RESOLVE™

# INSOLVENCY AND BANKRUPTCY JOURNAL

NO. 2 | PG. 1-100 | FEBRUARY 2022 | ₹ 500 (SINGLE COPY)




INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)
'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

TAXMANN® ACADEMY

Presents

# Tax and Accounts Professional Course

A comprehensive three-level **online course** involving knowledge and skills **training** about various **compliances** applicable in **day-to-day business practice**

## What Will You Learn?

- Income Tax
- GST
- TDS/TCS
- Company Law
- Labour Laws
- MSME
- FSSAI
- MS Office
- Personality Development
- And Much More

## Highlights

| Curriculum | Course Fees |
|---|---|
| 08 Modules | ~~₹ 30,000~~ Special Introductory Offer ₹19,999* Offer valid till 15th April 2022 *Exclusive of GST |
| 125 Hours | |
| 07 Industry Experts | |

**Curriculum**

- 12 weeks
- Weekly and Weekend Classes
- Batch begins - April 2022

Scan to Visit

# NEWS FROM THE INSTITUTE

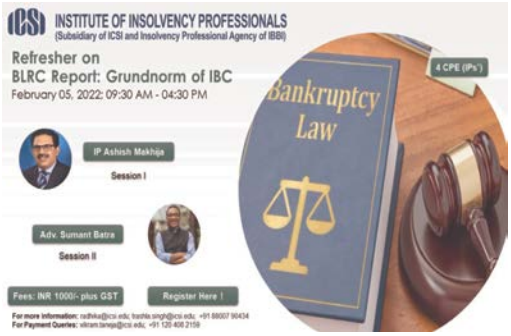
## ◆ Pre-Registration Educational Course

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.

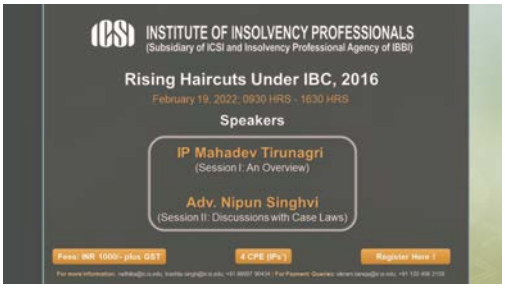
ICSI IIP jointly with the other three Insolvency Professional Agencies conducted batch of pre-registration educational course from 18th February to 24th February, 2022.

## ◆ Workshops Organized

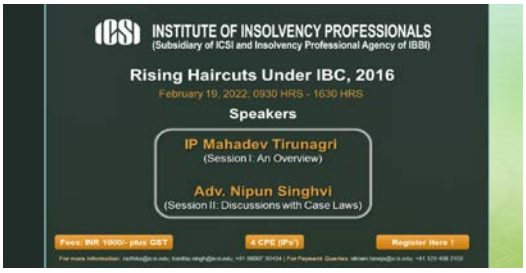
- Workshop on "Refresher on BLRC Report: Grundnorm of IBC" on 5th February, 2022



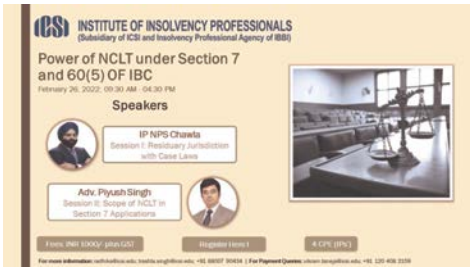

- Workshop on "Interplay of RERA, Admiralty Act & IBC" on 12th February, 2022




- Workshop on "Rising Haircuts Under IBC, 2016" on 19th February, 2022

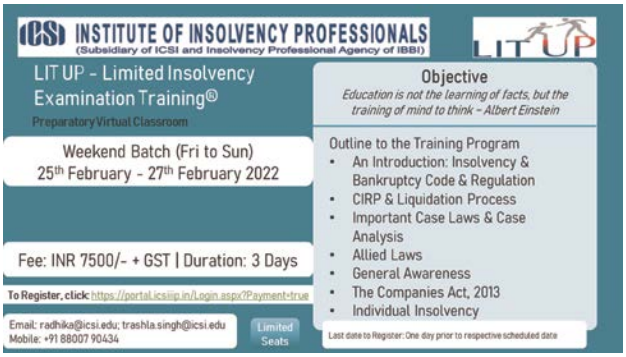



- Workshop on "Power of NCLT under sections 7 and 60(5) of IBC" on 26th February, 2022



## ◆ LIT UP- Preparation Course for Limited Insolvency Examination

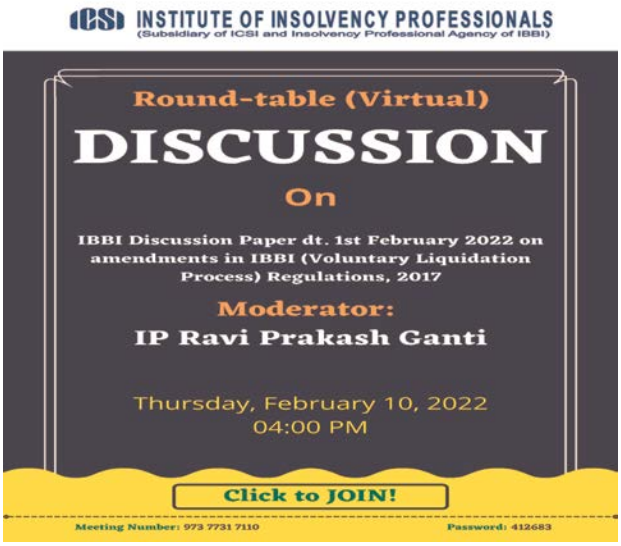
Pursuant to Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, an individual is eligible for registration as an Insolvency Professional only after passing Limited Insolvency Examination conducted by IBBI.




ICSI IIP organized three days intensive training program for preparation of Limited Insolvency Examination from 25th February, 2022 to 27th February, 2022.

## ◆ Roundtable discussion

ICSI IIP organised roundtable discussion on "IBBI Discussion Paper dt. 1st February 2022 on amendments in IBBI (Voluntary Liquidation Process) Regulation, 2017" on 10th February, 2022.



*Developed and Marketed by*
**TAXMANN®**
*Printed at*
**TAXMANN®**
*Edited & Published by*
**Dr. Binoy J. Kattadiyil**
for
**ICSI Institute of Insolvency Professionals**
'ICSI House', 3rd Floor, 22,
Institutional Area, Lodhi Road,
New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : info@icsiip.com
Website : http://www.icsiip.com

*Printed at*
**Tan Prints (India) Pvt. Ltd.**
44 km. Mile Stone, National Highway, Rohtak Road, Village Rohad, Distt. Jhajjar, Haryana (India)

**ANNUAL SUBSCRIPTION**
(JANUARY - DECEMBER 2022) : ₹ 5,500
*Cheques to be drawn in favour of*

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

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

***For Non-Members***
- **Taxmann Publications Pvt. Ltd.**
59/32, New Rohtak Road,
New Delhi-110005
Ph. : 91-11-45562222
email : sales@taxmann.com

# At a Glance

No. 2 | Pg. 1-100 | February 2022





Section 5(21) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Whether section 5(21) defines 'operational debt' as

a claim in respect of provision of goods and services and operative requirement is that claim must bear some nexus with provision of goods or services, without specifying who is to be supplier or receiver - Held, yes - Whether a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt - Held, yes (Para 43)

Section 5(20), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational creditor - Appellant sought an operational service from proprietary concern when it contracted with them for supply of light fittings - When contract was terminated, proprietary concern encashed cheque for advance payment, hence, it gave rise to an operational debt in favour of appellant, which remained unpaid - Whether therefore, appellant was an operational creditor as defined under section 5(20) - Held, yes - Whether respondent having taken over proprietary concern and Memorandum of Association (MOA) of respondent unequivocally stating that one of its main objects was to take over proprietary concern and since MOA of respondent still stands, it could be concluded that respondent would be liable to repay debt to appellant - Held, yes - Whether therefore, application under section 9 would be maintainable - Held, yes (Paras 53 and 56)

Section 3(12), read with section 9 of the Insolvency and Bankruptcy Code, 2016 and article 137 of the limitation Act, 1973 - Corporate insolvency resolution process - Default - Whether default is defined under section 3(12) as non-payment of debt by corporate debtor when it has become due - Held, yes - Whether limitation does not commence when debt becomes due but only when a default occurs - Held, yes (Para 59)

