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,
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TAXMANN®
Tax & Corporate Laws of INDIA

SEBI MANUAL

Compendium of
Amended, updated & Annotated text
of SEBI & Securities Laws

COVERAGE

SEBI Act, 1992
- Notifications

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
- Clarifications

Securities Contracts (Regulation) Act, 1956
- Rules/Regulations
- Clarifications

Listing Obligations and Disclosure Requirements
- Clarifications
- Listing Agreement for Indian Depository Receipts

COVID-19 Circulars

70+ SEBI Rules, Regulations and Guidelines

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WHAT SETS THIS BOOK APART?

- Updated, Amended & Annotated text of SEBI & Securities Laws
- Circulars are duty amended
- Circulars amending/ Clarifying the primary Circular are given together

COMPLETE PICTURE OF THE LAW

COVERING

- Alternative Investment Funds
- Bankers to an Issue
- Buy-back of Securities
- Collective Investment Scheme
- Credit Rating Agency
- Custodian/Debenture Trustee
- Debt Securities/Commercial Papers – Issue and Listing of
- Delisting of Securities
- Depository Receipts Scheme 2014
- Derivatives
- Development Financial Institutions
- Disclosure Standards for Corporates
- Employee Stock Option
- Euro Issue
- Foreign Portfolio Investors/Foreign Venture Capital Investors
- Forward Contracts/ Commodity Derivatives
- Informal Guidance
- Infrastructure Investment Trusts
- Insider Trading, Prohibition of
- Intermediaries
- International Financial Services Centres
- Investment Advisor
- Investor Protection
- Sweat Equity
- Takeover Regulations
- Underwriters
- Unfair Trade Practices
- Vanishing Companies
- Other Rules & Regulations
- Application Supported by Blocked Amount Process (ASBA)

NEWS FROM THE INSTITUTE

EVENTS DURING JULY, 2021

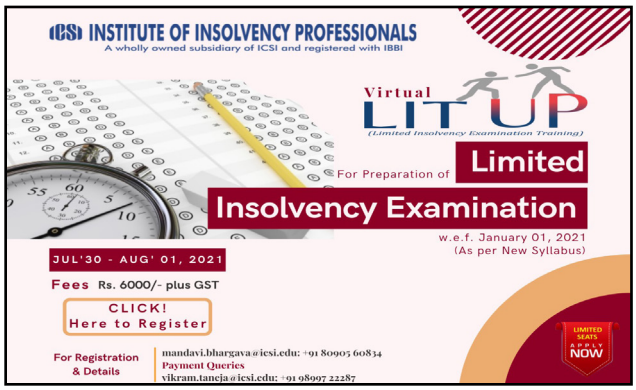
◆ Pre-Registration Educational Course

Pursuant to Regulation 5 (*b*) of the IBBI (Insolvency Professionals) Regulations, 2016, individuals are eligible to register themselves as Insolvency Professionals (IP) only after undergoing through the mandatory 50 hours Pre-Registration Educational Course from an Insolvency Professional Agency after his/her enrolment as a Professional Member.

ICSI IIP jointly with the other three Insolvency Professional Agencies conducted Pre-Registration Educational Course online from 23rd July- 29th July, 2021.

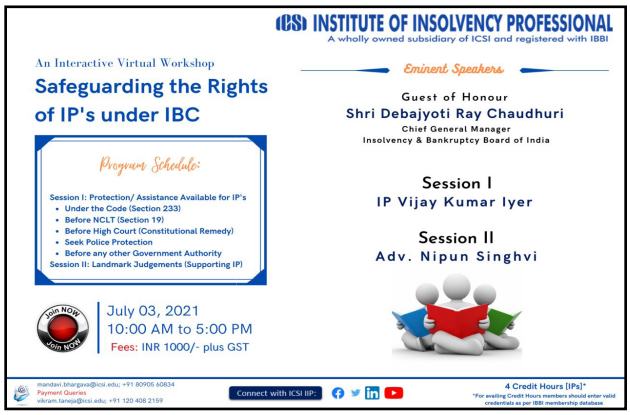
◆ LIT UP- Preparation Course for Limited Insolvency Examination

ICSI IIP organised 3 full days preparation course namely LIT UP from 30th July to 1st August 2021. This was the 11th batch. The sessions were taken by expert faculties.



◆ Workshop on 'Safeguarding the rights of IPs under IBC'

On 3rd July, 2021, ICSI IIP organized a full day workshop on '**Safeguarding the rights of IPs under IBC**'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, IP Vijay Kumar Iyer and Adv. Nipun Singhvi.

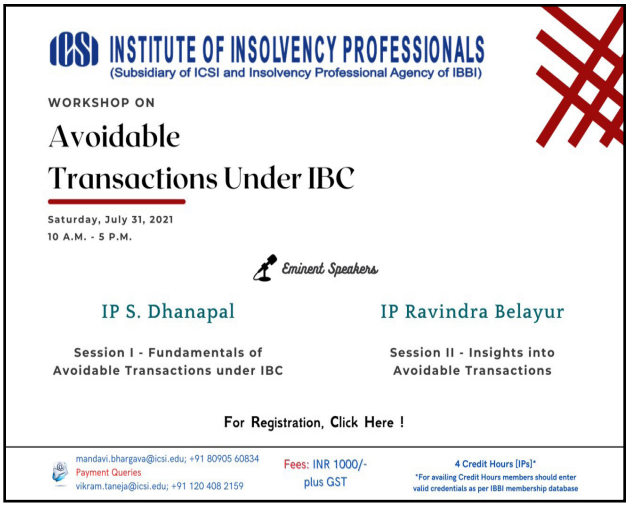


◆ Workshop on 'Treatment of Home buyers under IBC and related Case Laws'

On 24th July, 2021, ICSI IIP organized a full day workshop on 'Treatment of Home buyers under IBC and related Case Laws'. It was attended by 60 professional members. The workshop was addressed by the eminent speakers namely, IP Ravi Prakash Ganti and CS Megha Mittal.

◆ Workshop on Avoidable Transactions Under IBC

On 31st July, 2021, ICSI IIP organized a full day workshop on `**Avoidable Transactions Under IBC**'. It was attended by 75 professional members. The workshop was addressed by the eminent speakers namely, IP S. Dhanpal and IP Ravindra Belayur.



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At a Glance

No. 7 | Pg. 1-100 | JULY 2021

Regulation 41, read with regulation 18 of SEBI (Mutual Funds) Regulations, 1996 - Scheme of mutual funds - Procedure and manner of Winding up - Whether Consent of unitholders of Mutual Fund Scheme would be necessary if majority of directors of trustee company decide to wind up a scheme; however, power conferred under Regulation 39(2) (a) to

trustee to decide whether or not a scheme should be wound up is constitutionally valid - Held, yes - Whether however, consent of unitholders should be sought post publication of notice and disclosure of reasons for winding up under regulation 39 (3) - Held, yes - Whether consent of unit holders for purpose of clause (c) to Regulation 18 (15), would mean consent by simple majority of unitholders who have participated in poll; and not consent of majority of all unit holders of scheme - Held, yes (Paras 37, 42, 46 & 60)

- **Bank of Maharashtra v. Videocon Industries Ltd.**
  (2021) 128 taxmann. com 284 (NCLAT- New Delhi) • P-264

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellant was a dissenting financial creditor of corporate debtor, which was undergoing a consolidated CIRP - Resolution plan in respect of corporate debtor had been approved - It provided that Non convertible Debentures (NCDs) would be issued to financial creditors in discharge of debt - However, NCLT by impugned order directed payment of cash - Whether considering exceptional facts of instant matter, impugned order was to be stayed till next date and status quo ante as before passing of impugned order was directed to be maintained - Held, yes (Para 14)

- **Anuj Tejpal v. Rakesh Yadav**
  (2021) 129 taxmann. com 296 (NCLAT- New Delhi) • P-266

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Appellate Tribunal Rules, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether in interest of justice, inherent powers under rule 11 can be exercised by NCLAT which may allow or disallow application for withdrawal of CIRP proceedings keeping in view interest of concerned parties and facts of each case - Held, yes - Whether where prior to constitution of Committee of Creditors all amounts due and payable by corporate debtor to operational creditor, who filed section 9 application, had been paid in full and parties had come to a settlement, application for withdrawal of CIRP proceedings in exercise of inherent powers under rule 11 was to be allowed - Held, yes (Para 46)

- **9M Corporation v. Naresh Verma**
  (2021) 129 taxmann. com 298 (NCLAT- New Delhi) • P-270

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Whether where company 'BIL' had given 'guarantee' on behalf of principal borrower for items referred to in sub-clause (i) of section 5 (8), guarantor company 'BIL' would also come within meaning of 'corporate debtor' qua 'financial creditor' in whose favour guarantee had been given - Held, yes (Paras 22 and 27)

- **Deputy Commissioner, CGST Kalol, Gujarat v. Gopala Polyplast Ltd.**
  (2021) 129 taxmann. com 312 (NCLAT- New Delhi) • P-272

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - During Corporate Insolvency Resolution Process (CIRP) of respondent, appellant-operational creditor on behalf of CGST, 'Department of Goods and Services Tax', had filed claim of outstanding GST dues recoverable from corporate debtor - Appellant stated that claim was admitted to extent of a sum - However, resolution plan approved by Committee of Creditors had made provision of meagre sum as full and final settlement of dues of appellant - NCLT by impugned order approved resolution plan - Whether resolution plan approved is binding on Central Government, State Government, any local authority, Guarantors and other stakeholders - Held, yes - Whether sufficiency or insufficiency of amount is matter of commercial decision of Committee

of Creditors and it would not be appropriate on part of Appellate Tribunal to interfere in same - Held, yes - Whether therefore, appeal was not to be admitted - Held, yes (Paras 5 and 6)

- **Ideal Surgicals v. National Company Law Tribunal**
  (2021) 129 taxmann. com 294 (Kerala) • P-275

Section 61 of the Insolvency and Bankruptcy Code, 2016, read with article 226 of the Constitution of India, 1950 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - Petitioner-operational creditor filed writ petition being aggrived by order of NCLT, where by NCLT admitted resolution plan submitted by resolution applicant - Whether since an effective alternative remedy being available with petitioner by way of statutory appeal under section worth 61, instant writ was not maintainable - Held, yes (Para 9)

- **Committee of Creditors v. Parag Seth**
  (2021) 129 taxmann. com 295 (NCLT - Ahd.) • P-278

Section 22 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution Professional - Appointment of - An application filed under section 7 in case of corporate debtor was admitted and Interim Resolution Professional (IRP) was appointed - Committee of Creditors (CoC) in its meeting with 78. 26 per cent voting shares had passed a resolution to not to continue said IRP as RP and resolved to appoint new RP - It was noted that erstwhile IRP had performed his duties as expected from him under Code and he was removed from his duties without assigning reasons - It was also noted that new RP was based at a location which was far distant from location where corporate debtor and its properties were situated - Further, fee quoted by new RP was higher as compared to fee quoted by erstwhile IRP and new RP also appeared to have enough workload which would delay timely resolution of insolvency of corporate debtor - Whether it was an instance of an imprudent decision in facts and circumstances of case, and therefore, decision of CoC was liable to be rejected and erstwhile IRP was to be confirmed as RP - Held, yes (Para 13)

- **NTPC Ltd. v. Ram Ratan Modi**
  (2021) 129 taxmann. com 300 (NCLAT-New Delhi) • P-288

Section 42 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Appeal against decision of liquidator - Appellant had awarded two contracts to respondent - corporate debtor - Respondent-corporate debtor failed to carry out contracts and appellant terminated contract and got balance work executed through third party - Application under section 7 was admitted against corporate debtor and appellant filed proof of claim as an `other creditor' - Subsequently, liquidation order was passed and appellant filed claim to liquidator - Liquidator however, sent an e-mail rejecting claim and appellant moved to NCLT by filing company petition - NCLT partially rejected appellant's claim by impugned order - Whether it was duty of liquidator to examine appellant's claim as provided by Insolvency and Bankruptcy Board of India (Liquidator Process) Regulations, 2016 and liquidator had avoided performing duty as was required to be performed under IBC Code' and Regulations by rejecting claim - Held, yes - Whether liquidator was required to look into documents and come to `best estimate' and give benefit to appellant - Held, yes - Whether liquidator was directed to take steps and process claim of appellant as `other creditor' and arrive at best estimate of amount of claim made by appellant and give necessary benefit to appellant - Held, yes (Paras 12, 16 and 17)

- **Ram Niwas & Sons v. Palm Developers (P.) Ltd.**
  (2021) 129 taxmann. com 181 (NCLT - New Delhi) • P-289

Section 22 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution Professional - Appointment

of - Whether Corporate Insolvency Resolution Process (CIRP) is a time bound process involving certain common steps which needs to be performed by every IRP/RP, like, Appointment of valuers, Evaluating and placing Resolution Plan before Committee of Creditors (CoC) etc. and for performing such mandated tasks, it is necessary that CoC is in operation - Held, yes - Whether non-performance of aforesaid steps within prescribed time lines will make entire CIRP infructuous, which per force will drive corporate debtor into liquidation eventually - Held, yes - In respect of corporate debtor, CIRP was initiated and one 'MKS' was appointed as IRP - 'MKS' had neither made any efforts in managing operations of corporate debtor as a going concern nor performed duties casted upon him under code to complete CIRP - Whether this was a case of abuse of process of IBC and in order to protect interest of corporate debtor, its stakeholders, and for furtherance of CIRP, new IRP was to be appointed in place of 'MKS' - Held, yes - Whether further, show cause notice was to be issued to 'MKS' as to why contempt proceedings would not be initiated against him - Held, yes (Paras 19 and 22)

- **Hytone Merchants (P.) Ltd. v. Satabadi Investment Consultants (P.) Ltd.**
  (2021) 129 taxmann. com 302 (NCLAT-New Delhi) • P-291

Section 65, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or malicious proceedings - Whether where application to initiate CIRP is filed collusively not with purpose of insolvency resolution but otherwise, then despite fulfilling all conditions, Adjudicating Authority can exercise its discretion in rejecting application relying on section 65 - Held, yes - Applicant/financial creditor sanctioned loan of Rs. 3 lakhs to corporate debtor company - Corporate debtor committed default in repayment - Financial creditor thus, filed application under section 7 to initiate CIRP against corporate debtor - On perusal of master data of corporate debtor it was found that networth of corporate debtor was Rs. 15 crores and it had already given a corporate guarantee worth Rs. 482 crores, thus, it was hard to believe that corporate debtor was unable to repay a loan of Rs. 3 lakhs only and it appeared that corporate debtor colluded with financial creditor to escape its liability as a corporate guarantor - Whether thus, even though application filed under section 7 met all requirements, Adjudicating Authority had rightly rejected said application - Held, yes (Para 49)

P. K. MALHOTRA

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

From Chairman's Desk

What comes our way is not in our hands, but what we make out of it is 100% in our hands

In the past one year, the impact of Covid-19 pandemic on Indian Economy has been severe (particularly on the MSMEs). With this realisation and that implementation of IBC (including evolution of the ecosystem, stabilisation of processes, and growing jurisprudence), has prepared the ground for new initiatives to be put in place, the MCA, had constituted a sub-committee of the ILC to recommend a regulatory framework for PPIRP. Taking note of the progress made in insolvency reforms, maturity of the systems and practices relating to insolvency in the country, as also learnings from experience of pre-packs in other jurisdictions, the sub-committee had designed a pre-pack framework (within the basic structure of IBC) for the Indian market and submitted the same (to the Government of India) vide its report dt. 31st October 2021. The underlying idea behind PPIRP is to save time taken in the entire resolution process as also to facilitate consensual restructuring. It is important to realise that this scheme is being made available to almost 70% of the Indian Industry as the parameters for MSMEs have now been changed (max. capital investment in micro enterprise

cannot be more than 1 crore and turnover not more than 5 crores; for small enterprises, the capital investment shall not be more than 10 crores and turnover shall not be more than 50 crores; for medium enterprises, the capital investment shall not be more than 50 crores and turnover shall be more than 250 crores).

With the passing of IBC (Amendment) Act, 2021 the concept of Pre-Packaged Insolvency Resolution Process (PPIRP) for Micro, Small and Medium Enterprises (MSMEs) has taken a concrete shape and is all set to take-off. PPIRP, as we understand, is an informal process for corporate rescue for which NCLT's approval/ sanction is procured after an agreement is arrived at *inter se* CD and its creditors. In other words, under this process, a resolution agreement is to be arrived at *inter se* corporate debtor and its creditors prior to approaching NCLT. To clarify further, the CD initiates the process and persuades lenders to participate in resolution process through an informal/out of court process. By this process, all lengthy and costly legal proceedings are avoided, though ultimately the resolution fructifies after NCLT's approval only. The most significant and distinguishing part of this process is that CD is able to retain management control till resolution is arrived at. For an MSME which has failed to meet its payment obligations of 10 lakh INR or more (maximum up to 1 Crore INR), this remedy for insolvency resolution is made available.

The MSMEs which contribute majorly to the socio-economic development of the nation has gained immense importance due to its significant contribution to nation's GDP as well as its growing number. India has approximately 6. 3 crore MSMEs which contributes about 29% towards the GDP through its national and international trade. Being the largest employment provides, the need to promote and sustain MSMEs is very crucial for the Indian Economy. In fact, this sector has been described as a backbone of Indian Economy and Union Government now aims to increase MSME's contribution to the 50% of nation's GDP. Several steps have been taken in this direction, for instance, the MSME Ministry runs various schemes targeting to provide credit and financial assistance, skill development training, infrastructure development, marketing assistance, technological and quality upgradation and other services to the MSMEs across the country. In one of the recent developments, in the month

of May, 2021, the IDBI Bank announced introduction of its fully digitised loan processing system with >50 products for the MSMEs and agriculture. In the same month, the NI-MSME, *i.e.* the National Institute for Micro, Small and Medium Enterprises, Hyderabad also arrived at an agreement (MoU) with IIM Nagpur concerning collaboration in the areas of MSME development, training, research & consulting and entrepreneurship. Also, the BSE SME (Small and Medium Enterprises) platform is expected to witness >60 SMEs to enter the market in one year (2021-22) to bring up equity funds for meeting their business requirements. Therefore, realising the crucial place and role played by the MSME, this IBC Amendment Act has been brought-in and is being welcomed by all stakeholders with open arms.

To strengthen the IBC regime further and to encourage more participation from different stakeholders, the IBBI, in collaboration with MyGov. in, is conducting its second National Online Quiz on IBC. The Quiz, which is starting from 1st August, 2021, shall be open to all Indian citizens above 18 years of age (except for individuals working in IBBI, service providers registered with IBBI, and also their immediate family members) who can participate in the quiz. The intent is to spread more awareness about the Code and to encourage all stakeholders to participate in the Quiz. After an overwhelming response received (in the first IBC Quiz organised last year) from a wide range of stakeholders including students, professionals and employees, it is expected that participation this year shall also exceeds our expectations. The link to participate in the quiz has been provided for in IBBI's Press Release dt. 30th July 2021 (available at https://ibbi. gov. in//uploads/press/74b87337454200d4d33f80c4663dc5e5. pdf). I encourage all eligible persons to participate in the quiz.

The IBBI has *vide* its circular dt. 20th July 2021 prescribed a format for Form CIRP 8 which is required to be mandatorily filed by an IP on IBBI's website concerning the requirement of intimating details under regulation 35A of CIRP Regulations. The form is required to be filed by all IPs in relation to their ongoing CIRP assignments (as well as those commencing on or after 14th July 2021) wherein it forms an opinion (or makes a determination) concerning PUFE transactions covered u/s. 43/45/50/66, IBC. The form is to be filed by 140th day of ICD. The circular (along with the format) is available at https://ibbi. gov. in/uploads/legalframwork/f6c188806f3e1357ec641821cfc62d7e. pdf.

The IBBI, through its circular dt. 28th July 2021, has also laid down certain penalties which are to be imposed by the Disciplinary Committee of IPAs in case certain contraventions are found on the part of Professional members. The circular, which has been issued by the IBBI in exercise of its powers u/s. 196, IBC, is made effective from the date of its issue itself. A round-table discussion of the professional members is proposed to be conducted by ICSI IIP for an elaborate discussion on the said circular as also to take on-board the views of members to be shared with the IBBI. I encourage all professional members to come forward with their thoughts and views on the same.

I wish to meet you all very soon. Till then, please take very good care of your health!

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

Managing Director's Message

Knowledge does not belong to us, we belong to the knowledge

Dear Professional Member(s),

I wish to start by first conveying my special thanks to all the resource persons/subject matter experts who have been not only willing but also very forthright in sharing their knowledge through various learning activities/workshops conducted by ICSI IIP. Being a Professionals' Institute/body, our biggest strength lies in the development of our professional members itself, which invariably requires knowledge sharing activities *inter se* the members. In fact, I also believe that it results in a win-win situation for all because knowledge is like money and to be valuable it must always be in circulation. Sharing one's knowledge results in gain to others, without any lose at one's end. Charles Darwin also remarked, in the long history of humankind, those who learned to collaborate and improvise most effectively have prevailed.

The IBC journey that started in the year 2016 has been able to come this far only on account of the steps that have been taken by different stakeholders which is reflective of the commitment and determination shown by them to make IBC a huge success in achieving its solemn objective. Success is a consequence of harnessing all that you have to the best possible result, and this can happen only when you look at how to make a contribution to everything around you. The very decisive measures adopted and steps taken by the Parliament (and the Government), the pace at which its implementation took place at the Regulator's end, the commitment shown by Professional members and the alacrity with which the Judiciary dealt with all teething troubles, have all culminated in a establishment of this reform which has now reasonably entrenched itself as a legal mechanism for insolvency resolution.

