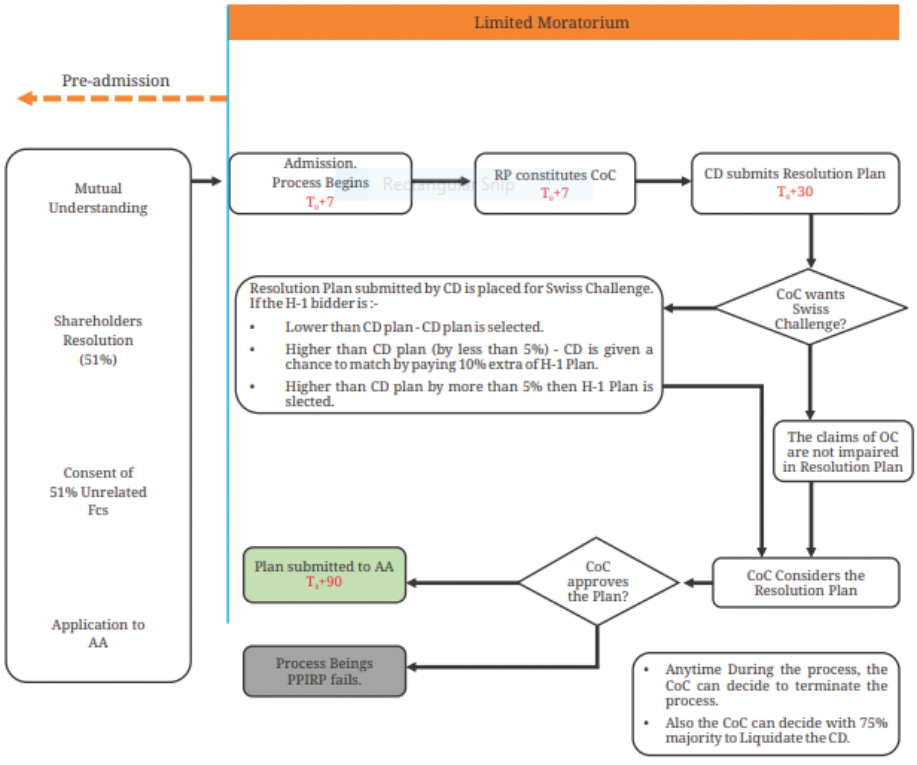
CS Peer Mehboob,
Assistant Director,
ICSI IIP,

1. Background

On 08th January, 2021, Ministry of Corporate Affairs (MCA) released a much awaited Report of sub-committee of Insolvency Law Committee (ILC) on the proposed Pre-Packaged Insolvency Framework under Insolvency and Bankruptcy Code, 2016 and invited comments from public.

As an option for resolving insolvency, Government constituted a sub-committee of Insolvency Law Committee (ILC) vide order

A Typical Pre-pack Process Flow



dated 24.6.2020 to prepare a detailed scheme for implementing pre-pack and prearranged insolvency resolution process. The sub-committee has designed a pre-pack framework within the basic structure of the Insolvency and Bankruptcy Code, 2016, for the Indian market as detailed in their report, taking note of the progress in insolvency reforms, maturity of the systems and practices relating to insolvency in the country, and learning from the experience of pre-packs in other jurisdictions.

Pre-pack is a restructuring plan which is agreed to by the debtor and its creditors prior to the insolvency filing, and then sanctioned by the court on an expedited basis.

2. Benefits of Pre-Pack Process

The sub-committee took note of benefits of a typical pre-pack process as follows:

1. Quick Resolution: Pre-pack enables a faster resolution, preserves and maximises value and increases the possibility of resolution.
2. Cost Effective: As substantial part of prepack is conducted outside the court and the formal part of the process has minimum involvement of the court, the cost associated with interface with a court is reduced. Since the process takes less time, the cost of process linked to time becomes less.
3. Value Maximisation: Pre-pack preserves value by cutting down the elements of the formal process. Early initiation and closure of the process as compared to the formal process, minimises the possibility of liquidation and thereby destruction of economic value in case of otherwise viable businesses.
4. Job preservation: Since a pre-pack may commence at the earliest sign of distress, it facilitates continuity of its operations without any job loss. It ensures a company keeps going, in contrast to a more protracted formal insolvency process which risks losing 95 customers and employees.
5. Group resolution: In the absence of any mechanism to effectively deal with insolvency of a group of companies in most jurisdictions, prepacks have proved to be very helpful.
6. Lighter on Courts: The courts usually have limited infrastructural capacity and can perform its obligations within its limits. A pre-pack has the potential to reduce litigation, due to its informal and consensual nature.

3. Key Highlights of the recommendations of the Report:

The key highlights of the recommendations of the Report of the sub-committee on the proposed pre-pack insolvency framework are as below:

1. Pre-Pack should be an `additional option for resolution' which blends features of both formal and informal options.
2. Pre-pack should be available for all Corporate Debtors (CDs) and for any stress i.e. pre defaults and post defaults.

3. The implementation could be phase wise.
4. Pre-pack will be available for all defaults including Covid -19 defaults also for which CIRP not available; and also for the default from Rs. 1 to Rs. 1 crore.
5. Initiated by: The CD may initiate prepack with consent of simple majority of (a) unrelated FCs and (b) its shareholders.
6. Pre-pack and CIRP shall not run in parallel.
7. Cooling off period: pre-pack cannot be initiated within 3 years of closure of another pre-pack.
8. Management of CD: CD shall remain under the control and possession of current management.
9. Claim allocation and IM: CD shall make available an updated list of outstanding claims and draft IM duly certified by its Chairman/ MD alongwith indemnification in case of any omission, they will be personally liable. Criminal liability will also be attracted for providing any wrong information.
10. Moratorium shall be available.
11. Role of IP: IP shall play the role of RP in pre-pack. He shall conduct the process and not run the operations of the CD.
12. The appointment of IP shall have the consent of majority of unrelated FCs.
13. The CoC shall take decision with simple majority, only decision to liquidate would require approval from 75% of voting share, present and voting.
14. The CoC may decide to close the process with the approval of 66% of voting shares.
15. Pre-pack should start with a base resolution plan, which will face swiss challenge.
16. Pre-pack should offer two optional approaches, namely with swiss challenge and without swiss challenge.
17. Pre-pack shall not end with liquidation, except with CoC approval with 75% voting share.
18. IRPC shall not include cost of running process.
19. The pre-pack should allow 90 days for market participants to submit the resolution plan to AA and 30 days thereafter for the AA to approve it.
20. The regulatory benefits as are available to CIRP shall be available for Pre-pack.

4. The salient features of proposed pre-pack vis-à-vis CIRP

Parameter	CIRP	Proposed Pre-pack
Objective	Resolution through a resolution plan	Resolution through a resolution plan
Legal framework	Relatively more in the statute and less in regulations	Relatively less in the statute and more in regulations
Applicability	Companies and LLPs	Companies and LLPs

Initiation of process	Default above Rs.1 crore, excluding COVID-19 Default	Pre and post default stress, including COVID-19 default. In a phased manner, if required
Initiation by	FC, OC, or CD	CD, with consent of majority of unrelated Fcs
Management of the CD	IP-in-possession with creditor-in-control	Debtor-in-possession with creditor-in-control
Role of IP	IRP appointed by the applicant and then RP by the CoC	RP, to be appointed with consent of majority of unrelated Fcs
	Managing affairs of the CD and conducting the process	Conducting the process
Claim collation	IRP to invite and collate	CD to provide. RP to verify.
Information memorandum	Prepared by RP	Draft prepared by CD and finalised by RP
Moratorium	Moratorium under section 14	Limited Moratorium
Interim finance	Yes	Yes
Avoidance transactions	Yes	Yes
Valuation	By two valuers	By two valuers
IRPC	Includes cost of running operations	Does not include cost of running operations
Invitation for resolution plans	Public process	First right of offer to promoters, Swiss Challenge
Ineligibility for resolution plan	Section 29A to applies	Section 29A to apply
Early closure of process	Under section 12A, on request of the applicant	With approval of 66% of voting share, present and voting; Suo moto by CoC
Approval of resolution plan by CoC	66% of voting share	66% of voting share, present and voting
Consequence of termination of process	No termination allowed	Liquidation, with 75% of voting share of CoC
Consequence of failure of process	Liquidation	Closure
Binding outcome	Resolution plan binding	Resolution plan binding
Regulatory benefits	Yes	Yes
Clean Slate, post resolution	Yes	Yes
Role of IP and AA	Relatively more	Relatively less
Timeline	180 days till approval of resolution plan by the AA	90 days for filing of resolution plan with the AA plus 30 days for the AA to approve it
Cooling off	12 months between two CIRPs	Three years between two Pre-packs

5. Concluding Remarks:

The proposed pre-pack mechanism will be a blend of informal and formal mechanisms, with the informal process stretching upto NCLT admission, followed by the existing NCLT-supervised process for resolution as specified under the IBC. The proposed pre-pack mechanism, if implemented, could be a viable alternative to the current corporate insolvency process and would be significantly less time-consuming and inexpensive as against the formal insolvency proceedings.

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Code and Conduct of Insolvency Professionals

Anu
Executive
(Legal and Compliance),
ICSI IIP,

1. Introduction

A code of conduct is a set of rules outlining the norms, rules, and responsibilities or proper practices of an individual party or an organisation. The code of conduct is generally based upon ethics and morality. At present, Code of Conduct is prescribed for all the professionals be it, doctors, Chartered Accountants, Company Secretaries, Lawyers, engineers etc.

Under the Insolvency and Bankruptcy Code, Insolvency Professional plays major role in the corporate insolvency resolution process and he is entrusted with all the powers of the Board/Management of Corporate Debtor. Therefore, for IPs also, the code of conduct has been codified.

2. Legal Framework

As per Regulation 7(2) of the IBBI (CIRP) Regulations, 2016, an Insolvency Professional shall all times abide by the Code, rules, regulations, guidelines and the bye-laws of the insolvency professional agency with which he is enrolled and abide by the Code of Conduct.

The code of conduct for Insolvency Professionals is specified under Section 208(2) of the Insolvency and Bankruptcy Code, 2016. As per Section 208(2), every insolvency professional shall abide by the following code of conduct:

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;

(*c*) to allow the insolvency professional agency to inspect his records;

(*d*) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and

(*e*) to perform his functions in such manner and subject to such conditions as may be specified.

The detailed code of conduct for Insolvency Professionals is prescribed in the first schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. Ten key points mentioned in code of conduct are (***i***) **Integrity and objectivity;** (***ii***) **Independence and impartiality;** (***iii***) **Professional competence;** (***iv***) **Representation of correct facts and correcting misapprehensions;** (***v***) **Timeliness;** (***vi***) **Information management;** (***vii***) **Confidentiality;** (***viii***) **Occupation, employability and restrictions;** (***ix***) **Remuneration and costs and** (***x***) **Gifts and hospitality.**

In this chapter, we shall focus on one point *i.e.* "Integrity and objectivity" of the Code of Conduct for Insolvency Professionals. The same is briefly summarised as under:

As an option for resolving insolvency, Government constituted a sub-committee of Insolvency Law Committee (ILC) vide order

3. Integrity and objectivity

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.

2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.