- **Amit Katyal** *v.* **Meera Ahuja**
  (2022) 136 taxmann.com 55 (SC) • P-44

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and Article 142 of the constitution of India - Corporate Insolvency Resolution Process - Withdrawal of application - Respondents were home buyers in housing project being developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by respondents asking them to refund consideration amount - Despite granting several opportunities to corporate debtor, when amount in question was not refunded, respondents filed instant application under section 7 - It was noted that respondents as well as other home buyers have settled dispute with corporate debtor and a settlement had been entered into, under which, corporate debtor had agreed to refund consideration amount with applicable/accrued interest to respondent - Corporate debtor also undertook to complete entire project and hand over possession to home buyers (who want possession), within a period of one year - Whether thus, this was a fit case to exercise powers under Article 142 and to permit respondents to withdraw CIRP proceedings which would be in larger interest of home buyers who were waiting for possession since more than eight years and thus, respondents were permitted to withdraw application filed by them under section 7 - Held, yes (Para 14)

- **Prakash Corporates v. Dee Vee Projects Ltd.**
  (2022) 136 taxmann.com 315 (SC) • P-48

Section 13, read with section 16, of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and Order VIII rule 1 of Code of Civil Procedure, 1908 - Appeals from decrees of commercial courts and commercial divisions - Following a payment related dispute between parties, respondent instituted civil suit against appellant - Appellant was served with summon for appearance and for filing written statement - Trial Court declined appellants application dated 22-6-2021 seeking time to file written statement on ground that permitted period of 120 days for filing written statement was expired on 6-5-2021, and thus, appellant forfeited right to submit their written statement - It was noted

that due to COVID-19 pandemic, Apex Court in Cognizance for Extension of Limitations, In re (2021) 132 taxmann.com 123/168 SCL 784 had extended limitation period from 15-3-2020 until 2-10-2021 - Whether thus, time limit for filing written statement by appellant did not come to an end on 6-5-2021 and therefore, impugned order passed by Trial Court declining prayer of appellant for submission of written statement was to be set aside - Held, yes (Para 20.3)

- **Tharakan Web Innovations (P.) Ltd. v. National Company Law Tribunal, Kochi**
  (2022) 135 taxmann.com 187 (Kerala) • P-49

Section 4 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Application of - Whether corporate insolvency resolution process gets triggered moment there is a default as mentioned in section 4 - Held, yes - Whether triggering can be at instance of corporate debtor itself or a financial creditor or an operational creditor - Held, yes - Whether section 4, after amendment on 24-3-2020 clearly says that Part II of IBC shall apply to matters relating to insolvency and liquidation of corporate debtors where minimum amount of default is Rs. 1 crore - Held, yes - Whether therefore, no application could have been filed after 24-3-2020 regarding an amount where default was less than Rs. 1 crore, even if date of default was prior to 24-3-2020 - Held, yes (Paras 23 and 25)

- **Satyanarayan Bankatlal Malu v. Insolvency and Bankruptcy Board of India**
  (2022) 136 taxmann.com 317 (Bombay) • P-51

Section 236 of the Insolvency and Bankruptcy Code, 2016, read with section 435 of the Companies Act, 2013 - Special Court - Trial of offence by - Whether Special Court which is to try offences under Insolvency & Bankruptcy Code is established under section 435 (2) (b) of the Companies Act, 2013 which consists of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office of A sessions Judge or Additional Session Judge - Held, yes (Para 14)

- **Axis Bank Ltd. v. Samruddhi Realty Ltd.**
  (2022) 136 taxmann.com 319 (NCLAT - Chennai) • P-52

Section 5(8), read with sections 42 and 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was engaged in business of construction and development of residential accommodation - Allottees/retail home buyers had approached appellant bank for financial assistance which was disbursed by appellant as Loan amounts to respective allottees which was then disbursed by allottees to corporate debtor - CIRP application in respect of corporate debtor was admitted by Adjudicating Authority - Appellant submitted its claims before RP which was rejected - Subsequently, Adjudicating Authority passed an order for initiating liquidation proceedings against corporate debtor and a liquidator was appointed - Appellant submitted its claim before liquidator which was also rejected on ground that disbursement of amount for time value of money had been made by appellant in favour of allottee i.e. borrower and not corporate debtor and further appellant was not a financial creditor in terms of provisions of Code - Whether appellant when it questions determination of liquidator to effect that appellant is not a 'financial creditor', then, as per section 42, in respect of accepting or rejecting claim, an 'Appeal' is to be preferred against decision of liquidator to 'Adjudicating Authority' within 14 days of receipt of such decision - Held, yes - Whether liquidator having accepted allottees claim, appellant was not entitled to vary/modify same, especially when allottees were not parties to application before Adjudicating Authority - Held, yes - Whether appellant not having subjectively satisfied Tribunal that money which it was claiming was disbursed to 'corporate debtor' for time value of money as per section 5(8), Adjudicating Authority was right in dismissing application - Held, yes (Paras 47, 52 and 53)

- **Union Bank of India v. National Housing Bank**
  (2022) 135 taxmann.com 142 (NCLAT-New Delhi) • P-54

Section 14 of the Insolvency and Bankruptcy Code, 2016, read with section 16B of the National Housing Bank Act, 1987 - Corporate insolvency resolution process - Moratorium - General - DHFL availed financial assistance from National Housing Bank (NHB) under its refinance and other schemes - Loans granted by NHB were secured by way of pari passu charge inter alia over movables including receivables of DHFL - Whether such assets/receivable under refinance scheme of NHB be deemed to be held by DHFL in trust for benefit of refinancing institution, i.e. NHB in terms of section 16B of NHB Act and DHFL could not use these receivables for its purposes or uses or treat them as its property - Held, yes - Whether therefore, when CIRP was initiated against DHFL, Adjudicating Authority had not erred in excluding from scope of moratorium those assets which were owned by a NHB being a third party and which were in hands of DHFL under a contract - Held, yes (Para 18.39)

- **Writer Business Services (P.) Ltd. v. Ashutosh Agrawala, Resolution Professional for Cox & Kings Ltd.**
  (2022) 136 taxmann.com 294 (NCLAT-New Delhi) • P-56

Section 235A, read with sections 14 and 236, of the Insolvency and Bankruptcy Code, 2016 - Punishment where no specific penalty or punishment is provided - Whether where Adjudicating Authority is empowered to impose penalty, specifically, it has been provided in Code - Held, yes - Whether section 235A is a provision for awarding a punishment of fine and provision is for punishment of an offence - Held, yes - Whether trial of such offence has to be as per section 236 on taking cognizance by Special Court by complaint made by Board or Central Government for punishment of a person - Held, yes - Whether therefore, where Resolution Professional filed an application alleging that appellant had violated Moratorium by refusing to provide its record management services, however, there was neither any prayer for imposition of fine, nor any kind of punishment was prayed for, imposition of penalty on appellant by Adjudicating Authority in exercise of powers under section 235A was beyond jurisdiction, hence, unjustified - Held, yes - Whether since there was allegation of commission of an offence, punishment could have been awarded after following procedure under section 236 - Held, yes (Paras 17, 24, 25, 27 and 28)

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Whether Record Management Services being provided by appellant are critical services within meaning of section 14(2A) which should not be terminated during period of Moratorium, hence, there was no error in direction issued by Adjudicating Authority to appellant to continue providing its services to corporate debtor, during CIRP period - Held, yes - Whether further, since it was on record that appellant had issued invoices for payment for services provided during CIRP and part payment was made during period, prayer of Resolution Professional that direction be issued to appellants that they are not entitled to receive any payment for services during CIRP period could not have been granted - Held, yes (Paras 30 and 32)

- **Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional for Jet Airways (India) Ltd.**
  (2022) 136 taxmann.com 321 (NCLAT-New Delhi) • P-58

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - CIRP in case of corporate debtor was admitted - Appellant, a registered Trade Union representing 95 per cent of aircraft maintenance engineers of corporate debtor submitted its claim and RP had admitted its claim - Thus, appellant being a stakeholder in CIRP filed instant appeal ques-

tioning order of NCLT by which it had granted approval to proposal of CoC and RP to sell subject assets of corporate debtor - Whether since appellant being stakeholder in CIRP had interest in assets of corporate debtor and it was value of those assets which would be relevant for determination of its claim either in Resolution Plan or in liquidation proceedings, submission of RP that appellant was not an aggrieved person would not be acceptable and appellant being a person aggrieved within meaning of section 61, appeal on behalf of appellant would be fully maintainable - Held, yes (Para 13)

