RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

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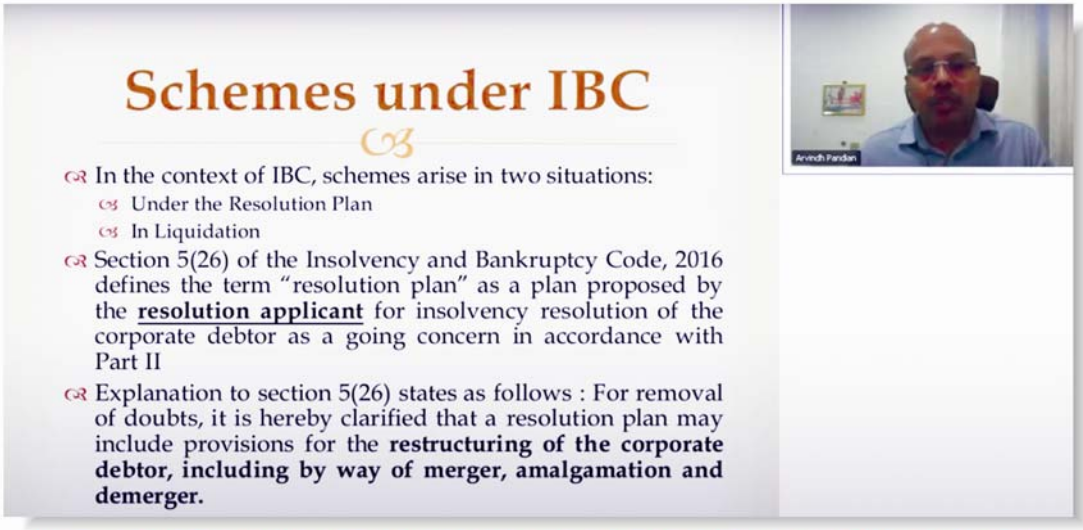
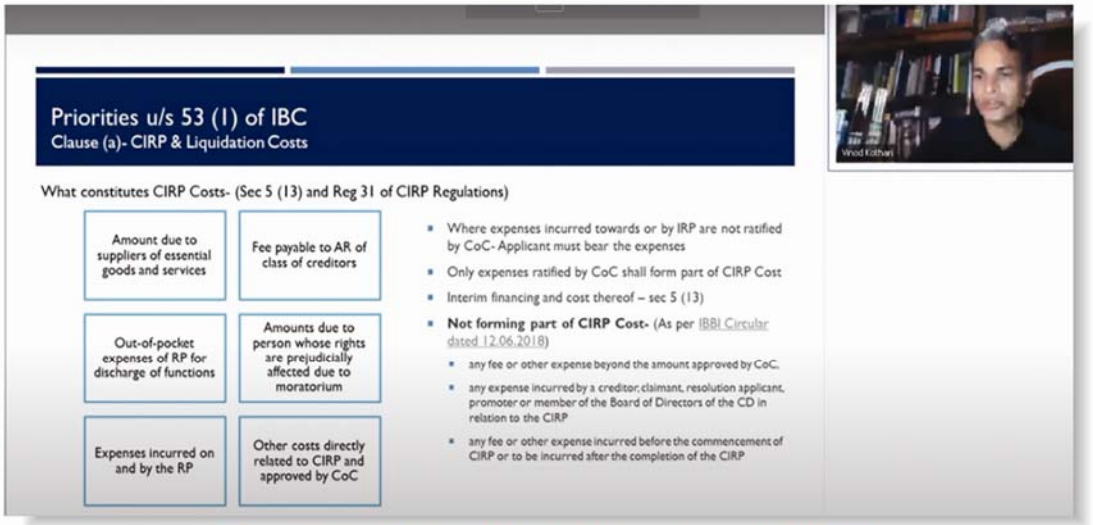
Some Webinar Events held during April Month

Webinar on Impact of IBC on EODB and Relaxation of IBC threshold on April 02, 2020



Webinar on Revival under IBC Resolution Plans and Schemes under Section 230, Companies Act on April 26, 2020



Webinar on Section 53 of IBC The Heart of Insolvency Law on April 29, 2020

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Dr. Binoy J. Kattadiyil
for
ICSI Institute of Insolvency Professionals
'ICSI House', 3rd Floor, 22,
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New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : info@icsiiip.com
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For ICSI IIP Members
- **ICSI Institute of Insolvency Professionals**
  'ICSI House', 3rd Floor, 22,
  Institutional Area, Lodi Road,
  New Delhi- 110 003.
  Phones : 45341099, 45341048
  E-Mail : nitin.satija@ICSI.edu

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Section 208, read with sections 5(13) and 220 of the Insolvency and Bankruptcy Code, 2016 and Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Resolution Professional shared a confidential document being Information Memorandum (IM)

discreetly with an intended party prior to issue of Form G for Invitation of Expression of Interest and even before conduct of due diligence by RP to ensure that they would qualify as eligible prospective resolution applicants - Despite IBBI Circular clearly stating that Insolvency Resolution Process Costs (IRPC) should not include any expense incurred by a member of CoC or a professional engaged by them, RP charged fee of lender's legal counsel to tune of Rs. 73.87 lakh from IRPC - Further, RP on direction of CoC, finalized appointment of an Auditor for second forensic audit, and fees of Rs.50.74 lakhs charged by said Auditor was included as IRPC - Disciplinary Committee observed that Insolvency Resolution Professional (RP) displayed a negligent approach during conduct of CIRP - Whether since Insolvency Professional had displayed utter misunderstanding of provisions of Code and Regulations, his registration was to be suspended for six months and he was to be directed to secure reimbursements which were paid to lender's legal counsel and Auditor and charged to IRPC - Held, yes (Para 5.2)

- **Bhupesh Gupta, *In re***

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Section 208, read with sections 5(13) and 220, of the Insolvency and Bankruptcy Code, 2016 and Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Despite his own disbelief in conducting third valuation, Resolution Professional permitted conduct of same only upon desire of CoC and, thus, incurred additional financial costs upon an over-burdened Corporate Debtor - Though Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016 clearly states that in cases where Liquidator fees has not been decided by CoC, liquidator is entitled to a fee as per table provided in said Regulation, he continued to charge same fees during liquidation process which he was charging while acting as an Resolution Professional - Whether Resolution Professional had allowed members of CoC to usurp his powers thereby putting additional burden on an already ailing Corporate Debtor and displayed utter misunderstanding of provisions of Code and Regulations - Held, yes - Whether Resolution Professional should be warned and directed to deposit amount in Liquidation Estate which he had drawn without any authorisation during period while acting as liquidator - Held, yes (Para 5.2)

- **Koteswara Rao Karuchola, In re**

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Section 208, read with section 13, of the Insolvency and Bankruptcy Code, 2016 - Insolvency professionals - Functions and obligations of - Though verification of claims of creditors was primary duty of Resolution Professional himself, he outsourced his duty and engaged Insolvency Professional Entity (IPE) for verification of such claims - He further included payment made to IPE for same in Insolvency Resolution Process Costs thereby burdening ailing Corporate Debtor with additional costs of fee of Rs. 3 lakh plus GST paid - Whether since Resolution Professional had displayed a casual attitude towards his duties under the provisions of the Code and Regulations made thereunder, a monetary penalty of Rs.1 Lakh was to be imposed and he would be barred from accepting any new assignment as an IP till he deposited said penalty - Held, yes (Para 5.2)

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  - Can an application filed u/s 9, IBC be admitted by the AA if it is filed prior to issuance of notice u/s 8, IBC?