3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.

4. An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not himself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

The Insolvency and Bankruptcy Board of India (IBBI) and Insolvency Professional Agencies (IPAs) are entrusted with the authority to monitor the conduct of Insolvency Professionals and take actions against the Insolvency Professionals. The actions that may be taken by IBBI includes suspension or cancellation of registration, imposition of monetary penalty, cancellation of authorisation for assignment *et al.*

4. Orders

- The Disciplinary Committee of IBBI(DC) *vide* an order dated 20th April, 2020, observed that an Insolvency Professional outsourced his duty and engaged IPE for verification of claims. The DC observed violation of clause 2, 3 of the Code of Conduct, other provisions of IBC and imposed penalty of Rs. one lakh.

- The DC of IBBI vide another order dated 27th April, 2020, observed that an Insolvency Professional despite IBBI Circular dated 12.06.2018 stating that Insolvency Resolution Process Cost (IRPC) shall not include any expense incurred by a member of CoC or a professional engaged by them, the IP charged the fee of lenders legal counsel from IRPC, appointed second forensic auditor on direction of CoC but included the fees in IRPC; shared confidential document i.e. IM prior to the issue of Form G and even before the conduct of due diligence (by the RP) to ensure that they would qualify as eligible prospective resolution applicants. The DC observed violation of clause 1, 2, 3 of the Code of Conduct, other provisions of IBC and suspended the registration of Insolvency Professional for six months.

- The DC of IBBI vide another order dated 8th June, 2020 observed that an Insolvency Professional attempted to siphon off money from Corporate Debtor and acted under the influence of one creditor. The DC observed violation of clause 1, 2 of the Code of Conduct, other provisions of IBC and imposed penalty equal to 25% of fee payable to him.

- The DC of IBBI *vide* another order dated 29th October, 2020 observed that an Insolvency Professional did not comply with the directions of Adjudicating Authority, distributed assets of CD to financial creditors, did not take reasonable care and diligence while performing his duties during the processes under the Code and, therefore violated clauses 2, 5 of the Code of Conduct, other provisions of IBC. The DC debarred the IP from taking fresh assignment for period of 90 days.

5. Concluding remarks

Lastly, the success or failure of any institution depends upon the conduct of its professionals. The objective of the Insolvency and Bankruptcy Code cannot be achieved unless the professionals enrolled under it follows code of conduct in its letter and spirit.

CORPORATE INSOLVENCY IN INDIA AND OTHER COUNTRIES-A BRIEF COMPARATIVE STUDY

CS Peer Mehboob,
Assistant Director
ICSI IIP

Introduction

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code/IBC"), implemented in phases since August 5, 2016, was enacted to overhaul the outdated and complex corporate insolvency laws in India to address an economy-wide problem of bad loans, with its resulting impact on the banking sector and access to credit. The Code has also materially impacted the rates of default on loan repayments. In other words, repayment rates have materially improved owing to a fear among controlling shareholders of Indian debtors that they may lose control of their (largely) family owned businesses if placed in insolvency. It is therefore equally important for existing creditors and shareholders to take note of the change in debtor-creditor dynamics introduced by the Code, given that it is now possible for creditors to credibly enforce their rights, including in ways that result in a change in ownership of debtors.

This Article focuses on the aspects of the practical implementation of the Insolvency and Bankruptcy Code, 2016 in India. The timelines have been drastically changed to tackle the delay in settlement of cases under the said law; however its practical impact is matter of assessment and therefore the need for present research. Four years since passing of this legislation, this article seeks to analyze the effectiveness of the Indian Insolvency Law (IBC) in comparison with its counterparts. This Article has drawn a comparison of insolvency and bankruptcy legal procedures in India from other countries such as US, UK, Gerrmany, Singapore, and Australia.

Comparative Analysis of Insolvency Laws

One of the usual question that arises in our minds is how is the Indian IBC 2016 compared to other Insolvency Codes practiced internationally. Since internationally Insolvency and bankruptcy laws have been in place for a long time, and have dealt with several cases a look into their laws may give some more insight. As we know, IBC 2016 was enacted in May 2016 and is therefore, young and evolving. It should be really appreciated how proactively and speedily the regulator (Insolvency & Bankruptcy Board of India) is reacting to every emerging situation by bringing rules and regulations to deal with various situations appropriately.

The World Bank's Doing Business report assesses 190 economies on eleven parameters[1] every year. The doing Business (DB) project of the World Bank provides useful data on the ease of doing business, rank each location and recommend reforms to improve performance in each of the indicator areas. DB studies the time, cost and outcome of insolvency proceedings involving domestic entities as well as the strength of the legal framework applicable to liquidation and reorganization proceedings. The data for the resolving insolvency indicators are derived from questionnaire responses by local insolvency practitioners and verified through a study of laws and regulations as well as public information on insolvency systems. The ranking of economies on the ease of resolving insolvency is determined by sorting their distance to frontier scores for resolving insolvency. These scores are the simple average of the distance to frontier scores for the recovery rate and the strength of insolvency framework index.

The table below provide a comparative snapshot of the rankings of ease of doing business and resolving insolvency, as the study is focused.

Table 1: Ease of Doing Business and resolving insolvency Ranks from the years 2017 to 2020

Country	Ease of doing business				Ease of resolving insolvency		
	2017 (190)	2018 (190)	2019 (190)	2020 (190)	2017 (190)	2018 (190)	2019 (190)
India	130	100	77	63	136	103	108
United States (US)	8	6	8	6	5	3	3
United Kingdom(UK)	7	7	9	8	13	14	14
Germany	17	20	24	22	3	4	4
Singapore	2	2	2	2	29	27	27
Australia	15	14	18	22	21	18	20

Source: compiled from World Bank's Doing Business report 2017 to 2020

1 Eleven parameters used by World bank to assess Ease of Doing Business: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, labour market regulation, enforcing contracts and resolving insolvency.

The above table clearly signifies, nation-wise progress achieved in ease of doing business and resolving insolvency from the years 2017 to 2020. India made remarkable progress. India's huge stride towards becoming a business-friendly nation has come in the last two years, with a total jump of 53 places in the year 2019 and 14 places in the year 2020. Singapore has been consistent throughout these years. As for "Ease of Resolving Insolvency", India's ranking declined by five places to settle at 108. This occurred despite the adoption of the Insolvency and Bankruptcy Code, which has started to show promising results on the ground. The other nations have more or less changes in rankings when compare from 2016 to 2019. The DB report, ultimately emphasis continuous reforms in policies and legislations for the smooth functioning of business activities in any nations. The reports published by World Bank are taken into consideration for analysis.

World Bank's Doing Business studies the time, cost and outcome of insolvency proceedings involving domestic legal entities. These variables are used to calculate the recovery rate, which is recorded as cents on the dollar recovered by secured creditors through reorganization, liquidation or debt enforcement (foreclosure or receivership) proceedings. To determine the present value of the amount recovered by creditors, *Doing Business* uses the lending rates from the International Monetary Fund, supplemented with data from central banks and the Economist Intelligence Unit.

Table 2: Insolvency Resolution Parameters and Credit Data

Indicator	India	US	Germany	UK	Australia	Singapore
Rank	52	2	4	14	20	27
Recovery Rate	71.6%	81%	79.8%	81%	82.7%	88.7%
Time (years)	1.6	1.0	1.2	1.0	1.0	0.8

Source: World Bank Doing Business Report, 2019

According to a World Bank Doing Business Report, 2019, it takes an average of 1.6 years for insolvency resolution of a company in India, whereas its 1.0 year in US, UK and Australia, 1.2 years in Germany and it takes 0.8 years in Singapore. Also, recovery rate is 71.6% lower than other countries in comparison.

At this juncture, it is pertinent to examine the practice in other jurisdictions for some guidance in bringing about reform in Indian insolvency regime. The reason for selecting the comparison of insolvency laws between India and these countries, is that as per the rankings of World Bank, India ranks at 52 in its insolvency resolution, while US ranks at 2, Germany is at 4, UK is at 14, Australia and Singapore are at 20 and 27 respectively. Hence, despite India's ranking is improving but there is still a long way to go for India in terms of 'Insolvency Resolution' in comparison with these countries.

A Bird's eye view on cross country comparison:

S. No.	Details	India	UK	US	Australia	Germany	Singapore
1.	**Law governing Insolvency**	IBC, 2016	UK Insolvency Act, 1986	Chapter 11 of US Bankruptcy Code	Bankruptcy Act, 1966, the Corporations Act, 2001 and Australian Securities and Investments Commission Act, 2001.	German Insolvency Code (InsO)	Chapter 50 of the Companies Act, 1967
2.	**Who can start proceeding**	Creditors, Corporate Debtor	Creditors, debtors, Holders of qualifying floating charges (QFC)	Debtor Company	Creditors, Directors or Debtor	Debtor company or creditors	Company, its directors or its creditors.
3.	**Moratorium**	Yes	Yes	Yes	Yes	Yes	Yes
4.	**Management Control**	Board of directors are suspended with the appt. of IP	Insolvency Practitioner but daily operations remains with the directors	Management continues. Debtor in Possession (DIP) approach	Receiver and administrator	Debtor in case of self admin-istration, else Debtor	Judicial Manager (officer of the court) takes over running of company
5.	**Approval of Resolution Plan**	Approved by CoC by 66% votes	By simple majority in value of creditors	by majority and 2/3 in amount actually voting	Approval from majority of the creditors is required	By majority of creditors	By majority of creditors
6.	**Insolvency Proceeding Costs**	Whoever initiates the process	Born by Debtor	Borne by Debtor	Whoever initiates the process	Born by debtor	Whoever initiates the process
7.	**Cross Border Insolvency**	Secs.234 & 235 of the Code, UNCITRAL not yet adopted	Inside EU - EU Insolvency Regulation, Outside EU - UNCITRAL Model Law	UNCITRAL model law has substantially been adopted	Australia also adopted UNCITRAL model law	UNCITRAL Model law is not adopted, own set of rules are complied	Singapore adopted the UNCITRAL model of Cross Border Insolvency Law

Conclusion:

Indian Insolvency & Bankruptcy law is a progressive law and the main emphasis is on its resolution process. One of the major difference compared to the US laws is that US laws stipulate a "Debtor in Possession" approach (management remains in control on running the company) where as Other countries & Indian laws envisage the management of the company through Insolvency professional. Although both the situations have their own merits, for example, US laws believe that the management of the company is best suited for running the company for a quick reorganisation plan rather than a new person who will have own learning curve as well cost, however UK & Indian laws envisage that the company can best be run by Insolvency Professional over the previous management.

All the laws look for a resolution plan on going concern basis over liquidation. Insolvency regulator IBBI is proactively addressing the emerging situations which is remarkable. IBC has brought a culture change in corporate India, but it is a journey which has only just started.

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Vijayalakshmi Enterprises v. Malabar Hotels (P.) Ltd.