Section 25, read with section 14, of the Insolvency and Bankruptcy Code, 2016 and regulation 29 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Whether regulation 29(1) specifically empowers RP to sell unencumbered asset(s) of corporate debtor, if he is of opinion that such sale is necessary for better realization of value - Held, yes - Whether therefore, despite declaration of Moratorium under section 14(1)(b), RP is empowered to conduct sale of unencumbered assets, if he is of opinion that it is necessary for better realization of value - Held, yes - Whether prohibition in transferring assets of corporate debtor is on corporate debtor and said prohibition ipso-facto does not prohibit RP or CoC, who were empowered by specific provision of Code to undertake any such sale - Held, yes - Whether therefore, decision of RP to proceed with sale of property of corporate debtor after approval of CoC was permissible and was not interjected by virtue of declaration of Moratorium under section 14(1)(b) - Held, yes (Paras 25 and 28)

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether when Moratorium is declared any action to foreclose, recover or enforce any security interest created by corporate debtor in respect of its property is prohibited - Held, yes - Whether prohibition to foreclose or to recover any security interest is in interest of corporate debtor, so that secured creditors do not enforce its security during continuance of CIRP - Held, yes - Whether law does not permit secured creditors to enforce their security, since, if permitted, secured creditors will be more than inclined to enforce their securities and realize their debt during currency of CIRP, which shall defeat entire object of insolvency resolution, hence, not permissible - Held, yes (Para 30)

- **Standard Surfa Chem India (P.) Ltd. v. Kishore Gopal Somani**
  (2022) 136 taxmann.com 323 (NCLAT-New Delhi) • P-60

Regulation 47A, read with regulation 47 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 - Exclusion of period of lockdown - Appellant emerged as successful bidder in e-auction of Pondicherry unit of corporate debtor - Liquidator issued a letter of intent stipulating 90 days timeline for making full payment to complete auction - Before expiry of said 90 days, appellant preferred an IA before NCLT seeking time extension in complying with auction proceedings - However, NCLT vide impugned order dismissed said IA - On appeal, it was found that applicant had sought an extension of 3 months due to 2nd wave of Covid-19 outbreak on ground of regulation 47A which provided that period of Lockdown imposed by Central Government in wake of Covid-19 outbreak shall not be counted for computation of timeline for any task that could not be completed due to Lockdown in relation to any liquidation process - It was found that regulation 47 which deals with Model Timeline for Liquidation Process is only directory in nature and was provided under regulation as a guiding factor to complete liquidation process in a time-bound manner and in exceptional circumstances, such a time limit can be extended - Further, E-Auction Process Information Document also provided discretion to liquidator to extend timeline and since impact of 2nd wave of Covid-19 was everywhere in India, of which judicial notice could be taken - Whether therefore, in said special circumstances, liquidator ought to have sought

permission of Adjudicating Authority to extend timeline and Adjudicating Authority should have extended timeline to extent permissible under applicable laws and regulations - Held, yes - Whether Adjudicating Authority did not consider that satisfaction of creditor claims while ensuring asset maximization is underlying principle of IBC, which cannot be overridden on account of meagre delays induced by a force majeure event - Held, yes - Whether therefore, appeal deserves to be allowed by setting aside impugned order - Held, yes (Paras 28, 31, 33 and 35)

**P.K. MALHOTRA**

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

# From Chairman's Desk

*We should never assume that whatever we know is the absolute. What we know is based on our level of perception at that moment, but that perception is bound to evolve with time.*

The IBC prescribes time-limits for each process to be completed. It also facilitates, inventivises and empowers the ecosystem to close the process expeditiously. While an early resolution increases the likelihood of a company being revived resulting in CD's assets turning into productive assets, any delay in the process has a very heavy cost associated with it. IBC thus aims for a time-bound resolution. There are 2 clear options available with a CD undergoing CIRP which is (*a*) revival through a resolution plan; or (*b*) liquidation of the Company. Both the options can lead to maximisation of value of assets depending upon the position in which CD stands. The IBC lets the market make an attempt to revive the company. In fact, by way of the 2019 amendment to the Code, it was clarified that the CoC can divide to liquidate a company as soon as it is constituted. After all, a timely liquidation is always preferred over a fruitless resolution proceeding. Therefore, the expectations of the stakeholders from CoC (which is a creature of the IBC statute itself) is and has always been very high. The commercial wisdom bestowed on them by the IBC ecosystem requires it to make an accurate assessment such that all the stakeholders can rest assured that they are moving towards the best possible

outcome *vis-à-vis* life of CD. CoC is one of the most important institutions under the CIRP and being conferred with an exalted/ supreme position, its conduct has to be always above board. The other most important institution is undoubtedly the IPs who have to drive the entire process as per law and while doing so they have to act in the capacity of an MD of the CD which undergoes insolvency process. The other important professional is the registered valuer who values the company which is under distress and is undergoing CIRP. Needless to say that while a good valuation can ensure that the CD gets through resolution process, a bad valuation can lead to a good company getting liquidated or even *vice versa*. The other important pillar of IBC is the Information Utility which is an innovation of IBC. It is a first of its kind institution conceived in the entire world which does a match-making between the borrowers and the creditors in terms of the data which is there in the system and is able to put down the *factum* of default which is there.

The objective of IBC is to nip in the bud and not allow issues to fester. Now, with a little more than 5 years since introduction of IBC, 2016, there have been various challenges in the way of effective implementation of IBC. The results have been equally encouraging and rewarding, especially in terms of the satisfaction that we received as stakeholders in the process. With the endeavour and efforts made by all key stakeholders, especially the judiciary which not only underlined the economic reform that is envisaged in the statute, but also, with its well-reasoned judgments which really helped us in arriving at a clear purposive construction (and interpretation) of different IBC provisions. The legislative amendments have also helped in eliminating teething issues that were faced in realising objectives of this legislation. Many important judgments have been pronounced upon the subject giving a fine shape to the Code, including certain landmark judgments wherein Hon'ble Supreme Court has tried to ensure that the spirit of the Code is given primacy over procedural requirements. On the commercial side, with multiple assets on sale, strategic investors have been first off-the-mark, with billion dollar conglomerates trying to outbid each other and add coveted companies to their inventories. The interest shown by the corporates by participating in the process to turn around some loss making entities has been extremely encouraging for the economy as also for the NPA laden banking system. The

IBBI, which is the chief regulatory and supervisory body under the IBC, has always set very high standards and its functioning has received accolades from different stakeholders for the commendable job that it has done in not only being proactive in its approach, but also being a hands-on regulator, spreading awareness and regulating the space. IBC has unified the law relating to enforcement of statutory rights of creditors and has further streamlined the manner in which a debtor company can be revived in order to sustain its debt without extinguishing creditors' rights.

One of the thoughts that has intrigued me concerns the space wherein we can have an interface between arbitration process and insolvency resolution process. Now, we all know that insolvency proceedings are governed by IBC and arbitration proceedings are commenced under the Arbitration and Conciliation Act, 1996. The Code stipulates the consequences of CIRP (or subsequent liquidation) on continuation/commencement of other legal proceeding which potentially have an impact on realisation of the objectives enshrined in the IBC. This includes arbitration proceedings as well. With respect to CIRP, the Supreme Court in *A. Ayyasamy* v. *A. Paramasivam & Ors.* had earlier clarified that *insolvency and winding-up matters are not arbitrable*. Therefore, as soon as the CIRP is initiated, the initiation or continuation of arbitration proceedings or related court proceedings are barred in light of the moratorium imposed u/s. 14 of the Code. The rationale and primary objective behind imposition of *moratorium* on legal proceedings is to ensure that the assets of CD are not adversely impacted. Infact, in one of its landmark cases, *i.e., Alchemist Asset Reconstruction Company Ltd.* v. *Hotel Gaudavan Pvt. Ltd.*, Hon'ble SC also clarified that arbitrations or related proceedings commenced after initiation of CIRP are considered unlawful. Ultimately, the Courts go by the purpose and intent behind imposition of *moratorium*. Section 18, IBC casts a duty upon an IRP to receive and collate all claims submitted by the creditor pursuant to the public announcement requires the IRP to take account of such claims as well. The FCs and OCs are thus entitled to file their claims against CD. A *claim* under an arbitration agreement is not specifically covered under the definition of a *debt* under the Code, however, if the *claim* independently falls within the purview of the *financial debt* or *operational debt*, the same can be filed by a creditor and