  - Can an appeal be entertained and delay in filing it be condoned by NCLAT under the provisions of section 5, Limitation Act?

- Can the dues arising from lease of an immovable property to the CD be taken as an Operational Debt of the CD?
- Can the previous filing of an FIR by CD against OC's Directors for the amount claimed by OC in its application u/s 9 be construed as an existence of dispute *inter se* the parties?
- Can a decree-holder file an application against the CD on the basis of amount due to it by the CD under the Decree?
- Can a resolution applicant renegotiate on his plan with CoC after the same has been found to be not satisfying criteria under the Request for Proposal (RFP)?
- Can an application filed u/s 9, IBC be opposed on the ground that the Creditor has already initiated proceedings against CD under MSMED Act, 2006?
- Can a CD claim benefit under an agreement executed between its FC/Banks, by raising grievance for a default by a member of the consortium of Banks?
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- Section 61(2) of IBC overrides section 5 of the Limitation Act
- The resolution can be taken even during the CIRP, if any Promoter as investor agrees to invest the money for keeping the company as a going concern and complete the infrastructure project within the time frame
- Police cannot take forward criminal proceedings initiated against the Company under Corporate Insolvency Resolution Process (CIRP), unless and until the CIRP culminates, in a resolution or otherwise
- The legislative intent behind the amendment in section 31(1) of the IBC is that the Government will not raise any further claim of its dues after the resolution plan is approved
- Resolution plain in relation to a corporate debtor would not extinguish/reduce the liability of a guarantor of such corporate debtor
- The definition of 'person' in section 3(23) of IBC is an inclusive definition which inter alia also includes Sole Proprietorship Firms
- The letters of One Time Settlement (OTS) create a fresh period of limitation with effect from the date when the OTS was signed
- Delhi High Court restrained a Bank to declare an account as NPA in light of the moratorium announced by RBI by its circular issued on 27th March amid COVID-19
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From Chairman's Desk

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

"A problem is a chance for you to do your best."
– Duke Ellington

Dear Professional Members,

While the COVID-19 pandemic has pushed the entire nation to undergo an unprecedented lockdown period, its impact has been felt not only on our personal and social life, but also on our professional life. Closure of markets and offices has resulted in a huge loss of earnings for the businesses and corresponding revenue loss for the State leading to slow-down in the economy. Be that as it may, it is not unknown to humanity that sometimes we have to necessarily undergo hard times in order to achieve the higher purposes of our lives, and therefore, the need is to slowdown a bit and examine the results of our past actions, with the wisdom of hindsight, to see the lessons that we otherwise missed or otherwise overlooked. This will help us in understanding the way life is shaping itself up. Slowing down a bit shall not only help us in understanding the destination that we are headed to more clearly, but it shall also give us an opportunity to make course correction, if required.

In the insolvency and bankruptcy law space, we saw amendment being introduced recently whereby the threshold of default for

a CIRP has been raised to Rs. 1 crore as against earlier limit of one lakh *vide* MCA notification dt. 24th March 2020. The move is intended to primarily deal with financial challenges faced by the corporates arising out of COVID-19 pandemic. A safeguard provided to the companies, especially those within the MSME category, is actually intended to prevent them from being unduly dragged into the insolvency process by the creditors. The amendment shall provide them a breather since they are already undergoing a difficult period concerning their business activities. If the crisis situation prolongs, there is a likelihood that filing of applications for CIRP could also be suspended for a suitable period. This shall ensure that we keep pursuing the solemn objectives of insolvency law which is to provide for measures for early detection of financial distress within the corporate and empowering the commercial wisdom of creditors decide on viability of the entity.

The Supreme Court, had taken *suo motu* cognizance of the current lockdown situation and exercising its powers under Art. 142 of the Constitution directed for extension of limitation period *w.e.f.* 15th March 2020 till further orders. The orders are binding on all Courts/Tribunals and Authorities. The NCLAT had also taken *suo motu* cognizance of the current situation and, *vide* its orders dt. 30th March 2020, directed *inter alia* for exclusion of the lockdown period from calculation of CIRP period *w.r.t.* all applications (and appeals) pending before it or the NCLT. A similar statement was also issued by the NCLT directing for a temporary closure of the Tribunals with directions that all IBC matters shall be taken up as soon as regular benches start functioning.

Taking into account difficulties faced by different stakeholders *viz.*, the IPs, the CoC members, and prospective Resolution Applicants (RAs) on account of the present lockdown situation the IBBI has issued instructions providing that the period of lockdown shall not be counted for the purpose of calculating timelines for any activity that could not be completed by the said stakeholders due to lockdown in relation to a CIRP.

We also saw a report being submitted by the *Committee of Experts* (CoE) constituted by the MCA to examine the need for an institutional framework for regulation and development of valuation professionals. The report, which is a very well-

researched, detailed, reasoned and an erudite piece of work, has recommended *inter alia* for constitution of a *National Institute of Valuers* (NIV) which shall act as a statutory body responsible for development and regulation of valuation profession in India, and shall discharge functions related to registration and regulation of valuers, valuer institutes and Valuation Professional Organisations (VPO). The Committee has also expressed a need for establishment of a dedicated cadre of valuers who would render valuation services after their registration with the NIV.

Please do look after yourselves and your families and stay safe & healthy.

Thank you!

Managing Director's Message

Dr. BINOY J. KATTADIYIL
Managing Director
ICSI Institute of Insolvency Professionals

Live as if you were to die tomorrow. Learn as if you were to live forever.

...Mahatma Gandhi

Dear Professional Members,

The World is undoubtedly going through a very tough phase, wherein, it is becoming increasingly difficult to not only understand the present, but the uncertainty regarding the future is also becoming evident. We are witnessing these unprecedented times wherein a historic war has been waged against a disease. But, amidst all that, we should not forget the ultimate truth that *difficulties do not come to break us, rather they are there to make us stronger and wiser*. It is my firm belief and faith that nothing worthwhile (and long-standing) has ever come to us without first making us prepare for the same, and as the saying goes, *there is always a sunshine after a ragging storm*, we must always be hopeful of a better future. One of the great lessons that current situation has taught and reminded us is the virtue of *social distancing*. It is now no more a personal choice of an individual, but also an ethical duty. We, as a global society need to see *social distancing* as an act of solidarity, an intentional choice that binds us in a common cause, because by staying

apart we are actually coming closer together in our common cause to defeat COVID-19. As a nation, I am very sure that our resilience is going to be a big factor in making us win over this challenge. We all shall have to stay focussed on our priorities, *viz.*, *first*, safety of all has to be our paramount responsibility; *second*, business continuity is the key; and *third*, to the extent possible, we must come forward and provide a helping hand to those around you, who needs it the most.

Now, realising the necessity to maintain *social distancing*, coupled with the objective to keep you updated, your Institute, ICSI IIP, has, in the month of April itself organised a good number of webinars by taking-up some very crucial and pertinent issues/ subjects (in the insolvency and bankruptcy law space in India) for a discussion by some eminent faculties. The feedback received from you all is indeed very encouraging, and we shall keep organising such webinars in the coming times as well. I encourage you all to help us with your ideas on the initiatives you would like us to take in order to go the extra mile to serve you better. We do take your feedback very seriously and this keeps us in moving forward as well!