JUSTICE BANSI LAL BHAT, ACTG. CHAIRPERSON
AND ANANT BIJAY SINGH, JUDICIAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1068 OF 2020†
DECEMBER 15, 2020

Section 7, read with sections 31 and 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether initiation of CIRP would not be equivalent to adjudication of claim for recovery of money which Claimant in respect of disputed claim, allegedly claims to be entitled to - Held, yes -Whether where corporate debtor had already undergone CIRP and while approving Resolution Plan it was held that claim of financial creditor was a disputed claim and was to be paid on basis of outcome of adjudication of legal proceedings, adjudication had to be, in respect of claim, by a Civil Court and other adjudicatory mechanism like Arbitral Proceedings - Held, yes - Whether proceedings under Code are only meant to resolve insolvency issues and not to adjudicate a claim and thereby, appropriate remedy for appellant/financial creditor for adjudication of his disputed claim would not lie in triggering Corporate Insolvency Resolution Process by taking resort to provisions of section 7 - Held, yes (Paras 3 and 4)

CASE REVIEW

Vijayalakshmi Enterprises v. Malabar Hotels (P.) Ltd. (2020) 117 taxmann.com 64 (NCLT - Chennai) (para 4) *affirmed.*

† Arising out of order of NCLT Chennai Bench dated 5-5-2020 in Vijayalakshmi Enterprises v. Malabar Hotels (P.) Ltd. (2020) 117 taxmann.com 64 (NCLT - Chennai)

Aravind Pandian, Sr. Adv., **Anandh K.** and **Pawan Jhabakh**, Advs. *for the Appellant.* **Sumant Batra**, Adv. *for the Respondent.*

ORDER

1. Appellant is aggrieved of dismissal of its application filed under section 7 of the I&B Code in terms of impugned order dated 5th May, 2020 by virtue whereof the Adjudicating Authority (National Company Law Tribunal), Division Bench-I, Chennai, taking note of the fact that the Resolution Plan has a saving clause for the Financial Creditor providing that the Financial Creditor shall be paid on the basis of the outcome of the adjudication of the legal proceedings and keeping in view that the claim of the Financial Creditor was rejected by the Resolution Professional at the first instance in its entirety and the Resolution Applicant having submitted the Resolution Plan to the Committee of Creditors, which was approved by the Adjudicating Authority, held that the amount payable to the Financial Creditor has not been crystallized. Resolution Plan in respect of the Corporate Debtor-Malabar Hotels Pvt. Ltd.' came to be approved by the Adjudicating Authority in terms of order dated 17th September, 2018.

2. Mr. Sumant Batra, Advocate representing Respondent - Corporate Debtor has invited our attention to page 170 of the appeal paper book (extract of the Resolution Plan) wherein in respect of disputed creditors it is provided that the amounts claimed by Mr. Bharat Kumar Dugar and M/s Vijayalakshmi Enterprises (Appellant) shall be paid on the basis of the outcome of the adjudication of the legal proceedings. Same has been reflected in clause (9) of the order dated 17th September, 2018 passed by the Adjudicating Authority in regard to approval of the Resolution Plan. It is therefore clear that the claim of the Appellant was to be paid on the basis of outcome of adjudication of legal proceedings.

3. Admittedly, Appellant has sought initiation of Corporate Insolvency Resolution Process against the Corporate Debtor by filing an application under section 7 of the I&B Code which cannot be held to be a legal proceeding dealing with the adjudication of the disputed claims. From tone and tenor of clause (9) of the order approving the resolution plan, it can be easily gathered that outcome of adjudication of legal proceedings postulates pendency of any proceedings on the date of approval of the Resolution Plan or even a suit or arbitration proceeding taken in respect of the claim thereafter. However, there is no difficulty in holding that initiation of Corporate Insolvency Resolution Process would not tantamount to adjudication of the claim in regard to right to recover money which

claimant in respect of a disputed claim, claims to be entitled to. Adjudication has to be, in respect of the claim, by a Civil Court and other adjudicatory mechanism like Arbitral Proceedings. Proceedings under Insolvency and Bankruptcy Code, 2016 are only meant to resolve the insolvency issues and not adjudge a claim. Therefore, the Appellant cannot bank on this clause, while referring to filing application under section 7 of the I&B Code. The remedy available to him did not lie in triggering Corporate Insolvency Resolution Process by taking resort to provisions of section 7 of the I&B Code.

4. We find no merit in this appeal. It is accordingly dismissed. However, disposal of this appeal will not preclude the Appellant from seeking remedy from the competent forum, subject to all just legal exceptions.

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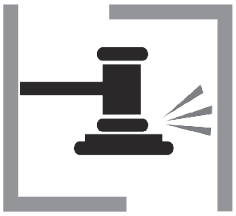


(2021) 124 taxmann.com 175 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Mohan Lal Jain v. Lalit Modi

JUSTICE BANSI LAL BHAT, ACTG. CHAIRPERSON
ANANT BIJAY SINGH, JUDICIAL MEMBER
AND V. P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 944 OF 2020†
DECEMBER 16, 2020

Section 66, read with sections 65 and 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's - Adjudicating Authorities - Fraudulent or wrongful trading - Whether allegations of preferential transactions as also fraudulent trading/ wrongful trading carried on by corporate debtor during insolvency resolution could have been inquired into by Adjudicating Authority (NCLT) and it was not permissible for Adjudicating Authority to abdicate its power and refer matter to Ministry of Corporate Affairs - Held, yes (Para 5)

CASES REFERRED TO

Embassy Property Development (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 4).

Arun Kathpalia, Sr. Adv. and **Anirban Bhattacharya**, Adv. *for the Appellant.* **Sumesh Dhawan**, **Ms. Vatsala Kak** and **Ms. Geetika Sharma**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT New Delhi Bench in regard to CA 1342/2019, dated 27-2-2020.

ORDER

1. Ministry of Corporate Affairs has been arrayed as party Respondent No. 46 in terms of the direction given in order dated 6th November, 2020. However, there is no appearance on behalf of Respondent No. 46, though Mr. Sanjay Shorey, Director (Legal), MCA has appeared previously.

2. Heard learned senior counsel representing the Appellant and learned counsel representing for the Financial Creditor. Since the issue raised in this appeal is limited to direction given in terms of impugned order by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench in regard to CA 1342/2019 only, we dispense with the appearance of Respondent Nos. 2 to 45.

3. In terms of impugned order dated 27th February, 2020, apart from making a modification in its earlier direction in respect of CA 702/2019 which is not the subject of challenge in this appeal, the Adjudicating Authority when approached by the Liquidator for invoking the provisions of Section 43/66 of the I&B Code for taking action in regard to preferential transactions and fraudulent trading/wrongful trading, the Adjudicating Authority having regard to different versions in regard to such transactions emanating from both parties, observed that it would be beyond the scope of powers of the Adjudicating Authority to look into the transactions which attract the provisions of Section 43/66 of the I&B Code and explanation of the opposite party, if required, can be offered to the Investigating Agency.

4. It is submitted on behalf of the Appellant that while the jurisdiction of the Adjudicating Authority was rightly invoked by the Resolution Professional/Liquidator as specifically provided by Section 43 and Section 66 of the I&B Code, respectively, it was not permissible for the Adjudicating Authority to abdicate its powers and refer the matter to the Ministry of Corporate Affairs or an Investigating Agency. It is submitted that the allegations on the basis of which jurisdiction of the Adjudicating Authority was sought to be invoked with reference to preferential transactions and fraudulent trading/wrongful trading falling within the ambit of Sections 43 and 66 of the I&B Code respectively, lies within the domain of the Adjudicating Authority and the express provisions of these sections leave no room for ambiguity in this regard. Shri Arun Kathpalia, learned senior counsel representing the Appellant has referred to observations of Hon›ble Apex Court made in "*Embassy Property Development (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445", paras 51 and 52, in this regard, which are extracted herein below:-

`51. The objection of the appellants in this regard is well founded. Section 65 specifically deals with fraudulent or malicious initiation of proceedings. It reads as follows:

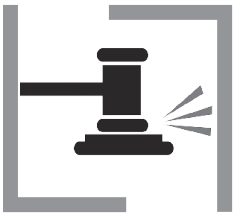
"65. *Fraudulent or malicious initiation of proceedings.* — (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.'

52. Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (*i*) fraudulent initiation of proceedings as well as (*ii*) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation'.

5. It is abundantly clear that allegations of preferential transactions as also fraudulent trading/wrongful trading carried on by the Corporate Debtor during the insolvency resolution can be inquired into by the Adjudicating Authority. This being the settled position of law, we are of the considered opinion that it was not open to the Adjudicating Authority to link the fate of CA-1342/2019 with CA-702/2019. All that the Adjudicating Authority was required to do was to take cognizance of the complaint emanating from the Liquidator in regard to the alleged preferential transactions and fraudulent trading/wrongful trading having occurred *qua* the Corporate Debtor. Unfortunately, the impugned order, to the extent of disposal of CA-1342/2019 is not in conformity with the statutory provisions and the dictum of the Hon'ble Apex Court. The impugned order to the extent indicated, cannot be supported and the same is modified by providing that the Adjudicating Authority will inquire into such alleged dealings in accordance with law with expedition, preferably within two months. Appeal is accordingly disposed of.

6. A copy of this order be communicated to the Adjudicating Authority forthwith.



(2021) 124 taxmann.com 179 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Committee of Creditors of Rosewood Trexim (P.) Ltd., In re

JUSTICE BANSI LAL BHAT, CHAIRPERSON
AND ANANT BIJAY SINGH, JUDICIAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1066 OF 2020†
DECEMBER 15, 2020

Section 12 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Time limit for completion of - Whether where appellant, Resolution Professional on account of being in self-isolation and quarantined as a victim of COVID-19 Pandemic was prevented from undertaking further steps for bringing CIRP to logical conclusion, period of time for which Resolution Professional was immobilized as a result of being infected with COVID-19 virus was to be excluded from CIRP period of 180 days and extension of CIRP period by 90 days was to be allowed - Held, yes (Paras 3 and 4)

CASE REVIEW

Reliance Commercial Finance Ltd. v. *Rosewood Trexim (P.) Ltd.* (2021) 124 taxmann.com 178 *set aside* (***See Annex***).

Ashok Juneja and **Shailender Singh**, Advs. *for the Appellant.*

ORDER

1. Aggrieved of dismissal of IA 4719 of 2020, seeking exclusion of period and extension of Corporate Insolvency Resolution Process (CIRP for short) period in the wake of lockdown imposed due to COVID-19 being declared Pandemic, by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, *vide* impugned order dated 19th November, 2020, the Committee of Creditors ("CoC" for short) of Corporate Debtor- 'Rosewood Trexim Pvt. Ltd.' through Resolution Professional Mr. Shailendra Singh has preferred the instant appeal assailing the impugned order *inter alia* on the ground that the Resolution Professional had fallen sick around 01st September, 2020 necessitating to go into self-isolation and that he subsequently tested positive for COVID-19 on 18th September, 2020, which hampered progress in the conduct of CIRP.

2. It is submitted by the Appellant-Resolution Professional appearing in person that on account of being

† Arising out of order of NCLT, New Delhi in *Reliance Commercial Finance Ltd.* v. *Rosewood Trexm (P.) Ltd.* (2021) 124 taxmann.com 178 (NCLT - New Delhi).

in self-isolation and quarantined as a victim of COVID-19 Pandemic, he could not carry on the CIRP. It is submitted that even when he was still in quarantine, due to urgency in the matter, he issued notice on 22nd September, 2020 convening meeting of CoC on 24th September, 2020 through virtual mode but his efforts turned futile as his ill health proved to be a stumbling block in achieving the desired progress. It is submitted that the Appellant recovered from illness and after testing negative on 2nd October, 2020, he sent notice for 8th CoC Meeting on 5th October, 2020 and the meeting of CoC was finally conducted on 8th October, 2020 wherein the CoC unanimously resolved by 100% voting of the sole CoC member that the Adjudicating Authority be approached for exclusion of period of lockdown time and extension of time to conclude the CIRP.