then it becomes a part of the overall resolution process. If a claim is not included by the IRP, it is categorized as a pending litigation/dispute, and then it is up to the RA to determine how to treat such claims. Generally, a *nil* value is assigned to such claims, or the Resolution Plan provides that all pending litigation/ dispute resolution claims will stand extinguished as soon as the CIRP is completed and the new management takes over the CD. Also, in case the CIRP fails, and CD moves into liquidation, the liquidator has the right to consolidate the claims. An FC or an OC or even a creditor who is partly an FC and partly an OC can then file its claims before the liquidator. As regards arbitration proceedings initiated in respect of a claim by the CD, the moratorium does not bar the same. The moratorium order u/s 14, IBC may not apply where the CD is the claimant and proceedings are for its benefit. Although it is not expressly mentioned, however, the law draws a distinction between the arbitration proceedings wherein CD is the defendant (*i.e.* a claim is made against the CD) and those wherein CD is itself the claimant. In liquidation proceedings, the liquidator can also initiate fresh proceedings on behalf of CD (as the Claimant) after receiving NCLT's prior approval for the same. A distinction between the CIRP and Liquidation *vis-à-vis* legal proceedings is that while initiation or continuation of legal proceedings is barred under the moratorium order (s. 14, IBC) upon admission of a CIRP application, the liquidation process only bars initiation of any new proceedings. This means that existing proceedings can continue against the CD. Also, since the moratorium order is applicable only after commencement of CIRP, therefore, the impact of moratorium would not extend to the proceedings initiated prior to initiation of CIRP.

IBC has been rightly described as a jewel in the Indian statute book and what we should never loose sight of is the fact that the Bankruptcy Law Reforms that are envisaged under the BLRC report. As stakeholders we should also remember the there is always a big difference between `doing what you like' and `doing what is needed' because when you start doing what is needed, there is no such thing as what I like and what I do not like!

I am waiting for an opportunity to meet you all in person. Till then, please take a very good care of yourself and your loved ones.

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

# Managing Director's Message

*Before searching and finding the solution, it is always important to have a good grip and understanding of the problem so that we can address ourselves to the right questions in order to find the solution*

The IBC has established and recognised the primacy of markets as well as the rule of law in the matters of finding an effective solution to the state of insolvency of a firm. The attention and importance that the legislation has gathered is not without reason. Infact, the six amendments so far made to the legislation is itself a testimony to the fact that a regular check is being kept by the legislature to ensure that the process is not put to any misuse and that the legislation succeeds in achieving its purpose and objective. There are some more changes that are there in the offing, and which shall add more features to the legislation aiming to make the IBC processes speedier as well as smoother. Every law has an evolution process. On the day of its conception, though consecrated with all good intentions, it cannot be expected to also deal with all the future challenges and situations without undergoing

the needed change. The Statute can have provisions which are more in the form of fundamental principles which need to manifest themselves not only through the delegated legislation, but also the judicial pronouncements by the Constitutional Courts of the country which play a very big role in providing clarity as to the application of law to different circumstances and situations. Moreover, for every new circumstance that was not envisaged while laying down the fundamental principles of law, there cannot be a legislative change to be expected. Here, the role of judges plays a major role. In fact with their great ability and capability to interpretate and construe the legislative provisions in the light of the objective that is sought to be achieved by the legislation, the judges have helped in the process of evolution of law. Infact, if I may also add here that very frequent changes made either in the legislation or even in the interpretation of provisions only adds to the confusion and further limits the natural process of institutional maturity, apart from unsettling the jurisprudence evolved and undermining the evolution of a solution thereof. This also often results in undesirable outcomes. The objective of IBC is clear, it is that the entire insolvency resolution process has to be market driven and to be conducted in a time-bound manner. A CIRP envisages a resolution either by way of revival of the firm (through a resolution plan) or else it has to go for liquidation so that the value of assets does not deplete further. While a resolution plan resolves the state of insolvency of a firm by running it as a going concern, wherein, under the approved resolution plan the firm is made to get back standing on its own feet so that it can improve its earnings, increase its valuation post resolution. This results in a win-win situation since the prospects of realisation for creditors also get improved, as compared to its erstwhile situation, and who better to decide on the things than the financial creditors who have their skin in the game. Here, I believe that the Financial Creditors need to make a departure from their past mindset of immediate recovery and a long term visions needs to be developed so as to make evaluation of resolution plans a credible and reasonable exercise which is able to justify itself. Therefore, there is a definite need for the FCs to switch from a mindset of immediate recovery to resolution based mindset in case of all viable firms. This is definite to take away all the fallout coming from some big haircut decisions taken by the banks and financial institutions.

At the same time, what we never forget is the fact that if the CoC comes to a legitimate conclusion that the CD has no enterprise value left in it and that it is no more into any viable business and thus cannot be revived, the decision of liquidation must follow suit. The Government of India is keen in not only allowing freedom of entry to the businesses, but there is also a freedom of exit encapsulated in its policy. Infact, IBC is described as an statutory instrument facilitating such freedom. IBC envisages closure of unviable firms and the rescue of viable ones. This can be seen in the fact that the CoC has the complete authority to decide to liquidate the CD as soon as it (CoC) gets constituted provided that there is a conclusion that the firm is not a viable firm. For all viable firms, the IBC requires CoC to consider the resolution plans submitted by the prospective Resolution Applicants provided the applicants are credible and capable. The underlying thought behind conferring final say (or final word) to the CoC in the decision making process is that they have the required business dexterity which allows them to identify and see if firm is viable or not. The biggest evidence of preferring commercial decision making over judicial rationale is the commercial call of CoC has been kept outside the judicial review process, thereby conferring a binding nature to such decisions.

Coming to the case-law that came from Hon'ble SC in the month of February, in a landmark ruling (in the case of *Consolidated Construction Consortium Limited* v. *Hitro Energy Solutions Private Limited*) the Court has made it clear that an a debt that arises from a contract which is in relation to supply of goods or services to be made by the corporate debtor is an operational debt. In other words, a debt which arises out of an advance payment made to a corporate debtor for supply of goods or services which is to be made by the corporate debtor would be an *operational debt* covered u/s. 5(21), IBC. The Court while delivering this judgment framed the issue as follows: whether the appellant is an operational creditor within the meaning of IBC even though it is a purchaser. After analysing the facts and the case and applying the language of the provision to it, the Court came to a finding that although the appellant did not provide any goods or services to the respondent, but only availed of goods or services, the appellant is an OC and was owed an operational debt. The reasoning provided thereof was that the term operational debt is defined u/s 5(21) as "claim in respect

of the provision of goods and services". Therefore, *the definition does not restrict the claim to only those who supply goods and services, but it requires that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver*. Furthermore, on a conjoint reading of the s. 8(1) r/w rule 5(1) and Form 3 of the IBBI (Application to Adjudicating Authority) Rules, 2016, it noted that a notice for an operational debt can be issued either through a demand notice or an invoice. It is not mandatory that an invoice for supply of goods or services to the CD is required to prove the existence of operational debt. Also, it was noted that upon a conjoint reading of Reg. 7(2)(*b*)(*i*) and (*ii*) of CIRP Regulations, 2016, it can be noted that an OC, seeking to claim an operational debt in a CIRP, has an option between relying on a contract for the supply of goods and services with CD or an invoice demanding payment for the goods and services supplied to the CD. The contract for supply of goods and services would therefore include also those arrangements in which an OC may have been the receiver of goods or services from the CD.

# INTERVIEW

**MR. ASHOK JUNEJA**

*Practising Advocate, Company Secretary (FCS) Cost Accountant (ACMA), Master of Commerce (M.Com), Insolvency Professional (IP) Director of "MANTRAH INSOLVENCY PROFESSIONALS PVT. LTD."*

**1. Insolvency and Bankruptcy Code, 2016, has come a long way since its inception, so according to you how significantly this regime has shaped the economy?**

**Ans.** On 28th May, 2016, the Code was published in the official gazette after its passage in Parliament. It has been hailed as a major economic measure, aimed at aligning insolvency laws with international standards. Parliament's previous attempts to ensure recovery of public debt, (through the Recovery of Debts due to Banks or Financial Institutions Act, 1993, hereafter "RDBFI Act") securitization (by the Securitization and Reconstruction and Enforcement of Security Interests Act, 2002 hereafter "SARFAESI") deal with certain facets of corporate insolvency. These did not result in the desired consequences. The aim of the Code is to a) promote entrepreneurship and availability of credit; b) ensure the balanced interests of all stakeholders and c) promote time-bound resolution of insolvency in case of corporate persons, partnership firms and individuals.