For the Professional Members it is important to remember that every assignment has a corresponding duty/responsibility attached with it requiring him/her to dedicate time as well as energy which is sufficient enough to result in an optimum outcome. The *Code of Conduct* for professionals invariably reflects on it and bears this requirement almost as a hall mark. In other words, the essence of what constitutes a professional responsibility should never be lost sight of by a true professional. One has to be conscious that his/her actions (or lack of it) shall always have a direct nexus/impact on the out come which he/she is required to achieve. For the IPs, *vide* a recent notification dated 22nd July, 2021, an upper cap on number of assignments that an IP can undertake has been laid down, and therefore, at any point of time, the maximum number of assignments that an IP can undertake can never be more than the maximum prescribed number (*i.e.* a maximum of a total of ten assignments), out of which there cannot be more than three assignments having admitted claims exceeding one thousand crore rupees. The amendment has come effective from 22nd July 2021, and while some clarifications have been sought by Professional members concerning application of this rule *vis-à-vis* the IPs who are currently handling more assignments than the maximum provided, the rationale of this rule has been widely accepted and appreciated as a reflection of practicality.

In July we saw passing of IBC (Amendment) Act, 2021 replacing the amendment ordinance which was earlier promulgated on

4th April 2021. The amendment act concerns introduction of Pre-Package Insolvency Resolution Process (PPIRP) as a mode of insolvency resolution for the MSME sector. The maximum default threshold therein is 1 Crore, which is also the minimum default threshold for a CIRP. PPIRP as a process shall enable creditors and shareholders to come together to negotiate and agree on a resolution plan which shall become enforceable after obtaining NCLT's approval. The process involves an initial discussion *inter se* CD and its creditors for arriving at some kind of resolution plan which has to be later put through a competitive selection process. The distinguishing feature of this process is that CD itself is afforded an opportunity to submit its resolution plan and if its resolution plan stands out, then the same can be taken to the NCLT for its approval. Strict time lines have been provided for each step under this process as well.

It was recently reported that under the IBC mechanism, Banks have been able to recover their bad debts worth 5. 5 lakh crores (approx.), out of which nearly 1 lakh crores have been recovered from accounts that were written off. The statistics are not only a proof of worth of IBC, but reassures all stakeholders that we are on right path. At the same time, we should never forget the fact that IBC is not a mere legal framework for recovery, rather a tool for timely resolution of insolvency. So, while there has been (by and large) a good amount of recoveries made by banks, in many cases, the haircuts afforded by them have been enormous. For instance, in a recent case of Videocon Group of Companies, the Hon'ble NCLT (Mumbai Bench), in its orders dt. 8th June 2021, while noting details the CoC approved resolution plan wherein huge haircuts were taken by FCs and OCs, quizzically remarked, "... therefore, the Successful Resolution Applicant is paying almost nothing and 99. 28% hair cut is provided for Operational Creditors (Hair cut or Tonsure, Total Shave). " The disappointment of the NCLT was writ large as it noted "... voluminous number of Operational Creditors are also MSME and if they are paid only 0.72% of their admitted claim amount, in the near future many of these Operational Creditors may have to face Insolvency Proceedings which may be inevitable...". Therefore, while the Code clears the ground for FCs (CoC) to exercise their commercial wisdom in deciding the fate of CD, it is beyond any doubt that the wisdom has to appear on the face of the decision, and not run counter to it.

The Code not only provides for an expeditious process for resolution of insolvency, but also identifies times lines within which each step is to be completed, and with an expert (Insolvency Professional) being put in-charge of the entire process, and final word being given to the lenders, *i.e.*, the Committee of Creditors (CoC) who are best suited to decide fate of CD (in exercise of their commercial wisdom), there is hardly anything that can be suggested in order to deal with this subject in a better way, except that such commercial wisdom has to be exercised properly and that timelines provided must be adhered to by all.

All attempts have been made to make the resolution process transparent as well as certain. The effectiveness of IBC is predicated on existence of a competitive market to acquire bad debts/ assets. But since the on-set of Covid-19 pandemic, the world has encountered a changing situation. Though the time extensions sought in many CIRP cases have remained range bound, if the process can be completed within prescribed timelines, it will build confidence in the bidders as regards certainty of the process, which shall definitely lead to overall maximisation of value for all stakeholders.

I once again thank you all for keeping your trust and faith in us and encouraging us with your support!

Please keep a very good care of you and yours!

Dr. Binoy J. Kattadiyil
MD-ICSI IIP

INTERVIEW

Shivadutt Bannanje
Insolvency Professional

1. I would like to start by asking your views on journey of Code so far as it has been quite some time since the introduction of this Insolvency law.

The codification of Insolvency Law (IBC, 2016) has simplified the process of insolvency resolution by laying down a collective mechanism for a streamlined, faster and fairer process of insolvency resolution, which was fragmented across multiple legislations earlier. Since its introduction in year 2016, the code has been actively amended several times which has brought essential clarity on various ambiguities, resolved certain complexities and plugged various loopholes. Besides, Indian Judiciary has played a seminal role in evolution of the code. The code has faced challenge as regards its constitutionality, and nearly every provision has undergone intricate judicial scrutiny. The welcoming decisions of apex court have helped resolve several contentious questions of law, and maintain the spirit of the code. Furthermore, the educational program conducted by the ICSI institute have immensely helped many professionals in understanding the true essence of the Insolvency law and intricacies involved in it.

2. How has your overall experience as an Insolvency Professional been since you are handling quite a number of assignments? What changes are you looking forward to in this already implemented law?

My journey as an insolvency professional is packed with professional challenges, personal learnings, vivid opportunities and several enriching experiences. The designation "Insolvency Professional" is both a badge of honour and responsibility. Being an insolvency professional, it gives me an immense sense of pride and honour to have salvaged the in undated companies from sinking, and to have brought sigh of relief to numerous guiltless creditors. However, there are certain procedural and practical challenges that an insolvency professional faces during the insolvency process.

The essence of the code, which is to maintain a balance for all stakeholders to preserve and maximize the economic value of the assets of a corporate debtor and to achieve resolution in a time bound manner ought not to get diluted due to any dilatory tactics. Chiefly, legal procedures should not lead to delay or disruption of an on-going resolution process. There are several events wherein some parties having concealed interests reach before courts to thwart the on-going resolution process. Such events cause the process to deflect from the timelines prescribed, thereby violating the spirit of Insolvency law. Any step taken by the legislature in this regard would be welcome.

3. Since you are also a Company Secretary by profession, whether your practice as an Insolvency Professional had any impact on your secretarial or legal domain?

Since I have an accumulated experience of over 30 years in heading legal and transaction advisory, being more focussed towards investment banking, I personally feel that the professional knowledge and experience have in fact complemented my practice as an insolvency professional. Concurrently, my involvement with several insolvency assignments have helped me gain a deeper understanding of stressed assets management and getting the effective resolution plans at early stages. The legal and secretarial work are corollary to the insolvency assignments. Fortunately, I have been able to find an ideal balance amongst all three domains of my practice.

4. Due to this covid outbreak, since there has been complete lock-down in the country twice, in such a situation how did you handle your assignments in hand?

Imposition of lockdown makes it practically difficult to approach the resolution applicants and find a market for assets of a corporate debtor under liquidation. During the lockdown period, the insolvency process gets virtually hampered.

5. One of the major challenges faced by IPs in this profession is fees paid to Insolvency Profes-sionals, so do you experience this challenge in your cases and how you deal with it?

Yes, every professional faces such challenge in his profession. I believe that the fees should always be fair and corresponding to the work involved and efforts put in by the professional. Accordingly, in this profession also, it is natural to expect some imbalances in the fees. However, once a professional accepts an assignment, he has to do justice to the assignment, and not be principally motivated by the fee. Demonstrating a good work will fetch more assignments and better fees.

The problem which I have faced is delay in the payment of CIRP/Liquidation expenses. In my opinion, the insolvency proceedings should not get unnecessarily hampered due to financial illiquidity of corporate debtor. Many a times, an insolvency professional has to invest his personal financial resources and incur all expenses relating to the insolvency process. This puts a lot of hardship on the insolvency professional. Any step taken by the legislature in this regard would be welcome.

6. During the Corporate Insolvency Resolution Process (CIRP), an IP has to deal with various authorities such income tax departments, local police authorities etc. to carry out the process. So, during the course of your assignments how has your experience been while dealing with such authorities? How do they perceive this insolvency regime?

Since the Insolvency Law is relatively new, some officers and authorities lack familiarity with its provisions. As such, it is primarily to be made sure that they are familiarized with the necessary provisions in order to smoothen the procedural co-ordination. Even otherwise, it is my duty as a professional to apprise the authorities and update them regarding the applicable legal provisions and processes. In my experience, I have found that the authorities are generally co-operative with the insolvency professionals.

7. What is your say on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs which was introduced by the provisions of "The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021?"

The introduction of the Pre-Packaged Insolvency for the MSMEs has abundant potential for the revival of financially distressed MSMEs. However, there are some challenges linked to the resolution framework as it chiefly depends on the existing management of such MSMEs for successful resolution. The requirement of obtaining NCLT approval despite obtaining consent of 66% of the financial creditors marks a question on the effectiveness and viability of the framework.

8. What practical challenges are faced by an Insolvency Professional while carrying out the insolvency process which regulators are not aware about?

A major hurdle that I have personally

faced is the marketability of assets of a corporate debtor undergoing liquidation. Since the type and class of assets of a corporate debtor depends upon the business and industry it is engaged in, it is practically difficult to find a market for assets which are unique due to the kind of business operations and industry. There must be some provision of a class-based market for every class or type of asset, which can help in early realization of the value of such assets and expedite the insolvency process.

9. Since a Graduate Insolvency Program has been introduced for the students opening doors of new career opportunities for them, what advice would you like to give this young aspiring Insolvency Professionals?

My message to the young ones aspiring to become a highly qualified professional in the domain of bankruptcy and insolvency laws in to join the Graduate Insolvency Programme, which is a prestigious programme that encourages and attracts the brightest minds, that the leading insolvency professional entities, law firms, advisory firms, banks and other financial institutions, including those located out of India, compete to hire graduating students. GIP is a curated programme that will help the young aspirants become the Insolvency professionals at a younger age by bypassing the requirement of having prior professional experience of 10 years, as required by the Insolvency Law at present.

10. Lastly, how significantly do you think the ICSI Institute of Insolvency Professionals (ICSI IIP) serves the profession of Insolvency Professionals and what suggestion you want to give for the improvement?

I feel ICSI IIP is doing commendable work when it comes to the matter of educating the professionals and young aspirants by providing valuable knowledge capsules, publishing e-capsules, conducting various workshops and providing regular updates. The knowledge center, as provided on the ICSI IIP portal is immensely helpful for all knowledge seekers. My suggestion to ICSI IIP is to design an electronic platform on which the young aspirants can get in direct touch with insolvency professionals on a regular basis, which will not only motivate the young aspirants to join the profession but also help them with their queries concerning the profession.

Insight!

39.26% - Looking at the high haircuts & low recoveries from another perspective

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◆ Introduction

The Insolvency & Bankruptcy Code of 2016 was one of the inordinate economic reforms introduced by the NDA Government.

The Indian economy was considered to be a debtors' paradise in the pre-IBC era. Then legislations like SARFAESI Act, RDDBFI Act, SIC Act etc. were the only available routes to dealing with the state of insolvency. These, however, took years and in some cases even decades to come any conclusion. The result, debtors and wilful defaulters took the banks and financial institutions for a ride. In such a scenario, IBC came a game-changer, providing timelines, consolidating and super-ceding all the non-yielding existing provisions in the Indian Law dealing with the subject.

At the same time, we know that, as per the data made available by the Insolvency and Bankruptcy Board of India (IBBI) as on March 31, 2021, in over 1277 major NCLT resolutions, Financial Creditors have taken an average haircut of almost

60% on the amounts due (for recovery) from different entities brought covered in the ambit of IBC.

In April, IDBI Bank-led group of lenders had discussed and approved an OTS proposal offered by M/s Siva Industries wherein the creditors agreed to take a 93.4% haircut to settle their dues of Rs. 4,863 Crore. Apart from this case, the NCLT had also questioned the creditors' rationale behind agreeing to an extensive haircut of almost (96%) by the lenders *vis-à-vis* the insolvency resolution plan of Videocon group of companies.

◆ Understanding the objective and vision of the IBC:

The vision and objective behind formulating the IBC wasn't to ensure maximum recovery from assets of a CD which is under liquidation, we already have SARFAESI to ensure a reasonable monetary value to the underlying assets. The birth of IBC was to ensure resolution of businesses, thereby reducing the stressed debt and provide a feasible solution for distressed organizations to restructure and continue as going concerns.

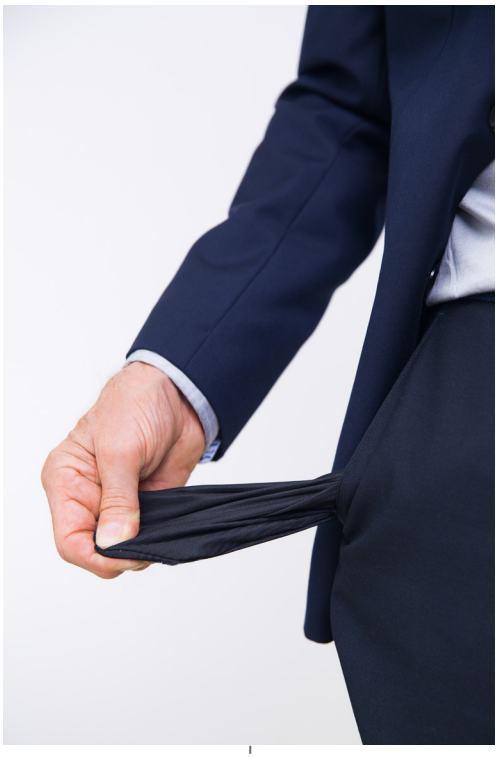
IBC was formulated to ensure a timely, process driven and an objective -oriented law to govern the subjects of insolvencies and bankruptcies. While the law has stressed on maximizing the value of assets of CD which is under resolution (or even liquidation), under no circumstances does it attempt to suggest it as solution, from the point of view of being a recovery mechanism for creditors.

I am reminded of the speech delivered by Lt. Shri Arun Jaitley, former Union Minister for Finance and Corporate Affairs (under whose leadership the IBC was conceptualized and formulated at a Conference held in New York on 5th December 2018 on the subject `Insolvency and Bankruptcy Code - A New Paradigm for Stressed Assets' India struggled literally for decades to find a response to this (the issue of stressed assets). We had a regime which was fairly scattered, not focused, which continued, and continued without really being able to produce any results. We had a provision for commercial insolvency conventionally under our Companies' law. We had about three decades ago, a prime law with relation to certain stressed assets, which was the SICA law, but really it did not produce any significant results. The central bank and the Government had in the earlier decades come out with various schemes of restructuring of the debt which was owed to the State sector banks in particular. It did produce subtle, marginal results but not very significant.

In another speech by him at the National Conference on `Insolvency and Bankruptcy: Changing Paradigm' at Mumbai on 19th August 2017 he had made the following remarks "The SICA experiment was an absolute failure. It was brought in with an idea that companies which are sick would be revived irrespective of whether they were capable of being revived or not. The only effective purpose it served was that the debtors got an iron curtain around them. Then the iron curtain, which prevented the creditors from making recoveries, continued indefinitely. Therefore, effectively there was very little purpose that the SICA was able to achieve for which it was created."

◆ The curious case of low recoveries:

In the month of May 2021, a second and devastating wave of SARS - COVID 2 ravaged across the country, with countless perishing in its death grip. We saw dramatic visuals of people losing their lives, gasping for health services. Some, even losing their lives due to a delayed response to the infection.



Comparing a resolution under IBC to a attending a critical patient gasping for health services is the most apt way of understanding how haircuts work under IBC.

Let's say that you have been diagnosed with a life threatening disease. The only two options available to you are, either visit a doctor to seek treatment, or to do nothing and let the disease take its own toll. Let's presume that you choose the former, there is a good chance you may survive depending on how bad the infection has spread in your body, however treating it too late may not yield the results one expects.

Resolutions under IBC work in a somewhat similar manner. It is very important to identify that at what stage an "insolvent" or a "sick" organization is brought under the IBC process. The chances of its revival (and even recovery for the creditors) significantly depends on the fact as to whether or not the organization is a "lost cause" already when it is brought under the IBC ambit.

Further quoting Dr. M. S. Sahoo, Chairperson, Insolvency & Bankruptcy Board of India, "It depends on several factors, including the nature of business, business acumen of creditors, market for distressed assets, and health of the economy." It, however, critically depends on, at what stage of the stress, the company enters the IBC process, as much as at what stage a patient arrives in the hospital. If the company has been sick for years, and the assets have depleted significantly, the IBC process may yield huge haircut or even liquidation. The companies, which have been rescued through IBC till March 2021, had assets valued, on average, at 22% of the amount due to creditors when they entered the IBC process. This means that the creditors were staring at a haircut of 78% to start with. The IBC process not only rescued these companies, but also reduced the haircut to 61% for financial creditors."

Chairperson of the RPG Group, Mr. Harsh Goenka too voiced his criticism and concern surrounding the IBC Code with a tweet stating "Promoters stash away money on the side, take the company to the cleaners, get a 80-90% haircut from bankers/NCLT - that's the new game in town."

◆ Conclusion

The idea and intent behind IBC is undoubtedly a noble one. In any capitalist society, the exit mechanism for inefficient firms is only through insolvency and bankruptcy process; all major economies have some form of this law, and India, late to the party, bought this in only five years ago. These five years have been a learning experience for resolution professionals, NCLTs, member, committee of creditors, lenders and borrowers.

While the debate on low recoveries continues, IBC has also given us some 0% haircut cases in the resolution of M/s Binani Cement Limited and also in the case of M/s MBL Infrastructures Limited.

Globally, recoveries under IBC stand taller to recoveries under peer legislations when compared, as per the World Bank report dated October, 2019, recovery rates as a % of liquidation value were: India (71.6%), US (81%), UK (85.4%), Brazil (18.2%), Russia (43%), China (36.9%) and South Asia (38.1%).

The Economic Survey of 2021 conducted by the Ministry of Finance, Government of India pointed out that IBC recoveries were more than the combined recoveries each year under Lok Adalat, Debt Recovery Tribunal and the SARFAESI Act during 2016-17 to 2019-20. SARFAESI yielded highest recoveries for banks prior to the introduction of the insolvency code.

An interesting fact highlighted in the IBBI report is the fact that although the realizable value of assets for the liquidations outstanding as on 31st March 2021 was Rs. 1.12 Lac crore actual proceeds have realized an amount of Rs. 2.03 Lac crore, a whopping 82% more than expected.

Moreover, the final say in the acceptance or rejection of resolution plans lies in the commercial wisdom of the CoC, the haircuts they receive are a result of their own decisions during the CIRP. Inevitably the decision on haircuts is not on the acquirer (RA) but on the financial creditors. Hence the conjecture placed around IBC claiming as if it is being misused by acquirers and promotors to unjustly enrich themselves is not true.

Operational effectiveness of the Code is constantly being monitored by the Central Government through committees of experts set up on this behalf. The IBC, 2016, although a relatively young law, is promising and has the potential to be the game-changer for the Indian Economy as well as the India growth story!

●●●

Enlarging the Term *"Ordinary Course of Business"* in Context of Avoidance Transactions under the Insolvency and Bankruptcy Code, 2016

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The term "ordinary course of business" has been used various times in the Insolvency and Bankruptcy Code, 2016 ("Code" or "IBC"), but the legislature has left the said term undefined. Since the context where this term is used (whether it be definition of related party, or declaring a transaction to be preferential or undervalued) is of such a nature that often brings various parties to litigation and argue upon justifying there acts to be in ordinary course of business, there is a huge scope of debate as to what constitutes ordinary course. Through this article we have made an effort to quantify the meaning of the term "Ordinary Course of Business" in light of various judgments and authoritative prescriptions.

A transaction to be preferential in nature needs to qualify the Section 43(2), (3) & (4) of the Code, which reads as under:-

> "(2) A corporate debtor shall be deemed to have given a preference, if-
>
> (*a*) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
>
> (*b*) the transfer under clause (*a*) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers-

(*a*) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(*b*) any transfer creating a security interest in property acquired by the corporate debtor to the extent that -

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

(4) A preference shall be deemed to be given at a relevant time, if-

(*a*) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(*b*) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date."

Thus, as per Sub-section (3), the transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee, are excluded.

The term "Ordinary Course of business" is also used at various places in Companies Act, 2013 as well, for example in Section 180 (restrictions on Power of board) and Section 188 (Related Party Transactions). Ordinary Course of business acts as a bulwark against the allegations of unfair transactions under any commercial law.

Before going into the judicial findings, let's first see what the authoritative guideline of ICSI has to say on determining ordinary course of business. The ICSI Guidance note on "Ordinary Course of Business" lists out the following factors to be considered while determining whether an activity constitutes an ordinary course of business or not:-

- Whether the activity is covered in the objects clause of the Memorandum of Association
- Whether the activity is in furtherance of the business

- Whether the activity is normal or otherwise routine for the particular business (*i.e.* activities like advertising, staff training, etc.)
- Whether the activity is repetitive/ frequent
- Whether the income, if any, earned from such activity/transaction is treated as business income in the company's books of account
- Whether the transactions are common in the particular industry
- Whether there is any historical practice to conduct such activities
- The financial scale of the activity with regard to the operations of the business.
- Revenue generated by the activity
- Resources committed to the activity.

It is pertinent to note here that time and again, it has been affirmed by various courts that the Memorandum of Association of the company should be referred to for ascertaining whether the activity is covered in the objects clause therein. This is not a conclusive test but will assist in determining whether a transaction is in the ordinary course of business or not, apart from the other points for determination.

The Black's Law Dictionary (8th edn.) defines `ordinary course of business' as `the normal routine in managing a trade or business' and terms it as `regular course of business', `ordinary course', `regular course'.

The exclusion under section 43(3) of IBC was discussed at stretch by the Hon'ble Supreme Court in *Anuj Jain* v. *Axis Bank Ltd.* (2020) 114 taxmann.com 656. It was held that the word "or" should be read as "and", to cover only the transfers in nature of ordinary course/financial affairs of corporate debtor as well as the transferee, along with certain other findings:

> "25.2. Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor; and *qua* the health and prospects of the corporate debtor... the scheme of Section 43 of the Code is essentially of scanning through the affairs of the corporate debtor and to discredit and disregard such transaction by the corporate debtor which tends to give unwarranted benefit to one of its creditor/surety/guarantor over others, in our view, the purport of clause (*a*) of Sub-section (3) of Section 43 is also principally directed towards the corporate debtor's dealings. In other words, the whole of conspectus of Sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of Sub-section (3) of Section 43."