At the very start of this month, we saw a report being submitted by the *Committee of Experts* (CoE), which was constituted by the Government of India *vide* its order dt. 30th August 2019, and which was headed by Dr. M.S. Sahoo, Chairperson, IBBI. The report examines and presents in a very lucid manner the crucial aspects related to the subject of *"need for an Institutional Framework for Regulation and Development of Valuation Professionals"*. The Committee has also suggested the Government of India with a draft `*Valuers Bill, 2020*' for its consideration. The report *inter alia* makes an in-depth analysis of the concept, the history, and the critical role that the exercise of *Valuation* fulfils in a market economy. Apart from examining the entire valuation landscape in India, both in terms of the institutional arrangements for development and regulation of valuation professionals, and the legal and regulatory requirements surrounding valuations services, a study of different models adopted in other advanced jurisdictions has also been carried out. The CoE has accordingly recommended a least disruptive, yet modern and robust, institutional framework that carried with it not only learnings from experience of valuation profession in India and abroad, but also of other professions in India.

Every time I analyse for myself the pace at which economic reforms are taking place in India, I fill myself with an enormous amount of admiration of this period itself. Though we had some good number of economic reforms taking place in India in the past (including the 1991 economic reforms), but the sheer intensity at which we are proceeding forward reassures of our solemn resolve and commitment to take the nation to a completely new level of economic development. Afterall, the economic prosperity of a nation depends largely on the economic reforms that it is able to introduce and implement through an institutional mechanism. Needless to mention, that, in a market economy like India, the Professionals, who discharge second order state functions (such as audit, reporting, monitoring, due diligence, and compliances) act as the extended arms of the Regulators. Infact, it is the Professionals, who determine, to a very large extent, the competitive edge of a nation.

Looking forward to continue to receive your continuous and unstinted support in all our endeavours and activities.

Please, do take a very good care of yourselves and your families.

Stay safe!

IBC - Threshold for default goes up 100 times !!

The push behind this move and the impact going forward...

S. T
B.Com., FCS., FCMA, CAIIB, DCG (ICSI)
Registered Insolvency Professional
Director -
CREATE & GROW
Research Foundation

Preamble:

Insolvency and Bankruptcy Code, 2016 (**IBC or Code**) became one of the most talked-about reform measures taken by the Government in the recent history. The Code made waves not only for much better recovery compared to earlier legislations but also brought in credit discipline amongst the corporates. Resolution plans resulting in revival of several corporates helped in the process the associated stakeholders including the employees, suppliers, etc. Well, on the flip side, the enormous time taken by cases to come to a finality far exceeding the time-lines enshrined in the Code made the creditors, particularly, financial creditors, to sit back and have a relook before pressing the IBC button.

Be that as it may, the main threshold of default for a company or a Limited Liability Partnership firm to be admitted into insolvency resolution process is Rs. 1 lakh as specified in Sec. 4 of IBC which is reproduced below, as it stood prior to amendment:

Applicability of Part II – Insolvency Resolution and Liquidation for Corporate Persons:

Sec.4(1) This part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:

Provided *that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.*

On 24th March 2020, the Central Government notified Rs.1 crore as the minimum amount of default provided under Sec. 4, in place of the earlier provision of Rs. 1 lakh. This is a quantum leap under any law for a minimum threshold to be increased by a whopping 100 times !!

- **What made the Government to react in such a decisive manner to increase the threshold of default from Rs.1 lakh to Rs.100 lakhs?**
- **What were the objectives to go for this huge hike?**
- **What are the implications of such massive increase in the threshold of default?**
- **Are there any side effects to this decision?**

  The author tries to decipher the thought process for this amendment. Please read on....

- **What made the Government to react in such a decisive manner to increase the threshold of default from Rs.1 lakh to Rs.100 lakhs?**

The date of the notification by the Ministry of Corporate Affairs assumes significance inasmuch as it was on 24th March 2020, when the Government announced the historic 21-days lockdown due to COVID-19 virus threat. Even prior to this date too, there were some hue and cry from the industry that the threshold of default at one lakh rupees was too low a sum and because of this several cases were coming to NCLT Benches.

In particular, there were representations by the MSME sector that IBC is hurting them most because any sub-vendor to whom an MSME has not paid its dues of Rs. 1 lakh or more, it is vulnerable for such MSME (as corporate persons) to be dragged into the IBC process.

Well, it could also be stated here that many MSME enterprises (as operational creditors) go against larger corporates for default in dues to them in spite of remedies under MSME Development Act, 2006. Therefore, the threshold of Rs. 1 lakh was seen as a very small sum by which even an employee (being an operational creditor) of a company, can take the company to NCLT and bring it down on its knees.

Seen in this context, another amendment made by way of an Ordinance in Dec.2019

is worth mentioning. This amendment relates to Sec.7 wherein the financial creditors of a particular class need to fulfil a condition that at least one hundred of such class of creditors in the same class or not less than ten per cent of the total number of such creditors in the same class alone can file an application under Sec.7 against a defaulting corporate debtor.

The three provisos to Sec.7(1) inserted with effect from 28th Dec.2019 are given below.

(After the Parliament approval, a notification was issued on 13th March 2020 and the amendments were to have effect from 28th Dec.2019):

"**Provided** that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also *that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission."*

The trigger for the amendment was that even a smallest home buyer was able to file an application before NCLT and drag a company into IBC process where a default was not less than one lakh rupees. The real estate infrastructure companies had to face the wrath of irate home buyers as even one such creditor was entitled to file an application before NCLT.

It was discussed in several forums that such class of creditors have alternative remedies under the legal framework. For example, the Real Estate Regulatory Authority Act, 2016 provided for several relief measures to home buyers against unscrupulous real estate developers.

In order to stem a free run on the real estate developers, the Government brought about a minimum threshold that only not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less, will be entitled to file an application under Sec.7 against a defaulting corporate debtor.

The above amendment arguably met with heavy resistance from the home buyers.

Several applications were filed by the investors and home buyers' associates. Providing partial relief to homebuyers, the Supreme Court issued a notice to the Government of India on the petition filed by homebuyers against the abovesaid amendment.

It is learnt that by virtue of this action by the Apex Court, the NCLT Benches will have to maintain status *quo* with respect to the applications already filed by homebuyers and investors against defaulting developers. Having said that, the legality and constitutional validity of the amendment is yet to be tested by the Supreme Court after hearing the government and the homebuyers.

Now enters the Corona..... With the Government taking decisive steps against the lethal onslaught of the COVID-19 across the globe, lockdowns were imminent disrupting the entire economic scenario. Preserving life was the most important priority than anything else. The Government wanted to provide a big relief to the industries as defaults could be rampant when there is a complete clampdown on the movement of the entire country.

Handy came the provision under Sec. 4 which gave the Government the bandwidth upto Rs.1 crore for the default threshold. The Government did not bat an eyelid to raise the threshold to the maximum of Rs.1 crore and rightly so in the address of the Finance Minister to the nation, this announcement of increase in threshold of default came with a tinge that this is intended to give a big relief to the MSME sector.

The message was loud and clear that smaller corporate players in the MSME sector would get benefited by this relaxation. On the contrary, this relaxation is across the corporate spectrum with no specific relevance to MSME sector.

This brings us now to the next question...