3. After hearing the Appellant in person and keeping in view the ground projected which is duly substantiated by material on record (Annexure A8 and A9 being page nos. 63 to 70 of the appeal paper book), we are of the considered opinion that the Appellant was, in the wake of outbreak of COVID-19 declared as Pandemic culminating in imposition of Nationwide lockdown w.e.f 25th March, 2020, prevented from undertaking further steps for bringing the CIRP to logical conclusion. There is ample proof on record to hold that the Appellant was tested positive for COVID-19 after falling sick and he became inactive due to medical reason being on self-isolation and quarantined. Thus, despite his earnest effort he was unable to convene meeting of the CoC. Even an attempt made at convening such meeting through digital platform proved futile due to falling ill. In the given circumstances, the Adjudicating Authority should have taken these factors into consideration which warranted mitigating the hardship and not compounding the same. The CoC, which was in existence, had not been dissolved and once the Nationwide lockdown was imposed as a sequel to outbreak of COVID-19 declared as Pandemic resulting in all activities related to trade and commerce business coming to a grinding halt, CoC as an institution cannot be said to have got dissolved, moreso, when taking factors of Pandemic into consideration, fresh filing of applications under sections 7, 9 & 10 of the 'I&B Code' was suspended and in *suo motu* jurisdiction of the Hon'ble Apex Court and this Appellate Tribunal, the limitation was extended. Having conspectus of all these relevant factors, we are inclined to hold that the CoC would not be deemed to have been dissolved, at least for the purposes of passing of Resolution seeking exclusion of Lockdown period and extension of CIRP period beyond the prescribed time of 180 days.

There being cogent reasons for acceding to the prayer made in this appeal, we find that the impugned order cannot be sustained.

4. We accordingly, allow the appeal, set aside the impugned order and allow exclusion of 203 days w.e.f. 15th March, 2020 till 4th October, 2020 (inclusive of the period for which the petitioner was immobilized as a victim of COVID-19) from CIRP period of 180 days and also allow extension of CIRP period by 90 days.

Appeal is accordingly allowed with direction to the Appellant to carry forward the CIRP with expedition.

ANNEX

(2021) 124 taxmann.com 178

NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH

RELIANCE COMMERCIAL FINANCE LTD.

v.

ROSEWOOD TREXIM (P.) LTD.

B.S.V. PRAKASH KUMAR, ACTG. PRESIDENT
AND HEMANT KUMAR SARANGI, TECHNICAL MEMBER
(IB) NO. 413 (PB) OF 2019
NOVEMBER 19, 2020

Ashok Juneja and **Shailender Singh**, Advs. *for the Appellant.*

ORDER

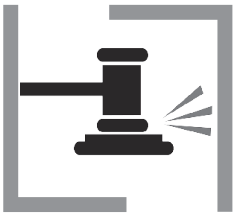
1. It is an application (IA-4719/2020) filed for exclusion and extension of CIRP period taking lockdown into consideration.

2. As per this application, it appears that CIRP period started running from 10-10-2019, so that 180 days period was over by 8-4-2020. Now, this Applicant/Resolution Professional filed this application based on the resolution passed by the CoC on 8-10-2020 seeking for exclusion and extension of CIRP period stating that since this company is situated at New Delhi and the New Delhi Government having announced restricted movement from 15-3-2020, the applicant has sought exclusion of time from 15-3-2020 to 15-8-2020.

3. Even if it is deemed that the above period is excluded from CIRP period, then also CoC ought to have passed resolution at least on or before 8-9-2020, but no resolution was passed. It is an application filed based on the resolution passed on 8-10-2020.

4. By the time resolution passed for extension, CIRP period, even after inclusion of excluded period as well as balance period is counted

in, CIRP period being lapsed, CoC could not remain in existence. Therefore resolution passed on 8-10-2020 cannot be considered as valid resolution. Legally speaking, the CoC was not in existence as on the date this resolution was passed, this Bench has therefore no right to revive the CIRP period under the Code, hence this IA-4719/2020 is dismissed holding that the CoC was not in existence as on the date resolution was passed.



(2021) 124 taxmann.com 177 (NCLT - Mum.)

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-'IV'

CFM Assets Reconstruction (P.) Ltd. v. Vishram Narayan Panchpor

RAJESH SHARMA, TECHNICAL MEMBER
AND MRS. SUCHITRA KANUPARTHI, JUDICIAL MEMBER

IA NO. 1198/MB/C-IV/2020
CP NO. 3049/MB/C-IV/2019
DECEMBER 16, 2020

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether relevant date for considering withdrawal of CIRP is date of application and nothing else - Held, yes - Whether where CoC had already been constituted, any application for withdrawal of CIRP had to comply with regulation 30A(1)(b) of CIRP regulations read with section 12A of IBC and therefore, Interlocutory Application filed by assignee of financial creditor for seeking indulgence and challenging action of IRP of not filing application of withdrawal of CIRP of corporate debtor was to be dismissed - Held, yes (Para 10)

CASES REFERRED TO

Garware Wall Ropes Ltd. v. *Coastal Marine Construction & Engineering Ltd.* (Civil Appeal No. 3631 of 2019, dated 10-4-2019) (para 5), *Feroze N. Dotivala* v. *P.M. Wadhawani* (2003) 1 SCC 433 (para 7), *Encore Asset Reconstruction Co. (P.) Ltd. v. Ms. Charu Sandeep Desai* (2019) 107 taxmann.com 100/154 SCL 382 (NCL - AT) (para 7), *Swiss Ribbons* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL

365 (SC) (para 7), *Jai Kishan Gupta* v. *Green Edge Buildtech LLP* (2020) 114 taxmann.com 109/158 SCL 116 (NCL - AT) (para 8) *K.C. Sanjeev* v. *Easwara Pillai Kesavan Nair* (Company Appeal (AT) (Insolvency) No. 1427 of 2019, dated 28-2-2020) (para 10).

Rohit Gupta, **Rubina Khan** and **Nidhi Bajpai**, Advs. *for the Applicant.* **Rohan Savant** and **Ms. Krupa Joshi** *for the Respondent.*

ORDER

Rajesh Sharma, Technical Member. - This court convened through video conferencing today.

2. This Interlocutory Application has been filed by "CFM Assets Reconstruction Private Limited", the Applicant/Assignee under section 60(5) and section 12A of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Mr. Vishram Narayan Panchpor, Interim Resolution Professional for seeking indulgence and challenging the action of IRP, of not filing the application of withdrawal of CIRP of the Corporate Debtor.

3. Brief submissions of the aggrieved assignee of financial creditor Applicant are as under:

(*a*) The Applicant is the Assignee of the Janata Sahakari Bank Limited, Financial Creditor. The Petition was admitted *vide* order dated 4-8-2020 by this Tribunal which is annexed at pp. 15-23, Exhibit 'II' of IA and Mr. Vishram Narayan Panchpor was appointed as an Interim Resolution Professional (IRP) to carry out the function under the I&B Code.

(*b*) Subsequently the Financial Creditor has unconditionally and irrevocably assigned the loan together with the underlying security interest with respect to the Corporate Debtor to the Applicant *vide* its Assignment Agreement dated 21-8-2020 which is annexed at pp.26-59, Exhibit 'III' of IA, executed between the Financial Creditor and Applicant in terms of section 5(1)(*b*) of the SARFAESI Act, 2002.

(*c*) The Financial Creditor *vide* its letter 21-8-2020 which is annexed at p.60, Exhibit 'IV' of IA, informed the IRP along with copy of Assignment Agreement dated 21-8-2020 and intimated the identity of the Assignee as per Rule 28 of IBBI (Insolvency Resolution Process of Corporate Person), 2016.

(*d*) Then after, the Applicant, *vide* its email dated 25-8-2020 which is annexed at p.61, Exhibit 'V' of IA, intimated to the IRP that the Applicant is in the process of re-structuring the debt of the Corporate Debtor and thus not to wish to continue with the CIRP of the Corporate Debtor. The IRP replied to the said email *vide* its reply email dated 25-8-2020 which is annexed at pp.62-63, Exhibit 'VI' of IA, stating that the IRP will respond to the Applicant's email after considering the position in law and after obtaining necessary legal guidance in the matter.

(*e*) The Applicant received a letter dated 26-8-2020 *vide* email by the

IRP which is annexed at pp.64-69, Exhibit 'VII' of IA, wherein the IRP alleged that since the terms of the assignment were not provided to him there is non-compliance of section 28(1) of the CIRP Regulation. The IRP also contended in the said letter that to withdraw the CIRP Applicant has to get itself impleaded in the captioned Company Petition and get the cause title amended.

(*f*) On 26-8-2020, the Applicant sent a letter *vide* its email which is annexed at pp.70-76, Exhibit 'VIII' of IA, providing a copy of Assignment Agreement dated 21-8-2020 along with Form FA and demand draft of Rs. 3,00,000.00. Further, on 27-8-2020, the Applicant has delivered by hand delivery, the said letter dated 26-8-2020 along with the original Form FA and Demand Draft. The acknowledgement of said delivery is annexed at pp.77-80, Exhibit 'IX' of IA. The Applicant stated that the Applicant has duly complied with the provisions the Code and the Regulation by requesting the IRP before constitution of CoC, to file an application for withdrawal of CIRP proceedings, within 3 days of receipt of Form FA, as per term Regulation 30A(1)(*a*) and 30A(3) of the CIRP Regulations.

(*g*) Then after, the Applicant received a letter from IRP *vide* email contending that since the Applicant (Assignee) is not an Applicant in the captioned petition, the Form FA cannot be filed by the IRP. The IRP also informed in the said letter that since the CoC has been constituted and the report has also been filed before this Tribunal on 27-8-2020.

(*h*) The Applicant submitted that the last date of submission of claim was 19-8-2020 and the last date for verification of claims was on 26-8-2020 (*i.e.* with 7 days from the last date submission of claims), the IRP had time till 28-8-2020 for constituting the CoC and has filed certifying the constitution of CoC before this Tribunal on 27-8-2020 (*i.e.* a day prior).

4. Mr. Vishram Narayan Panchpor, Interim Resolution Professional, filed his affidavit in reply dated 12-9-2020 and submitted as under:

(*a*) The IRP stated that the Applicant relied upon section (5) of SARFAESI Act, 2002 which has no application to the present proceedings under I&B Code, 2016. The only option given to an asset reconstruction company upon acquiring the financial assets of an originator is with respect to obtaining the prior consent of such originator before filing substitution application and certainly does not give the Applicant an option whether to file a substitution application or not.