"25.6... Even if transferees submit that such transfers had been in the ordinary course of their business, the question would still remain if the transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL so as to fall within the exception provided by clause (*a*) of Sub-section (3) of Section 43 of the Code."

"25.6.1...It remains trite that an activity could be regarded as `business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. As regards the meaning and essence of the expression `ordinary course of business', reference made by the Appellants to the decision of the High Court of Australia in Downs Distributing Co. (supra), could be usefully recounted as under:

> *...It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."*

"25.6.2 Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of `ordinary course of business' of a particular corporate entity only if it falls in place as part of `the undistinguished common flow of business done'; and is not arising out of `any special or particular situation', as rightly expressed in Downs Distributing Co. (supra). Though we may assume that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present Respondents but on the given set of facts, we have not an *iota* of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/ building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/ or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial

affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by it sholding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL."

In *Tirumala Balaji Alloys (P.) Ltd.* v. *Sumit Binani* (2021)123 taxmann.com 17 (NCL - AT), an issue of determining certain transactions to be preferential, came before the Hon'ble NCLAT. In this case there was are payment in the unsecured loans of the promoters by the corporate debt or and the promoters took the defense that the taking/repayment of loans was in ordinary course of business of the company. The findings of the NCLT Mumbai which were upheld by the NCLAT being:

"12. As we all know that so long as company is doing well and able to discharge its obligations without instilling any kind of fear in the minds of the creditors about payability of the company to them, they don't mind to whom the company paying before and to whom it is paying later, but when the company started going down, count down will start more to the creditors, because they are not sure as to whether their debt from the debtor is fully realisable or not.

13. Insolvency/bankruptcy no doubt looks always harsh on the creditors of the debtor, because the unsecured creditors will only receive a portion of his claim against the debtor, at times, he may very well not receive anything at all. In a situation like this, creditor will have anxiety to realise before others realise, on the other creditor gets fear because others would realise before he gets something on *pro rata* basis in the event of liquidation. One - opting for a possibility to takeout their value before it has gone to others, two - to ensure that its entitlement to its dues remain on par with the same class of creditors in the event of liquidation.

14. If we examine the other situation, that is in the present case, if the man in the line of creditors and them an screened under the corporate

veil is one and the same, *i.e.*, the promoters and the people connected to promoters, called as insiders/related parties, and if themselves devour remains of the debt or in the name of loans given to the company, what will happen to the outsiders who have given loans, what do they do, who have advantageous situation, of course people in driving seat can drive it in the way they want.

16. Now in this case, the explanation of R1 & R2 who run by the promoters and their relatives is, the money loaned by R1 & R2 was immediately paid back to them because they helped out the corporate debtor when nobody came forward to help them. No material for what purpose this money came in, how it was spent, except this explanation to this application. What do we have to call it? No doubt we know every company is an independent entity, it liabilities will not fall upon others, including promoters, but it does not mean, when around ten thousand crores of rupees are payable to outsiders, can the promoters take out their money from the company leaving other creditors behind them? It cannot be so. Though company is an independent entity, it is always run by human beings, who are they, they are promoters, entity, it is always run by human beings, who are they, they are promoters, thereby the onerous duty is cast more upon them to ensure the remains of the company equally distributed as per waterfall mechanism available under section 53 of the Code. May be this money is pittance, when compared to thousands of crores payable to the creditors; at least these promoters must seemingly remain honest to their creditors. Having regard to this case, the Resolution Value of the corporate debtor is not even one third of the admitted claims collated by the Resolution Professional, the restructuring ushered through resolution plan could not even meet the claims of secured creditors, the claims are more than ten thousand crores, but value of the resolution plan is bringing in only around 2,800 crores. Since loans have become irregular for more than three years before filing this case, the promoters knew well, it is not salvageable. When it is known that company is in all respects insolvent, how could the promoters self-deal with the funds of the company?

17. Most fundamental doctrine underlying the field of insolvency/ bankruptcy is equality of distribution of the debtor's assets among his creditors. This objective cannot be achieved if the debt or is free to prefer favourit's creditors by distributing assets unequally shortly before onset of insolvency, if such conduct is allowed, liquidation/bankruptcy distributions would become largely meaningless. It is not surprising to say that equality of treatment of creditors is the oldest and most frequently advanced goal of preference law. In legal terminology, it is called as doctrine of *pari passu* (on equal footing) treatment of creditors of the same class so that every creditor of the same class will *inter se* receive a proportionate share from the Corporate Debtor's property in return for the debt owed. A preference occurs when a

company pays specific creditor or group of creditors and by doing so makes the creditor "better off" than the majority of other creditors before the company going into insolvency.

21. When such presumption has arrived on the given facts, if the transferee takes defence of ordinary course of transaction, then burden lies upon such transferee, to prove that transfer is made in the ordinary course of business. We shall remember that RP need not prove that it has not been out of ordinary course of business.

25. The Respondents submit that when nobody came forward to provide finance to the company owing to its size of liability exposure, the Respondents upon seeing the resolution passed by the corporate debtor board, they provided short term loans to the corporate debtor; they had to be paid as agreed between the corporate debtor and the respondents individually, accordingly the corporate debtor repaid along with interest, therefore the respondents submit, they shall be treated as transfers in ordinary course of business. The Respondents have go next a step further saying that these transfers are with in the ordinary course of financial affairs of the respondents, because the respondents keep financing the companies, in the same process they have provided finance to the corporate debtor as well. And for having section envisaged that transfer could be either in the ordinary course of business or financial affairs of the corporate debtor or the transferee, it need not be of in the ordinary course of the corporate debtor. If such is the case, not even single case falls within the ambit of section 43 of the Code. Only thing that has to be seen is, as to whether such transfer is in the ordinary course of business or financial affairs in between the corporate debt or and the transferee, otherwise this defence will not be a defence to the transferee, indeed this defence would be a monster to swallow up the main section itself."

Reliance can also be made on the judicial findings under tax laws. Here are few of the principles that needs to be considered while determining whether an activity constitutes "Ordinary Course of Business" under tax laws. These Principles have evolved from the decisions pronounced by various courts (*A. Ebrahim & Co.* v. *State of Bombay* (1962) 13 STC 877 (Bom); *CST* v. *Hindustan Spg. & Wvg. Co. Ltd.* (1964) 15 STC 69; *Gosri Dairy* v. *State of Kerala* AIR 1962 Ker 4):-

- Objects Clause-If a proposed transaction forms part of the memorandum of association, either as a part of main objects or ancillary objects then the same can be termed as "ordinary course of business". However, it is worth noting that `all *intra vires* activities do not amount to transactions in the ordinary course of business and all the transactions in the ordinary course of business are not necessarily *intra vires* activities.
- Nature of Business and Industry - The industry and the nature of company's business is also one of

the essential factors in determining whether transaction is in ordinary course of business or not.

- Periodicity-A transaction which does not occur on day-to-day basis would not fall under the purview of "Ordinary Course of Business".

The term "ordinary course of business" though stated various times in the Code but not had been defined anywhere. In order to understand the exact meaning let's look at the Hon'ble Supreme Court's definitions on the following:

a. The word "ordinary" has been defined as under:

- "ordinarily" means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably.- *Babubhai* v. *State of Gujarat* (2010) 12 SCC 254
- "ordinarily" means "normally", it may not mean "solely" or "in the name" but it never means "primarily".- *Commissioner of Customs* v. *J.D. Orgo chem Ltd.* 2008 taxmann.com 334 (SC).
- The word "ordinary" necessarily implies the exclusion of "extraordinary" or "special" circumstances.- *Eicher Tractors Ltd.* v. *Commissioner of Customs* (2001) 1 SCC 315

b. The word "course" has been defined as under:

- The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time: duration and not a fixed point of time- *Hardeep Singh* v. *State of Punjab* (2014) 3 SCC 92.

c. The word "business" has been defined as under:

- To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, there must be some real and systematic or organized course of activity or conduct with a set purpose of making profit.- *State of AP* v. *H Abdul Bakhi & Bros.* (AIR 1965 SC 531).

d. The words "Ordinary", "Course" & "Business" were jointly described as under:

- To infer from a course of transactions that it is intended thereby to carry on business ordinarily there must exist the characteristics of volume, frequency, continuity and system indicating an intention to continue the activity of carrying on the transactions for a profit.- *Director of Supplies & Disposals* v. *Member, Board of Revenue* AIR 1967 SC 1826.

Conclusion

Hence going by the above discussion, it can be said that for a transaction to be in ordinary course it needs to have the following characteristics-

- In a volume & frequency ordinarily required or done in the company; can be seen to have been in continuity throughout a long period;
- The activity shall be carried on such a systematic manner that it indicates a clear intention to continue the activity for sometime.
- The proposed activity shall be carried out in sync with the primary objective of the formation of company *i.e.* to earn profit and create value.
- The activity shall be present in the routine business affairs of the company since much time before the Insolvency Commencement Date.
- The activity should not be carried out as a result of an extraordinary or special occasion.

However, a clear understanding as to what exactly means ordinary course and what isn't will become clearer once we have more judicial findings in this respect.

The Bad Bank of India - A step towards cleansing the banking system or a recipe for disaster?

Karan N. Sanghavi
MCom, ACA, ID

◆ Introduction

The year was 2007, the global economy was staring at a financial crisis of the magnitude only seen once before, perhaps in anticipation of it being even worse than the Great Depression. Lackluster financial regulation, excessive risk-taking by banks & financial institutions and the bursting of the United States housing bubble culminated in a plummet in valuations of mortgage-backed securities which were tied to the American real estate. Financial institutions worldwide suffered severe damage, reaching a climax with the bankruptcy of Lehman Brothers in September, 2008 and a subsequent international banking crisis. U.S. household debt as a percentage of annual disposable personal income was 127% at the end of 2007, versus 77% in 1990.

The financial crisis of 2007-2008 resulted in bad banks being set up in several countries. But what is a bad bank?

A bad bank is a corporate structure which isolates or takes over the management of illiquid and high risk assets (typically non-performing loans) held by a bank or a financial organization with the objective to free up the capital held off by these stressed assets. A large volume of non-performing assets usually make it difficult for the bank to raise capital. In addition to segregating the bad assets from the banks' balance sheets, a bad bank structure permits specialized management to deal with the problem of bad debts. The approach allows good banks to focus on their core business of lending while the bad bank can specialize in maximizing value from the high risk assets.

In a 2009 report, McKinsey & Company identified four basic models for bad banks:

- In an on-balance-sheet guarantee, the bank uses some mechanism (typically a government guarantee) to protect part of its portfolio against losses. While simple to implement, this situation is difficult for investors to assess.
- In an internal restructuring, the bank creates a separate unit to hold the bad assets. This solution is more transparent, but does not isolate the bank from risk.
- In a Special Purpose Entity (SPE), the bank transfers its bad assets to another organization, typically government backed. This solution requires significant government participation.
- Finally, the bank creates a new, independent bank to hold the bad assets. This completely isolates the original bank from the risky assets.

◆ Bad Banks around the world:

The first to use the bad bank strategy was Mellon Bank back in 1988. With about $130 million brought in by Mellon Financial Corporation, Grant Street National Bank (in liquidation) was spun off as a bad bank. Mellon shareholders were issued shares in both the good and bad banks on a one-for-one basis and it took no public deposits. The bank was dissolved in 1995 after repaying all bondholders and meeting its objectives.

Formed in 2012, SAREB is the bad bank of Spain. The intent was to manage and disinvest high-risk assets that were transferred to it from the four nationalized Spanish financial institutions (BFA-Bankia, Catalunya Banc, NGC Banco Gallego and Banco de Valencia). The Fondo de Reestructuración Ordenada Bancaria (FROB) created in 2009 as a result of the financial crisis is the largest stakeholder with 45% ownership in SAREB.

US based Citigroup found itself in the crosshairs during the financial crisis in 2008. Its decision to double down on subprime mortgages on the eve of the downturn led to a mammoth $17 billion loss in Q4 of 2008 alone. It followed that up with an $8 billion quarterly loss a year later. To survive, one of Citigroup's strategies to stem the flow of losses was to quarantine the responsible assets and operations in a separate subsidiary, Citi Holdings, which it created in the second quarter of 2009. At its peak, Citi Holdings administered more than $ 800 billion worth of assets. That would make Citi Holdings the fifth largest bank in the USA both now and when it was created. Citi Holdings was later closed down and now when investors browse Citigroup's financial statements, it's almost as if the crisis never occurred.

The China Huarong Asset Management Co. Ltd. China set up dedicated bad banks for each of its big four state-owned commercial banks. These bad banks were meant to acquire non-performing loans (NPLs) from those banks and resolve them within 10 years. In 2009, their tenure was extended indefinitely. However it has not achieved the kind of success that was planned.

◆ The Do's & Don'ts of a Bad Bank

As India gets ready to operationalize

its new bad bank, the National Asset Reconstruction Company Ltd. (NARCL), there are a lot of lessons to be learnt.

A centralized bad bank like NARCL should ideally have a finite tenure. Such an institution is typically a swift response to an abrupt economic shock (like Covid) when orderly disposal of bad loans *via* securitization or direct sales may not be possible. The banks could transfer their crisis-induced NPAs to the bad bank and focus on expanding lending activity. The bad bank in turn can restructure and protect asset value. Over time, it could gradually dispose of the assets to private players, thus avoiding a fire-sale during the economic shock. Clearly, such a bad bank has a temporary purpose, and need not exist in perpetuity.

Transferring NPAs to a bad bank is not a solution in itself. There must be a clear resolution strategy. The China Huarong Asset Management Co. is a great example why it should be defined and not allowed to run for perpetuity.

The RBI Bulletin (2021) notes that sources of funds of ARCs have largely been bank-centric, thus although the banks transfer their NPAs to ARCs, they remain exposed to these NPAs. The same banks also continue to hold close to 70 per cent of the total security receipts. RBI has tightened bank provisioning while liberalizing foreign portfolio investment norms. Creation of the NARCL must not reverse the progress.

Further, SARFAESI was created as a means for recovery of the bad NPAs, it resulted in creating multiple, privately owned ARCs. As a result, regulations have treated ARCs like bad banks. ARCs should be allowed to purchase stressed assets from mutual funds, insurance companies, bond investors etc. ARC trusts should be allowed to infuse fresh equity in distressed companies, within IBC or outside of it.

◆ The National Asset Reconstruction Company Limited

The National Asset Reconstruction Company Ltd. (NARCL) — has been incorporated, with the Corporate Affairs Ministry giving legal recognition in July 2021. The capital structure will have a component of both equity and debt with PSBs led by Canara Bank to have controlling stake.

PSBs have identified 22 assets (stressed consortium loans of over Rs. 500 crore) worth about Rs. 82,500 crore that will be transferred to the bad bank in phases. In the long run, stressed assets worth as much as Rs. 2 lakh crore are expected to be transferred to NARCL. The accounts which have been identified by the banks include Reliance Naval and Engineering, Amtek Auto, Castex Technologies, Visa Steel, Wind World India and Lavasa Corporation, among others. The NARCL is expected to stick to the existing industry practice of paying 15 per cent in cash and 85 per cent in security receipts.

The bad bank will be headed by Padmakumar Madhavan Nair, a stressed assets expert from State Bank of India (SBI), as the managing director. The other directors are Indian Banks' Association (IBA) chief executive Sunil Mehta, SBI deputy managing director Salee Sukumaran Nair and Canara Bank's representative Ajit Krishnan Nair.

◆ Conclusion

There has been evidence to show both, the success as well as failure of the "bad bank" model. Indian policy makers must demonstrate caution while formulating the operations of the bad bank.

With the onset of the covid pandemic and with the economic devastation yet to unravel, banking in India is at a crucial juncture. Bad loans are piling on and could cause banking institutions to collapse if left unchecked.

While the NARCL will inherit the headaches of NPAs, a fresh breathing room is expected to be provided to the banks. However timely resolution to the NPAs is crucial, especially since taxpayer money is being involved. Replicating the fate of NARCL just like the China Huarong Asset Management Co. Ltd. and having its legacy tainted with multiple government bailouts and extensions will prove this experiment to be a failure.

While suggested by the Narasimham Committee back in 1998, India is catching up with its global peers in setting up an ARC dedicated to stressed loans from PSBs. Sound governance and timely resolution will play a key catalyst to judge its success or failure.

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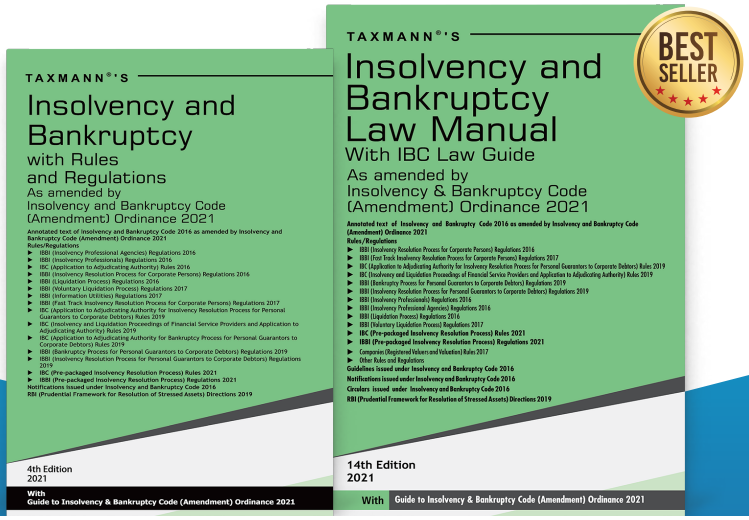
Insolvency and Bankruptcy Code

Amended, Updated & Annotated text of Insolvency & Bankruptcy Code 2016



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As Amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance 2021

Updated till 15th May 2021

	IBC Law Manual	IBC with Rules & Regulations
Guide to Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021	✓	✓
Tables showing enforcement of Provisions of IBC	✓	✓
Coverage of provisions of other Acts referred in the IBC	✓	✓
Previous Amendment at a Glance	✓	✗
Coverage of Rules & Regulations	All	Limited
Guidelines issued under the IBC	✓	✗
Notifications issued under the IBC	✓	✓
Circulars issued under the IBC	✓	✗
Coverage of RBI directions	✓	✓

(2021) 128 taxmann.com 219 (SC)

SUPREME COURT OF INDIA

Franklin Templeton Trustee Services (P.) Ltd. v. Amruta Garg

SANJIV KHANNA AND S. ABDUL NAZEER, JJ.

CIVIL APPEAL NOS. 498 TO 501 OF 2021 & OTHS.‡

JULY 14, 2021

Regulation 41, read with regulation 18 of SEBI (Mutual Funds) Regulations, 1996 - Scheme of mutual funds - Procedure and manner of Winding up - Whether Consent of unitholders of Mutual Fund Scheme would be necessary if majority of directors of trustee company decide to wind up a scheme; however, power conferred under Regulation 39(2)(a) to trustee to decide whether or not a scheme should be wound up is constitutionally valid - Held, yes - Whether however, consent of unitholders should be sought post publication of notice and disclosure of reasons for winding up under regulation 39(3) - Held, yes - Whether consent of unitholders for purpose of clause (c) to Regulation 18(15), would mean consent by simple majority of unitholders who have participated in poll; and not consent of majority of all unitholders of scheme - Held, yes (Paras 37, 42, 46 & 60)

FACTS

- The appellant was an Asset Management Company (AMC) Trustees of appellant informed unitholders of mutual fund scheme of appellant that they had decided to wind up six schemes, of appellant.
- The High Court, interpreting regulation 18(15)(*c*) and regulation 39(2)(*a*) holds that the decision of

the trustees to wind up a scheme under clause (*a*) to regulation 39(2) must muster the consent of the majority of the unitholders as per regulation 18(15)(*c*).

- Contesting said finding and interpretation, the argument of SEBI, the trustees and the AMC was that regulations 39 to 42 were complete code dealing with winding up of a scheme of mutual funds. It was argued that prior consent of the unitholders was not envisaged when the trustees, form an opinion that a scheme was required to be wound up, or when SEBI directs winding up of a scheme in the interest of the unitholders. Only when the unitholders want to wind up a scheme, a resolution by 75 per cent of the unitholders was mandated. To put it differently, the unitholders would not come into the picture when the trustees and SEBI, decide to wind up a scheme.

- Challenge to the constitutional validity of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996. Challenge had been raised by one of appellants, that SEBI had been invested with the power to issue directions for winding up a mutual fund scheme only when it was in the interest of the unitholders; further, SEBI had not prescribed/ issued guidelines or policy regarding formation of opinion by the trustees to wind up the scheme; the opinion of the trustees was given paramountcy and was supreme. Even SEBI accepts that it had no role and could not examined and set aside the decision of the trustees; there was no provision for appeal or internal challenge against the decision of the trustees who form a wrong opinion regarding winding up of the scheme.