As the regime is gearing up to innovative responses, it is instructive to recapitulate the basic features and outcomes associated with the IBC. The objective of the IBC is time bound reorganisation and insolvency resolution of firms for maximisation of value of

assets of the firm concerned, to promote entrepreneurship and availability of credit and thereby balance the interests of all stakeholders. The first order objective is resolution. The second order objective is maximisation of value of assets of the firm and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. The Code has proved to be an efficient, effective, and efficacious legislation based on its outcomes so far.

IBC has indeed set alarm bells ringing with almost every debt-stricken company trying its hand at debt restructuring or putting up distressed assets on sale.

The contribution that the enactment and operationalization of the Code made to the Ease of Doing business ranking of India has been the most talked about. However, it is important to recognise the contribution of the Code to a positive behavioural change in the creditor-debtor relationship and the systemic strengthening of the credit markets. In the long run, the Code driven incentives will be internalised by stakeholders providing certainty and predictability to creditor - debtor contracts. This vital element will strengthen the market economy and hence would be the lasting achievement of the Code.

**2. In reference to the assignments handled by you how has your experience as an Insolvency Professional been? What changes are you looking forward to in this already implemented law?**

**Ans.** The experience as an Insolvency Professional is magnificent being the earliest entrant into the profession. This has given me an opportunity to diversify my perspectives like stepping up from compliances management to evolving as person who relentlessly working for the reviving of Corporates. While handling the assignments, we even come across various dimensions of the problem which has resulted the company to undergo the insolvency resolution process. On few occasions we find out what kind of decisions taken by the erstwhile management has thrown the company into trouble, whereas in certain other occasions, the policy decisions taken by the Government could have yielded this unwanted situation. At the same time because of the company undergoing this turmoil, how the interests of various stakeholders is getting affected. The financial creditors have to undergo the huge haircuts, the operational creditors sometimes will not receive anything out of the resolution plan, the workmen and employees have to spend nightmare during the trouble times of the company and even after the receipt of resolution plan, there may not be a penny to them. As an Insolvency Professional, we have to even handle the fury of these segments of stakeholders. Sometimes they may not even understand what is permissible and what is not. But they come to the Insolvency Professional under the impression that their problems will be solved. Even after receipt of the Resolution Plans, we may not be in a position to address the concerns of all the stakeholders to their satisfaction.

The following changes I am looking forward to be incorporated in this Code:

**(*a*) The Removal of IRP concept**

The concept of Interim Resolution Professional (IRP) should be removed.

This is because the IRP is also a person appointed by NCLT and is qualified to run the CIRP process. However any misdeeds done like violating the code and the regulations thereunder by the IRP shall be the reason to replace him similar to how the appointed RP can be replaced with another RP.

**(*b*) Mandatory Contribution of CIRP Expenses**

The concept of mandatory contribution of CIRP expenses by the Financial Creditors in the first month of CIRP itself should be placed in the code, wherever it is necessary based on the availability of the funds in Corporate Debtor. Though there are various judgments, but in some cases the contribution is not coming. Simultaneously certain guidelines about how to utilise the contributed amount towards CIRP can be placed in the regulations like where to take mandatory permission from CoC members and where the amount can be utilised by the RP on his own.

**(*c*) Restriction on voting time lines by CoC Members**

The concept of mandatory voting at the CoC meeting and/or restriction of evoting window for only 3 to 5 days shall be added. This will save the time in CIRP and also the CoC members will come prepared and with proper authorisation to meet the deadlines of voting.

**(*d*) Removal of the concept of priority payment to the dissenting CoC member**

The payment to the dissenting CoC Member has to be made as per the plan amount. If priority payment is there, then certain CoC members are trying to take advantage of this by intentionally either dissenting or even abstaining themselves. There should be a mandatory requirement to express why the CoC member is dissenting to the resolution plan and the same should be noted in the Minutes. If the concern of that particular CoC member is about not getting a fair amount then that should be curbed. This is because the motive of the Code is not the recovery of money.

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

**Ans.** One reason for delay in CIRP is abnormal delay in approving resolutions by COCs involving Financial Institutions, Government Authorities like IT Deptt., GST Deptt., ESI, PF. There needs to be deemed approval system after certain time if no response is received from them. Some authorities continue to raise demands, pass orders against the CD even intimation to them for the CIRP. There needs to be awareness to them about the provisions of IBC to avoid waste of time of NCLT and RPs.

**4. You also being a Company Secretary by profession, how has this been helpful in carrying out your duties as an Insolvency Professional?**

**Ans.** The experience as Company Secretary is very useful in the process of Compliances, conducting COC/SCC meetings, drafting of Minutes and dealing with Court matters.

Beside CS I am an Advocate and also a Cost Accountant which has given an edge

to me while performing my obligations under the Code. Insolvency and Bankruptcy Code is a law oriented Code. The Company Secretary has a vital role to play in the aspects related to governance of Corporate as they are involved and contribute to the Corporate right from the Incorporation till the Winding Up of the Company. However, professional competence, responsibility towards stakeholders and demonstration of the highest ethical standards are required to make the exercise a success and meet the objectives of the legislation.

**5. How do promoters, Board of Directors or any other management of the Corporate Debtor whose insolvency has been commenced perceive this insolvency law?**

**Ans.** Section 17(1) talks about suspension of "powers" of the board of directors and partners of the corporate debtor, and exercise of those powers by the interim resolution professional/resolution professional.

The Board of Director stands suspended, but that does not amount to suspension of Managing Director or any of the Director or officer or employee of the Corporate Debtor. To ensure that the Corporate Debtor remains on going concern, all the Director/employees are required to function and to assist the Resolution Professional who manages the affairs of the Corporate Debtor during the period of moratorium.

The board of directors works as a collective body, and the directors, in their individual capacity, are not empowered to exercise the powers which the board is entitled to exercise. There is nothing which stipulates that the directors in the board of directors of the corporate debtor shall be suspended or shall vacate their offices. It precludes them from working as a "board". The board of directors is still there, but is powerless in doing acts which they have been empowered to do under the law. However, the directors who constitute the board are there and are NOT relieved from their duties and functions. This is evident from section 19 which mandates the personnel of the corporate debtor to assist the resolution professional in managing the affairs of the corporate debtor.

The views that are currently prevailing that once the insolvency resolution period commences, there would be no board meetings, there would be no audit committee meetings, that the resolution professional will sign each and every document relating to the corporate debtor, that the resolution professional shall be doing all the filings are completely misguided.

Their immediate reaction is that of frustration. In most of cases, they do not cooperate, create hurdles in carrying out CIRP, instigate employees not to cooperate. It involves lot of efforts to get their co-operation including asking for directions from the NCLT.

**6. One of the major duties of Insolvency professionals is to identify avoidable transactions and seek appropriate reliefs from Adjudicating Authority. How far filing of these applications benefitted the corporates under insolvency?**

**Ans.** After taking charge of CD by IRP and on confirmation of his appointment in the First CoC meeting, Resolution Professional

(RP) appointed has to promptly scrutinize all the available information and records at his disposal to identify such transactions, which may have taken place in the immediate past two years from the commencement of CIRP. This is required to identify the Avoidable transactions which may be having a special bearing in leading the deterioration of the financial health of the CD and its way to suffocated funds position which leads to default to Financial and Operational Debts.

Timely action by RP in identifying such transactions and reporting to IBBI and in turn to Hon'ble NCLT may be a deterrent the unscrupulous elements in running the business against the public policy and help in protecting the Assets of the Corporate Debtors from falls in their value through timely Resolution.

It is one of the RP duty to form an opinion on or before 75th day of the CIRP Comemecment date to whether the CD has been subject to any transaction under sections 43, 45, 49 and 66 of the IB Code.

Further, the RP has to determine the same on or before 115th day of the CIRP Commencement.

Further, if the RP makes the determination than he is duty bound to apply to the AA on or before the 135th day of CIRP Comemecment date for seeking appropriare relief.

This can also be discussed in conjuction with Section 25(2)(j) wherein the RP is duty bound to file an application for avoidance of transaction.

The severe penalties like imprisonment for a term of 3 years to 5 years and or with fine from Rs. 1 Lakh to Rs. 1 Crore.