(*b*) This Tribunal has passed an admission order which is annexed at pp.96-99, Exhibit 'L' of reply, in CP (IB) No. 3619/2018 filed under section

7 of I&B Code, 2016 by TJSB Sahakari Bank Limited against the same Corporate Debtor. TJSB Sahakari Bank Limited is a member bank of consortium of banks of which the Financial Creditor in the present matter was the lead Bank. In this case, the Applicant has entered into a Deed of Assignment with TJSB Sahakari Bank Limited, post order of admission dated 6-3-2019 passed by this Tribunal in the above-mentioned Petition. Further, the Applicant filed MA No. 1043/2019 for being substituted in the place of TJSB Sahakari Bank Limited and MA No. 1044/2019 for withdrawal of CIRP before this Tribunal. The Tribunal had allowed both the MAs on 1-4-2019 which is annexed at pp. 100-102, Exhibit 'M' of reply, given the extent position in law as on that date.

(*c*) The Applicant sent an email to the IRP which is annexed at P.26, Exhibit 'C' of reply, stating that the Applicant have already acquired 39.57% share from 4 banks and the applicant is in the process of acquiring the debt of one more Bank and also the Applicant will submit its claim within 2-3 days after the said acquisition together.

(*d*) On 21-8-2020, the IRP received an email along with the attached Deed of Assignment from the Financial Creditor which is annexed at pp.27-64, Exhibit 'D' of reply, informing that the Financial Creditor wanted to withdraw its, claim which it had, which was filed with the IRP on 18-8-2020 since the Financial Creditor had assigned the debt in respect of Corporate Debtor in favour of the Applicant.

(*e*) The IRP has confirmed the email dated 25-8-2020 sent by the Applicant which is annexed at p.61, Exhibit 'V' of reply and the response thereto which is at pp.62-63, Exhibit 'VI' of IA filed by the Applicant. The IRP has also confirmed the detailed reply sent to the Applicant *vide* email dated 26-8-2020 which annexed atpp.64-69 Exhibit 'VII' of IA filed by the Applicant and also annexed at pp.65-70, Exhibit 'D' of the reply filed by the IRP.

(*f*) The IRP notified to the Applicant about the constitution of CoC *vide* its email dated 27-8-2020 and on 28-8-2020, the IRP was served with a copy of the Interlocutory Application filed by the Applicant.

(*g*) On 2-9-2020, the Applicant sent an email to the IRP which is annexed at pp.88-90, Exhibit 'H' stating that the CoC constituted by IRP is

incomplete and the Applicant as the Financial Creditor has not been included. Further, the Applicant stated that the Applicant is in the process to submit its claim and the same is delayed due to some unavoidable reasons which are beyond control. The IRP replied to the said email *vide* his email on the same day which annexed at pp.91-93, Exhibit 'I' of reply contending the constitution of CoC is legal and convened strictly in accordance with the law.

(*h*) On the 4-9-2020, this Tribunal directed to the Applicant to add the CoC as necessary party to the Application and accordingly the Application was amended and served upon the CoC on 6-9-2020 by the Advocate's letter of the Applicant.

5. Mr. Amir Arsiwala, Learned Counsel of CoC has filed affidavit and submitted as under:

(*a*) The Application filed by the Applicant is not maintainable. The Assignment agreement filed by the applicant purported to have been executed on 21-8-2020. This document shows that it evidences of stamp duty Rs. 100/-. As per Maharashtra Stamp Act, 1958, agreement of this nature require stamp duty of 0.1% of the amount of debt being assigned subject to cap of Rs. 1,00,000/-. In the absence of appropriate amount of stamp duty being paid the said Assignment Agreement cannot be taken into cognizance.

(*b*) It is submitted by the Learned Counsel for the CoC that the amount owed by the Corporate Debtor towards the Original Petitioner as well as the other consortium members arises from an award passed by consent by an arbitrator on the 23-3-2017. As per the terms of this arbitral award which is annexed at Annexure `3', the Corporate Debtor and some of its related parties agreed to be joint and severally liable to make payment of an amount of Rs. 52,58,36,865/- to the member of the consortium. The original petitioner which was obliged to receive the installments from the Corporate Debtor under the terms of the consent award and thereafter to distribute the same amongst the other consortium lenders. To this extent the Original Petitioner was appointed as an agent of all the consortium lenders through the terms of consent award dated 23-3-2017.

(*c*) The Learned Counsel for the CoC submitted that sections 6 & 7 of the Transfer of Property Act, 1882, which

restrict the right of a person to effectuate a transfer of property. Therefore, the nature of the right created in favour of the Original Petitioner in terms of the consent award cannot be transferred.

(*d*) The Applicant cannot file the present application as an Assignee as the Assignment Agreement between the Financial Creditor and the Applicant dated 21-8-2020 is insufficiently stamped which makes the same unenforceable in law. The Respondent No. 2 relied upon the Judgment laid down in the case of "*Garware Wall Ropes Ltd.* v. *Coastal Marine Construction and Engineering Ltd.* (Civil Appeal No. 3631 of 2019, dated 10-4-2019)":

> "16. A close look at section 11(6A) would show that when the Supreme Court or High Court considers an application under section 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoyed by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent.
>
> 19. When on arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of section 11(6A), when read with section 79(2) of the 1996 Act and section 2(*h*) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law."

6. Written Arguments on behalf of the Applicant/Assignee are as follows:

(*a*) There are two option available to the Petitioner to seek withdrawal of the Petition.

First being before constitution of CoC and second after constitution of CoC. In the present case the Applicant was made request to the IRP for withdrawal before constitution of CoC. However, the IRP deliberately proceeded to constitute the CoC.

(*b*) It is admitted position that the request was initially made, by seeking the details of expenses on 25-8-2020 at p.61 and as on that date no CoC was constituted.

(*c*) As far as substitution is concerned, admittedly, Applicant is assignee of Janata Sahakari Bank, the original Financial Creditor who is the Applicant in the Petition. Regulation 2(1)(*a*) defines applicant which means the person filing an application under section 7, 9 or 10 of the Code. The term Financial Creditor defined under section 5(7) of the Code which includes a person to whom such debt has been legally assigned or transferred to. Since the Applicant is an Assignee of the original Financial Creditor and is included in the definition of "Financial Creditor", by no stretch of imagination it can be said that the Applicant is not covered in the definition of Financial Creditor or Applicant in terms of section 5(7) and Regulation 2(1)(*a*).

(*d*) The Applicant is an asset reconstruction company and has acquired the debt from the original Financial Creditor under section 5 of the SARFAESI Act, 2002. Section 5(4) of the SARFAESI Act, 2002 provides that no proceedings filed by or against the assignor bank or financial institution shall in any way be prejudicially affected by reason of acquisition of financial asset by an asset reconstruction company.

(*e*) Section 5(5) of the SARFAESI Act, 2002 provides for substitution application in the pending proceedings. In the present case, the Petition has been disposed on 4-8-2020 and there is no provision either under the SARFAESI Act, 2002 or under the Code that mandates the Applicant to first get itself substituted to be recognized as an Applicant in the place of original Petitioner. In fact, as per Regulation 28, the IRP/RP has to inform this Tribunal regarding the Assignment.

(*f*) The withdrawal of the Petition on earlier occasion will not impact this withdrawal. It was discretion of the Tribunal as contemplated in the Judgment of Swiss Ribbon, which was prior to the amendment coming into force. There was

no provision for withdrawal before constitution of CoC.

(*g*) Section 5(1A) of the SARFAESI Act, 2002 provides clear exemption on payment of stamp duty on assignment of debt under the provision of section 5(1) of SARFAESI Act, 2002. Under the Registration Act, time provided to register the documents is more than 3 months which in the present case did not elapse when the IRP admitted the claim of Applicant or when the Applicant sought for withdrawal of the Petition. Hence, no registration of the said Assignment Agreement required at that time. The Agreement is now registered which is a *prima facie* proof that the document is properly stamped.

(*h*) The debt which assigned and the debt is defined the section 2(h)(*a*) of SARFAESI Act, 2002 and section 2(*g*) of Recovery of Debts and Bankruptcy Act, 1993 and *inter alia* includes not just the uncrystalized debt but the debt in the form of award also. Therefore, the award as well as the decree with respect to the debt can be assigned.

7. The submissions on behalf of IRP are as fol lows:

(*a*) The Applicant is not entitled to file the Form FA or seek withdrawal of the original Petition as the Applicant is the "Applicant". Section 12A r/w Regulation 2(1)(*a*), 30A, states that the Applicant can withdraw the original Petition. Relying on the Judgment in *Feroze N. Dotivala* v. *P.M Wadhawani* (2003) 1 SCC 433 para 13, Regulation 2(1) defines an Applicant in the following words:

"'Applicant' means the person(s) filing an application under section 7, 9 or 10, as the case may be;"

(*b*) As regards to the contention of the Applicant based on section 5A of SARFAESI Act, 2002, it is submitted that reliance on the said provision is misplaced. There is no dispute with the contention that the assignee does not need to come on record in every proceeding and the assignor can continue with the proceeding for the be for the benefit of the assignee, however, in the present case, the Applicant does want to and has elected to step into the shoes of the assignor and has sought withdrawal on its own. In this scenario, the Applicant as assignee ought to come on record before this Tribunal and thereafter make an appropriate application. The provision of IBC shall prevail over the SARFAESI Act,

2002 as held by the NCLAT in paras 14 and 15 *Encore Asset Reconstruction Co. (P.) Ltd. v. Ms. Charu Sandeep Desai* (2019) 107 taxmann.com 100/154 SCL 382 and hence the assignee of a debt is required to come on record in the proceedings.

8. The Written Submissions on behalf of the CoC are as under:

(*a*) The Applicant has submitted Form FA after the last date for verification of claims. Therefore, the Form FA could have to be put before the CoC for voting in accordance with Regulation 31A of CIRP Regulations and section 21A of IBC. Notable, the CoC stood constituted before expiry of the time period given to IRP to take action on the Form FA submitted by the Applicant.

(*b*) The Learned Counsel for the CoC has summarized the scope of the Application in the following points:

i. No prayer for withdrawal of given in the IA No. 1198/2020 filed by the Applicant either under section 12A of IBC, Regulation 31A of CIRP Regulations, or Rule 11 of NCLT Rules.

ii. Relief being sought to direct RP to act upon Form FA. However, if Form FA is to be acted upon today, it would have to compulsorily be put up before the CoC for voting.

iii. No relief sought by the Applicant for admission to CoC as member. Thus, no desire to participate in the CIRP of the Corporate Debtor.

(*c*) The Hon'ble Supreme Court has discussed the concept of withdrawal for proceedings under section 12A on the IBC in the Judgment in *Swiss Ribbons v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (para 52-53 as on page 100), as:

"52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed

at any time within 30 days from the date of each case."

"53. The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily 102 rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster."

(*d*) It is clear that, once commenced, CIRP is for the benefit of all creditors and not just the original Petitioner. It is a proceeding in rem. Therefore, the law requires discussion and consent amongst the CoC. It is further stipulated that preferably a petition should only be withdrawn if there is an omnibus settlement taking into account the interest of all creditors. In the present case, there is no settlement. The remaining members of the CoC do not wish for withdrawal under section12A.

(*e*) The NCLAT in the case of *Jai Kishan Gupta v. Green Edge Buildtech LLP* (2020) 114 taxmann.com 109/158 SCL 116 has also held that the Adjudicating Authority need not allow withdrawal under section 12A r/w Rule 11 of NCLT Rules in every case, but may direct the proposal to be placed before the CoC where felt necessary.