HELD

- Investments by the unitholders constitute the corpus of the scheme. To deny the unitholders a say, when regulation 18(15)(*c*) requires their consent, debilitates their role and right to participate. It is an in-contestable position that the unitholders exercise informed choice and discretion when they invest or redeem the units. Regulations envision the unitholders not as domain experts, *albeit* as discerning investors who are perceptive and prudent. The trustees are therefore commanded to inform and be transparent. The unitholders, when in doubt, as prudent investors maybe advised to abstain, but they are not placid onlookers and helpless when the trustees decide to wind up the scheme in which they have invested. The stature and rights of the unitholders can co-exist with the expertise of the trustees and should not be diluted because the trustees owe a fiduciary duty to them. Thus, the contention that the trustees being specialists and experts in the field, their decision should be treated as binding and *fait accompli* has to be rejected not only in view of the specific language of regulation 18(15)(*c*), but to be in concinnity with

the objective and purpose of the regulations. (Para 35)

- 'Consent' for the purpose of regulation 18(15)(*c*) refers to the consent of the majority of the unitholders present and voting, and in case of a poll, the computation would be with reference to the number of units held by the unitholder. In fact, in the course of hearing, it was conceded that majority of the unitholders belong to provident fund trusts or pension funds. The voting pattern referred to in our earlier order reflects that voting under regulation 18(15)(*c*) is possible and can work smoothly without much difficulty. The apprehensions expressed, therefore, do not carry much weight. It is obvious that where the unitholders vote against winding up, consequences would follow and accordingly the scheme would not be wound up. This is a natural and normal consequence which will have to be given effect to. It would, as stated above, happen rarely and that too would not happen without any genuine and good reason. (Para 37)

- On and from the date of publication of notices under regulation 39(3), the cease and freeze effect of regulation 40 applies. The words used in sub-regulation (3) to regulation 39 are 'where a scheme is to be wound up in sub-regulation (2)', that is, a scheme is to be wound up in terms of clause (*a*), (*b*) or (*c*) to regulation 39(2). Sub-regulation (3) to regulation 39 also mandates the trustees to disclose in the public notice the circumstances leading to winding up of the scheme. This obviously means that where the trustees form an opinion to wind up a scheme, they must disclose the reasons, and thereupon, the unitholders exercise their right to vote and give or deny consent. This is the true legal effect on harmonious reading of regulation 18(15)(*c*) and regulation 39(2)(*a*). (Para 39)

- The language of clauses (*a*) and (*c*) to sub-regulations (2) and (3) to regulation 39 does not envisage involvement of the unitholders till the publication of notices in case of clauses (*b*) and (*c*) to sub-regulation (2) to regulation 39. Therefore, when clause (*a*) or (*c*) of regulation 39(2) apply, the unitholders are to be informed about the winding up by the trustees or SEBI by way of public notice. Publication in terms of regulation 39(3) is even required when the unitholders vote for winding up of a scheme under clause (*b*) of regulation 39(2). (Para 40)

- It is manifest that publication of notices under regulation 39(3) should be instantaneous without any interstice between the decision of winding up by the trustees under clause (*a*), by the unitholders under clause (*b*) or by SEBI under clause (*c*). Delay would hold up the cease-and-freeze effect of regulation 40 and consequently nullify the salutary purpose and object behind it.(Para 41)

- In view of the above discussion and harmoniously interpreting regulations 39 to 42, it is held that the consent of the unitholders, as envisaged under clause (*c*) to regulation 18(15), is not required before publication of the notices under regulation 39(3). Consent of the unitholders should be sought post publication of the notice and disclosure of the reasons for winding up under regulation 39(3). (Para 42)

- Regulation 41(1) requires calling of a meeting of the unitholders for authorising the trustees or any other person to take steps for winding up of the scheme. In case where the scheme is being wound up under regulation 39(2)(*a*), it is possible to hold a meeting of the unitholders under the said provision where if the resolution for winding up is passed, the unitholders can also decide by simple majority of the unitholders present and voting whether the trustees or any other person should take steps for winding up of the said scheme. One meeting in many a cases would suffice. (Para 44)

- Regulation 41(1) it requires calling of a meeting of the unitholders for authorising the trustees or any other person to take steps for winding up of the scheme. In case where the scheme is being wound up under Regulation 39(2)(*a*), it is possible to hold a meeting of the unitholders under the said provision where if the resolution for winding up is passed, the unitholders can also decide by simple majority of the unitholders present and voting whether the trustees or any other person should take steps for winding up of the said scheme. One meeting in many a cases would suffice. (Para 44)

- Regulation 18(15), clause (*a*) applies and requires the trustees to obtain consent of the unitholders whenever required by SEBI in the interest of the unitholders. Clause (*b*) states that the trustees would obtain consent of the unitholders whenever required to do so on the requisition made by three-fourths of the unitholders of any scheme. Accordingly, clause (*a*) would apply whenever SEBI mandates and clause (*b*) applies whenever three-fourths of the unitholders of the scheme make a requisition. (Para 45)

- The High Court was, therefore, right in observing that the trustees and the AMC have understood and accepted that the consent of unitholders of the scheme would be necessary if the majority of the directors of the trustee company decide to wind up a scheme. (Para 46)

- Section 11B empowers SEBI to issue directions and levy penalty. It stipulates that such powers can be exercised if and after making or causing any inquiry SEBI is satisfied that it is necessary - (i) in the interest of the investors or orderly development of the securities market, (ii) to prevent affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of the

investors or securities market; or (iii) to secure proper management of such intermediary or person. SEBI may issue directions to - (a) any person or class of persons referred to in section 12 or associated with the securities market, or (b) to a company in respect of the matters specified in section 11A as maybe appropriate, in the interest of the investors in securities and in the securities market. The explanation to the section is important for it clarifies, by way of removal of doubt, that the directions under this section shall include and shall always deem to include power to direct any person, who has made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of the Act, or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention. The provisions of section 11B have been held to be procedural in nature and include not only an individual but also a company. Therefore, any person associated with the securities market who commits breach of the SEBI Act, Rules and Regulations, can be subjected to such directions and measures as maybe imposed and issued by SEBI. Sub-section (2) to section 11B states that SEBI may after holding an inquiry pass an order in writing, and, without prejudice to the provisions of section (11), levy penalty under sections 15A, 15B, etc. (Para 52)

- If there is a violation of the regulations, *i.e.* Clause (*a*) to regulation 39(2), 39(3), 40, 41 or 42 by the trustees or the AMC, it is open to SEBI to proceed in accordance with law and in terms of sections 11 and 11B of the Act. It would be, therefore, incorrect to state that the decision of the trustees under clause (*a*) to regulation 39(2) cannot be made subject matter of inquiry or investigation and therefore no directions or orders under section 11 or 11B of the Act can be passed. No doubt, clause (*a*) to regulation 39(2) gives primacy to the opinion of the trustees and does not require prior approval of SEBI, yet SEBI is entitled to conduct an inquiry and investigation when justified and necessary to ascertain whether the trustees have acted in accordance with their fiduciary duty and also for reasons which would fall within the four corners of clause (*a*) to regulation 39(2). If the trustees have acted for extraneous and irrelevant reasons and considerations, the action would be in violation of clause (*a*) to regulation 39(2) and therefore amenable to action under the SEBI Act, including directions under section 11B. (Para 54)

- The Trustees and the AMC in their written submissions filed before the High Court interpreting the SEBI Act and the regulations had conceded that SEBI has extensive powers with respect to the regulation of mutual funds including the trustee's decision to wind up a scheme of

the mutual fund. Section 11(1) of the SEBI Act states that it is the duty of SEBI to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by 'such measures as it thinks fit'. Under section 11B of the SEBI Act, SEBI has broad powers to issue appropriate directions if it is satisfied after inquiry that such directions are necessary in the interest of investors or for orderly development of securities market or to prevent the affairs of any intermediary being conducted in a manner detrimental to the interest of investors or the securities market or to secure proper management of any intermediary or other person. The power of SEBI extends to regulating and monitoring the functioning and decisions taken by mutual funds, the trustees and the AMC. SEBI has the power to pass any direction if it deems fit in the interest of unitholders. (Para 56)

- However, the High Court was justified in holding that the Regulations have been framed in exercise of power conferred by section 30 of the SEBI Act which authorises them to make regulations consistent with the provisions of the SEBI Act to carry out the purpose of the SEBI Act. The very object of the SEBI Act is to preserve confidence of the investors and to regulate the capital market, including mutual funds. In the first portion of this order, we have elaborately referred to the regulations which thereby create a three-tier system of the sponsor, the AMC and the trustees. There are stipulations regulating the activities of the trustees and the AMC whose powers, obligations and rights have been expressly laid down. The power to regulate mutual funds, once accepted, would include the power to make regulations for winding up of a scheme of the mutual fund. Not framing any regulation in this regard would have amounted to dereliction of duty on the part of SEBI and subjected it to adverse comments. (Para 57)

- It cannot be accepted that the trustees under clause (*a*) to regulation 39(2) have been given absolute and unbridled power to wind up a scheme. The trustees hold the assets of the scheme in fiduciary capacity on behalf of the investors. They are experts in the field and, therefore, conferred the power under regulation 39(2)(*a*) to decide whether or not a scheme should be wound up. (Para 58)

- High Court was also justified in holding that the opinion of the trustees under clause (*a*) to regulation 39(2), must be consented to by the unitholders in terms of the mandate of regulation 18(15)(*c*). In view of this interpretation, the argument challenging constitutional validity of the Regulations on the ground that they give unbridled and absolute power to the trustees loses much of its sting and force. There are, therefore, sufficient guidance and safeguards in the Regulations itself on the power of the trustees

to decide on winding up of the fund. (Para 60)

CASE REVIEW

Franklin Templeton International v. *Amruta Garg* (2021) 124 taxmann.com 326/164 SCL 720 (SC) *affirmed*.

CASES REFERRED TO

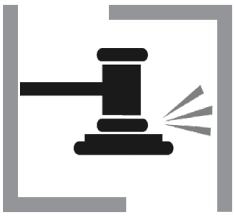
State of Tamil Nadu v. *P. Krishnamurthy* (2006) 4 SCC 517 (para 49), *Shayara Bano* v. *Union of India* (2017) 9 SCC 1 (para 49), *Senior Superintendent of Post Offices* v. *Izhar Hussain* 1989 taxmann.com 644 (SC) (para 49), *Director General, Central Reserve Police Force* v. *Janardan Singhand* (2018) 7 SCC 656 (para 49), *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 49), *Alka Synthetics & Trading* v. *SEBI* (1998) 15 SCL 213 (Guj.) (para 55), *Nikhil T. Parikh* v. *Union of India* (2014) 45 taxmann.com 125/127 SCL 205 (Guj.) (para 55), *Sterlite Industries (India) Ltd.* v. *SEBI* (2001) 34 SCL 485 (para 55), *Nisha Priya Bhatia* v. *Union of India* (2020) 13 SCC 36 (para 58), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 62) and *Union of India* v. *Raman Iron Foundry* (1974) 2 SCC 231 (para 62).

Dr. Abhishek Manu Singhvi, Sr. Adv., **Ashish Bhan**, **Mohit Rohatgi**, Advs., **Jasmeet Singh**, AOR, **Ketan Gaur**, **Ashim Sood**, **Rajendra Dangwal**, **Saif Ali**, **R.S. Saluja**, Advs., **Ravindra Shrivastava**, Sr. Adv., **Arjun Garg** Adv., **Abhinav Shrivastava**, AOR, **Nirmal Prasad**, Adv., **Ms. Meenakshi Arora**, Sr. Adv., **Nithyaesh Natraj**, **Vaibhav R. Venkatesh**, Advs., **Gopal Singh**, AOR, **Anirudh Sriram**, Adv., **Manish Kumar**, AOR, **Ms. Madhumita Bhattacharjee**, AOR, **Ms. Srija Chowdhury**, **Anant**, **Pratap Venugopal**, **Ms. Surekha Raman**, **Akhil Abraham Roy**, **Vijay Valsan**, **Paritosh Gupta**, Advs., **Ms. Supriya Juneja**, AOR, **Aditya Singla**, Adv., **Ms. Aishwarya Reddy**, **Ms. Cheshta Jetly**, **Shivam Singh**, **Sahil Raveen**, **Jaideep Khanna**, **Vidur Diwedi**, **Puneet Jain**, **Harshit Khanduja**, **Harsh Jain**, **Akshat Maheshwari**, **Harshvardhan Sharma**, **Neeraj Sharma**, Advs., **Ms. Christi Jain**, **Dheeraj Nair**, AORs, **Kumar Kislay**, **Angad Baxi**, **Rajat Nair**, **Ms. Priyanka Das**, Advs., **Arvind Kumar Sharma**, **Sanjay Kapur**, AORs, **V.M. Kannan**, **Ms. Megha Karnwal**, **Arjun Bhatia**, **Mrs. Shubhra Kapur** and **Lalit Rajput**, Advs. *for the Appearing Parties.*

‡ Arising out of *Franklin Templeton International* v. *Amruta Garg* (2021) 124 taxmann.com 326/164 SCL 720 (SC).

For Full Text of the Judgment see

(2021) 128 taxmann.com 219 (SC)



(2021) 128 taxmann.com 284 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bank of Maharashtra v. Videocon Industries Ltd.

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS.) NOS. 503 & 505 OF 2021†

JULY 19, 2021

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellant was a dissenting financial creditor of corporate debtor, which was undergoing a consolidated CIRP - Resolution plan in respect of corporate debtor had been approved - It provided that Non-convertible Debentures (NCDs) would be issued to financial creditors in discharge of debt - However, NCLT by impugned order directed payment of cash - Whether considering exceptional facts of instant matter, impugned order was to be stayed till next date and status quo ante as before passing of impugned order was directed to be maintained - Held, yes (Para 14)

FACTS

- Corporate debtors (Videocone Group) were undergoing a consolidated CIRP and resolution plan had been approved.
- The appellant was dissenting financial creditor of corporate debtor.
- Resolution Plan provided that Non-Convertible Debentures (NCDs) would be issued to appellant-financial creditors in discharge of debt but Adjudicating Authority by impugned order directed payment of cash.

HELD

- Considering the observations of the Adjudicating Authority and the submissions made by the appellants in the appeals and the grounds raised in the appeals, and considering the exceptional facts of present matter the impugned order is stayed till the next date and status *quo* ante as before passing of the impugned order is directed to be maintained. Resolution Professional will continue to manage the corporate debtors as per provisions of IBC till the next date. (Para 14)

CASE REVIEW

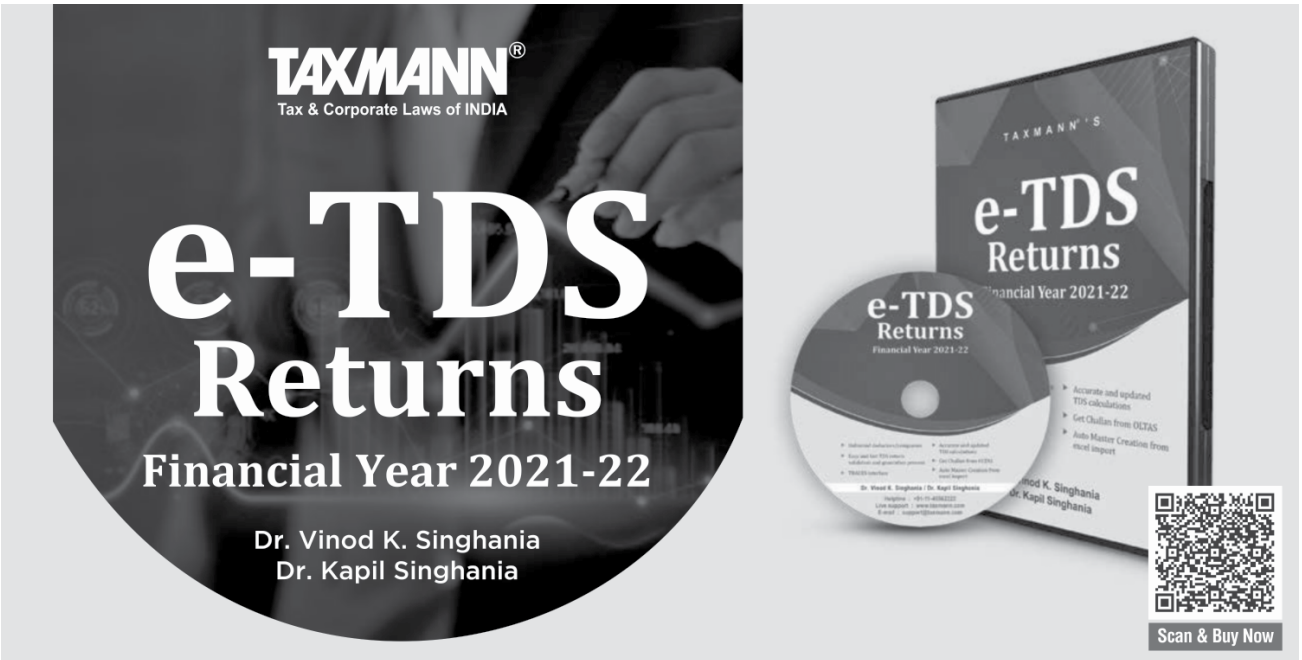
Videocon Industries Ltd., In re (2021) 128 taxmann.com 283 (NCLT - Mum.) (para 14) *stayed.*(***see Annex***)

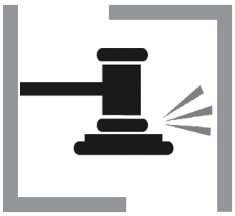
Ranjit Kumar and **Garima Prashad**, Sr. Advs. **Chaitanya Nikte**, **Ayush Negi**, **Prasad Sarvankar**, **Sumedh Ruikar**, **Ms. Sneha Bhunge**, **Raj V.K. Vprmai**, **Abhinav Agarwal**, **Anuj Malhotra** , **Karan Valecha** and **Sanjay Vashishtha**, Advs. *for the Appellant.* **Abhinav Vasisht**, Sr. Adv., **Anoop Rawat**, **Saurav Panda**, **Vajiayant Paliwal**, **Zeeshan Khan**, **Moulshree Shukla**, **Prabh Simran Kaur**, **Bishwajit Dubey**, **Madhav Kanoria**, **Diwakar Maheshwari** and **Ms. Shreyas E.**, Advs. *for the Respondent.*

† Arising from *Videocone Industries Ltd.*, In re (2021) 128 taxmann.com 283 (NCLT - Mum.) *See Annex.*

For Full Text of the Judgment see

(2021) 128 taxmann.com 284 (NCLAT- New Delhi)





(2021) 129 taxmann.com 296 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Anuj Tejpal v. Rakesh Yadav

ANANT BIJAY SINGH, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

I.A. NOS. 815 & 816 OF 2021 AND OTHERS
DIARY NOS. 27487 & 27488 OF 2021 COMPANY APPEAL (AT) (INSOLVENCY) NO. 298 OF 2021†

JULY 7, 2021

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Appellate Tribunal Rules, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether in interest of justice, inherent powers under rule 11 can be exercised by NCLAT which may allow or disallow application for withdrawal of CIRP proceedings keeping in view interest of concerned parties and facts of each case - Held, yes - Whether where prior to constitution of Committee of Creditors all amounts due and payable by corporate debtor to operational creditor, who filed section 9 application, had been paid in full and parties had come to a settlement, application for withdrawal of CIRP proceedings in exercise of inherent powers under rule 11 was to be allowed - Held, yes (Para 46)

FACTS

- The 'OYO' had executed the Management Service Agreement (MSA), with the operational creditor and granted license. During the subsistence of MSA all rights and liabilities were transferred to company MTH, a distinct legal entity MTH revised the term of commercial arrangement wherein the benchmark revenue payable to the 'operational creditor' was modified. Section 8 demand notice was issued by the 'operational creditor' to OYO demanding payment pertaining to the period July, 2019 to September, 2019.
- Application under section 9 was filed against 'OYO.' Adjudicating Authority admitted said application.
- An appeal again order of admission of application was filed on ground that the dues under the present MSA if payable to the 'operational creditor' could only be claimed against MTH and not against 'OYO' and therefore the Adjudicating Authority ought not to have admitted the petition under section 9 ignoring the factum that the application was filed against incorrect legal entity and also the existence of 'pre-existing dispute'.

- Subsequently, the erstwhile director of 'OYO' filed an application under rule 11 read with rule 31 of the National Company Law Appellate Tribunal Rules, 2016 seeking a direction to set aside the impugned order in exercise of the inherent powers under rule 11, in view of the settlement arrived at between the parties. It was stated that all disputes, claims and counter claims of the 'operational creditor' *qua* both 'OYO' as well as 'MTH' stand settled to the full satisfaction of the parties and the 'operational creditor' has issued a letter to that effect. It was also submitted that the IRP had received the payment towards the total expenses incurred by him and there was no further amount outstanding in this regard.

HELD

- Section 12A deals with the situation of withdrawal of application admitted under section 7, 9 or 10, on an application made by the applicant with the approval of 90 per cent voting share of the Committee of Creditors, in such manner as may be specified', meaning thereby that section 12A refers to a situation Post-Constitution of CoC. (Para 40)

- Rule 11 of NCLAT Rules, 2016 provides that 'Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.' It is a well settled proposition of law that substantive law takes precedence over a regulation and section 12A clearly refers to withdrawal of an application under section 7, 9 or 10 after the Constitution of the Committee of Creditors, seeking approval of 90 per cent of the voting share of the CoC. (Para 41)

- In the interest of Justice, the inherent powers under rule 11 can be exercised by both NCLT and NCLAT which may allow or disallow the Application of Withdrawal keeping in view the interest of the concerned parties and the facts of each case. (Para 45)

- The communication filed by the all amounts due and payable by corporate debtor to operational creditor, who filed section 9 application, have been paid in full and final satisfaction, to parties concerned in that Application, together with IRP Cost. Thus, the application of Withdrawal in exercise of inherent power under rule 11, was be allowed. (Para 46)

CASE REVIEW

Rakesh Yadav v. *OYO Hotels & Homes (P.) Ltd.* (2021) 126 taxmann.com 146 (NCLT - Ahd.) (para 47) (*reversed*).

CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC)

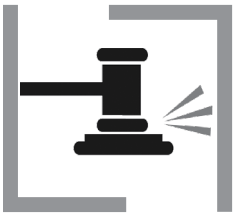
(para 6), *Mothers Pride Dairy India (P.) Ltd.* v. *Portrait Advertising & Marketing (P.) Ltd.* (2018) 92 taxmann.com 186 (SC) (para 10), *Indus Biotech (P.) Ltd.* v. *Kotak India Venture (offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129 (SC) (para 10), *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (para 10), *Sintex Plastics Technology Ltd.* v. *Zielen Industries (P.) Ltd.* (2021) 128 taxmann.com 273 (NCLAT - New Delhi) (para 10), *Sandeep Kukkar* v. *Vijay Kumar Todi* 2020 SCC Online NCLAT 897 (para 10), *Francis John Kattukaran* v. *Federal Bank Ltd.* (Co. Appeal (AT) (Insolvency) No. 242 of 2018, dated 11-12-2018) (para 10), *Sushil Ansal* v. *Ashok Tripathi* (2020) 118 taxmann.com 569 (NCL-AT) (para 12), *Jai Kishan Gupta* v. *Green Bdge Buildtech LLP* (2020) 114 taxmann.com 109/158 SCL 116 (NCL-AT) (para 12), *Bhaskar Biswas* v. *Devi Trading & Holding (P.) Ltd.* 2019 SCC online NCLAT 1072 (para 12), *Samarth Lifters (P.) Ltd.* v. *DBM Geotechnics & Constructions (P.) Ltd.* (C.P. (IB) 1798 of 2018, dated 30-8-2019) (para 14), *Abhishek Singh* v. *Huntamaki PPL Ltd.* (Co. Appeal (A.T.) (Insolvency) No. 235 of 2021, dated 26-3-2021) (para 14), *Hadi Mohd. Taher Badri* v. *Neeraj Gupta* (Co. Appeal (AT) (Insolvency) No. 107 of 2019, dated 5-4-2019) (para 14), *Javitri Estates (P.) Ltd.* v. *Chryso India (P.) Ltd.*(Co. Appeal (AT) (Insolvency) No. 888 of 2019, dated 30-8-2019) (para 14), *Chitra Sharma* v. *Union of India* (2017) 88 taxmann.com 205/(2018) 145 SCL 425 (SC) (para 14), *Ghanshyam Mishra & Sons (P.) Ltd* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 14), *Narayan Singh Pathania* v. *Valuelabs LLP* (Co. Appeal (AT) (Insolvency) No. 1415 of 2019, dated 9-2-2021) (para 21), *Gajendra Sharma* v. *Dinesh Sanitary Store* (Co. Appeal (AT) (Insolvency) No. 119 of 2020, dated 3-2-2020) (para 21), *Phool Chand Goyal* v. *Avneet Goyal* (2020) 118 taxmann.com 549/162 SCL 336 (NCL-AT) (para 21), *Sunil Tandon* v. *Manoj Kumar Anand* (Co. Appeal (AT) (Insolvency) No. 283 of 2019, dated 15-4-2019) (para 21), *Janak Dhawan* v. *Famous Innovations Digital Creative (P.) Ltd.* (Co. Appeal (AT) (Insolvency) No. 769 of 2019, dated 20-12-2019) (para 21), *Gouri Prasad Goenka* v. *Surendra Kumar Agarwal* (2020) 118 taxmann.com 401/(2021) 164 SCL 57 (NCL-AT) (para 21), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 26), *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* AIR 1941 FC 5 (para 26), *Shiv Shakti Co-op. Housing* v. *Swaraj Developers* (2003) 6 SCC 659 (para 26), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 26), *Jogendra Kumar Arora* v. *Dharmender Sharma* (2019) 109 taxmann.com 319 (NCL-AT) (para 28), *Avishek Roy* v. *Diamond Steel Enterprises* (Co. Appeal (AT) (Insolvency) No. 794 of 2018, dated 12-3-2019) (para 30), *Ashok Kumar Tibrewala* v. *Diamond Steel Enterprise* (Civil Appeal No. 1778 of 2020, dated 2-3-2020) (para 30), *Vishal Gupta* v. *Aanav Construction* (Co. Appeal (AT) (Insolvency) No. 1016 of 2019, dated 23-1-2020) (para 31), *Vivek Verma* v. *IRPO Sugar Engineering (P.) Ltd.* (Co. Appeal (AT) (Insolvency) No. 967 of 2019, dated 16-10-2019) (para 32), *K.C. Sanjeev* v. *Easwara Pillai Kesavan Nair* (Co. Appeal (AT) (Insolvency) No. 1427 of 2019, dated 28-2-2020) (para 35) and *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* (Appeal (C) No. 31557 of 2018, dated 14-12-2018) (para 40).

Mukul Rohatgi, Sr. Adv., **Abhijeet Sinha**, **Jeevan Ballav Panda**, **Ms. Shalini Sati Prasad**, **Ms. Meher Tandon**, **Satish Padhi**, **Gaurav Sharma**, **Ms.Shreya Agarwal**, **Ishan Nagar**, **Harsh Kaushik**, **Rakesh Yadav**, **Kumar Anurag Singh**, **Srinivas Kotni**, **Shantam Gorawara**, **Zain A. Khan**, **Keyur J. Shah**, **Ms. Noopur K. Dalal**, **Pankaj Jain**, **Ameya Ranade**, **Mohit Chaudhary**, **Ms. Garima Sharma**, **Ramchandra Madan**, **Rahul Gupta**, **Krishnendu Datta**, Sr. Adv., **Samer Parekh**, **Sumit Goel**, **Ms. Sonal Gupta**, **Ms. Malvika Bhenot**, **Salvador Santosh Rebello**, **Debesh Panda**, **Ms. Mithali Gupta**, **Raghav Sharma**, **Ms.Anukriti Dua**, **Mukesh Suhkhija**, **P.S. Ghai**, **Paras Mithal** and **Carlos De Sousa** *for the Appearing Parties.*

† Arising out of *Rakesh Yadav* v. *OYO Hotels & Homes (P.) Ltd.* (2021) 126 taxmann.com 146 (NCLT - Ahd.)

For Full Text of the Judgment see

(2021) 129 taxmann.com 296 (NCLAT - New Delhi)



(2021) 129 taxmann.com 298 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

9M Corporation v. Naresh Verma

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 45 OF 2021†

JULY 13, 2021

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Whether where company 'BIL' had given 'guarantee' on behalf of principal borrower for items referred to in sub-clause (i) of section 5(8), guarantor company 'BIL' would also come within meaning of 'corporate debtor' qua 'financial creditor' in whose favour guarantee had been given - Held, yes (Paras 22 and 27)

FACTS

- Section 7 application filed by the appellant financial creditor against the company BPPL was admitted.
- During CIRP, one non-banking finance company 'STCI' filed its claim before IRP. Said claim was based on debtor-creditor relationship, which was the result of guarantee given by the BPPL for a loan of Rs. 24 crores sanctioned by STCI to 'BIL', which was a group concern of the corporate debtor.
- It was claimed by the appellant that BPPL had furnished a collateral security to STCI and thus STCI was not a financial creditor as defined in section 5(7) and section 5(8) since the fundamental requirement of a financial debt was disbursal against the consideration for the time value of money. The appellant had also claimed that the Adjudicating Authority had not considered important distinction between 'debt' and 'financial debt', and had considered the debt advanced by STCI to be a financial debt. The appellant had, therefore, prayed for setting aside the impugned order and directing RP to reconstitute the CoC of the corporate debtor in accordance with section 21.

HELD

- It is an admitted position, that there is disbursement of debt against the consideration for the time value of money by the creditor STCI to the borrower BIL. (Para 18)
- A Deed of Guarantee was executed by BPPL (the Guarantor) and BIL (the

borrower) on an unconditional and irrevocable corporate guarantee of the Guarantor is included explicitly. This corporate guarantee is in relation to the loan provided by STCI to BIL. (Para 19)

- Liability arising out of guarantee for any of the items referred in sub-clauses (*a*) to (*h*) is Financial Debt. The requirement for a debt to be a financial debt and such a creditor to be a financial creditor. (Para 22)
- In the facts of the present case, on the basis of corporate guarantee given by BPPL for the loan provided by STCI to BIL; STCI is a financial creditor in the Corporate Insolvency Resolution Process of the corporate debtor BPPL. (Para 27)

CASE REVIEW

9M Corporation v. *Naresh Verma* (2021) 129 taxmann.com 297 (NCLT - Jaipur) (para 27) *affirmed* (***See annex***).

CASES REFERRED TO

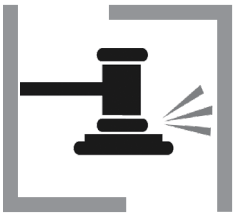
Ascot Realty (P.) Ltd. v. *Ajay Kumar Agarwal* (Co. Appeal (AT) (Ins) No. 658 of 2020, dated 15-10-2020) (para 6), *Anuj Jain* v. *Axis Bank Ltd.* (2020) 115 taxmann.com 1 (SC) (para 6), *Amrit Kumar Agarwal* v. *Tempo Appliances (P.) Ltd.* (2021) 125 taxmann.com 406/164 SCL 763 (NCL - AT) (para 8) and *SBI* v. *Smt. Kusum Vallabhdas Thakkar* 1991 SCC Online Guj 14 (para 10).

Ms. Anju Jain, **Hitesh Sachar**, Advs. *for the Appellant.* **Amol Vyas**, **Ms. Saumil Sharma**, **RP, Atul Sharma, Kamal Gupta,** Caveators, **Dhruv Dewan**, **Tabrez Malawat** and **Ms. Harshita Choubey**, Advs. *for the Respondent.*

† Arising Out of Order of NCLT Jaipur in *9M Corporation* v. *Bohra Partisha (P.) Ltd.* (2021) 129 taxmann.com 297.

For Full Text of the Judgment see

(2021) 129 taxmann.com 298 (NCLAT - New Delhi)



(2021) 129 taxmann.com 312 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Deputy Commissioner, CGST Kalol, Gujarat v. Gopala Polyplast Ltd.

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 477 OF 2021†

JULY 16, 2021

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - During Corporate Insolvency Resolution Process (CIRP) of respondent, appellant-operational creditor on behalf of CGST, 'Department of Goods and Services Tax', had filed claim of outstanding GST dues recoverable from corporate debtor - Appellant stated that claim was admitted to extent of a sum - However, resolution plan approved by Committee of Creditors had made provision of meagre sum as full and final settlement of dues of appellant - NCLT by impugned order approved resolution plan - Whether resolution plan approved is binding on Central Government, State Government, any local authority, Guarantors and other stakeholders - Held, yes - Whether sufficiency or insufficiency of amount is matter of commercial decision of Committee of Creditors and it would not be appropriate on part of Appellate Tribunal to interfere in same - Held, yes - Whether therefore, appeal was not to be admitted - Held, yes (Paras 5 and 6)

FACTS

- During the Corporate Insolvency Resolution Process (CIRP) of the respondent-corporate debtor, the appellant for 'CGST, Department of Goods and Services Tax' had filed claim of the outstanding GST dues recoverable from the corporate debtor. The claim was admitted to an extent.
- However, Resolution Plan approved by the Committee of Creditors had made provision of a meagre sum as full and final settlement of the dues of the appellant.
- The Adjudicating Authority (NCLT) by impugned order approved the Resolution Plan.
- On appeal, appellant stated that the amount approved for the appellant-operational creditor was too insufficient considering the claim which was outstanding. The appellant, thus, submitted that the Resolution Plan as approved was required to be interfered with.

HELD

- The Resolution Plan approved is binding on the Central Government, State Government, any local authority, Guarantors and other stakeholders. Sufficiency or insufficiency of the amount is matter of Commercial Decision of the Committee of Creditors. It would not be appropriate on part of Appellate Tribunal to interfere in the same. As such, the appeal did not make out any ground to admit the same. (Para 5)

- Thus, the appeal was not to be admitted. (Para 6)

CASE REVIEW

Vikash G. Jain v. *Gopala Polyplast Ltd.* (2020) 120 taxmann.com 273 (para 6) *affirmed.*

*Ghanshyam Mishra & Sons (P.) Ltd.*v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 5) *followed.*

CASES REFERRED TO

Ghanshyam Mishra & Sons (P.) Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 4).

Sonu Bhatnagar, Sr. Adv., **Vaibhav Joshi**, **Ms. Mallika Joshi** and **Venus Mehrotra**, Advs. *for the Appellant.* **Jaimin R. Dave**, Adv. *for the Respondent.*

ORDER

1. This Appeal has been filed by the Appellant against impugned order passed in *Vikash G. Jain* v. *Gopala Polyplast Ltd.* (2020) 120 taxmann.com 273 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench at Ahmedabad approving the Resolution Plan.

2. Heard Learned Counsel for the Appellant and Learned Counsel for the Respondent. Respondent is 'M/s Gopala Polyplast Limited' who has gone through Resolution Process and is now under the Successful Resolution Applicant. The appeal claims and Learned Counsel for the Appellant has argued that during the Corporate Insolvency Resolution Process (CIRP) of the Respondent the Appellant for 'CGST, Department of Goods and Services Tax, Kalol, Gandhinagar, Gujarat' has filed claim of the outstanding GST dues recoverable from the Corporate Debtor. The claim, as pointed out at page 47, is dated 30th May, 2019. The Learned Counsel submits that the claim was admitted to the extent of Rs. 2,36,67,282/-. It is stated that the Resolution Plan approved by the Committee of Creditors has made provision of only Rs. 1,18,336/- as full and final settlement of the dues of the Appellant, as can be seen from Annexure A-4 (Page 53).

3. The Learned Counsel for the Appellant submits that the amount approved for the Appellant - Operational Creditor is too insufficient considering the claim which was outstanding. The Learned Counsel, thus, submits that the Resolution Plan as approved was required to be interfered with.

4. Having Heard Learned Counsel for both sides. Perused judgment in the matter of *Ghanshyam Mishra & Sons (P.)*

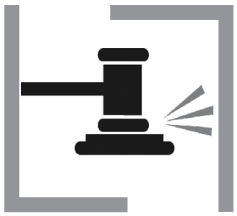
Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC). In the said judgment the Hon'ble Supreme Court has dealt with issues in this context and Para 95 of the judgment reads as under:–

> "95. In the result, we answer the questions framed by us as under:
>
> (*i*) That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;
>
> (*ii*) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;
>
> (*iii*) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued."

5. Considering the above judgment of the Hon'ble Supreme Court, the Resolution Plan approved is binding on the Central Government, State Government, any local authority, Guarantors and other stakeholders. Sufficiency or insufficiency of the amount is matter of Commercial Decision of the Committee of Creditors. It would not be appropriate on our part to interfere in the same. As such, the appeal does not make out any ground to admit the same.

6. For the given reasons, we decline to admit the Appeal. The Appeal is disposed of as not admitted. No costs.

† Arising from order of NCLT - Ahmedabad *Vikash G. Jain* v. *Gopala Polyplast Ltd.* (2020) 120 taxmann.com 273.



(2021) 129 taxmann.com 294 (Kerala)

High Court of Kerala

Ideal Surgicals v. National Company Law Tribunal

V.G. ARUN, J.

WP (C) NOS. 8257, 11233 & 12125 OF 2021

JULY 2, 2021

Section 61 of the Insolvency and Bankruptcy Code, 2016, read with Article 226 of the Constitution of India, 1950 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - Petitioner-operational creditor filed writ petition being aggrived by order of NCLT, where by NCLT admitted resolution plan submitted by resolution applicant - Whether since an effective alternative remedy being available with petitioner by way of statutory appeal under section worth 61, instant writ was not maintainable - Held, yes (Para 9)

CASES REFERRED TO

Sulochana Gupta v. *RBG Enterprises (P.) Ltd.* (2020) 119 taxmann.com 390 (Ker.) (para 4), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 4), *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 4) and *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 7).

G. Harikumar (**Gopinathan Nair**) and **Akhil Suresh**, Advs. *for the Petitioner*. **P. Vijayakumar**, ASG, **K. Latha**, **Pradeep Joy**, **S. Sreekumar**, and **P.H. Arvindh Pandian**, Sr. Advs., **Millu Dandapani**, **P. Martin Jose**, **P. Prijith**, **Thomas P. Kuruvilla**, **Anna Linda V.J. Ajay Ben Jose**, **Manjunath Menon**, **R. Githesh**, Advs. *for the Respondent*.

JUDGMENT

1. The challenge in these original petitions is against the proceedings of the National Company Law Tribunal (NCLT), Kochi Bench. The essential facts are as under; For the sake of convenience, the parties and the Exhibits are referred to, as described in W.P.(C) No. 8257 of 2021;

The proceedings under challenge pertains to the Corporate Insolvency Resolution Process initiated under the Insolvency and Bankruptcy Code, 2016 (`the Code' for short) with respect to the 4th respondent; Corporate Debtor. The proceedings commenced at the instance of two Operational Creditors. Ext. P1 order was issued by the NCLT appointing the second respondent as Interim Resolution Professional (IRP). The IRP was reappointed as the Resolution Professional (RP) by the members of the Committee of Creditors. In accordance with the procedure prescribed by the Code, application under sections 30(6) and 31(1) was filed by the RP, seeking approval of the Resolution Plan submitted by the third respondent; Resolution Applicant. By Ext. P2 order dated 22-2-2021, the NCLT

approved the Resolution Plan and made it effective from the date of order. Being aggrieved by Ext. P2 order, the petitioners, who are Operational Creditors, preferred appeals before the National Company Law Appellate Tribunal (NCLAT). These writ petitions are filed on the premise that the appeals and stay petitions are not being taken up by the NCLAT. While admitting the writ petition, this Court granted an interim stay of further proceedings pursuant to Ext. P2 order.

2. The third respondent and the additional 5th respondent has challenged the very maintainability of the writ petition.

3. I heard Advocates Akhil Suresh and Jinish Paul appearing for the petitioners, Senior Advocates Sri. P.H. Arvindh Pandian, Sri. S. Sreekumar appearing for the contesting respondents, Sri. Millu Dandapani for the Corporate Debtor, Smt. K. Latha for the Resolution Professional and Smt. S. Krishna, learned Counsel representing the ASG.

4. The maintainability of the writ petitions is challenged on the ground that the petitioners have an effective alternative remedy of appeal under section 61 of the Code. In support of this contention, reliance is placed on the Division Bench decision of this Court in *Sulochana Gupta* v. *RBG Enterprises (P.) Ltd.* (2020) 119 taxmann.com 390. The averment in the writ petitions that the appeals are not being taken up, as the NCLAT is on leave, is refuted. According to the learned Senior Counsel, the appeals are defective and will be taken up only after the defects are cured. It is pointed out that the NCLAT is functioning and the appeals filed by other Operational Creditors against Ext. P2 order had come up for admission. However, no stay or even *status quo* order was granted. It is contended that interference by the High Court, in exercise of jurisdiction under Article 226 of the Constitution, will defeat the very objective of the Code, which has been enacted with a view to consolidate and amend the law relating to insolvency resolution. Attention is drawn to the observations of the Hon'ble Supreme Court in *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 and *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) to contend that the IBC, 2016 being a self contained Code, the High Courts should refrain from interfering with the resolution process.

5. Learned Counsel for the petitioners submitted that their appeals have been accepted by the NCLAT, but are yet to be numbered and posted for admission. In the meanwhile, if the resolution process is continued in accordance with Ext. P2 order, the appeals will be rendered infructuous. In such circumstances, the High Court can, in the interest of justice, exercise its jurisdiction under Article 226 to safeguard the interest of the petitioners, till the appeals are taken up for consideration. Ext. P3 is pointed out to be an interim order granted by this Court under similar circumstances.

6. Learned Counsel for the 4th respondent supported the submissions made on behalf of the petitioners and contended that Ext. P2 order is patently illegal. That, hasty steps are being taken to give effect to the order before the appeals are taken up for hearing and that, implementation of the Resolution Plan will cause serious

prejudice to the Corporate Debtor and its creditors.

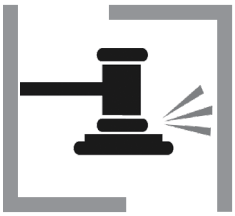
7. As observed by the Apex Court in *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625, the IBC, 2016 is a Single Unified Umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time bound manner. The code provides a three-tier mechanism namely, (*i*) the NCLT, which is the adjudicating authority (*ii*) the NCLAT, which is the appellate authority (*iii*) the Supreme Court, which is the final authority, for dealing with all issues that may arise in relation to the reorganisation and insolvency resolution of corporate persons. An order passed by the NCLT is appealable to the NCLAT under section 61 of the Code and the orders of the NCLAT are amenable to the appellate jurisdiction of the Supreme Court under section 62.

8. In *Swiss Ribbons (P.)Ltd.* (*supra*), the Honourable Supreme Court, while rejecting the challenge against certain provisions of the code held as under:

"The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."

9. One of the issues that arose for consideration before the Division Bench in Sulochana Gupta, was the maintainability of the writ petition under Article 226 against an order of the NCLT. The Division Bench, after elaborate survey of precedents, answered the issue by holding that the writ petition to be not maintainable.

In view of the exposition of the Hon'ble Supreme Court regarding the objective of the Code and the authoritative pronouncement of the Division Bench, with which I am in respectful agreement, the writ petitions are dismissed.



(2021) 129 taxmann.com 295 (NCLT - Ahd.)

NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH

Committee of Creditors v. Parag Seth

MADAN B. GOSAVI, JUDICIAL MEMBER AND VIRENDRA KUMAR GUPTA, TECHNICAL MEMBER

IA NO. 370 OF 2021 CP (IB) NO. 781 OF 2019

JULY 12, 2021

Section 22 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution Professional - Appointment of - An application filed under section 7 in case of corporate debtor was admitted and Interim Resolution Professional (IRP) was appointed - Committee of Creditors (CoC) in its meeting with 78.26 per cent voting shares had passed a resolution to not to continue said IRP as RP and resolved to appoint new RP - It was noted that erstwhile IRP had performed his duties as expected from him under Code and he was removed from his duties without assigning reasons - It was also noted that new RP was based at a location which was far distant from location where corporate debtor and its properties were situated - Further, fee quoted by new RP was higher as compared to fee quoted by erstwhile IRP and new RP also appeared to have enough workload which would delay timely resolution of insolvency of corporate debtor - Whether it was an instance of an imprudent decision in facts and circumstances of case, and therefore, decision of CoC was liable to be rejected and erstwhile IRP was to be confirmed as RP - Held, yes (Para 13)

FACTS

- The corporate debtor was admitted into corporate insolvency resolution process by Adjudicating Authority and IRP was appointed. However, in first meeting the CoC had passed the resolution to not to continue IRP as RP. The CoC had approved the name of new RP with 78.26 per cent votes.
- The CoC through one of its members has filed an affidavit in support of the application wherein it had been submitted that the objectors were opposing the appointment of RP without any valid ground which was absurd, vexatious, and not tenable in law. The CoC had already passed the resolution to appoint an RP with 78.26 per cent votes after rejecting the appointment of IRP as RP with similar percentage of votes.