On the face of it, it appears to be sound provisions but the practical problem is the adjudication of application before the Hon'ble NCLT is tideous and time consuming due to number of respondents in such cases. Moreover, the Hon'ble AA is not empowered to convict the defaulting officer as the AA has to refer it to the Special Courts established under Chapter XXVIII of the Companies Act, 2013.

## 7. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs?

**Ans.** Pre package Insolvency Resolution plans has been initiated by IBBI to help the MSME sector. It is a great steps in removing the fear in the minds of small business. In case of constrains in the operations of the business, through mutual consent and cooperation of IRP, things may be resolved within less time and in reasonable cost, without losing the control of the Unit. The Plans has been drafted in the right earnest however progress is slow due to inherent nature of Management of these Units. A lot of publicity through Open Forums are required to spread a message to the target Companies in this sector.

## 8. What advice would you like to give to the upcoming Insolvency Professionals who are seeing their career in Insolvency Law?

**Ans**. We all know, the Profession of Insolvency Professional is of huge responsibility and challenging for all the professionals. Responsibilty is enormous since IBBI perceive that Insolvency Professionls are an extended arm of NCLT under the monitoring of the

IBBI. Hence, Professionals with sufficient experiences in running/monitoring of business and who has passed out exam conducted by IBBI with post qualification trainings are eligible to be enrolled as IRP.

After enrolment as IP, the IPs have a great role to play in resolving the issues connected with the CIR process.

The IP with his accument and expertise should endeavour to have a balancing role with the various stakeholders involved in the CIR process.

**9. How significantly do you think the regulators *i.e.* IBBI and IPAs serve the profession of Insolvency Professionals? Any suggestion that you would like to give for the improvement?**

**Ans.** Both IBBI and IPA are regulator for IP's and discharging similar functions. Some times that amounts to duplicacy of Reporting by Insolvency Professionals. Efforts are to be made that let IPA's should take reporting from IP's and keep IBBI updated and exceptionally IBBI shall directly communicate to IP's. Like we have reporting system by Listed Entities to Stock Exchanges and then in turn Stock Exchanges report to SEBI for and on behalf of Listed entities.

**10. Lastly, where do you see Insolvency and Bankruptcy Code and yourself as an IP in next 5 years?**

**Ans.** Insolvency and Bankruptcy Code 2016 in the years to come shall be a success, if regulator continue to Regulate the CD rather then Professionals and Intermediaries involved. Professionals are already over regulated but no binding Law in force to regulate or no provisions exists for/on the Committee's who has to effectively run the Unit in CIRP. More so, Remuneration fixed by the NCLT Court and/or COC should be timely available to IP's not at the end of the Process. Every CIRP being accepted at the NCLT level should deposit sufficient funds by the Applicant ( which may be returned by assets sale) in the Escrow Account under the monitoring of IPA's to be disburse to IP's in a time bar manner. Only Cost and Remuneration disbursement to IP's be ensured out of these funds held by IPA's. Unless a system to protect the interest of IP's is adhered most of the new budding IP's who are full time involved in the Profession shall loose interest in the Sytem; resulting in premature death of a otherwise promosing Regulation.

Moreover, the amendement in section 4 of the IBC wherein the Central Government has raised the limit for admission of application from Rs. 1 Lakh to Rs. 1 Crore has dampening effect in the scope of IBC.

It would be very rare that the threshold limit of Rs. 1 Crore will be met by workers/ employees and the OC's.Even the small FC's are now not eligible to apply for initiation of CIRP.

It is suggested that the different threshold limits for different categories of application may be determined like for workers/ employees it could be Rs. 3,00,000/-, for OC's it could be Rs. 10,00,000/- and for FC's it may be Rs. 25,00,000/-.

Such rationalisation of threshold limits will be beneficial for the IPs and IBC.

Insight!

# "Resolution Professional, Committee of Creditors and Adjudicating Authority: Three Predominant Pillars of the Corporate Insolvency Resolution Process"

**SHAILENDRA SINGH**

*IP, Advocate, Managing Partner (Corporate & IBC) at August Attorneys LLP (Advocates & Solicitors), Proprietor at Shailendra Singh & Co. (Advocates & Legal Consultants), qualified Independent Director.*

IBC describes the procedure of Corporate Insolvency Resolution Process ("CIRP" for short) of the corporate entity which fails to pay off its debts when such liabilities become due for the repayment. According to the Code, the CIRP is a method of preventing a seemingly bankrupt but potentially viable corporate entity from being liquidated. The Code creates a framework for varied creditors to act in harmony by subjecting them to a centralized, mandatory, and collective procedure under the rules and regulations as amended up-to-date. Under Sections 7 and 9 of the Code, this sort of mandatory and collective proceeding against the corporate debtor is contemplated with the goal of resolving the entity's probable bankruptcy while keeping its operation as a going concern.

CIRP involves engagement of an independent Insolvency Professional as Interim Resolution Professional and Resolution Professional (hereinafter referred to as "IRP" and "RP" respectively).

The IRP and RP is engaged initially for a period of 180 days which might be extended to 330 days upon requirement. The Interim Resolution Professional constitutes a committee consisting of financial creditors or operational creditors in case where there is no financial creditors, known as Committee of Creditors (CoC) which acts as a decision-making body and also has the power to consider and approve the best commercially viable Resolution Plan as per its wisdom provided it meets all mandatory criteria as envisaged in the Act.

In the process of CIRP the involvement of RP and CoC are of prime importance. Where the independence of RP is a major goal, the commercial wisdom of CoC and its Supremacy has been reaffirmed by NCLT at stances from time to time. RP and CoC acts as the Centre of the process.

## 1. RESOLUTION PROFESSIONAL : GUARDIAN OF THE INSOLVENT

The Resolution Professional (Hereinafter referred to as RP) is appointed by the Adjudicating Authority after approval from CoC with requisite majority to manage the entire procedure for bankruptcy and insolvency. In the Report of 2015 released by the Bankruptcy Law Reforms Committee it was stated that IRP/RP acts as a caretaker to the person who is undergoing CIRP. He is not only a supervisor of the bankrupt organization, but also a negotiator between its creditors and debtors in analyzing the potential scope of retaining the said company as a going concern, according to the Report.

The Insolvency and Bankruptcy Code expressly provides for the duties and responsibilities of RP and IRP under sections 25 and 18 respectively. Here RP is assigned with the duty of carrying out the essential tasks which play pertinent roles in setting insolvency process into motion. These Sections provide for the duty of RP to collate all the claims that are submitted by the creditors. The Regulation 13 of the CIRP Regulations provide the duty of RP to verify the claims. This was thoroughly discussed in the case of *Grasim Industries Ltd Edelweiss Asset Reconstruction Co. Ltd.* v. *Tecpro Systems Limited* (Civil Appeal No. 8129 of 2019) where the Ld. Principal Bench, New Delhi stated that the Regulation 13 of the CIRP Regulation clarified that the duty of RP to verify each and every claim and to maintain a list of all the creditors which has to include their names with the amount claimed by them and the amount admitted of their claimed amount is mandatory.

Further, the question of jurisdiction with respect to the power of RP to decide or reject the claim of either 'Financial Creditor' or 'Operational Creditor' arose in the cases of *Prasad Gempex* v. *Star Agro Marine Exports (P.) Ltd. Company Appeal (AT) (Insolvency) No. 469 of 2019 and SREI Infrastructure Finance Ltd.* v. *Kannan Tiruvengandam (R.P.) Company Appeal (AT) (Insolvency) No. 591 of 2018* The same issue was taken into consideration in the case of *Dynepro (P) Ltd* v. *V. Nagarajan* (2019) 102 taxmann.com 476/152 SCL 454 (NCL-AT) where the Hon'ble NCLAT denied the jurisdiction of RP in deciding the claims of one or other creditors including Financial Creditor, Operational Creditor, Secured Creditor or unsecured Creditor.

In the case of *Swiss Ribbons (P) Ltd.v. Union of India (2019) 101 taxmann.com 389/152 SCL 365 (SC)* it was observed by the Hon'ble Supreme Court that RP though does not have any adjudicatory power but he has to vet and verify the claims and then finally calculate the amount associated with each claim. In the case of *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) it was observed that the role of RP is not adjudicatory but administrative.