9. Mr. Dinesh Inani, member of the Suspended Board of Directors filed Submissions supporting of this Interlocutory Application by the Applicant in the following terms:

(*a*) A reading of section 12A of the IBC r/w Regulation 30A(1), (2), (3) and (4) demonstrate that there is no difference in the status of the right to seek withdrawal of the section 7

Application either pre or post constitution of the CoC. This is apparent from the fact that in both Regulation 30A(3) and in Regulation 30A(4); the word used is "shall". It is clear that if the conditions of Regulation 30A(1)(*a*) and (2) are fulfilled, the IRP "shall submit the application to the Adjudicating Authority, within three days of its receipt". Similarly, if the conditions of Regulation 30A(1)(*b*) are fulfilled, the committee "shall consider the application, within seven days of its receipt".

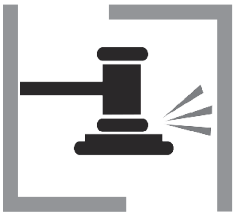
(*b*) Hence, there is no statutory or regulatory preference to either a pre-CoC constitution withdrawal under section 12A or a post-CoC constitution withdrawal. The plain language of Regulation 30A demonstrates that an Applicant is entitled to seek withdrawal under section 12A either pre or post CoC constitution.

(*c*) The contention that there is nothing which precludes a CoC constitution in the three days contemplated by Regulation 30A(3) is based on will render the provisions of Regulation 30A(1)(*a*) otiose and nugatory. It would lead to an absurd outcome. The present case is demonstrative of the consequence of such an interpretation. The Form FA was submitted to the IRP on 26-8-2020. If a withdrawal application was made to the NCLT within 3 days, a withdrawal pre-CoC constitution would have been possible. However, by constituting the CoC on 27-8-2020, the IRP has sought to defeat the attempt. He could not have done so. The law mandates that what is to be filed in the NCLT is an application under Regulation 30A(1)(*a*). It therefore necessarily requires the IRP to not constitute the CoC once the Form FA is submitted to him. Otherwise, in every case, an IRP upon being furnished with a Form FA, would proceed with CoC constitution and withdrawal under Regulation 30A(1)(*a*) r/w section 30A(3) would become impossible. The CoC constitution cannot take precedence over the right of withdrawal under section 12A r/w Regulation 30A(1)(*a*).

Findings & Conclusion

10. We have gone through the documents submitted by the parties and heard the arguments of Learned Counsel of applicant assignee of financial creditor, Resolution Professional, CoC and Member of suspended Board of Directors. The Bench observed that the Interim Resolution Professional has acted fair and has taken actions as per requirements of the Code

judiciously. It is a settled law by the Hon›ble Supreme Court through various judicial pronouncements that Corporate Insolvency Resolution Proceedings (CIRP) are proceedings in rem. On the issue as to which event is crucial for withdrawal of CIRP, as per the law laid down by Hon'ble *K.C. Sanjeev* v. *Easwara Pillai Kesavan Nair* (Company Appeal (AT) (Insolvency) No. 1427 of 2019, dated 28-2-2020), the relevant date for considering withdrawal of CIRP is the date of application and nothing else. As a matter of fact, in this case no application for withdrawal of CIRP has ever been filed by the Interim Resolution Professional before the Adjudicating Authority, rather this IA has been filed by the assignee of financial creditor. As is evident from the records, since CoC has already been constituted in this case, any application for withdrawal of CIRP has to comply with regulation 30A (1) (*b*) of CIRP regulations read with Section 12 A of IBC-2016. Accordingly, IA filed by Assignee of original Financial Creditor is hereby dismissed. Stay granted on functioning of CoC is vacated.



(2021) 124 taxmann.com 213 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rajnish Jain *v.* Manoj Kumar Singh – I.R.P.

JUSTICE A.I.S. CHEEMA, JUDICIAL MEMBER
AND V. P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 519 OF 2020†
DECEMBER 18, 2020

Section 18, read with section 25, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Duties of - Whether core duty of Interim Resolution Professional (IRP) is to receive, collate and verify claims which cannot be further delegated to Committee of Creditors (CoC), who in turn cannot be allowed to do same in purported exercise of commercial wisdom - Held, yes - Whether IRP/Resolution Professional (RP) after collation of claims and formation of CoC is not entitled to suo motu review or change status of a creditor from financial to operational creditor and CoC also has no adjudicatory power to decide as to whether a creditor who files its claim is a financial or operational

† Arising out of order of NCLT Allahabad in *Vikas Tiwari v. Jain Mfg. (India) Pvt. Ltd.* In CA No. 142 of 2019 in CP(IB) No. 422/ALD/2018, dated 23-1-2020.

creditor - Held, yes - Whether however, to maintain an updated list of claims IRP/ RP is authorized to add to existing claims or admit or reject further claims received collating them and thus update list of creditors accordingly - Held, yes (Paras 26, 27, 38, 58 and 59)

Section 5(8), read with section 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether a financial debt is a debt together with interest, if any, which is disbursed against consideration for time value of money and it may further be money that is borrowed or raised in any of manners prescribed in section 5(8) - Held, yes -Whether therefore, to qualify as a financial creditor, basic element of disbursal to corporate debtor, of amount against consideration of time value of money, needs to be found in genesis of any debt being claimed as 'financial debt' before it could be treated so, under section 5(8) - Held, yes (Paras 51 and 52)

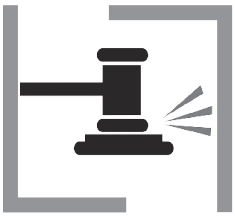
CASE REVIEW

Vikas Tiwari v. *Jain Mfg. (India) (P.) Ltd.* [2021] 124 taxmann.com 212 (NCLT - All.) (para 60) *affirmed* ***(see annex)***.

CASES REFERRED TO

K. Sashidhar v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 22), *Mahal Hotel (P.) Ltd.* v. *Asset Reconstruction Co. (India) Ltd.* (CA No. (AT) (Insolvency) No. 633 of 2018, dated 18-11-2019) (para 28), *Prasad Gempex* v. *Star Agro Marine Exports (P.) Ltd.* (2019) 107 taxmann.com 46 (NCL - AT) (para 28), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 39), *Anuj Jain* v. *Axis Bank Ltd.* (2020) 114 taxmann.com 656 (SC) (para 43), *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 47), *Nikhil Mehta & Sons* v. *AMR Infrastructure Ltd.* (2017) 84 taxmann.com 163/143 SCL 278 (NCL - AT) (para 50) and *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 51).

Neelambar Jha, Adv. *for the Appellant.* **D.N. Awasthi** and **Abhishek Kumar Tripathi**, Advs. *for the Respondent.*



(2021) 124 taxmann.com 181 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rajendra Narottamdas Sheth *v.* Chandra Prakash Jain

A.I.S. CHEEMA, JUDICIAL MEMBER
AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 621 OF 2020†
DECEMBER 18, 2020

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 19 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether perusal of section 19 of Limitation Act, shows that where payment is made on account of a debt or interest before expiration of prescribed period by person liable to pay, a fresh period of Limitation shall be computed from time when payment was made - Held, yes - Whether section 19 is not subject to any qualification/exception that after Account is declared NPA, if debtor makes payments on account of debt, section would not be applicable - Held, yes - Accounts of corporate debtor were classified as Non-Performing Assets (NPA) on 30-9-2014, by bank and thereafter bank filed DRT Proceedings for recovery - However, amounts still remained unpaid, hence, bank filed application on 25-4-2019 under section 7 against corporate debtor which was admitted by Adjudicating Authority - Appellants filed reply on behalf of corporate debtor, claiming that since Account was classified as NPA on 30-9-2014, application filed in 2019 was time-barred as date of default had to be calculated from date of NPA and date of NPA does not shift - However, it was found that various repayments were indeed made by corporate debtor even after Bank declared their Accounts as NPA - Adjudicating Authority found that there were not merely repayments but also Acknowledgements - Whether therefore, fresh period of limitation shall be computed from time these payments were made - Held, yes (Paras 24 to 27)

CASE REVIEW

Union Bank of India v. *RK Infratel Ltd.* (2021) 124 taxmann.com 180 (NCLT - Ahd.) (para 27) *affirmed* (*See Annex*).

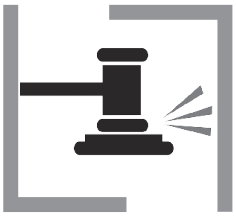
CASES REFERRED TO

Jagdish Prasad Sarda v. *Allahabad Bank* (2020) 119 taxmann.com 244 (NCL - AT) (para 4), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 22), *B.K. Educational Services*

† Arising out of order dated 1-6-2020 passed by NCLT, Ahmedabad Bench in *Union Bank of India* v. *RK Infratel Ltd.* (2021) 124 taxmann.com 180 (NCLT - Ahd.).

(P.) Ltd. v. Parag Gupta & Associates (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 22) and Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P.) Ltd. (2020) 118 taxmann.com 323 (SC) (para 22)

Nalin Tripathi, Adv. *for the Appellant.* **Ms. Nikita C. Jain** and **A.K. Shukla**, Advs. *for the Respondent.*



(2020) 121 taxmann.com 346 (Delhi)

HIGH COURT OF DELHI

Venus Recruiters (P.) Ltd. *v.* Union of India

PRATHIBA M. SINGH, J.

W.P.(C) NO. 8705 OF 2019
CM APPL. NO. 36026 OF 2019
NOVEMBER 26, 2020

Section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether purpose of avoidance of preferential transactions is clearly for benefit of creditors of corporate debtor - Held, yes - Whether after a Resolution Plan is approved, no benefit would come to creditors - Held, yes - Whether once CIRP process itself comes to an end, an application for avoidance of preferantial transactions cannot survive or be adjudicated - Held, yes - Whether after a Resolution Plan is approved, corporate debtor comes under control of new management/ Resolution Applicant and RP's mandate ends and RP cannot indirectly seek to give a benefit by pursuing an application for avoidance of preferantial transactions - Held, yes - Whether if CoC or RP takes a view that there are transactions which are objectionable in nature, order in respect thereof would have to be passed prior to approval of Resolution Plan - Held, yes - Whether unless provision is made in final Resolution Plan, NCLT also has no jurisdiction to entertain and decide avoidance applications in respect of a corporate debtor which is now under a new management - Held, yes - Whether NCLT ought not be permitted to adjudicate preferential nature of transaction under a contract which stands terminated after approval of Resolution Plan - Held, yes (Paras 88 to 93)

FACTS

- The 'corporate debtor' BSL was the subject of Corporate Insolvency Resolution Process before the NCLT, initiated by the State Bank of India by a petition.
- On the same date when the CIRP was initiated, the NCLT appointed an 'IRP' for the corporate debtor. The Committee of Creditors was thereafter constituted, CoC confirmed IRP as 'RP' for the corporate debtor. Later on, the CoC approved the

Resolution Plan proposed successful Resolution Applicant TSL and the said plan was filed by the RP to seek approval before the NCLT.