- **What were the objectives to go for this huge hike?**

As discussed in the earlier paragraphs, the Government desired to send strong signals to the corporate sector that during these times of unprecedented crisis, the shackles of IBC should no longer give a threat to the existence of the smaller companies. Bang came this notification as the IBC had an in-built provision to increase the threshold upto one crore rupees. Yes, it is a whopping increase of 100 times. But difficult times need difficult decisions, isn't it.

So, we go over to the third question....

- **What are the implications of such massive increase in the threshold of default?**

If one looks at the IBC dispensation, three sets of persons can file an application before NCLT, under respective Sections of IBC against a defaulting corporate debtor:

a. Financial creditors (under Sec.7)

b. Operational creditors (under Sec.9)

c. Corporate debtor itself (under Sec.10)

Of the above three sets of persons, the occurrences of financial creditor creditors filing an application under Sec.7 for any value less than one crore rupees have been very far and few. Therefore, one can safely say that this increase in the default threshold is not going to make a big change in the strategy of the lenders.

Coming to the cases of the corporate debtors lifting their hands and wanting to come under IBC, they were mostly to take advantage of the moratorium available under the provisions of IBC. With the amendments to IBC that the lenders can go against the personal guarantors independent of the actions against the corporate debtor, the cases of such corporates going into IBC voluntarily seem to have dipped as per the numbers shown in this article elsewhere.

Then comes the real segment which would feel greatly let down by the amendment. Yes, **the operational creditors**. They are the set of creditors who took IBC as a welcome tool in their hands to challenge the corporate debtors. The proceedings before NCLT in most of the cases resulted in a settlement. The corporate debtors felt the heat and many a times raised a dispute on such claims whenever the operational creditor sends a notice under Sec.8 of IBC to fight the cases longer before NCLT.

To corroborate this view that the applications filed by Operational Creditors do not last long for a possible resolution, an analysis of all the IBC cases where resolution plans were approved by the Adjudicating Authorities was done for the period till December 2019. The IBBI Newsletter which comes out for every quarter provided the required data. A quick summary of this analysis is given below:

No. of IBC cases where Resolution Plans have been approved by Adjudicating Authorities – from the QE Dec. 2017 until QE Dec.2019 (source: IBBI Newsletters)

Quarter ended	Financial Creditor	Operational Creditor	Corporate Debtor	Total No. of Cases
Dec. 2017	3	2	5	10
Mar. 2018	4	5	3	12
June 2018	9	2	1	12
Sept. 2018*	22	8	5	35
Dec. 2018	4	5	4	13
Mar. 2019	8	6	1	15
June 2019	15	10	1	26
Sept. 2019	22	11	5	38
Dec. 2019	17	10	7	34
Total	**104**	**59**	**32**	**195**

Note: *Includes backlog cases reported until Sept. 2018

One could see from the above table that more number of resolutions were happening in respect of cases filed by Financial Creditors rather than resolutions in respect of applications filed by the operational creditors or the corporate debtor themselves.

However, the above data needs to be compared with the total number of cases admitted during the same period, isn't it? We did this..

Analysis of IBC cases admitted till Dec. 2019 (Source: IBBI Newsletters)

Quarter ended	Financial Creditor	Operational Creditor	Corporate Debtor	Total no. of Cases
Mar.2017	8	7	22	37
Jun.2017	37	58	35	130
Sept.2017	99	98	38	235
Dec.2017	65	65	14	144
Mar.2018	85	89	22	196
June 2018	102	130	18	250
Sept. 2018*	98	128	16	242
Dec. 2018	113	147	16	276
Mar.2019	193	162	21	376
June 2019	129	154	17	300
Sept. 2019	265	291	9	565
Dec. 2019	245	301	15	561
Total	**1439**	**1630**	**243**	**3312**

Note: *Includes backlog cases reported until Sept. 2018

The trend of operational creditors filing more applications has been going strong since Sept. 2017 onwards. As against this, the financial creditors have been taking a cautious approach and they appear to be taking a deep breath before filing an application under Sec.7.

With reference to the above two tables, the ratio of resolution plans getting approved as a factor of number of cases admitted in the respective categories emerges as under:

Particulars applicant	Financial Creditor	Operational Creditor	Corporate Debtor	Total No. of Cases
Total No. of resolution plans approved by AA	104	59	32	195
Total No. of cases filed	1439	1630	243	3312
The resolution ratio	7.23%	3.62%	13.17%	5.89%

Therefore, the financial creditors being the serious players, have more probabilities of getting resolution plans approved for the cases for which they are filing applications, compared to operational creditors. On the other hand, the number of cases of Corporate Debtors filing applications has been on the vane particularly after the realisation that it is not doing them any good and the ploy of getting shelter under moratorium did not exist after the June 2018 amendment.

- **Are there any side effects to this decision?**

Having said this, there is a general view that the number of applications filed with NCLT would come down drastically after the 100-fold increase in the threshold for default. This is more substantiated by the fact that the operational creditors who have dues of more than one crore rupees alone would knock the doors of NCLT as compared to the earlier situation where even a default of one lakh rupees enabled an operational creditor to rush to NCLT.

This might be a good situation from the point of view of load on the judiciary system. On the other hand, the legal eco system which supports the filing of applications before NCLT would suffer a drastic cut on the number of clients approaching the law firms for filing applications before NCLT. The operational creditors would have to contend with writing more reminders to the corporate debtor and pleading before them for early payment or go to MSME Court for any relief.

The demand on insolvency professionals to be named as IRP or RP in those cases of operational creditors would be much less. This could be a good situation as in many cases of small value applications, the operational creditors were not able to pay the insolvency professionals leave alone bear the other costs like public announcement for submission of claims, etc.

Conclusion

Operational creditors were able to drag the defaulting corporate debtors to NCLT for insolvency resolution process. But thereafter, they neither had any role in the formation of Committee of Creditors nor were they invited to the meetings (except in cases where the operational creditors' debt is 10% or more of total debt). They do not have any voting right either. Therefore, the move to increase the threshold from rupees one lakh to one crore rupees, even though appear to be a knee-jerk reaction to the COVID-19 catastrophe be falling on the global economy, appears to be a well thought out one and perhaps, a timely one too.

Nevertheless, one has to wait for a few months and see how the plot unfolds after Corona is tamed. Time will tell if defaults in smaller cases will find their way into a settlement or snow ball into a situation to reach the threshold of one crore rupees and enter the NCLT premises!!!

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Rights of the Revenue to recover Crown Debts under IBC

PAWAN JHABAKH
Advocate,
High Court of Madras

SAI PRASHANTH
Principal Associate,
Lakshmikumaran & Sridharan, Chennai.

A `*Crown Debt*' is referred to as the debts "*due to the State or the king*"; debts which a prerogative entitles the Crown "*to claim priority for before all other creditors*"Advanced Law Lexicon by P. Ramanatha Aiyear (3rd Edn.) p. 1147. In fact, when the concept of `Crown Debt' was introduced by the Parliament of England, The Crown Debts Act, 1541 provided that the crown has priority for its debts *before all other creditors*.

How much of this is true in India?

The constant tussle between the Insolvency and Bankruptcy Code, 2016 (**'IBC'**) and other laws has always been a bone of contention. An emerging area of dispute pertains to the position of Crown Debts in the pecking order while distributing the assets of the liquidated company. The Revenue Department in the past have sought to assert their claims through attachment of properties, bank accounts, etc. to appropriate and realize crown debts notwithstanding the proceedings under IBC. This article addresses the interplay between the provisions of the IBC and the respective laws of GST and Income Tax.