The major roles and duties of RP further include protecting, preserving and monitoring the assets of the corporate debtor. It then collects all the information relating to finances, operations and assets. It then forms the COC. RP further takes over and manages all the affairs of the Corporate Debtor and takes control over all the assets. It them prepares the Information Memorandum and finally examines the Resolution Plan/s.

Owing to the above-mentioned roles it is pertinent to note that the part played by RP is very critical to the entire process of CIRP. IBC has given various safeguards in order to ensure that RP are unbiased and conduct CIRP in fair and unbiased manner keeping the interest of concerned stakeholders intact.

## 2. THE ASCENDENCY OF THE COMMITTEE OF CREDITORS

In order to seek resolution of a company, a new method has been conceived by the parliament empowering the financial creditors of a company. The charge of the company is handed over to the independent professionals from the board of directors. Such creditors of a company have been created as an entity referred to as the 'Committee of Creditors (CoC)'. Under the Insolvency and Bankruptcy Code of 2016, the committee of creditors play a very crucial role and has been recognized as a supreme decision making body during the Corporate Insolvency Resolution Process (CIRP) whose decision will highly impact the insolvency resolution of the corporate debtors.

### 2.1 *POWERS AND COMMERCIAL WISDOM OF THE COC*

As a part of the process, the Adjudicating Authority appoints a resolution professional who is authorized to conduct the CIRP and take all the important decisions in the interest of all after approval of the CoC. Such a power has been vested in the hands of the CoC to consider and then make an approval to a resolution plan with 66% votes of the total voting shares under the ambit of Sections 30 and 31 of the IBC, 2016. On the basis of this score, the resolution plan can either be denied or approved.

This supremacy of the commercial wisdom has been reaffirmed by the Supreme Court in *Kalparaj Dharamshi* v. *Kotak Investment Advisors Ltd* (2021) 125 taxmann.com 194/166 SCL 583 where it was held that the commercial wisdom of the CoC is not to be interfered with and recognized the legislative scheme as unambiguous. This is because the commercial wisdom of the individual financial creditors or the CoCs and their decision making power before the adjudicating authority has been intentionally barred by the legislature from being challenged and is non-justiciable.

The position of resolution applicants has been highlighted in the case of *Swiss Ribbons (P) Ltd.* (*supra*) which entails the eligibility of resolution applicants for the purpose of ensuring equitable treatment to the operational creditors. Therefore, no judicial intervention has been given to the commercial wisdom of CoC in order to ensure a speedy completion of the process within the timeline as prescribed by IBC.

### 2.2 *INSTANCES OF JUDICIAL INTERVENTION*

There have been a number of instances where the courts have been induced to adjudicate its interference on the decisions made by the CoC. In the case of *K. Sashidhar* v. *Indian Overseas Bank (2019) 102 taxmann.com 139/152 SCL 312(SC)* the question of the scope of adjudication over a commercial decision made by the CoC in the approval or the rejection of the resolution plan was highlighted. It was observed by the Court that while enacting the code, the legislature from the beginning had no intention of providing any ground to challenge the commercial wisdom of the CoC or the individual financial creditors before the NCLT/NCLAT. The Supreme Court further held that the amendment made to Section 30(4) of the Code in June, 2018 was more like a restatement where it mentioned the factors which were required to be considered by the CoC in any event.

Similarly, in the Committee of Creditors of *Essar Steel India Ltd* (*supra*), it was observed by the Supreme Court that NCLT/NCLAT is in no way authorized to trespass any commercial decision made by the CoC with its majority. The court laid emphasis on the primacy of the commercial wisdom of CoC by stating that judicial review by NCLT and NCLAT in this regard needs to be within the parameters of Section 30 (2) Section 32 read with Section 61(3) of the IBC respectively. The intervention of Apex Court in the case of *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solution Ltd.* (2021) 130 taxmann.com 208 was justified as dealing with the legality of the resolution plan, highlighting the absence of any provision pertinent to the withdrawal of the resolution plan once submitted, making the withdrawal of resolution plan illegal. Thus, construing CoC from withdrawing the resolution plan. Therefore, the responsibilities placed upon the CoC are of underlying technical complexity and merits and cannot be questioned except on a few limited grounds.

## 3. THE CONSTRICTIVE AMBIT OF AD-JUDICATING AUTHORITY

It is pertinent to note that before a resolution plan is sent to the adjudicating authority for its approval, it has to pass through a number of filters. It is finally submitted for sanction to the adjudication authority after being approved by the CoC. The primary question that arises as to the what is the extent of discretion of the adjudication authority while considering approval/rejection of resolution plan?

### 3.1 *ADJUDICATING AUTHORITY: IT'S POWERS AND LIMITATIONS*

Under the Code of 2016, there is no provision that empowers the Adjudicating Authority to make any modifications in the resolution plan without being approved by the CoC. Hence, the power of the Adjudication Authority is limited to either

accept or reject the plan. The Appellate Tribunal in the case of *Kamineni Steel & Power India (P.) Ltd.* In re (2018) 97 taxmann.com 124 (NCLT-Hyd.), reversed the decision of approval of resolution plan by the NCLT stating the ground that the criteria of requisite majority of 75% of voting share of the financial Creditors constituting the COC was not fulfilled in order to support the plan.

The Supreme Court in the case of *K.Sashidhar* (*supra*) held that the adjudicating authority

does not play any role in evaluating the commercial decision of the Committee of Creditors for the purpose of approving or rejecting a plan and that the CoC is authorized completely in this regard. It was stated that the Code has no provision that empowers the Adjudicating Authority to reverse any decision laid down by CoC. Hence, the commercial wisdom of the CoC cannot be reversed without their consent.

However, in order for a resolution plan to be approved by the adjudicating authority it must be satisfied that the requirements of Section 30(2) are being fulfilled by the resolution plan that is approved by CoC. This eligibility of the resolution applicant was applied by the Hon'ble Supreme Court in the case *Arcelor Mittal India (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354

Despite the fact that there is no specific provision in the Code, 2016, the Adjudicating Authority has been able to expand its power with reference to Section 31 with respect to examining the plans and providing remedies to the creditors with affected interests.

In the case of *Pratik Ramesh Chirania* v. *Trinity Auto Components Ltd* (2018) 99 taxmann.com 298 (NCLT-Mum)., an interpretation to the phrase "if the adjudicating authority is satisfied...." was made under section 31 and it was observed that "satisfaction" must be objective, subjective or both, and to form an opinion, thorough study of a resolution plan is required.

## 4. INTERDEPENDENCE OF THREE SIGNIFICANT PILLARS

It is important to understand that all the three pillars namely Adjudicating Authority, Committee of Creditors and Resolution Professional are required to conduct the entire process in time bound manner under the supervision of Adjudicating Authority. However, An important pillar of the insolvency ecosystem is the regulator,

namely, the Insolvency and Bankruptcy Board of India (IBBI) which keeps close watch on the system and its progress and shortcomings and as and when it finds the scope of improvement, it comes out with amendment in rules and regulation and that is the reason why since the inception of IBC Code, 2016 we have witnessed number of amendments in the IBC.

## 5. CONCLUSION: THE WAY FOREWARD

The Code's lingering worry has been that a corporate entity's inability to meet a fixed obligation may not be decisively symptomatic of its economic demise. As such, the Code aspires to advance the cause of commerce and constructive ingenuity. The CIRP resolution plans should strive to promote and encourage entrepreneurship by ensuring that essential financing facilities are available to the business entity while addressing the *inter se* needs of different stakeholders.

The three important pillars have to work in accordance to the ecosystem established to aid to the results to be derived from the process in an efficient way adhering to the walls built constricting their powers. They, being the most significant part of the process, have to maintain the transparency in order to ensure the conduction of proceedings in an effective manner as to pay heed to the spirit of the code.

# Payment to Dissenting Financial Creditor (DFC) under IBC

**VIKRAM KUMAR**
*Chartered Accountant , IP*

Payment to dissenting financial creditor (DFC) under the Insolvency & Bankruptcy Code (IBC/Code) remains a contentious issue with contradictory judgments on this vital subject by the adjudicating authorities.

Payment to assenting financial creditor (AFC) is explicitly stated in a resolution plan presented before the committee of creditors (CoC) and hence is known by the AFCs while approving a resolution plan placed for voting before the CoC. However, the payment to DFCs in a resolution plan may be ambiguous and the resolution plan placed before the COC may only state that the payment to DFCs shall be in compliance with the provisions of Section 30(2)(*b*)(*ii*) of the Code *i.e.*, payment shall not be less than the amount to be paid to creditors who do not vote in favour of the resolution plan in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. Hence under such circumstances, the payment to DFCs remains vague and subject to litigation and judicial interpretations.