- Thereafter, the RP filed an avoidance application being under section 25(2)(*j*), sections 43 to 51 and section 66. In the said application, various transactions were enumerated as 'suspect transactions' with related parties. The said avoidance application was a result of a Forensic Audit Report, submitted by a Forensic Consultant. The prayer made in the application was that the Tribunal should take on record the Forensic Consultant's report and pass appropriate directions in respect of the suspect transactions which included excess payments to Manpower companies/Contractors. The Petitioner was one manpower contractor.

- Almost five weeks after filing of the said avoidance application, the NCLT approved the Resolution Plan proposed by TSL. The said Resolution Plan had found favour with the CoC and accordingly, the NCLT passed various orders and directions. Insofar as the pending avoidance application in respect of the suspected transactions was concerned, there was no separate order passed by the NCLT. The application filed by the RP in relation to the suspected transactions was neither heard nor decided on merits.

- As the Resolution Plan was finally closed, the new management took over the corporate debtor. The NCLT passed an order in the avoidance application, which was field prior to the approval of the Resolution Plan.

- NCLT's order approving the Resolution Plan, was upheld by 'NCLAT'. However, later on, the NCLT impleaded the petitioner as a party in company application and issued notice to it on the basis of a fresh memo of parties filed by the former RP. It is the said order impleading and issuing notice to the petitioner, which was being challenged in the instant petition.

HELD

- A perusal of the chronology of events would show that the avoidance application in this case was filed after the CoC had approved the Resolution Plan and almost at the very end of the submissions on the Resolution Plan being heard by the NCLT. The NCLT did not pass any orders on the avoidance application at the time of approval of the Resolution Plan. The order approving the Resolution Plan expressly disposed of some specific applications. However, it merely had one sentence at the end stating that 'all other applications are also disposed of'. Thus, the avoidance application was not separately considered or ruled on by the NCLT. The first preliminary objection taken by the Respondents is that any order passed by

the NCLT under section 60 and section 61 is appealable to the NCLAT. Thus, this Court ought not to entertain this writ petition due to an existence remedy.

- There is no doubt that as per section 60, the NCLT/Adjudicating Authority has the jurisdiction to deal with all applications and petitions *"in relation to insolvency resolution and liquidation for corporate persons"*. In this case, the issue is whether the proceedings in question were in relation to insolvency resolution or not. The insolvency resolution process had already come to an end with the approval of the Resolution Plan by the NCLT on 15th May, 2018. The NCLT chose to exercise jurisdiction post the approval of the Resolution Plan. Under the Scheme of the IBC, as set out above, the jurisdiction of the NCLT is limited to insolvency resolution and liquidation. After the approval of the Resolution Plan and the new management taking over the corporate debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under section 60. (Para 68)

- Certainty and timeliness is the hallmark of the Insolvency and Bankruptcy Code, 2016. The Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank* (2017) 84 taxmann.com 320/143 SCL 625 observed that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. Any continuation of the jurisdiction of the NCLT beyond what is permitted under the IBC would be contrary to its very ethos. There is a fundamental issue of jurisdiction that has been raised by the Petitioner as to whether after the approval of the Resolution Plan, the NCLT can exercise jurisdiction in respect of an avoidance application. The answer is in the negative. Since the plea of the Petitioner is that the NCLT lacks jurisdiction the present writ petition is maintainable before this Court. (Para 69)

- An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the corporate debtor. The benefit is not meant for the corporate debtor in its new *avatar*, after the approval of the Resolution Plan. This is clear from a perusal of section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the corporate debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given

to the corporate debtor for the benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the NCLT. (Para 70)

- While the IBC itself does not fix any time limits for filing of avoidance applications in respect of any transactions, the 2016 CIRP Regulations in Chapter X clearly stipulate the structure and methodology for dealing with objectionable transactions. Under Regulation 35A, as amended with effect from 3rd July, 2018, a specific timeline has been provided, by which the RP has to form an opinion if the corporate debtor has been subjected to any of the objectionable transactions. The time limit prescribed earlier was 105 days from the insolvency commencement date, which has now been reduced to the 75th day from the insolvency commencement date. However, what is significant is the fact that under Regulation 39, the RP has to submit, along with the Resolution Plans, details of all the objectionable transactions including preferential transactions. (Para 71)

- A conjoint analysis of sections 43 and 44 read with the applicable Regulations clearly shows that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process. The examination has to commence on the insolvency commencement date. The RP has to form an opinion by the 105th day (pre-amendment) and 75th day (post-amendment). If the RP comes to the conclusion that the corporate debtor has been subject to preferential transactions, the determination has to be made by the 115th day. The RP also has to apply to the NCLT for appropriate relief on or before the 135th day. (Para 72)

- The prescribing of the above timelines has a purpose. The said purpose is that the RP includes these details in the Resolution Plan submitted under section 30 to the NCLT. These details ought to be available before the NCLT at the time of approval of the Resolution Plan under section 31. The argument that avoidance applications relating to preferential and other transactions can, therefore, survive beyond the conclusion of the CIRP is contrary to the Scheme of the Code. (Para 73)

- Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under section 31. The role of a RP is finite in nature. He or she cannot continue to act on behalf of the corporate debtor once the Plan is approved and the new management takes over. To continue a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent behind appointment of a RP. The Resolution

Professional (RP), as the name itself suggests has to be a person who would enable the resolution. The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist. (Para 74)

- The Supreme Court of India in *Committee of Creditors of Essar Steel India Ltd.* (*infra*) has held that the detailed provisions of the IBC, read with the 2016 Regulations make it clear that the RP is a person who is to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under section 7, 9 or 10 till a Resolution Plan is approved by the NCLT. of the RP is not adjudicatony but administrative...." (Para 75)

- According to section 23, the RP conducts the CIRP and manages the operations of the corporate debtor `during the corporate insolvency resolution process period'. (Para 76)

- There is a START line and FINISH line for the Resolution process. section 23 clearly stipulates that the role of the RP is to `manage' the affairs of the corporate debtor `during' the resolution process and NOT thereafter. In fact, until the enactment of the proviso to section 23, which was introduced with effect from 28-12-2019, the RP's mandate concluded with the CIRP. The proviso introduced, firstly in 2018 and thereafter in 2020, merely extended the mandate of the RP till the approval of the Resolution Plan under section 31(1) or appointment of liquidator under section 34. This itself makes it amply clear that the RP's authority is limited in nature and in any event, cannot extend beyond the order passed under section 31. Thus, there is an outer limit for the functioning of the RP under the proviso to section 23(1). The continuation of a RP or filing of an application for the purpose of prosecuting an avoidance application as a *'Former RP'* is beyond the contemplation of the IBC. The RP ceases to be one after an order under section 31 is passed. The RP does not have any connection whatsoever with the new Management which takes over the erstwhile corporate debtor, after the approval of the Resolution Plan. Any other interpretation could lead to a situation where an RP could be a `*Former RP*' for years together without any definite end date. Under section 23, the CIRP period is a specific period and cannot be read as a perpetual period or an indefinite period. The wording of the proviso in fact makes it further clear that the CIRP

process in fact comes to an end immediately upon the RP submitting the Plan itself. (Para 77)

- The IBC was meant to cure the fallacies and shortcomings in the previous legislations wherein winding-up of companies consumed years together leading to erosion of their assets and businesses. The wording of section 23 clearly lays down the mandate for the RP. The same cannot be extended beyond the contemplation in the statute. After the Resolution Plan is approved and the new management takes over, the manner in which the affairs of the company are to be run is the sole prerogative of the new management. In the statutory scheme, the RP cannot continue to act on behalf of the Company under the title of *'Former RP'*. That would be violative of the legislative intention and the statutory prescription. (Para 78)

- A perusal of section 30(4) also makes it adequately clear that the CIRP period has to be completed within the time period specified under section 12(3). Thus, the IBC does not contemplate the continuation of the RP beyond the CIRP period. (Para 79)

- The above interpretation is also in line with the overall object and purpose of the IBC. The IRP/RP are persons, who are assigned specific roles under the IBC. They are meant to provide a smooth transition for the corporate debtor during an insolvency period till the resolution process is over. Their continuation beyond the closure of the resolution process would in effect mean an interference in the conduct and management of the company, which is now having its own independent Board, managerial personnel, etc. The RP's role cannot continue once the Resolution Plan is approved and the successful Resolution Applicant takes charge of the corporate debtor. (Para 80)

- Regulation 39 requires details of the objectionable transactions to be placed by the RP before the NCLT. Form H is merely a format prescribed to provide the said details. The application in respect of such transactions would obviously be pending on the date when the Resolution Plan is submitted by the RP. The details of the transactions would be contained in Form H, would be filled by RP and submitted by the RP before the NCLT. However, Form H cannot be read to mean that they can remain pending after the order under section 31. (Para 82)

- The manner in which it is sought to be interpreted by the Petitioner and by the Respondents is in stark contrast. The Respondents rely heavily on this provision to argue that avoidance applications would not affect the CIRP. This is because under the scheme of the IBC, insofar as avoidance applications are concerned, the RP has to collect

the details, form an opinion, make a determination and submit the same to the NCLT within the prescribed timelines. This is independent of various other steps which are part of the CIRP. The activities in respect of objectionable transactions, which the RP has to conduct, would run parallelly with the other steps of the CIRP. However, finally, the RP would submit all the details to the NCLT along with the Resolution Plans. That is the purpose of the provision. The provision cannot be interpreted in a manner so as to say that the applications can survive the CIRP itself. Section 26 also cannot be read in a manner so as to mean that an application for avoidance of transactions under section 25(2)(*j*) can survive after the CIRP process. Once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance of transactions is clearly for the benefit of the creditors of the corporate debtor. No benefit would come to the creditors after the Plan is approved. Thus, Form H cannot come to the aid of avoidance applications to remain pending beyond the CIRP process. (Para 84)

- Thus, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application. The purpose is clear from this itself *i.e.,* that the avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the corporate debtor and the CoC of the Corporate debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the corporate debtor, who is now under the control of the new management/ Resolution Applicant, by pursuing such an application. The ultimate purpose is that any benefit from a preferential transaction should be given to the corporate debtor prior to the submission of bids and not thereafter. (Para 86)

- If an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan. (Para 88)

- In the present petition, this Court is concerned with a corporate debtor, in respect of which the Resolution Plan was approved

by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the *'Former RP'* and pursue an avoidance application in respect of preferential transactions after the hat of the corporate debtor has changed and it no longer remains a corporate debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a corporate debtor which is now under a new management unless provision is made in the final Resolution Plan. (Para 89)

- A far-fetched argument was made by the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the CIRP and not beyond that. (Para 90)

- The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the corporate debtor in its new *avatar* has terminated the agreement with the Petitioner. (Para 91)

- The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan. (Para 92)

- The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the corporate debtor which may assist in liquidating the company at the final stage. However, that is not the case in the present petition. (Para 93)

- In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings qua the Petitioner before the NCLT under

the Avoidance application are accordingly quashed. (Para 94)

CASES REFERRED TO

State Bank of India v. *Bhushan Steel Ltd.* (2018) 90 taxmann.com 194 (NCLT - New Delhi) (para 4), *Innoventive Industries Ltd.* v. *ICICI Bank* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 16), *S.P. Jain* v. *Kalinga Tubes Ltd.* AIR 1965 SC 1535 (para 26), *Pioneer Urban Land & Infrastructure Ltd.* v. *UOI* (2019) 8 SCC 416 (para 28), *Committee of Crediters of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 29) and *IOCL* v. *UOI* (W.P. (C) No. 13775 of 2019, dated 23-12-2019) (para 31).