HELD

- It may not be inappropriate to state that it is an instance of an

imprudent decision in the facts and circumstances of the case where proposed IRP is located at a location distant from location where corporate debtor and its properties were situated. Further, new RP has also quoted higher fee and appears to be having sufficient assignments in his hand and, therefore, the basic objects of Code including timely resolution of insolvency of corporate debtor may not be possible to achieve. It is noted that the originally appointed IRP performed his duties as expected from such IRP under the Code. No material has been brought on record to show the incompetence or otherwise non-suitability of the erstwhile IRP while passing a resolution of removal of such IRP and appointing a new RP in place of erstwhile IRP. Further, impugned order was passed without assigning any reason. Thus, considering this factual situation, the action of the CoC deserves to be cancelled. (Para 11)

- The success of CIRP is contingent upon independence competence of IRP and genuineness of intent of Committee of Creditors who acts in fiduciary capacity for all stakeholders and not merely confining to fulfilling of their own interests which makes IBC, like earlier regimes where individual actions and rights were a primary focus. Further, under the present structure such approach of Committee of Creditors would result into substantial damage to larger public interests including showing down of economy due to massive write-offs imposed upon operational creditors who may become insolvent or go out of business due to loss of their legitimate dues. Thus, more unemployment and non-availability of credit, defeating one of the objects of IBC. Such approach of Committee of Creditors gets reflected from the very beginning in replacing IRP in this manner, hence, this needs to be checked at this stage only, so as to make CIRP achieve the stated objectives to the fullest extent. (Para 12)

- Considering the overall facts and circumstances of the case the decision of the CoC is liable to be rejected and the originally appointed IRP is confirmed as RP. (Para 13)

CASES REFERRED TO

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 10).

Nipun Singhvi, **Vishal J. Dave**, **Jaimin R. Dave** and **Ms. Natasha D. Shah**, Ld. Counsels *for the Appearing Parties.*

ORDER

Virendra Kumar Gupta, Technical Member. - The instant application has been filed on behalf of the Committee of Creditors (hereinafter referred to as "CoC") under section 22(2)(*b*) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred

to as "IBC, 2016") for appointment of Resolution Professional (hereinafter referred to as "RP") Mr. Kamal Agarwal in place the Interim Resolution Professional (hereinafter referred to as "IRP") Mr. Parag Seth.

2. The facts, in brief, are that the corporate Debtor was admitted into Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") by this Authority *vide* order dated 24-2-2021 and Mr. Parag Seth was appointed as an IRP. It has also been submitted by the applicant that in the first CoC meeting dated 5-4-2021, the CoC has passed the resolution to not to continue IRP as RP on the recommendation made by a Financial Creditor namely Volkswagen Finance Private Limited. The CoC has approved the name of RP *i.e.* Mr. Kamal Agarwal on 8-4-2021 with 78.26% votes.

3. The CoC through one of its members has filed an affidavit in support of the application wherein it has been submitted that the objectors are opposing the appointment of RP without any valid ground which is absurd, vexatious, and not tenable in law. The CoC has already passed the resolution to appoint Mr. Kamal Agarwal as an RP with 78.26% votes after rejecting the appointment of IRP as RP with similar percentage of votes. Moreover, the erstwhile IRP can't claim to be appointed as RP as a matter of right. The appointment of the RP is the prerogative of CoC and is based upon its commercial wisdom.

4. The original Financial Creditor who filed application under section 7 of IBC, 2016 and the IRP have also raised objections. Their objections are on the ground that there is no need for such replacement as the decision has been taken arbitrarily by two Financial Creditors *i.e.* Bank of Baroda and M/s. Volkswagen Finance Private Limited and the proposed IRP is based at a location which is far distant from the location where the Corporate Debtor and its properties are situated. One more ground regarding lack of authority for filing this application has been raised. It has also been stated that the action for replacement should have been taken under section 27 and not under section 22 of IBC, 2016. It has also been submitted that the fee of new RP was higher than the fee which quoted by IRP.

5. We have considered the submissions made by both the parties and perused the material on record. It is noted that in the first meeting itself, the CoC has decided so and that too without assigning any reason therefor. It is also noted that the originally appointed IRP performed his duties as expected from such IRP under the Code r.w. relevant Regulations made thereunder. The Original IRP was situated at the place where the registered office of the Corporate Debtor and assets of the Corporate Debtor are situated. The new RP is from New Delhi. The fee quoted by him is also higher as compared to the fee quoted by erstwhile IRP. No material has been brought on record to show the incompetence or otherwise non-suitability of the erstwhile IRP while passing a resolution of removal of such IRP and appointing a new RP in place of erstwhile IRP. From the perusal of the consent form given by the new RP, it is noted that he is acting as Resolution Professional of three Corporate Debtors, two individuals, as liquidator in four matters, one more assignment as the liquidator are handled by such person,

hence, such proposed IRP appears to have enough workload and, therefore, this fact also need consideration having regard to the objects of CIRP.

6. The stand of the CoC is that it is their prerogative to change the IRP and appoint the new RP. In this regard, we state that Insolvency and Bankruptcy Code, 2016 (Code) is new economic legislation which has come into force with the object of maximization the value of Corporate Debtor by putting the Corporate Debtor back on its feet along with other objects such as balancing the interests of all stakeholders and IRP/RP is a key person in achieving such objects. As per section 18(1)(*c*) of IBC, 2016, the IRP is required to constitute CoC. The CoC is normally comprised of Financial Creditors. The Financial Creditors are ascertained based upon the claims submitted by such creditors to the IRP in pursuance of the public announcement published under section 13 r.w. section 15 of IBC, 2016. The tenure of "Interim Resolution Professional" remains valid till the date of appointment of Resolution Professional under section 22 of IBC, 2016. During this tenure, specific duties are being performed by IRP which are prescribed in sections 18 and 20 of IBC, 2016. Thus, the smooth conduct of the CIRP in the initial phase is the responsibility of IRP and IRP is also required to manage the operations of the Corporate Debtor as a going concern. The role of IRP is important as during this period CoC is not in place. It is also to be noted that under earlier law tenure of the IRP was 30 days from the date of his appointment in terms of provisions of section 16(5) of IBC, 2016. However, a suitable amendment has been made whereby this term remains till the appointment of RP under section 22 of IBC, 2016. This position also goes to show that IRP may be required to work for a longer period in some cases. As per section 22(1) of IBC, 2016, the first meeting of CoC shall be held within seven days from the constitution of CoC. As per Regulation 17 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "IBBI (CIRP) Regulations, 2016"), a report certifying the constitution of Committee to the Adjudicating Authority is to be filed within two days of the verification of claims received under Regulation 12(1) of IBBI (CIRP) Regulations, 2016. Regulation 17(2) of IBBI (CIRP) Regulations, 2016 prescribes that the first meeting of CoC shall be held within seven days of the filing of the report of the constitution of CoC with Adjudicating Authority. Regulation 17(3) of IBBI (CIRP) Regulations, 2016 also prescribes that in case of delay of appointment of RP under section 22 of IBC, 2016, IRP shall function as RP from the fortieth day of the insolvency commencement date till the RP is appointed. Having discussed the provisions relating to the appointment and tenure of IRP as well as functions to be performed by IRP, now, we would consider the provisions relating to the appointment of Resolution Professional. As per section 22(2) of IBC, 2016, the Committee of Creditors may in its first meeting either resolve to appoint IRP as RP or replace him with another Resolution Professional. In the event of replacement, CoC shall file an application before the Adjudicating Authority for the appointment of the proposed Resolution Professional.

The Adjudicating Authority shall forward the name of such proposed Resolution Professional to IBBI and shall make such appointment after confirmation by IBBI. Where the Board does not confirm the name of the proposed Resolution Professional within ten days, the Adjudicating Authority would direct the Interim Resolution Professional to function as RP until such time Board confirms the appointment of proposed Resolution Professional. However, subsequently, the procedure prescribed under sub-section 4 or 5 of section 16 of IBC, 2016 has been modified in practice whereby IBBI prepares the list of approved Insolvency Professionals for specific territorial jurisdictions of various Benches from which IRP/RP is proposed/ appointed. This procedure shows that IRP/RP should, in normal circumstances, be appointed on the basis of location of the Corporate Debtor and its assets. In case of the Corporate Debtor having business assets and operations on PAN India basis, an Insolvency Professional having presence at multiple locations connected with such Corporate Debtor may be appointed so as to complete CIRP in time-bound manner. In the case of section 7 of IBC, 2016, the name of IRP is to be proposed by Financial Creditor, being the applicant, mandatorily and the Adjudicating Authority has to appoint the same person in terms of provisions of section 16(2) provided that no disciplinary proceedings are pending against such proposed IRP. In the case of section 9 of IBC, 2016 application, if the name of IRP is proposed by the Operational Creditor, though, such proposition of name of IRP is not mandatory still the Adjudicating Authority will appoint the same person as IRP provided in section 16(3) of IBC, 2016 that no disciplinary proceedings are pending against such person. As noted earlier, under section 22(2) of IBC, 2016, it is not necessary that IRP appointed by this Adjudicating Authority is to be replaced necessarily as the word "may" has been used. The use of the word "may" indicates that discretion is given. Once a discretion is given, such discretion, as settled judicially, cannot be exercised in an unreasonable or arbitrary manner and there must be some valid grounds/justifiable reasons to replace the IRP with another RP. For example, if the conduct of IRP is not up to the mark or it is observed that such person was proposed by Financial Creditor or Operational Creditor, hence, either he is not working independently or is under their influence. Section 27 of IBC, 2016 comes into play in a situation where a Resolution Professional appointed under section 22 of IBC, 2016 is required to be replaced during the CIRP, if CoC is of the opinion that such replacement is required. Thus, there could be a situation with the original IRP who was confirmed to act as RP or was replaced with the new Resolution Professional to act as RP, both the categories of Resolution Professionals can be changed. However, in doing so, CoC is required to form an opinion which by fact itself imposes a pre-requisite condition that there should be ostensible reasons for replacement of Resolution Professional and it should not be based upon whims and fancies as a replacement, being done on that basis, would adversely affect the conduct of CIRP which is to be completed in time-bound manner and unnecessary litigation may also happen which would consume

precious judicial time. However, it may be said that under section 22(2) of IBC, 2016, the CoC may either appoint or replace IRP without forming any opinion but if in every case IRP proposed by the Original Financial Creditor is replaced without assigning any reasons, then, provisions of section 7(3) of IBC, 2016 shall become redundant. It is to be noted that under section 7(3) of IBC, 2016, the name of IRP is proposed mandatorily otherwise the application filed under section 7 of IBC, 2016 may be dismissed. Further, absence of words "of the opinion" in section 22(2) of IBC, 2016 cannot be construed to mean that no opinion is required as the use of the word "may" therein requires so by necessary implication. Thus, even under section 22 of IBC, 2016, proper justification is required for not appointing IRP as RP, as IRP performs very critical functions in the initial phases of CIRP which have already been discussed and on that basis the performance of IRP can be evaluated. In our considered view, such evaluation for changing the IRP even under section 22 of IBC, 2016 is necessary and it must be born out of deliberations on this aspect in the minutes of CoC where a resolution for replacement of IRP is passed. In the facts of present case, minutes of relevant meeting indicate nothing in this regard.

7. The other aspect is that the final power to replace the IRP does not rest with CoC as such proposal is to be confirmed by IBBI as prescribed under section 22(5) of IBC, 2016. As stated earlier, this requirement of law has to be looked into and exercised by Adjudicating Authority now due to change in procedure. Thus, it would be incorrect to say that if the CoC passes the resolution with the requisite percentage of votes to replace the IRP such decision needs to be confirmed by Adjudicating Authority in all circumstances. If that would be so, the Adjudicating Authority would become a signpost and not a check post which is not the intent of the legislature in view of section 7(3) of IBC, 2016 and consequence of its non-compliance and provisions of sections 16, 22 and 27 of IBC, 2016.

8. In case of a situation arising under section 27(1) of IBC, 2016 the same principle applies and it applies more strictly because the change of IRP in midway would adversely impact the timelines under which resolution of insolvency has to be achieved.

9. There is one more aspect of pendency of disciplinary action against Insolvency Professional and details/data relating thereto remains with IBBI and not with CoC, hence, for this reason also, replacement of IRP/RP needs the approval of Adjudicating Authority who on the basis of the approved list of Resolution Professional can certainly look into it.

10. A further point has been made on behalf of the CoC that such decision falls within the ambit of commercial wisdom of CoC which is considered to be supreme in the context of the structure of IBC, 2016. We are unable to understand as to how the exercise of appointment or replacement of IRP, in the very first meeting of CoC after Corporate Debtor is being admitted into CIRP, becomes an exercise of commercial wisdom because till that stage no significant developments as regard to steps specified in section 25(2) (*h*) of IBC, 2016, are taken normally and

only for such steps need for application of commercial wisdom arise in real sense. This aspect can further be explained from the perusal of sections 15, 17, 18 and 20 of IBC, 2016 which define the scope of duties and powers of IRP which mainly concern with the background work for smooth conduct of CIRP in future and management of the Corporate Debtor as a going concern during his tenure as IRP. Thus, appointment or replacement of IRP as RP is an exercise of the administrative nature, therefore, the question of immunity from interference by Adjudicating in the name of commercial wisdom does not arise at all. Even, otherwise, in our humble view, the supremacy of commercial wisdom is of very limited application *i.e.*, wherever the CoC has been specifically empowered as a final Authority, the same cannot be questioned. For example, in the context of approval of resolution plan or approval of certain actions as envisaged under section 28 of IBC, 2016, majority decision of CoC *i.e.* with the prescribed percentage, the such decisions cannot be interfered with in normal circumstances. It may not be out of place to mention that even such commercial wisdom is being put in check and balances by virtue of an amendment of the provision of section 31 of IBC, 2016 and Regulations 36 to 39 of CIRP Regulations, 2016 subsequently whereby the role of the Adjudicating Authority has gradually been increased and CoC is being required to record its deliberations on various aspects of Resolution Plan. Even, there is a paradigm shift in the judicial approach as regard to this aspect. Reference can be made to the observations of Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 in para 54 of the said order, the Hon'ble Supreme Court observed as under:

> "This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the

corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in section 30(2) would include judicial review that is mentioned in section 30(2)(*e*), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to resubmit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

Apart from this legal position, it is not in dispute that Adjudicating Authority, being NCLT is guided by the principles of natural justice which inherently involve equitable considerations. On the basis of equitable considerations also, a person cannot be punished or may be made to suffer without assigning any reasons or afforded the opportunity of being heard to make out his case. In case of happening of such violation, the Adjudicating Authority can invoke its jurisdiction under rule 11 of NCLT Rules, 2016 to prevent the miscarriage of justice and render substantial justice. We are further of the view that IRP/RP is not a free bird or cannot act arbitrary as suitable checks and balances have been provided in the Code itself. The IBBI is the regulator and various compliances have been prescribed which are to be done by the RP. As per section 217 of IBC, 2016 any person which includes CoC also can approach IBBI in case of any misconduct or arbitrariness being shown by RP. Further, under section 28(5) of IBC, 2016, CoC is also empowered to report the actions of Resolution Professional taken by Resolution Professional without seeking approval of CoC in addition to action being treated as void under section 28(4) of IBC, 2016. We may also add that once a Corporate Debtor is admitted into CIRP, the role of its suspended management becomes practically negligible as far as conduct of CIRP is concerned. Even, the role of the Financial Creditor or Operational Creditor in the conduct of CIRP is very minimal in their individual capacity. The Financial Creditor, if having a large voting percentage, can certainly have meaningful say in CIRP. Thus, there is a greater probability that such the Financial Creditor may obtain a much stronger position, if the IRP of their

choice is appointed by them by way of replacement without any justified reason. This may also result into a situation, where Committee of Creditors having regard to security interest possessed by them and personal guarantees also existing, the interests of all other stakeholders may suffer. Thus, having regard to considerations of these aspects, it is always preferable that IRP/RP should be independent of undue influence of CoC as far as possible. It may not be out of place to mention that the experience gained from last five years of working of IBC, 2016, the Financial Creditors are preferring IRP/RP of their choice which is resulting into other imbalances. Thus, it is incumbent upon this Adjudicating Authority to prevent the happening of a situation whereby IRP/RP works only according to the dictates of the Committee of Creditors. Further, RP is an officer of the Court who is expected to act in an unbiased manner for the benefit of all stakeholders and on whom the Adjudicating Authority can rely upon. Thus, independence of RP not only with reference to CoC as well as suspended management needs to be maintained. In case, IRP proposed by Financial Creditor or Operational Creditor acts otherwise, that would certainly justify the action under section 22 or 27 of IBC, 2016, as the case may be. However, in the present case no such case has been made out and for this reason also the resolution passed by CoC to replace IRP stands rejected.

11. We may also observe that a lot emphasis has been given on the aspect of supremacy of commercial wisdom of CoC. In this regard, it is noteworthy that these words are not defined in the IBC, 2016 or Regulations made thereunder. Thus, these words are to be understood as per common parlance as per their dictionary meaning or as understood and used in the commercial world. In common parlence/ business world, commercial wisdom is understood as an exercise of common sense or prudence to safeguard one's commercial interests and to have the best bargain in general. In real business situations, even compromising on commercial interests to some extent to obtain advantage/gain which may be practicable and feasible in those circumstances is considered as exercise of commercial wisdom instead of taking a regid instance resulting in loss of such advantage/gain even in the process. As per dictionary meaning, the word "commercial" generally means relating to or involving trade and services. It also involves an element of ability to make profit. It also denotes an approach which a reasonably prudent person would adopt in commercial transactions or different business situations. Now, we have to understand the meaning of word "wisdom". As per Concise Oxford English Dictionary (South Asia-Twelfth Edition) the word "wisdom" is defined as under:

Wisdom-n.1 the quality of being wise. 2 the body of knowledge and experience that develops within a specified society or period.

- PHRASES in someone's wisdom used ironically to suggest that someone's action is ill-judged: in their wisdom they decided to dispense with him.

The word "wisdom" indicates the quality of being wise.

The word "wise" is defined as under:

Wise-adj. 1 having or showing experience, knowledge, and good judgment. 2 (wise

to) informal aware of, especially so as to know how to act.-v. (wise-up) informal become alert or aware.

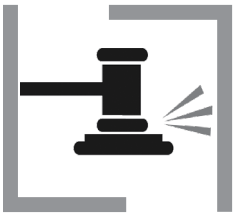
When the dictionary meaning of word "wisdom" is looked at, one can define wisdom as a quality of being able to use experience, knowledge and good judgment together to discern or judge what is true, right or lasting. It also implies the use of common sense and good judgment. One of the characteristics of wisdom is not to do the thing in desperate manner. Therefore, the exercise of commercial wisdom involves rational thinking, justified reasons and ability to understand the consequences of such action while taking such action. If commercial wisdom is viewed in this manner, then, it becomes apparent that decision to replace the IRP, in view of the fact that these two Financial Creditors, having required voting powers in CoC, is not an instance of exercise of commercial wisdom but exercise of voting strength. It may not be inappropriate to state that it is an instance of an imprudent decision in the facts and circumstances of the case where proposed IRP is located at a different location who has also quoted higher fee and appears to be having sufficient assignments in his hand and, therefore, the basic objects of IBC, 2016 including timely resolution of insolvency of Corporate Debtor may not be possible to achieve. Thus, considering this factual situation, the action of CoC deserves to be cancelled.

12. Before parting, we may add that the success of CIRP is contingent upon independence competence of IRP and genuineness of intent of Committee of Creditors who acts in fiduciary capacity for all stakeholders and not merely confining to fulfilling of their own interests which makes IBC, 2016 like earlier regimes where individual actions and rights were a primary focus. Further, under the present structure such approach of Committee of Creditors would result into substantial damage to larger public interests including slowing down of economy due to massive write-offs imposed upon Operational Creditor who may become insolvent or go out of business due to loss of their legitimate dues. Thus, more unemployment and non-availability of credit, defeating one of the objects of IBC, 2016. Such approach of Committee of Creditors gets reflected from the very beginning in replacing IRP in this manner, hence, this needs to be checked at this stage only, so as to make CIRP achieve the stated objectives to the fullest extent.

13. Considering the overall facts and circumstances of the case and the applicable legal position as discussed above, we are of the view that the decision of the CoC is liable to be rejected and the originally appointed IRP is confirmed as RP. In this view of the matter, the new RP as appointed by CoC is ordered to vacate the office of IRP and handover all documents and records of the Corporate Debtor to the new IRP forthwith.

14. Accordingly, IA No. 370 of 2021 in CP (IB) No. 781 of 2019 filed by COC stands dismissed and disposed of in terms indicated above.

15. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.



(2021) 129 taxmann.com 300 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

NTPC Ltd. v. Ram Ratan Modi

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 309 OF 2021‡

JULY 19, 2021

Section 42 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Appeal against decision of liquidator - Appellant had awarded two contracts to respondent - corporate debtor - Respondent-corporate debtor failed to carry out contracts and appellant terminated contract and got balance work executed through third party - Application under section 7 was admitted against corporate debtor and appellant filed proof of claim as an 'other creditor' - Subsequently, liquidation order was passed and appellant filed claim to liquidator - Liquidator however, sent an e-mail rejecting claim and appellant moved to NCLT by filing company petition - NCLT partially rejected appellant's claim by impugned order - Whether it was duty of liquidator to examine appellant's claim as provided by Insolvency and Bankruptcy Board of India (Liquidator Process) Regulations, 2016 and liquidator had avoided performing duty as was required to be performed under IBC Code' and Regulations by rejecting claim - Held, yes - Whether liquidator was required to look into documents and come to 'best estimate' and give benefit to appellant - Held, yes - Whether liquidator was directed to take steps and process claim of appellant as 'other creditor' and arrive at best estimate of amount of claim made by appellant and give necessary benefit to appellant - Held, yes (Paras 12, 16 and 17)

CASE REVIEW

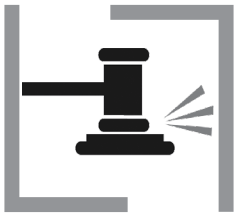
Indian Overseas Bank v. *D.C. Industrial Plant Services (P.) Ltd.* (2021) 129 taxmann.com 299 (NCLT - Kol.)(SB) (para 17) *set aside* (***See Annex***).