Priority of crown debts - Decisions under Sales Tax, Central Excise and Income Tax

Before delving into the case laws under IBC, it may be important to take a step back and analyse the history of how crown debts have been viewed under the earlier laws. In one of the earliest decisions on this point, the Hon'ble Supreme

Court *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co.* ((2000) 5 SCC 694) while examining the provisions of Karnataka Sales Tax Act, 1957 held that Crown Debts can at best take precedence over unsecured creditors and cannot usurp the preferential treatment of secured creditors.

The Hon'ble Supreme Court in another case *Union of India* v. *Sicom Ltd.* (2009) 18 STT 100 (SC) was faced with a question as to whether realization of the duty under the Central Excise Act, 1944 will have priority over the secured debts in terms of the State Financial Corporation Act, 1951. The Court held that a debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property, having regard to the plain meaning of Article 372 of the Constitution and must prevail over crown debt which is an unsecured debt.

Now coming to the decisions under IBC, a similar question arose under the Income Tax Act, 1961 before the Hon'ble Andhra Pradesh High Court *Leo Edibles & Fats Ltd.* v. *Tax Recovery officer* (2018) 99 taxmann.com 226/259 TAXMAN 387 (**"Leo Edibles Case"**). The Court was to determine whether the Income-Tax Department enjoys the status of a secured creditor on par with any other secured creditor covered by a mortgage or a security interest that has the benefit of realizing their respective securities under Section 52 of the IBC.

The Court rejected the contention of the Income-Tax Department and held that at best, the Department can have a charge under the attachment order in terms of Section 281 of the Income Tax Act. The Court further held that the Department cannot claim priority in respect of clearance of dues as provided under Section 178 (2) & (3) of the IT Act and can only seek recourse to distribution under Section 53 of the IBC. The Court also held that all crown debts payable to the Consolidated Fund of India will come within the ambit of Section 53(1)(e) of the Code. Notably, the Court also analysed Section 178 in the context of sub-section (6) which specifically carved out an exception to the provisions of the IBC.

Recently, the judgment of the National Company Law Tribunal ('NCLT'), New Delhi[1] has also reiterated the same position of law and consequently held that irrespective of any attachment of property by the Income Tax Department, such attached property would be considered as the asset of a corporate debtor forming part of the liquidation estate and available for distribution as per the mechanism under Section 53 of the IBC.

From the above, it can be safely concluded that, *firstly* Crown Debts would not enjoy the same privilege, rights and equality of any other secured creditor, *secondly,* that any attachment of properties of the Corporate Debtor would be inconsequential and ought to form part of the liquidation estate for distribution and *thirdly,*the Income Tax Department would be entitled to amounts under liquidation only in accordance to the waterfall mechanism of Section 53 of IBC.

Can the logic of the above judgments be extended to GST as well?

Section 82 of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**) provides

that GST payable by the company shall be a first charge on the property of the company. This provision has however been made subject to the provisions of IBC. Similar qualification is given under Section 93 of the CGST Act as well. In addition, the Central Board of Indirect Tax and Customs (**"CBIC"**)clarified vide a recent Circular[2] that the dues of the period prior to the commencement of Corporate Insolvency Resolution Process (**"CIRP"**) will be treated as an `*operational debt*'. It is possible to say based on the law which has evolved qua the Income Tax Department, the same would apply to the CGST Act.

Rights of Revenue against the Officers in charge of the Corporate Debtor;

While the analysis supra dealt with the tussle between the revenue and corporate debtor, it is also important to understand the interplay between the revenue and the directors/management/officers who were in charge of the Corporate Debtor. The National Company Law Appellate Tribunal (**'NCLAT'**) in one of its recent decisions *Savan Godiawala v.G Venkatesh Babu* (2020) 117 taxmann.com 477(NCL-AT) considered this interesting issue and held that *when an* offence under the tax laws was committed by the Managing Director prior to CIRP, the Official Liquidator cannot be held responsible and liable to defend the Corporate Debtor. The NCLAT held that the funds of the Corporate Debtor forming part of the Liquidation Estate cannot be used to compound the individual offences of Directors and that the directors of the Corporate Debtor have to defend such prosecution in their own personal capacity and cannot pass the buck to the Liquidator.

In essence, the NCLAT reiterated the well settled position of law that the individual offences of the officers cannot be treated as an offence of the Corporate Debtor and the liability arising out of such offences cannot be the liability or the burden of the Corporate Debtor.

Conclusion

Crown Debts under the IT Act would be subject to the waterfall mechanism prescribed under Section 53 of the IBC and their rights would be no superior or equal right to a secured creditor. Similar treatment would also be for Crown Debts arising under the provisions of the GST Act. The treatments of Crown Debts under both these tax legislations are in line with the recommendations of the Bankruptcy Law Reforms Committee[3]. However, there is no restrain or legal impediment for the revenue to recovery and realize demands against the directors/officers of the corporate debtor.

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1. Judgment dated 15.06.2020 in IA 992/2020 under CP/294/2018
2. Circular No.134/04/2020-GST dated 23.3.2020
3 The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design issued on November 2015 – Chapter 2; Page 14.

IBC v. Arbitration Act: Can Financial Creditor be referred to Arbitration in an Application filed u/s 7 of the IBC?

PINAK PARIKH
Advocate

Introduction

Earlier this month, the National Company Law Tribunal (**"NCLT"**), Mumbai Bench, in an unprecedented decision, in *Indus Biotech Private Limited* v. *Kotak India Venture Fund-I* (2020) 117 taxmann.com 912 referred parties to arbitration in a petition filed by Kotak India Venture Fund-I (**"Kotak"**) under section 7 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). The NCLT, Mumbai Bench has refused to admit the application filed by Kotak against Indus Biotech Private Limited (**"Indus"**) under section 7 of the IBC on the grounds that the disputes were T and arbitration agreement existed between the parties. As per scheme of the IBC, a corporate debtor, in a petition filed under section 9 of the IBC, having a defence of *pre-existing dispute* in its pocket can stall the initiation of insolvency proceedings against it till the resolution of a dispute. However, the defence of *pre-existing dispute* is not available to a corporate debtor in a petition filed by a financial creditor under section 7 of the IBC. The above position was reinforced by National Company Law Appellate Tribunal (**"NCLAT"**) in *Vinayaka Exports* v. *Colorhome Developers (P.) Ltd.* (2020) 113 taxmann.com 116, it observed that existence of dispute as to amount of debt owed to a financial creditor has no relevance in a petition filed under section 7 of the IBC. Thus, it appears that the NCLT, Mumbai Bench has clearly departed from well settled principles by referring parties to arbitration in a petition filed by a financial creditor under section 7 of the IBC.