Kapil Sibal, Sr. Adv., **Ms. Misha Rohatgi**, **Ms. Anusha Nagarajan** and **Ms. Aarushi Tiku**, Advs. *for the Appellant.* **Anurag Ahluwalia**, CGSC, **Abhigyan Siddhant**, Adv., **Dr. Sunil Kumar**, **Vijayendra Pratap Singh**, **Aman Sharma**, **Samarth K. Luthra**, Advs., **Abhinav Vasisht**, Sr. Adv., **Manmeet Singh** and **Anugrah Robin Frey**, Advs. *for the Respondent.*

FAQs on 'Claims' under IBC

1. How is the claim defined under the Insolvency and Bankruptcy Code, 2016 (The Code) ?

Section 3(6) of the code defines the term 'claim'. As per the definition, 'Claim' means-

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, disputed, undisputed, secured or unsecured;

2. Who can submit the Claim?

A claim can be submitted by:

- Creditors (Operational and Financial),
- Workmen,
- Employees,
- Home buyers,
- Government authorities,
- Any other creditors defined under the Code

3. What are the relevant forms to be filed by the creditors for submission of claim?

Type of Creditors	Form as per Schedule I
Operational Creditors	Form B
Financial Creditors	Form C
Person claiming to be creditor in a class	Form CA
Workman or an Employee	Form D
Authorized Representative of Workman or an Employee	Form E
Person claiming to be creditor other than operational/ financial creditors, workmen and employees	Form F

4. Whether the claim filed in the wrong Form by a Creditor will be disqualified from being considered?

Claim will not be disqualified just because it has been filed in an incorrect form.

5. Who shall bear the cost of proving the debt of the creditor?

As per Regulation 11 of the IBBI CIRP Regulations 2016, a creditor himself shall bear the cost of proving the debt due to such creditor.

6. What is the time duration for submission of claims?

Public announcement as available on the website of IBBI and the Corporate Debtor, mentions the last date of submission of claims. Any claimant must refer the same for the purpose of timely submission of their claims.

As per section 15(1)(c) of the Code read with Regulation 6(2)(*c*) of CIRP regulations, claim(s) are to be submitted within fourteen days of appointment of Interim Resolution Professional.

Further as per regulation 12(2) of CIRP Regulations, a creditor who fails to submit claim within fourteen days can submit the claim, on or before the ninetieth day of the Insolvency Commencement Date.

Further, in case of Liquidation Process, as per section 38 of the Code read with IBBI (liquidation process) Regulations, 2016, the Creditors are required to submit their claims within the time period stipulated in the Public Announcement, which shall be thirty days from the liquidation commencement date.

7. Whether the resolution professional can entertain the claims beyond 90 days?

Claim received post the last date of submission of claims will not be entertained. However, in some of the cases, Hon'ble Tribunal have condoned the delay even after the time period of 90 days elapsed, citing that the Regulation 12 of CIRP regulations is directory.

The Resolution Professional shall

not reject the claim on the ground of delay as the CIR Process is still under progress and no resolution plan has been approved by the CoC so far. That means creditor, who failed to submit proof of claim within the time stipulated in the Public Announcement, may submit such proof to the IRP/RP, as the case may be, till the approval of resolution plan by committee.

8. How to file a claim as a creditor?

Creditors are liable to submit the proof of their claims in the prescribed Forms through:

(*i*) For Financial Creditors including creditors in class, electronic means only

(*ii*) For operational creditors including workmen, employee and any other creditor), by post or electronic means.

9. What is the time limit within which IRP/RP has to verify the claims?

IRP/RP has to verify the claims within 7 days from the last date of the receipts of claims as per Reg.13 (1) of CIRP Regulations.

In case of liquidation process, as per Reg.30 liquidator shall verify the claims submitted within 30 days from the last date of receipt of claims.

10. Whether resolution professional can adjudicate claims in CIR process?

A resolution professional is not an adjudicating authority and is not required to enquire into the factual scenario between parties and determine their rights and liabilities.

The scope of a resolution professional is limited to verifying the claims received in light of Regulations 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulations, 2016.Verification is a process of establishing truth, accuracy or validity of the claim. It is not meant to be passing of a judgment or making a decision on the quantum of claim.

11. Whether interest also forms part of the claim?

As given in Form B (Submission of Claims by Operational Creditors) and Form C (Submission of Claim by Financial Creditors), Total amount of claim includes any interest as at the insolvency commencement date).

12. Whether a creditor may withdraw or vary his claim during liquidation process?

As per section 38(5) of the Code, a creditor may withdraw or vary his claims within 14 days of its submission.

13. What will be the nature of debt of "indemnity obligation in respect of a guarantee given by the corporate debtor"?

The basic criteria for identifying the

financial debt as per Section 5(8) of the Code is as that the debt should be disbursed against "consideration for time value of money"

Therefore, any indemnity obligation in respect of a guarantee also come within the meaning of 'Financial Debt' as per Section 5(8) of the Code as the debt has been disbursed against "consideration for time value of money"

Though, if the resolution plan gets approved and the successful 'Resolution Applicant' takes over the management of the 'Corporate Debtor', the 'Corporate Debtor' will continue to be guarantor of the entity as their right will not cease and as it cannot raise claim at this stage.

14. Whether a resolution professional shall admit the un-matured obligations?

It is not necessary that all the claims as are submitted by the Creditor should be a claim matured on the date of initiation of Resolution Process/admission, even in respect of debt, which is due in future on its maturity, the Financial Creditor or Operational Creditor or Secured Creditor or Unsecured Creditor can file such claim. However, they will be able to raise claim when it will become due.

15. Whether a trade union can be said to be operational creditor for the purpose of Insolvency and Bankruptcy Code?

A trade union is certainly an entity established under a statute- namely, the Trade Unions Act and would therefore fall within the definition of "person" under Section 3(23) of the Code. Consequently, a trade union can file an application under Section 9 of Insolvency and Bankruptcy Code.

16. What will be the nature of dues of state Government and Central Government under the Insolvency and Bankruptcy Code?

All the dues of Central Government, State Government, local authorities etc. arising out of the operation of any existing law are classified as Operational Debt and such bodies are considered as Operational Creditors within the meaning of Section 5(20) of the Insolvency and Bankruptcy Code, 2016.

17. What will be the nature of debt of "Counter Corporate Guarantor"?

The liability of Corporate Guarantee as 'Counter Corporate Guarantee' being joint and co-extensive with Principal Borrower which is disbursed against the consideration for the time value of money in favour of the Principal Borrower, falls within the meaning of Financial Creditor in terms of Section 5(7) r/w Section 5(8)(*h*) of the Code.

18. What will be the treatment of a charge which is not registered with the Registrar of Companies while evaluating claims and its treatment under Section 53 of the Code?

As per Section 77 (3) of the Companies Act, 2013 provides that no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Code, as the case may be or any other creditor unless it is duly registered with ROC.

19. How to treat a claim which is debarred as per the limitation act but is being shown as liability in the books of the corporate debtor?

If the loan is appearing in the balance sheet of the Corporate Debtor which is an acknowledgement of liability and corporate debtor has not disputed the fact of loan being shown as liability in its balance sheet, it will not be debarred by limitation.

20. Liquidator has rejected claim of a creditor. What remedy will he have?

As per section 42 of the Code, creditor may appeal to the NCLT against the decision of the liquidator within a period of 14 days of receipt of such decision.

Important developments having taken place in IBC

During the month of December, 2020

- **Clarification- computation of fee payable for delay in filings under regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

  On 4th December, 2020, IBBI vide its clarification circular in respect of computation of fees for delay in filing forms under sub-regulation 40B of the IBBI (Insolvency Resolution Process, clarified that fee is payable for the period that lapses between the due date of filing a Form or 1st October, 2020, whichever is later, and the actual date of filing the said Form.

  Further, it is also informed through the clarification circular that excess fees, if any, higher than what is payable under CIRP regulations, be refunded.

  IBBI circular may be viewed at:

  https://www.ibbi.gov.in/uploads/legalframwork/60e18951f684c-85b59ab3485e25081aa.pdf

- **IBBI invites comments on its Discussion paper on Engagement of 'Professionals' in a Corporate Insolvency Resolution Process**

  On 15th December, 2020, IBBI has come out with another Discussion Paper on the issue of Engagement of 'professionals' by an insolvency professional (IP) in a corporate insolvency resolution process (CIRP)

to solicit comments on the same.

In order to remove ambiguity in the manner of appointment of professionals under CIRP, IBBI solicits comments, latest by 08th January, 2021. ICSI IIP also convened a Roundtable Discussion with its registered Insolvency Professionals to deliberate on the same and submitted the consolidated views of the Insolvency Professionals to IBBI.

IBBI Discussion Paper may be viewed at:

https://www.ibbi.gov.in/uploads/whatsnew/b042b88a757cf4a9b490b9d7ee3f165a.pdf

- **Government extended suspension of Insolvency Proceedings by another three moths till 31st March, 2021**

On 22nd December, 2020, the Ministry of Corporate Affairs issued a notification to extend the suspension of insolvency proceedings by another three month with effect from December 25, 2021, to help businesses cope with the lingering difficulties posed by the COVID-19 pandemic.

The government suspended the Insolvency and Bankruptcy Code (IBC) in June due to the pandemic situation for six months, starting from 25 March, 2020. Thus, the suspension of IBC was in effect till 25 September 2020. The government further extended the suspension for three months, resulting in IBC suspension extension till 25 December, 2020.

MCA notification may be viewed at:

https://www.ibbi.gov.in/uploads/legalframwork/55d4f612f270d6c637ee4b3c8131c8.pdf.

- **Automatic Case Number Generation is mandatory from 01st January, 2021**

On 24th December, 2020, NCLT *vide* its Order directed that Automatic Case Number Generation should be mandatorily started from 1st January, 2021 in all benches across the country. The automatic number has to be generated from E-filing portal *i.e.* efiling.nclt.gov.in.

NCLT order may be viewed at:

https://www.ibbi.gov.in/uploads/legalframwork/c0e9da77beb8bcef58bfe30414582903.pdf

SUBJECT INDEX VOLUME III

INSTRUCTIONS FOR BINDER

ICSI IIP Insolvency and Bankruptcy Journal Volume III comprises of 12 issues (Jan. 2020 to Dec. 2020).
It contains the following 5 sections:

1. Messages (Page No. 1 to 86)
2. Insight (Page No. 1 to 272)
3. Judical Pronouncements (Page No. 1 to 460)
4. Knowledge Centre (Page No. 1 to 62)
5. Policy Update (Page No. 1 to 130)

The binder needs to separate the pages of all the 5 sections from all the issues in the sequence as above and bind them together to make Volume III.

The Subject index given at the end of December 2020 issue is a consolidated subject index of Volume III (Jan. 2020 to Dec. 2020). The bound volume shall start with this consolidated subject index followed by the 5 sections.

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INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003