Balbir Singh, Addl. Solicitor General of India, **R. Sudhinder**, **Ms. Ekta Bhasin**, **Pierre Uppal**, Advs. *for the Appellant.* **Mohd. Azeem Khan** *for the Respondent.*

† Arising from order of NCLT - Kolkata Bench *Indian Overseas Bank* v. *DC Industrial Plant Services (P.) Ltd.* (2021) 129 taxmann.com 299 (SB).

For Full Text of the Judgment see

(2021) 129 taxmann.com 300 (NCLAT- New Delhi)



(2021) 129 taxmann.com 181 (NCLT - New Delhi)

NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH

Ram Niwas & Sons v. Palm Developers (P.) Ltd.

ABNI RANJAN KUMAR SINHA, JUDICIAL MEMBER AND L.N. GUPTA, TECHNICAL MEMBER

IA. NO. 1742 (ND) OF 2021 COMPANY PETITION NO. (IB)-894(ND)/2019

JULY 13, 2021

Section 22 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution Professional - Appointment of - Whether Corporate Insolvency Resolution Process (CIRP) is a time bound process involving certain common steps which needs to be performed by every IRP/RP, like, Appointment of valuers, Evaluating and placing Resolution Plan before Committee of Creditors (CoC) etc. and for performing such mandated tasks, it is necessary that CoC is in operation - Held, yes - Whether non-performance of aforesaid steps within prescribed time lines will make entire CIRP infructuous, which per force will drive corporate debtor into liquidation eventually - Held, yes - In respect of corporate debtor, CIRP was initiated and one 'MKS' was appointed as IRP - 'MKS' had neither made any efforts in managing operations of corporate debtor as a going concern nor performed duties casted upon him under code to complete CIRP - Whether this was a case of abuse of process of IBC and in order to protect interest of corporate debtor, its stakeholders, and for furtherance of CIRP, new IRP was to be appointed in place of 'MKS' - Held, yes - Whether further, show cause notice was to be issued to 'MKS' as to why contempt proceedings would not be initiated against him - Held, yes (Paras 19 and 22)

FACTS

- Adjudicating Authority had initiated the CIR Process against the corporate debtor and appointed the one 'MKS' as IRP of the corporate debtor.
- The main grievance of the Applicant/IBBI was that said IRP had neither made efforts in managing the operations of corporate debtor as a going concern nor performed the duties casted upon him under the Code to complete the CIR Process, nor complied with the directions of the Adjudicating Authority.

HELD

- It is found that IRP had not been able to give any cogent reasons for not being able to carry forward the CIR Process and as to why no meeting of CoC with Financial

Creditors could be convened. (Para 16)

- CIR Process is a time bound process involving certain common steps those need to be performed by every IRP/RP like Appointment of valuers, Evaluating and placing Resolution Plan before CoC etc. and for performing such mandated tasks, it is necessary that the CoC is in operation. The non-performance of the aforesaid steps within the prescribed time lines will make the entire CIR Process infructuous, which per force will drive the corporate debtor into Liquidation eventually. (Para 17)

- In view of the above and in an extraordinary situation, where the IRP had neither conducted any meeting of CoC nor taken concrete steps for carrying forward the CIR Process in accordance with the provisions of the IBC though a period of 309 days have elapsed in the meantime against the statutory initial timeline of 180 days, this a case of abuse of the process of the IBC/Tribunal and in order to protect the interest of the corporate debtor and its stakeholders, and for furtherance of the CIR Process, 'MKS' was to be replaced and new IRP was to be appointed. (Para 19)

- Accordingly, show cause notice was to be issued to 'MKS' as to why the contempt proceedings would not be initiated against him. (Para 22)

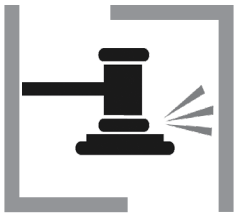
CASES REFERRED TO

Gujarat Urja Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150 (SC) (para 10) and *Indu Kumar* v. *Saha Infratech (P.) Ltd.* (2021) 127 taxmann.com 44 (NCLT - New Delhi) (para 20).

Abhishek Kumar, Adv. *for the Applicant.* **Barun Kumar Sinha**, Adv. *for the Respondent.*

For Full Text of the Judgment see

(2021) 129 taxmann.com 181 (NCLT - New Delhi)



(2021) 129 taxmann.com 302 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Hytone Merchants (P.) Ltd. v. Satabadi Investment Consultants (P.) Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 258 OF 2021†

JUNE 30, 2021

Section 65, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or malicious proceedings - Whether where application to initiate CIRP is filed collusively not with purpose of insolvency resolution but otherwise, then despite fulfilling all conditions, Adjudicating Authority can exercise its discretion in rejecting application relying on section 65 - Held, yes - Applicant/financial creditor sanctioned loan of Rs. 3 lakhs to corporate debtor company - Corporate debtor committed default in repayment - Financial creditor thus, filed application under section 7 to initiate CIRP against corporate debtor - On perusal of master data of corporate debtor it was found that networth of corporate debtor was Rs. 15 crores and it had already given a corporate guarantee worth Rs. 482 crores, thus, it was hard to believe that corporate debtor was unable to repay a loan of Rs. 3 lakhs only and it appeared that corporate debtor colluded with financial creditor to escape its liability as a corporate guarantor - Whether thus, even though application filed under section 7 met all requirements, Adjudicating Authority had rightly rejected said application - Held, yes (Para 49)

FACTS

- The Appellant-financial creditor had given an unsecured loan of Rs. 3 lakhs to the Respondent/ corporate debtor for six months carrying interest at rate of 15 per cent per annum. This was under request for financial assistance by the corporate debtor.
- The corporate debtor acknowledged receipt of the unsecured loan amount and also issued a demand promissory note. However, the corporate debtor defaulted to repay the dues.
- The financial creditor had filed the section 7 application against the corporate debtor on account of default committed by the corporate debtor in repaying loan amount advanced by the financial creditor.
- The existence of debt and default are admitted. In fact, in the reply affidavit filed by the corporate

debtor, there was a definite admission of default.

- The section 7 application was complete in all respects and met all requirements under IBC and Regulations thereunder. However, despite finding and ascertaining that there was indeed the existence of default and that the section 7 application was complete in all respects, the Adjudicating Authority proceeded to dismiss the section 7 application.
- Being aggrieved by the said order, instant appeal was filed.

HELD

- Section 7(5)(*a*) lays down parameters about general conditions to admit an application. However, in the given situation where it appears that application is filed collusively not with the purpose of insolvency resolution but otherwise, then despite fulfilling all the conditions of section 7(5), the Adjudicating Authority can exercise its discretion in rejecting the application relying on section 65. (Para 34)
- The Adjudicating Authority should be very cautious in admitting the application so that corporate debtor cannot be dragged into corporate insolvency resolution process with *mala fide* for any purpose other than the resolution of the insolvency. Therefore, to protect the corporate debtor from the *mala fide* initiation of CIRP, the law has provided a penalty under sections 65 and 75. Before admitting the application, every precaution is necessary to be exercised so that the insolvency process is not misused for any other purposes other than the resolution of insolvency. (Para 39)
- Even if the petition complies with all requirements of section 7 it is filed collusively, not with the intention of Resolution of Insolvency but otherwise. Therefore, it is not mandatory to admit the Application to save the Corporate Debtor from being dragged into Corporate Insolvency Resolution Process with *mala fide*. (Para 45)
- In the instant case, the Adjudicating Authority has observed that on perusal of the master debt of the Corporate Debtor it is seen that the networth of Rs. 15,36,39,015. It is hard to convince oneself that the company having a networth of Rs. 15,36,39,015 is not able to make a payment of Rs. 3 lakhs corporate debtor has given a corporate guarantee of Rs. 482,42,00,000 and that the corporate debtor colluded with the financial creditor to escape its liability as a corporate guarantor. It appears that the petition at hand has been filed in collusion with the Corporate Debtor. (Para 46)
- In the circumstances, the Adjudicating Authority had rightly decided that the petition is filed in collusion with the Corporate Debtor and

thereby rejected the Petition filed under section 7 (Para 49)

CASE REVIEW

Hytone Merchants (P.) Ltd. v. *Satabadi Investment Consultants (P.) Ltd.* (2021) 129 taxmann.com 301 (NCLT - Kol.)(SB) (para 50) *affirmed* (***See annex***).

CASES REFERRED TO

Innoventive Industries Ltd. v *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 12), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxamnn.com 389/152 SCL 365 (SC) (para 30) and *Arcelormittal India (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 40).

Shaunak Mitra and **Sarad Singhania**, Advs. *for the Appellant.* **Ms. Swati Sood**, Adv. *for the Respondent.*

† Arising out of order of NCLT - Kolkata *Hytone Merchants (P.) Ltd. v Satabdi Investment Consultants (P.) Ltd.* (2021) 129 taxmann.com 301 (SB).

For Full Text of the Judgment see
(2021) 129 taxmann.com 302 (NCLAT- New Delhi)

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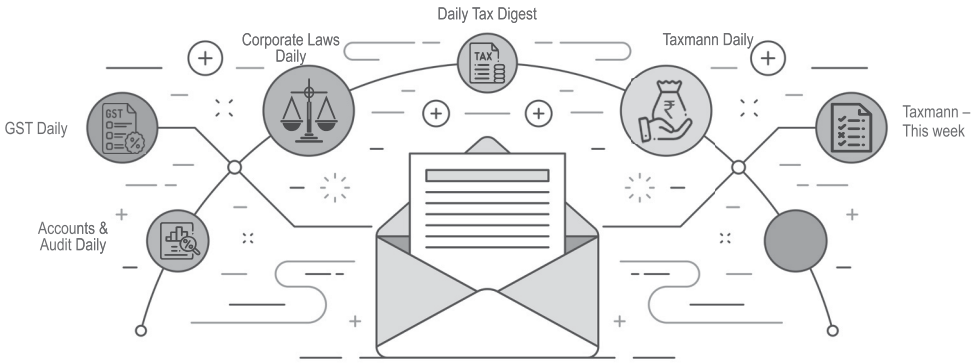

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Occupation, Employability and Restrictions

Code of Conduct

With reference to 'Occupation, Employability and Restrictions', the Code of Conduct for Insolvency Professionals, specified under first schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that:

- An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.
- An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.
- Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other

than services under the Code, to a creditor having more than ten per cent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.

- An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.
- An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.
- An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

Restriction on number of assignments to be handled by Insolvency Professional

The main objective of the Insolvency and Bankruptcy Code is maximization of value of assets of the Corporate Debtor. Value is dependent on the time taken to resolve the insolvency since it erodes over time. The longer the corporate insolvency resolution process, the more will be chances of liquidation. Also, liquidation value reduces with time. Time is the essence of the Code and an Insolvency Professional must adhere to the time limits prescribed under the IBC and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties. Further, an Insolvency Professional is entrusted with critical responsibilities under CIRP including managing the corporate debtor as going concern, custody of assets, holding CoC meetings, verification of claims, preparation of information memorandum, facilitating resolution plan etc. Given the expansive and intense responsibilities of an Insolvency Professional to be fulfilled within the timelines prescribed, if an Insolvency professional takes up too many assignments at the same time, then he/she will not be able to devote adequate time to each of his assignments.

Also, no restriction on numbers of assignments to be handled by an Insolvency Professional gives rise to the problem of skewed work allocation amongst Insolvency Professionals *i.e.* few Insolvency Professionals handling too many assignments.

Therefore, recently IBBI *vide* its notification dated 22nd July, 2021, inserted following clarification to the IBBI (Insolvency Professionals) Regulations:

> "An insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each".

Judicial/Regulatory Rulings

The Adjudicating/Regulatory Authorities in its various orders directed that the Insolvency Professionals should refrain from accepting too many assignments.

In the matter of *IDBI Bank Ltd.* v. *Lanco Infratech Ltd.* (2018) 92 taxmann.com 150, the Hon'ble NCLT Hyderabad Bench in its order dated 7th August, 2017 stated that "Therefore, we agreed with the submissions of the respondents considering his previous three assignments to large companies and the current corporate debtor itself is a large company we are of the *prima facie* view that the proposed IRP would not find sufficient time to act as IRP for the respondent company."

In the matter of *Anil Goel* v. *LML Ltd.*, C P No. (IB) 55/ALD/2007 with CA No. 73/2018, the Hon'ble NCLT Allahabad Bench in its order dated 23rd March, 2018 stated that "……He is also appointed the Liquidator in another two matters…"

> "In the case in hand, the Resolution Profession Process was to be completed within the extended period of CIRP, by dated 25-2-2018. But the Resolution Professional failed to submit the progress report/the resolution plan within the statutory period *i.e.* 270 days. The Resolution Professional has filed this application on 19-3-2018, after the issuance of notice by order of this Tribunal dated 13-3-2018 for submission of progress report/Resolution Plan against him. The RP was also directed to remain present in the Court in person on 19-3-2018. The above act of the RP shows that he was not careful in following the timeline prescribed under the Insolvency and Bankruptcy Code."

Giving consent to act as IP in multiple CIRPs at the same time

A husband and wife were insolvency professionals registered with the Board. The husband, in the capacity Interim Resolution Professional (IRP) of the Corporate Debtor, filed applications for initiating Corporate Insolvency Resolution Process (CIRP) of 14 Corporate Debtors (CDs). His wife consented to act as IRP for CIRPs of all 14 CDs simultaneously, even though she has absolutely no experience whatsoever and no capacity.

The Disciplinary Committee of IBBI observed that CIRP is a serious responsibility of an IP. Section 20 of the Code obliges the IRP to make every endeavour to protect and preserve the value of the property of the CD and manage the operations of the CD as a going concern. Section 23 of the Code mandates the RP to conduct the entire CIRP and manage the operations of the CD during the CIRP period. While the Code aims to rescue the ailing CDs, such conduct of an IP ensures just the opposite. That is why the law prohibits an IP from taking too many assignments, if he is unlikely to devote time to each of his assignment. The argument that the IP in question would withdraw her consent, after she gets a few assignments, is mischievous. Assuming for the sake of argument that she really meant to withdraw her consent, she must not forget the cost of such withdrawal to the insolvency regime and the hardships the CDs and their stakeholders would suffer on account of withdrawal. The Insolvency Professional violated clause 22 of the code of conduct specified for Insolvency Professionals. In view of the same, the Disciplinary Committee issued necessary directions.

Requirement of valid Authorisation for Assignment (AFA) before accepting or undertaking assignment

Insolvency and Bankruptcy Board of India *vide* its notification dated 23rd July, 2019, introduced the concept Authorisation for Assignment (AFA). As per Regulation 7A of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with clause (23) of the code of conduct for insolvency professionals, an insolvency professional shall not accept or undertake any assignment unless he or she holds an AFA issued by the insolvency professional agency concerned. Insolvency Professionals are barred from having employment when they are in possession of AFA. The concept of AFA is similar to the concept of Certificate of Practise (CoP) issued by institutions such as the Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI) and Institute of Cost and Management Accountants of India (ICMAI). The practice of CoP is also found in the field of Accountancy/ Insolvency in developed jurisdictions such as Australia and New Zealand, England and Wales, Ireland etc.

Before this amendment the individuals in employment were not permissible to become an Insolvency Professional. Now the individuals under employment can register themselves as Insolvency Professionals however, they have to discontinue the employment and take AFA before accepting or undertaking any assignment. The concept of AFA is based on self-regulation by the Insolvency Professionals.

The AFA is issued by the Insolvency Professionals after checking requirements such as registration with IBBI as Insolvency professional, fit and proper person, not in employment, not attained age of 70 years, no pending disciplinary proceedings, payment of fees, completion of continuous professional education, not debarred by the agency or IBBI etc.

It is pertinent to mention that the Insolvency Professional Agencies have taken disciplinary actions against various Insolvency Professionals for accepting or undertaking assignments without valid AFA.

Avoidance of conflict of interest

While performing his functions by the Insolvency Professional, there may be circumstances where employment or professional association may be offered to him with the Corporate Debtor, resolution applicant, financial creditor etc. An Insolvency Professional may compromise his position in promise of a return in future, after he completes a process or after he/she ceases to be an Insolvency Professional. This shall then lead to non-realization of the objective of the code. In order to address this threat of conflict of interest, code of conduct provides that an Insolvency Professional shall not accept any employment (other than an employment secured through open competitive recruitment) with, or render professional services, other than services under the Code, to a creditor having more than 10% voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of 1 year has elapsed

from the date of his cessation from the CIRP under him.

An Insolvency Professional is also not expected to engage his relatives or related parties in connection with any work related to any of his assignments in order to ensure integrity, objectivity and independence. To ensure compliance to this, the IBBI *vide* its circular dated 16th January, 2018 provided that the Insolvency Professionals are required to disclose his relationship with the corporate debtor, professionals engages by him, financial creditors, interim finance providers, prospective resolution applicants to the Insolvency Professional Agency of which he is a member.

Judicial Rulings

Resolution Professional has to be an independent party for conducting CIRP

Mussadi Lal Kishan Lal v. *Ram Dev Int. Ltd.*, ((IB) - 178 (PB) of 2017, dated 15-5-2018)

The State Bank of India is a member of CoC. The name of Mr. K.V. Somani, who has been on the panel of erstwhile State Bank of Hyderabad which is now merged with State bank of India, was proposed by the CoC to act as the RP by replacing the earlier RP, Mr. Rakesh Kumar Jain. In such circumstances, the proposed RP cannot be regarded as independent umpire to conduct the CIRP as required by well settled practice and therefore, NCLT cannot accept the request made by the learned Counsel for the CoC.

Ex-employee of the Financial Creditor cannot be proposed as IRP

State Bank of India v. *Metenere Ltd.*, (2020) 118 taxmann.com, 143/161 SCL 513 (NCL-AT)

The Financial Creditor proposed the appointment of an IP who was its ex-employee having worked there for 39 years and was drawing a pension from the financial creditor, to act as IRP. The corporate debtor objected the application of the Financial Creditor apprehending bias and plausible inability of the IRP to act fairly as an Independent Umpire. The Hon'ble NCLT passed impugned order dated 4-1-2020 directing the financial creditor to substitute the name of Insolvency Professional to act as an Interim Resolution Professional as it was of the view that there was an apprehension of bias and proposed IRP was unlikely to act fairly and could not be expected to act as an Independent Umpire. Aggrieved thereof, financial creditor preferred appeal.

The Hon'ble NCLAT dismissed the appeal of the financial creditor for disallowing substitution of the IRP observing the following:

> "..... Adjudicating Authority was perfectly justified in seeking substitution of Mr. X to ensure that the `Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. X was not disqualified or ineligible to act as an `Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant-

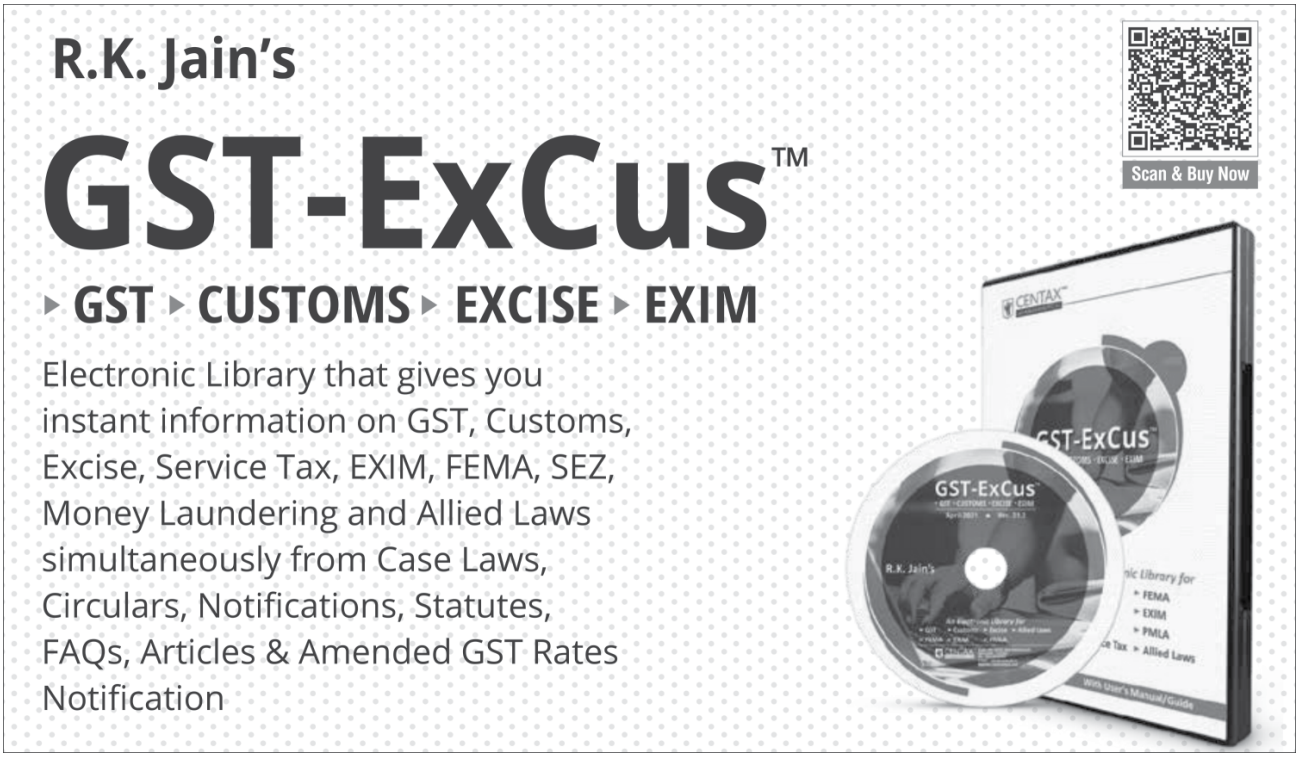
'Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."

References

IBBI - Handbook on Ethics for Insolvency Professionals: Ethical and Regulatory Framework

https://ibclaw.in/restricting-the-number-of-assignments-to-be-handled-by-ip/

https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/May/Discussion%20Paper%20IP_2019-05-13%2009:23:51.pdf



FAQs on Liquidation under IBC

1. As per Insolvency and Bankruptcy Code, 2016, in what scenario, the Adjudicating Authority may pass order for initiation of Liquidation of the Corporate Debtor's assets?