Background

On August 20, 2007, Kotak entered into Share Subscription and Shareholders Agreement (**"SSSA"**) with Indus for subscribing to the share capital of Indus. Under SSSA, Kotak subscribed to Optionally Convertible Redeemable Preference Shares (**"OCRPS"**) issued by Indus. In the meantime, Kotak intended to make Qualified Initial Public Offering (**"QIPO"**), and for that purpose it choose to convert OCRPS into equity shares. During the QIPO process, certain disputes arose between the parties regarding calculation and conversion formula to be adopted in carrying out valuation of OCRPS. While the dispute persisted, Kotak sought to trigger early redemption clause provided under SSSA, and claimed Rs. 367,07,50,000. When Indus failed to redeem the OCRPS, Kotak filed an application before NCLT for initiation of Corporate Insolvency Resolution Process (**"CIRP"**) under section 7 of the IBC. While the application of Kotak for initiation of CIRP against Indus was pending for admission before NCLT, Indus invoked arbitration clause under SSSA for referring the disputes to arbitration. Thereafter, Indus filed an Interim Application under section 8 of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) before NCLT seeking to dismiss the application filed by Kotak under section 7 of the IBC and refer the parties to arbitration. The issue that fell for consideration before the NCLT was whether provisions of the Arbitration Act will prevail over the provisions of the IBC?

The NCLT held that since disputes exist between Indus and Kotak, it is not satisfied that a default has occurred, and consequently, the section 7 application cannot be admitted until such disputes are resolved. Further, since disputes involved between the parties are arbitrable and have a bearing on judicial determination of existence of default under section 7(4) of the IBC, invocation of arbitration is justified in reaching to the conclusion as to whether there exists a default. Lastly, another reason given by NCLT to dismiss the application under section 7 of the IBC and refer parties to arbitration was that Indus is a solvent, debt free and profitable company, and that admitting the application would prematurely push an otherwise economically viable company into insolvency. Therefore, no meaningful purpose will be served by initiating CIRP against Indus at this stage.

Analysis of the NCLT's order

Although, the decision of the NCLT to dismiss the application filed by Kotak, for initiation of CIRP against Indus under section 7 of the IBC, was justified, the reasoning adopted by the NCLT in doing so was flawed. The NCLT dismissed the application on the grounds that since there is a dispute between the parties, it is not satisfied that a default has occurred. Had NCLT first inquired that whether there exists a financial debt; and whether Kotak is a financial creditor, there would not have been any need for determining the existence of default.

As per section 7 of the IBC, an application for initiation of CIRP against a corporate debtor can be filed by a financial creditor. According to section 5(7) of the IBC, financial creditor is a person to whom financial debt is owed. According to section 5(8) of the IBC, there are two essential

elements for any transaction to be termed as `financial debt' *i.e.* 1) It should be a debt along with interest, which is disbursed against the consideration for the time value of money; *and* 2) It may include any of the events enumerated in sub-clauses (a) to (*i*). On conjoint reading of section 5(7) and 5(8) of the IBC, it can be said that a person is not entitled to initiate CIRP under section 7 of the IBC unless financial debt is owed to him.

Whether failure to redeem OCRPS would fall within the ambit of financial debt?

According to section 5(8)(*c*) of the IBC, if the amount is raised by issuance of bonds, debentures, or any similar instrument, then such a transaction falls within the ambit of financial debt. There is a fundamental difference between the amount raised by issuing debentures and the amount raised by issuing OCRPS. The distinction was emphasized by the Calcutta High Court in *Hindustan Gas Industries Ltd.* v. *CIT* (1979) 1 Taxman 546, where it observed that in cases where money is raised by way of issuing redeemable convertible preference shares, such amount goes to the share capital of the company, and where money is raised by issuing debentures, such amount goes to loan capital of the company. Since the amount contributed by preference shareholders goes to the share capital, the company does not become debtor for such payment. In contrast, the amount raised by way of issuance of debentures goes to the loan capital of the company and consequently such debenture holders act as creditors of the company and are entitled to fixed rate of interest whether there are profits or not. In view of the above, it can be argued that there is no element of `consideration for time value of money' when money is raised by issuing OCRPS as preference shareholders are not entitled to any fixed rate of interest but entitled to get dividends only out of profits. Therefore, it can be concluded that transaction of raising money by way of issuing OCRPS will not fall within the ambit of financial debt under section 5(8) of the IBC.

Whether Kotak can be termed as a financial creditor?

Moreover, the owner of a preference shareholder cannot be termed as a creditor of the company. The above view was fortified by Bombay High Court in *Aditya Prakash Entertainment (P.) Ltd.* v. *Magikwand Media (P.) Ltd.* (2018) 95 taxmann.com 267, wherein the court observed that the shareholders of redeemable preference shares of a company do not become creditors of the company if their shares are not redeemed at appropriate time. Further, Gujarat High Court in *Anarkali Sarabhai* v. *CIT* (1983) 12 Taxman 120, had observed that where the company defaults in redeeming the preference shares, holder of the redeemable preference shares cannot compel the company to redeem the shares by suing in debt for the return of its capital.

In the present case, Kotak has filed an application under section 7 of the IBC on the grounds that Indus has failed to redeem the OCRPS. From the foregoing, it is clear that neither Kotak can be classified as financial creditor of Indus nor failure of Indus to redeem OCRPS would fall within the ambit of financial debt. Therefore, had NCLT first determined whether there

exists a financial debt or not, there would not have been any need to ascertain existence of default. Consequently, there would not have been any need to refer parties to arbitration in a petition filed under section 7 of the IBC.

IBC vis a vis Arbitration Act

In the present case, although, NCLT framed the question as to whether the provisions of Arbitration Act will prevail over the provisions of the IBC, it did not give a conclusive finding on the same, and kept the question open for debate in future cases. Despite, section 238 of the IBC provides for overriding effect of the IBC over any other law, the provisions of the IBC will not prevail over the provisions of the Arbitration Act in all the cases, and will vary from case to case.

It is a well settled principle that in case of conflict between a general law and a special law, a special law will prevail. Further, in case of conflict between two special acts, the latter act will prevail. However, this is not a sacrosanct rule. In *Life Insurance Corporation of India* v. D.J.. Bahadur, Supreme Court observed that a statute may be classified as special statute vis-a-vis other statute for certain purposes, and that special statute may be classified as general statute vis-a-vis other special statute for certain other purposes. There is always an element of relativity present while determining whether a statute is a general statute or a special statute. Moreover, Supreme Court in *Ashoka Marketing Limited and Another* v. Punjab National Bank & Others, observed that in case of inconsistency between two special statutes, conflict has to be resolved by referring to purpose, policy and intention of the legislature manifested by language of the statute. Therefore, it can be concluded that a statute cannot be classified as special for all purposes, and the classification is only relative in nature, depending upon the subject matter of dispute which is sought to be resolved.

In the present case, the maxim *Leges Posteriores Priores Contraries Abrogant*- in case of conflict between two special acts, the latter one prevails, will not be applicable as providing absolute overriding effect to the IBC, being the latter law, will militate against the well settled principles of statutory interpretation. The aim of the IBC is to bring all the laws relating to insolvency under one umbrella and to conclude insolvency resolution of corporate persons in a time bound manner. Further, as per scheme of the IBC, NCLT is not required to undertake fact-finding exercise, and resolve disputes as to amount of debt owed. On the contrary, under the IBC, NCLT has only been given 'summary jurisdiction' to ascertain the existence of default. On the other hand, Arbitration Act provides for speedy resolution of disputes by way of private adjudication. Thus, if there is any dispute as to the amount of debt, determination of it does not fall within the ambit of the IBC. Therefore, in cases where there is a dispute as to existence of debt, IBC will categorised as a general statute vis-a-vis Arbitration Act, and will have no overriding effect over the Arbitration Act.

Conclusion

As per scheme of the IBC, the Adjudicating Authority is required to dismiss the application filed by an operational creditor, if there is any pre-existing dispute between the parties. However, the IBC is silent on the approach to be adopted by the Adjudicating Authority when debt, in an application filed under section 7 of the IBC, is itself disputed. The Supreme Court has time and again clarified that the IBC is not a recovery mechanism and the NCLT should only entertain applications where the debt is undisputed, and can be determined by summary jurisdiction of the NCLT. In all other cases, where the debt is disputed, irrespective of whether it is a financial debt or operational debt, it should be left for appropriate forum to decide *i.e.* either civil court or by way of arbitration, provided there exists an arbitration clause.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Ashwini Mehra, *In re*

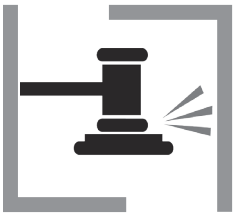
DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/23/2020

APRIL 27, 2020

Section 208, read with sections 5(13) and 220 of the Insolvency and Bankruptcy Code, 2016 and Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Resolution Professional shared a confidential document being Information Memorandum (IM) discreetly with an intended party prior to issue of Form G for Invitation of Expression of Interest and even before conduct of due diligence by RP to ensure that they would qualify as eligible prospective resolution applicants - Despite IBBI Circular clearly stating that Insolvency Resolution Process Costs (IRPC) should not include any expense incurred by a member of CoC or a professional engaged by them, RP charged fee of lender's legal counsel to tune of Rs. 73.87 lakh from IRPC - Further, RP on direction of CoC, finalized appointment of an Auditor for second forensic audit, and fees of Rs.50.74 lakhs charged by said Auditor was included as IRPC - Disciplinary Committee observed that Insolvency Resolution Professional (RP) displayed a negligent approach during conduct of CIRP - Whether since Insolvency Professional had displayed utter misunderstanding of provisions of Code and Regulations, his registration was to be suspended for six months and he was to be directed to secure reimbursements which were paid to lender's legal counsel and Auditor and charged to IRPC - Held, yes (Para 5.2)

Ashwini Mehra, **Piyush Mishra**, Advs. and **Archit Grover** *for the Applicant.*



INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Bhupesh Gupta, *In re*

DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/22/2020

APRIL 21, 2020

Section 208, read with sections 5(13) and 220, of the Insolvency and Bankruptcy Code, 2016 and Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Despite his own disbelief in conducting third valuation, Resolution Professional permitted conduct of same only upon desire of CoC and, thus, incurred additional financial costs upon an over-burdened Corporate Debtor - Though Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016 clearly states that in cases where Liquidator fees has not been decided by CoC, liquidator is entitled to a fee as per table provided in said Regulation, he continued to charge same fees during liquidation process which he was charging while acting as an Resolution Professional - Whether Resolution Professional had allowed members of CoC to usurp his powers thereby putting additional burden on an already ailing Corporate Debtor and displayed utter misunderstanding of provisions of Code and Regulations - Held, yes - Whether Resolution Professional should be warned and directed to deposit amount in Liquidation Estate which he had drawn without any authorisation during period while acting as liquidator - Held, yes (Para 5.2)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Koteswara Rao Karuchola, *In re*

DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/21 OF 2020

APRIL 20, 2020

Section 208, read with section 13, of the Insolvency and Bankruptcy Code, 2016 - Insolvency professionals - Functions and obligations of - Though verification of claims of creditors was primary duty of Resolution Professional himself, he outsourced his duty and engaged Insolvency Professional Entity (IPE) for verification of such claims - He further included payment made to IPE for same in Insolvency Resolution Process Costs thereby burdening ailing Corporate Debtor with additional costs of fee of Rs. 3 lakh plus GST paid - Whether since Resolution Professional had displayed a casual attitude towards his duties under the provisions of the Code and Regulations made thereunder, a monetary penalty of Rs.1 Lakh was to be imposed and he would be barred from accepting any new assignment as an IP till he deposited said penalty - Held, yes (Para 5.2)

Cases referred to :

committe of creditors of *ESSAR Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (Para 3.1)

Umesh Kumar Sharma, CGM and **Animesh Khandelwal**, RA (Law) for the Respondent.

Practical Questions

Q. 1 Can a sanctioned resolution plan be construed to be a variation of the terms of the contract inter se the principal debtor and creditor?

Ans. No.

(Calcutta High Court decision dt. 13th November 2019 passed in the matter of *Gauri Shankar Jain v. Punjab National Bank* (2020) 117 taxmann.com 613.

Q. 2 Can an application filed u/s 9, IBC be admitted by the AA if it is filed prior to issuance of notice u/s 8, IBC?

Ans. No.

(NCLAT decision dt. 10.01.2020 passed in the matter of *Landmark Realty v. Siroya Developers (P.) Ltd.* (2020) 117 taxmann.com 727 (NCL-AT)

Q. 3 Can an appeal be entertained and delay in filing it be condoned by NCLAT under the provisions of section 5, Limitation Act?

Ans. No, provisions of section 61(5), IBC would overrule provisions of section 5, Limitation Act, 1963.

(NCLAT decision dt. 30.01.2020 passed in the matter of *Radhika Mehra v. Vaayu Infrastructure* (2020) 117 taxmann.com 715 (NCL-AT)

Q. 4 Can the dues arising from lease of an immovable property to the CD be taken as an Operational Debt of the CD?

Ans. No.

(NCLAT judgment dt. 17th January, 2020 passed in the matter of *M. Ravindranath Reddy v. G. Kishan* (2020) 113 taxmann.com 526 (NCL-AT)

Q.5. Can the previous filing of an FIR by CD against OC's Directors for the amount claimed by OC in its application u/s 9 be construed as an existence of dispute *inter se* the parties?

Ans. Yes.

(NCLAT judgment dt. 29th January 2020 passed in the matter of *Anjani Gases v. B.P. Projects (P.) Ltd.* (2020) 117 taxmann.com 561 (NCL-AT)

Q.6. Can a decree-holder file an application against the CD on the basis of amount due to it by the CD under the Decree?

Ans. Yes, the definition of "*creditor*" includes a "*decree holder*".

(NCLAT judgment dt. 22nd January 2020 passed in the matter of *Ugro Capital Ltd. v. Bangalore Dehydration and Drying Equipment Company (P.) Ltd. (BDDE),* (2020) 115 taxmann.com 362 (NCL-AT)

Q.7. Can a resolution applicant renegotiate on his plan with CoC after the same has been found to be not satisfying criteria under the Request for Proposal (RFP)?

Ans. No.

(NCLAT judgment dt. 30th January 2020, passed in the matter of *Kundan Care Products Ltd. v. Surya Kanta Satapathy* (2020) 117 taxmann.com 156 (NCL-AT)

Q.8. Can an application filed u/s 9, IBC be opposed on the ground that the Creditor has already initiated proceedings against CD under MSMED Act, 2006?

Ans. No.

(NCLAT judgment dt. 13th January 2020 passed in the matter of *iValue Advisors (P.) Ltd. v. Srinagar Banihal Expressway Ltd.* (2020) 117 taxmann.com 704 (NCL-AT)

Q.9. Can a CD claim benefit under an agreement executed between its FC/Banks, by raising grievance for a default by a member of the consortium of Banks?

Ans. No, since such an agreement shall be binding on the FC/Banks only, CD does not have any locus.