As per Section 33 of the Code, the Adjudicating Authority may pass order for initiation of Liquidation of the Corporate Debtor in the following circumstances:

- When it does not receive a resolution plan on or before the expiry of the maximum time permitted for CIRP;
- When it rejected the resolution plan for non-compliance of the requirements specified;
- When Committee of Creditors (CoC), with minimum 66% voting share, decides to liquidate the CD before even completion of process, or *When the CoC decides to liquidate CD any time after its constitution but before confirmation of the resolution plan, including any time before the preparation of the information memorandum.*
- When any person prejudicially affected makes an application to the AA that the resolution plan (as approved) is contravened by CD.

The order of liquidation shall be deemed to be a notice of discharge to the officers, employees, workmen of CD except when the CD's business is continued during the liquidation process by the liquidator.

2. Is there any criteria set out to decide the fee payable to Liquidators under the IBC?

An IP who is proposed to be appointed as a liquidator shall charge his professional fee in accordance with the decision taken

by the CoC under Regulation 39D of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations")

In other cases, the liquidator shall be entitled to a fee:

(*a*) at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013); and

(*b*) as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under.

The liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed.

It is hereby clarified that where a liquidator realizes any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

The fees for the conduct of the liquidation shall be paid to the liquidator from the proceeds of the liquidation estate as per Section 53 of the Code.

3. What are the reports required to be submitted by Liquidators while handling the processes as per Insolvency and Bankruptcy Code, 2016?

In case of Liquidation,

- Preliminary report within 75 days from Liquidation Commencement Date detailing capital structure, assets & liabilities, proposed plan of action etc. and submission to Adjudicating Authority.
- Preparation of asset memorandum within 75 days from Liquidation Commencement Date and submission to Adjudicating Authority.
- Progress reports to Adjudicating Authority:
  - the first Progress Report within fifteen days after the end of the quarter in which he is appointed;
  - subsequent Progress Report(s) within fifteen days after the end of every quarter during which he acts as liquidator.

Provided that if an insolvency professional ceases to act as a liquidator during the liquidation process, he shall file a Progress Report for the quarter up to the date of his so ceasing to act, within fifteen days of such cessation

- Final report along with the application for dissolution to Adjudicating Authiority.

In case of Voluntary Liquidation,

- Preliminary report within 45 days from the liquidation commencement date detailing capital structure, estimates of assets and liabilities, proposed plan of action etc. to the corporate person.

- Annual status report after 12 months days from the liquidation commencement date detailing list of stakeholders, details of assets, distribution made by stakeholders, details of avoidance transactions, audited accounts showing receipt and payments since LCD etc. to the contributories.
- Final report along with application for dissolution on completion of liquidation process to registrar, Board and Adjudicating Authority.

4. In what cases is the Liquidator required to take prior approval of Adjudicating Authority for sale of assets?

As per Regulation 33 of Liquidation Regulations,

The liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(*a*) a related party of the corporate debtor;

(*b*) his related party; or

(*c*) any professional appointed by him.

5. Whether fresh valuation of assets or businesses of the Corporate Debtor is required as per IBBI (Liquidation Process) Regulations, 2016?

Generally, the liquidator shall consider the average of the estimates of the values arrived by the registered valuers appointed under the corporate insolvency resolution process in accordance with Regulation 35 of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016.

In other cases or where the liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date appoint two registered valuers to determine the realizable value of the assets or businesses of the Corporate Debtor.

The average of two estimates received shall be taken as the value of the assets or businesses.

The following persons shall not be appointed as registered valuers:

(*a*) a relative of the liquidator;

(*b*) a related party of the corporate debtor;

(*c*) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or

(*d*) a partner or director of the insolvency professional entity of which the liquidator is a partner or director.

The appointment of registered valuers shall be governed by IBBI circular dated 17th October, 2018.

6. What are the reporting requirements (with IBBI/IPA) for Insolvency Professionals who are handling Liquidation/Voluntary Liquidations assignments?

As of now, no CIRP forms or disclosures (cost/relationship) needs to be submitted by IPs to IBBI/IPA. Only the following needs to be done:

- details of initiation of liquidation need to be added on IP login at IBBI website;
- details of status of liquidation on IPA website (through online forms- every IPA has its own way of seeking information);
- periodic intimations needs to be sent to IBBI & IPA on designated email IDs as per Section 208(2)(*d*) of the Code;
- Other information, as and when asked.

●●●

Bill as introduced in the Lok Sabha

The Insolvency and Bankruptcy Code (Amendment) Bill, 2021[1]

The Insolvency and Bankruptcy Code (Amendment) Act, 2021 (hereinafter the 'amendment act') deemed to have come into force on the 4th day of April 2021, has been amended mainly to include into its ambit the Pre-Pack Insolvency Resolution Process. Some of the changes are as follows, for a detailed amendment Bill please refer to The Insolvency and Bankruptcy Code (Amendment) Bill, 2021

1. Section 4 of the IBC amended w.r.t. pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.
2. Definition of :
   - Base resolution plan inserted.
   - "Corporate applicant", "Initiation date", "Interim finance" amended to cover the pre-packaged insolvency resolution process also.
   - "Officer" amended to extend its application to Part II Chapter VI of the IBC.
   - "preliminary information memorandum", "pre-packaged insolvency resolution process costs", "pre-packaged insolvency commencement date."
3. Sections 11, 33, 34, 61, 65, 77, 208, 239, 240 & 240A amended and Sections 11A, 67A & 77A inserted.
4. Chapter III-A *"Pre-Packaged Insolvency Resolution Process"* inserted.
5. Ord. 3 of 2021Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 is repealed.

Regulations

Insolvency and Bankruptcy Board of India

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016[2].

1. Amendment to Regulation 3 sub-regulations (1), (2) & substitution of sub-regulation (3) to include "Interim resolution professionals" along with resolution professionals now.
2. Amendment to Regulations 4(1), 19 to include "Interim resolution professionals" along with resolution professionals now.
3. Substitution of "Insolvency Professional" to "resolution professional" in Regulation 4(2)(*b*).
4. Substitution of Regulation 27 from "Appointment of registered valuers" to "Appointment of Professionals".
5. Insertion of Regulation 4B for, *"Disclosure of change in name and address of corporate debtor"*.
6. Insertion of 1B to Illustration (*c*) of regulation 40B- Filing of Form 8 for intimating details of his opinion & determination under regulation 35A before 145th day of the CIRP.
7. Amendment to Regulations 9A & 13(2).
8. Insertion of Point 14A under Form H.

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016[3] - Amended up to 22-7-2021

Regulation 24(5) Substituted to "The Agency shall promptly realize the monetary penalty imposed by the Disciplinary Committee and credit the same to the Fund constituted under section 222 of the Code"

Insolvency And Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016[4]

1. Regulation 9 *'Registration for a limited period'* Omitted.
2. Substitution of word 'Shares' to 'equity shares' under Regulation 12(1)(*c*) 'Recognition of Insolvency Professional Entities.'
3. Proviso inserted after Regulation 12(1)(*g*).
4. Insertion of sub-regulations (3)& (4) to Regulation 12.
5. Regulation 13(2)(*b*) & (*c*) amended.
6. Clarification inserted in Regulation 22.

For further details on the aforementioned Regulations please visit the IBBI Webpage.

Circular

Filing of Form CIRP 8 under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[5].

Sub-regulation (1B) of regulation 40B of the CIRP Regulations requires the resolution professional to file Form CIRP 8 intimating details of his opinion and determination under regulation 35A, by 140th day of the insolvency commencement date.

For further details and Format of Form 8 please refer to the circular.

Monetary Penalties to be imposed by an Insolvency Professional Agency.[6]

By virtue of the said regulation IBBI has authorized the Disciplinary Committee of an Insolvency Professional Agency (IPA) to impose monetary penalty on its professional members under clause 24(2)(*d*) of the Schedule to the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016. In the interest of objectivity and uniformity the

Board has specified a list of contraventions and monetary penalty to be imposed thereof. Please refer to the circular for further details.

Guidelines

Amendment to the Guidelines for Technical Standards for the Performance of Core Services and Other Services under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017[7]

1. Abbreviation *"OVD - Officially Valid Document"* inserted in clause 1.2.
2. Clause 1.3 *i.e.* the definition clause amended.
3. Clauses 2.1, 2.2, 2.3, 2.4 amended.

Please refer to the guidelines for details.

Updates by Other Authorities

Guidance note for companies undergoing Corporate Insolvency Resolution Process-National Stock Exchange (NSE)[8]

And

Guidance note for companies undergoing Corporate Insolvency Resolution Process-Bombay Stock Exchange (BSE)[9]

By virtue of Circular No. IP/002/2018 dated January 3, 2018, issued by Insolvency and Bankruptcy Board of India and the aforementioned guidance note by the NSE and BSE, as the case may be.

1. The insolvency professional is required to ensure that the company complies with the applicable laws, including SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2018 (Hereinafter LODR Reg.).
2. Point 16 in Para A of Part A of Schedule III of LODR Reg. mandates disclosures at various stages by companies undergoing CIRP.
3. LODR Regulations contain the list of events that are required to be disclosed in relation to CIRP, further the following also need to be disclosed to the applicable Exchange,
   - 2 day prior Intimation regarding the date of hearing at the NCLT for considering the resolution plan.
   - Disclosure of the approval of resolution plan to be made to the applicable Exchange within 30 minutes of the hearing.
   - RP to inform the Applicable Exchange of any impact on the existing stakeholders of the company.

●●●

1. https://ibbi.gov.in//uploads/legalframwork/0cb67dc13cd3fdc59eddb4cc67226fc7.pdf
2. https://ibbi.gov.in//uploads/legalframwork/4c4602a23823998ec110b97804386b38.pdf
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Individual Insolvency- UK and Wales

Individual Insolvency Register[1]

This register includes the details about insolvency cases in England and Wales, including:

- bankruptcies, for example the date of a discharge (when someone is freed) from debts
- Debt Relief Orders
- Individual Voluntary Arrangements

The register can be searched by name or trading name (for sole traders), as it is available to the public online.

Records are usually removed within 3 months of an insolvency case ending.

Chapter 6 of the England and Wales Insolvency Rules, 2016 detail out the role of the IIR.

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- bankruptcies, for example the date of a discharge (when someone is freed) from debts
- Debt Relief Orders
- Individual Voluntary Arrangements

The register can be searched by name or trading name (for sole traders), as it is available to the public online.

Records are usually removed within 3 months of an insolvency case ending. The IIR is an amalgamation of the individual insolvency, bankruptcy restrictions and debt relief restrictions registers. The Insolvency Service is required by statute to maintain these registers, keep them up to date and make them available for public inspection.

The IIR contains details of:

- bankruptcies that are current or have ended in the last 3 months
- debt relief orders that are current or have ended in the last 3 months
- current individual voluntary arrangements (IVAs) and Fast-Track Voluntary Arrangements (FTVAs), including those that have ended in the last 3 months
- current bankruptcy restrictions orders or undertakings (BROs/BRUs) and interim bankruptcy restrictions orders (iBROs)
- current debt relief restrictions orders or undertakings (DRROs/DRRUs) and interim debt relief restrictions orders (iDRROs)

Role of the Secretary of State[2]

The Secretary of State for Small Business, Consumers and Corporate Responsibility is in-charge of handling the Insolvency Service. This organization that administers and investigates the affairs of bankrupts and companies in compulsory liquidations and reports criminal offences; takes disqualification proceedings against unfit directors of failed companies; authorizes and regulates insolvency practitioners; provides banking and investment services for bankruptcies and company liquidations; and provides policy advice to Ministers.

This role is synonymous to the role of the regulatory body (IBBI) in India.

Rule 5 of the England and Wales Insolvency Rules, 2016 specifies the power of the Secretary of State during ongoing individual insolvency proceedings.

Rule 5(2) states the role they play in Individual Insolvency:

> "(2) The regulations that may be made may include, without prejudice to the generality of paragraph (1), provision with respect to the following matters arising in companies winding up and individual bankruptcy—
>
> (*a*) the preparation and keeping by liquidators, trustees, provisional liquidators, interim receivers and the official receiver, of books, accounts and other records, and their production to such persons as may be authorised or required to inspect them;

(*b*) the auditing of liquidators' and trustees' accounts;

(*c*) the manner in which liquidators and trustees are to act in relation to the insolvent company's or bankrupt's books, papers and other records, and the manner of their disposal by the responsible office-holder or others;

(*d*) the supply of copies of documents relating to the insolvency and the affairs of the insolvent company or individual (on payment, in such cases as may be specified by the regulations, of the specified fee)—

(*i*) by the liquidator in company insolvency to creditors and members of the company, contributories in its winding up and the liquidation committee; and

(*ii*) by the trustee in bankruptcy to creditors and the creditors' committee;

(*e*) the manner in which insolvent estates are to be distributed by liquidators and trustees, including provision with respect to unclaimed funds and dividends;

(*f*) the manner in which moneys coming into the hands of a liquidator or trustee in the course of the administration of the proceedings are to be handled and invested, and the payment of interest on sums which have been paid into the Insolvency Services Account under regulations made by virtue of this sub-paragraph;

(*g*) the amount (or the manner of determining the amount) to be paid to the official receiver as remuneration when acting as provisional liquidator, liquidator, interim receiver or trustee."

The Secretary of State as per Section 251W of the Insolvency Act, 1986 states that they must also maintain the register for Debt Relief Orders.

Rule 8.26 of the England and Wales Insolvency Rules, 2016 states the role of the Secretary of State in the IVA process:

"8.26.—(1) After the creditors approve an IVA the nominee, appointed person or the chair must deliver a report containing the required information to the Secretary of State.

The report must be delivered as soon as reasonably practicable, and in any event within 14 days after the report that the creditors have approved the IVA has been filed with the court under rule 8.24(3) or the notice that the creditors have approved the IVA has been sent to the creditors under rule 8.24(5) as the case may be.

The required information is—

(*a*) identification details for the debtor;

(*b*) the debtor's gender;

(*c*) the debtor's date of birth;

(*d*) any name by which the debtor was or is known, not being the name in which the debtor has entered into the IVA;

(*e*) the date on which the IVA was approved by the creditors; and

(*f*) the name and address of the supervisor.

(4) A person who is appointed to act as a supervisor as a replacement of another person, or who vacates that office must deliver a notice of that fact to the Secretary of State as soon as reasonably practicable."

DEBT RELIEF ORDER

A debt relief order is synonymous to the Fresh Start Process to be commenced in India. The aim of a DRO is discharge. It is necessary to provide social insurance, entrepreneurship, reduce costs of Insolvency Proceedings and to create a systemised form of debt waiver. The point of consideration for a DRO is that there aren't enough safeguards in place.

UK has adopted the DRO model in 2009, wherein the government in partnership with debt advisors apply to get a waiver for their debt comprising of qualifying debts as given under the Insolvency Act, 1986 (Amended in 2002).

Benefits of a DRO:

- A debt relief order can be a low-cost alternative to bankruptcy
- You don't pay anything towards your debts for 12 months. After that they'll be written off
- Your creditors can't pursue you for your debts during the 12 month period
- Although a DRO is a formal debt solution, you don't need to appear in court.

Risks of a DRO :

- A DRO is only available if you owe less than £20,000 and live in England, Wales or Northern Ireland
- You'll need to pay the Insolvency Service a one-off fee of £90. If you qualify, our specialist team can help you apply
- You can't apply if you're a home-owner
- A DRO will appear on a public register and will affect your credit report negatively.

DROs and Fresh Start Process: A comparison

DRO (UK)	*Fresh Start Process (India)*
Qualifying debts only include debts that are for a liquidated sum payable either immediately or at some certain future time, are not excluded debts (such as education loans) and are not secured loans	In India, A list of qualifying debts as well as excluded debts is also provided under the Code by way of Section 79(19) and 79(15) respectively.

DRO (UK)	*Fresh Start Process (India)*
In UK, the cooling off period between two applications for DROs is 6 years	In India it is of a year only.
In UK, the order for DRO can only be given in a year and a period of 12 months moratorium is imposed on the debtor but only on his qualifying debts as opposed to his all his debts.	The same practice is said to be followed in India under the Code.
In UK, to be eligible for a DRO, you must meet these criteria: ◆ you owe £20,000 or less ◆ you have less than £50 to spend each month, after paying tax, national insurance and normal household expenses ◆ you've lived or worked in England or Wales in the last 3 years ◆ your assets aren't worth more than £1000 in total ◆ you've not had a DRO in the last 6 years	In India, Section 80 states the eligibility criteria of a debtor for applying to Fresh Start Process: "80. (1) A debtor, who is unable to pay his debt and fulfils the conditions specified in sub-section (2), shall be entitled to make an application for a fresh start for discharge of his qualifying debt under this Chapter. (2) A debtor may apply, either personally or through a resolution professional, for a fresh start under this Chapter in respect of his qualifying debts to the Adjudicating Authority if — (*a*) the gross annual income of the debtor does not exceed sixty thousand rupees; (*b*) the aggregate value of the assets of the debtor does not exceed twenty thousand rupees; (*c*) the aggregate value of the qualifying debts does not exceed thirty-five thousand rupees; (*d*) he is not an undischarged bankrupt; (*e*) he does not own a dwelling unit, irrespective of whether it is encumbered or not;

DRO (UK)	*Fresh Start Process (India)*
	(*f*) a fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and (*g*) no previous fresh start order under this Chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start."
If the debtor himself cannot file for a DRO, they can appoint a Debt Advisor for the same. The debt adviser will help complete the application and explain what information must be included. They will then send it to the official receiver.	In India, as per Section 82 of the Code, the application will be filed by the debtor himself or take help of a Resolution Professional. Note: The concept of a Debt Advisor is said to be introduced in the Indian Code which will be a group of professionals different from the Resolution Professionals which will help the debtors file for fresh start.
The application is sent to the official receiver who will review the petition and verify the financial information provided by the debtor.	The application is examined by the Resolution Professional as under section 83.
The DRO will usually last for 12 months. The official receiver will: tell that the DRO has been made and explain the restrictions and duties that it imposes on you. tell that the creditors listed in the DRO that it has been made, and that they can't ask to repay your debt to them.	A moratorium is imposed for 180 days till the disposal of the application. In these 180 days the creditors cannot initiate any proceedings against the debtor with regard to their claims, however, Section 86 grants the power to creditors to raise objections to any qualifying debt that the debtor has filed for.
DRO is added to the Individual Insolvency Register - it's removed 3 months after the DRO ends.	As per Section 92(5), the discharge order of the debtor will be forwarded to IBBI to be recorded in a register that is to be maintained by them. The names of the debtor, unlike in UK, will not automatically be added on admission of the application.

DRO (UK)	*Fresh Start Process (India)*
While DRO is in place debtor will have to follow some 'restrictions'. This means debtor cannot: ◆ borrow more than £500 without telling the lender about your DRO - whether you're borrowing on your own or with someone else ◆ act as a director of a company ◆ create, manage or promote a company without the court's permission ◆ manage a business with a different name without telling anyone you do business with about your DRO ◆ apply for an overdraft without telling your bank or building society about your DRO ◆ write cheques that are likely to bounce It's a criminal offence to break the restrictions - you may be prosecuted if you do so.	Section 85(3) of the Code places restrictions on the debtor during the period of moratorium.
The UK mechanism provides for a cooling off period of 6 years between two fresh start applications.	There is no cooling off mechanism, however, the same mechanism as under the UK Code is said to be included.

Part 9 of the England and Wales Insolvency Rules, 2016 talk of the procedure to be followed for debt relief orders.[3]

Part 7A of the Insolvency Act, 1986 has provisions for debt relief orders.[4]

INDIVIDUAL VOLUNTARY ARRANGEMENT: SALIENT FEATURES

- Part VIII of the Insolvency Act, 1986 holds the provisions for IVA.[5]
- Part 8 of the England and Wales Insolvency Rules, 2016 holds the provisions for the procedure for IVAs[6]
- An IVA is synonymous to the Insolvency Proceedings of Individuals under Part III of the Code. Both provide for a restructuring plan of the individual for all his debts.
- A major point of difference is that under the UK Code, IVA may be

submitted irrespective of whether the debtor is insolvent or not. In India the debtor or one of his creditors may only apply in case of being insolvent.

- In both the Indian and UK law, the debtor presents the repayment/ restructuring plan subject to approval of the creditors.
- The rules contain in detail the contents that need to be included in the proposal that the debtor will make and no such provision has yet been included in the Indian Code even though there is a need for the same.
- An IVA is an insolvency procedure, which results in the renegotiation by an individual of the payments due to all of their creditors, or some other form of financial restructuring.
- In order for an IVA to succeed, 75% of creditors (by value of debt attending and voting) must meet and vote its approval. In India, more than three fourth in value of the creditors present in person or in proxy approve the repayment plan as per Section 111 of the Code.
- All IVAs must be supervised by an insolvency practitioner. Pending the approval of the arrangement, the insolvency practitioner will act as the nominee and will usually become the supervisor to implementation of the approved proposal once the arrangement comes into effect.
- Another point of difference is that the UK Act provides for punishment for fraudulent applications and delinquent debtors by providing a penalty for imprisonment or fine or both. No such provision of penalty is prescribed in the Indian Code. The inspection and prosecution is done by Secretary of State.
- An appeal against the approved plan can be brought by the debtor or any other affected party in the Court for them to give directions, modify the acts of the supervisor or replace the supervisor altogether. Section 98 of the Code provides for replacement of the Resolution Professional by the Adjudicating Authority on recommendations made by the Board.

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1. http://www.legislation.gov.uk/uksi/2016/1024/part/11/chapter/6/made
2. http://www.legislation.gov.uk/uksi/2016/1024/article/5/made
3. http://www.legislation.gov.uk/uksi/2016/1024/part/9/made
4. https://www.legislation.gov.uk/ukpga/1986/45/part/7A
5. https://www.legislation.gov.uk/ukpga/1986/45/part/VIII
6. http://www.legislation.gov.uk/uksi/2016/1024/part/8/made

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