(NCLAT decision dt. 31st January 2020, passed in the matter of *Oriental Bank of Commerce v. Ruchi Global Ltd.,* (2020) 117 taxmann.com 707 (NCL-AT)

Q.10. Can the CoC move an application for removal of the Liquidator?

Ans. No, after the commencement of Liquidation, CoC stands as a mere claimant whose matters are to be determined by the Liquidator.

(NCLAT decision dt. 21st January 2020 passed in the matter of *Punjab National Bank v. Kiran Shah Liquidator of ORG Informatics Ltd.* (2020) 117 taxmann.com 427 (NCL-AT)

Learning Curves

- **Section 61(2) of IBC overrides section 5 of the Limitation Act**

  (NCLAT decision dt. 1st april 2020 passed in the matter of *Radhika Mehra v. Vaayu Infrastructure LLP (2020) 117 taxmann.com 715*)

- **The resolution can be taken even during the CIRP, if any Promoter as investor agrees to invest the money for keeping the company as a going concern and complete the infrastructure project within the time frame**

  (NCLAT decision dt. 3rd april 2020 passed in the matter of *Rajesh Goyal v. Babita Gupta* (2020) 117 taxmann.com 720)

- **Police cannot take forward criminal proceedings initiated against the Company under Corporate Insolvency Resolution Process (CIRP), unless and until the CIRP culminates, in a resolution or otherwise**

  (Calcutta high court decision dt. 7th april 2020 passed in the matter of *India Infoline Finance Ltd. v. The State of West Bengal* (2020) 117 taxmann.com 641)

- **The legislative intent behind the amendment in section 31(1) of the IBC is that the Government will not raise any further claim of its dues after the resolution plan is approved**

  (Rajasthan high court decision dt. 8th april 2020 passed in the matter of *Ultra Tech Nathdwara Cement Ltd. v. Union of India* (2020) 116 taxmann.com 152)

- **Resolution plain in relation to a corporate debtor would not extinguish/reduce the liability of a guarantor of such corporate debtor**

  (Calcutta high court decision dt. 15th april 2020 passed in the matter of *Gouri Shankar Jain v. Punjab National Bank* (2020) 117 taxmann.com 613)

- **The definition of 'person' in section 3(23) of IBC is an inclusive definition which inter alia also includes Sole Proprietorship Firms**

  (NCLAT decision dt. 16th april 2020 passed in the matter of *Neeta Saha v. Ram Niwas Gupta* (2020) 117 taxmann.com 706)

- **The letters of One Time Settlement (OTS) create a fresh period of limitation with effect from the date when the OTS was signed**

  (NCLAT decision dt. 17th april 2020 passed in the matter of *Ashish Kumar v. Vinod Kumar Pukhraj Ambavat* (2020) 117 taxmann.com 154)

- **Delhi High Court restrained a Bank to declare an account as NPA in light of the moratorium announced by RBI by its circular issued on 27th March amid COVID-19**

  (Delhi High Court decision dt. 21st april 2020 passed in the matter of *Shakuntla Educational & Welfare Society v. Punjab & Sind Bank* (2020) 117 taxmann.com 648)

A financial creditor can file application under section 7 of the Code against a Company who is guarantor to an individual/Sole Proprietorship firm

(NCLAT decision dt. 22th april 2020 passed in the matter of *Laxmi Pat Surana v. Union Bank of India* (2020) 117 taxmann.com 192)

National Company Law Tribunal or Appellate Tribunal Cannot Sit in Appeal on Commercial Wisdom of The 'Committee Of Creditors'

Vishal kalantri v. DBM Geotechnics & construction pvt. Ltd.(2020) 117 taxmann.com 462 (NCL-AT)

GOVERNANCE STRUCTURE OF THE REGISTERED VALUERS ORGANISATION

CIRCULAR NO. IBBI/RVO/033/2020, DATED 23-4-2020

The Companies (Registered Valuers and Valuation) Rules, 2017 (Rules) envisage Registered Valuer Organisations (RVOs) to act as front-line regulators for development and regulation of the valuation profession. The RVOs have the responsibility to admit, develop, monitor and discipline the members of the profession. Keeping their powers and responsibilities in view, the Rules have prescribed minimum norms of governance befitting a regulatory State. The Rules, *inter alia*, prescribe the composition of Governing Board of an RVO, and manner of discharge of its powers and functions.

2. Recognition of RVOs is subject to other conditions as may be specified by the Insolvency and Bankruptcy Board of India, being the Authority, in terms of rule 14 of the Rules. Clause 4 of Part I of Annexure - III of the Rules provides for the composition of the Governing Board of an RVO. Sub-clause (5) of clause (4) mandates that an independent director shall be an individual:

(*a*) who has expertise in the field of finance, law, management or valuation;

(*b*) who is not a registered valuer;

(*c*) who is not a shareholder of the registered valuers organisation; and

(*d*) who fulfils the requirements under sub-section (6) of section 149 of the Companies Act, 2013.

Further, as per sub-clause (6), the Chairperson of the Governing Board of an RVO shall be an independent director.

3. In the meetings with MDs/CEOs of the RVOs, the issue of eligibility to be an independent director has been discussed a few times, in view of the likely conflict of interests. It has been clarified that a member of the promoter organisation, which has promoted an RVO, shall not be an independent director in the RVO.

4. A promoter organisation may have its members - shareholder member in case the promoter is a company, a trustee in case the promoter is an association of persons/ trust, or a professional member in case the promoter is a professional body - as directors on the Governing Board of the RVO. However, such directors shall not be appointed as independent directors. Illustratively, a shareholder/professional member of the Institution of Valuers (IOV),

who is a director on the Governing Board of the IOV RVO or a professional member of the ICAI, who is a director on the Governing Board of the ICAI RVO shall not be considered as an independent director for the purposes of sub-clause (5) of clause (4) of Part I of Annexure - III of the Rules. It is further advised that if any RVO does not have composition of its Governing Board taking this clarification into account shall reconstitute the Governing Board within three months from the date of issue of this Circular to meet this requirement.

5. This is issued in exercise of the powers under clauses (*e*), (*g*) and (*i*) of rule 14 of the Companies (Registered Valuers and Valuation) Rules, 2017.

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (SECOND AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATION 40B

NOTIFICATION NO. IBBI/2019-20/GN/REG056, DATED 20-4-2020

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:—

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in regulation 40B, for sub-regulation (4), the following sub-regulation shall be substituted, namely: —

"(4) The filing of a Form under this regulation after due date of submission, whether by correction, updation or otherwise, shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay after 1st October, 2020.

Example: A Form is required to be filed by 30th October, 2020. It shall be filed along with a fee as under:

If filed on	*Fee (in Rupees)*
29th October, 2020	0
30th October, 2020	0
31st October, 2020	500
Any day in November, 2020	1000
Any day in December, 2020	1500"

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) (SECOND AMENDMENT) REGULATIONS, 2020 – INSERTION OF REGULATION 47A

NOTIFICATION NO. IBBI/2020-21/GN/REG060, DATED 20-4-2020

In exercise of the powers conferred by clause (*t*) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, namely: —

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020.

(2) They shall be deemed to have come into force from the 17th April, 2020.

2. In the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, after regulation 47, the following regulation shall be inserted, namely: —

" *Exclusion of period of lockdown*— 47A. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process.".

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