## Who is a Dissenting Financial Creditor?

A financial creditor (FC) who does not vote in favour of the resolution plan or abstains from voting on a resolution plan is considered as a DFC. However, the definition of the term DFC as stated in the CIRP Regulations has been deleted w.e.f. 5-10-2018 which further compounds the problem as the term DFC is now not defined under the Code or the CIRP Regulations.

The Code or the CIRP Regulations as they stand today do not use the term dissenting financial creditor, they only use the term *"financial creditors, who do not vote in favour of the resolution plan."*

Both Code or the CIRP Regulation is silent on the treatment to be given to a creditor "who abstains from voting on the resolution plan".

*It is a grey area as to whether the treatment to be given to financial creditors, who do not vote in favour of the resolution plan is same as the treatment to financial creditors who abstains from voting on the resolution plan* (emphasis added). Under the present IBC framework, the provisions as laid down in Section 30(2)(*b*)(*ii*) and Regulation 38(1)(*b*) are applicable only for a financial creditor who do not vote in favour of the resolution plan, however the Code and CIRP Regulations are silent on payment to a financial creditor who abstains from voting on the resolution plan.

## Background note on definition of DFC

Definition of DFC as on 1-12-2016

When CIRP Regulations (Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) were introduced w.e.f. 1-12-2016, Regulation 2(1)(*f*) defined DFC as:

> *"Dissenting financial creditors" means the financial creditors who voted against the resolution plan approved by the committee.*

Amended Definition as on 31-12-2017

The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017, w.e.f. 31-12- 2017 modified the definition of the DFC under Regulation 2(1)(*f*) as:

> *"Dissenting financial creditor" means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee;*

The above definition of DFC was deleted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018, w.e.f. 5-10-2018.

With no other amendments on the subject since then, the term DFC is not defined under the Code or the CIRP Regulations as on date.

In this article, the term DFC has been used to mean a financial creditor who does not vote in favour of the resolution plan or abstains from voting on a resolution plan. (Emphasis added)

## Provisions for protection of the interests of DFC under the Code

The provisions for protection of the interests of DFC under the Code and CIRP Regulations have gone through several amendments and modifications as explained below:

### A. Provisions under CIRP Regulations

(*i*) w.e.f. 1-12-2016

Regulation 38(1)(*c*) - A resolution plan shall identify specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted

in favour of the resolution plan.

The above provision mandated that the resolution plan can only pay liquidation value to the DFCs, *i.e.*, the AFCs and DFCs are to be treated separately even though they may be similarly situated creditors/or belong to the same class.

The provisions of Regulation 38(1)(*c*) were rightly held to be invalid and contrary to the provisions laid down in the Code by the Hon'ble NCLAT in matter of *Central Bank of India* v. *Resolution Professional of the Sirpur Paper Mills Ltd* (Company Appeal (AT) (Insolvency) No. 526 of 2018, dated 12-09-2018).

The Hon'ble NCLAT held that no discrimination can be made between the 'Financial Creditors' in the Resolution Plan on the ground that one has dissented and voted against the Resolution Plan or the other has supported and voted in favour of the Resolution Plan.

The provisions pertaining to Regulation 38(1)(*c*) was therefore deleted w.e.f. 5-10-2018 and Regulation 38(1)(*a*), (*b*) and (*c*) were substituted by Regulation 38(1) as stated below:

*Regulation 38(1) - The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.*

(*ii*) w.e.f. 27-11-2019 - following provisions were introduced to further protect the interest of DFC:

*Regulation 38(1)(b)* - The amount payable under a resolution plan to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

**B. Provisions under the Code**

(i) w.e.f. 16-8-2019- Provisions for Payment to DFC

Section 30(2)(*b*) - "The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(*a*) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(*b*) provides for the payment of debts of operational creditors in such manner

as may be specified by the Board which shall not be less than-

*(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*

*(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*

*Explanation 1.*—For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors."

As per the above provisions of the Code and the CIRP Regulations, the DFCs are to be paid at least the liquidation value payable to the financial creditors and in priority to the assenting financial creditors and the payment to DFC shall be fair and equitable. What is fair and equitable has been adjudicated by the Hon'ble Supreme Court of India in the judgment of Essar Steel which is covered in the section "Judicial pronouncements" in this article.

w.e.f. 16-8-2019- Provisions for distribution of amount under the resolution plan by the CoC to DFC

The manner in which the amount under a resolution plan is to be distributed has been prescribed under section 30(4) of the Code, as stated below:

(*ii*) Section 30(4) - The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability,

*the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.* (emphasis added)

Several litigations arose post amendment to section 30(4) - as the language of the section can be interpreted to mean that it is requisite for the CoC to consider the value of the security interest in determining the distribution of the amount to be paid to a secured creditor. The moot question is whether it is mandatory or it is directory/discretionary for the CoC to consider the value of security interest in deciding the distribution for each creditor?

The intent behind legislating section 30(4) of the Code as amended w.e.f. 16-8-2019 is articulated in the judgment of *India Resurgence ARC (P.) v. Amit Metaliks Ltd.* (2021) 126 taxmann.com 222 wherein the Hon'ble NCLAT has pronounced that

(*i*) "Section 30(4) vests discretion in the Committee of Creditors to take into account the value of security interest of a Secured Creditor in approving of a Resolution Plan. It's a guideline and not imperative in terms, which may be taken into account by the Committee of Creditors in arriving at a decision as regards approval or rejection of a Resolution Plan, such decision being essentially a business decision based on commercial wisdom of the Committee of Creditors".

(*ii*) "While it is true that prior to amendment of Section 30(4) the Committee of Creditors was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, *legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the Committee of Creditors while exercising their commercial wisdom* in taking the business decision to approve or reject the Resolution Plan. *Such consideration is only aimed at arming the Committee of Creditors*

*with more teeth so as to take an informed decision in regard to viability and feasibility of a Resolution Plan, fairness of distribution amongst similarly situated creditors being the bottom line."* (emphasis added) However, such business decision taken in exercise of commercial wisdom of Committee of Creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given a fair and equitable treatment.

## Issues around payment to DFC under a resolution plan

There are several litigations/issues around payment to DFCs and sum and substance of the various issues involved in these litigations are summarized below:

*i.* Quantification of the amount to be paid to DFCs as per Section 53(1)

*ii.* Is the liquidation value to a financial creditor under section 53 in CIRP different from the liquidation value payable under liquidation?

*iii.* Is it mandatory for the CoC to consider the value of security held by a dissenting secured financial creditor for determining the liquidation value payable to such dissenting financial creditor under CIRP?

*iv.* Can a secured FC be paid less than the value of security held by the said FC under a resolution plan in CIRP?

*v.* Whether treatment given to the financial creditors, who do not vote in favour of the resolution plan be also given to a financial creditor who abstains from voting on the resolution plan?

To answer the above issues pertaining to DFCs, I have referred to a few important judicial pronouncements wherein the Hon'ble NCLAT/Hon'ble Supreme Court have delved into the said issues and have clarified the treatment to be given to DFCs.

## Judicial pronouncements regarding payment to DFC

*i.* *DBS Bank Ltd* v. *Shailendra Ajmera* (2020) 113 taxmann.com 552 (NCLAT-New Delhi)

**Facts of the Case :** The appellant (DBS Bank) had high value security interest which covered around 90% of its admitted claim. However, the CoC approved the plan which did not consider the value of security interest available with the appellant. As per the appellant, the amount payable in the event of liquidation would be around 90% of its admitted claim, *i.e.,* value of security interest available with the appellant.

**Decision of the Hon'ble NCLAT** : Section 30(2)(*b*)(*ii*) cannot be interpreted in a manner to give advantage to a `dissenting secured

financial creditor'. In fact, Section 30(2)(*b*)(*ii*) *has been amended only to ensure that 'dissenting financial creditor' should not get anything 'less than liquidation value' but not for 'getting maximum of the secured assets* (emphasis added)

**Conclusion :** It is only mandatory to pay the liquidation value to a DFC, the value of security interest held by the said DFC shall be of no relevance. However, the method of calculating the liquidation value for a secured financial creditor under CIRP has not be explained by the Hon'ble NCLAT in the said judgment.

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

Some very important observations were made by the Hon'ble Supreme court of India with respect to payment to DFCs in this landmark judgment, which is enumerated below:

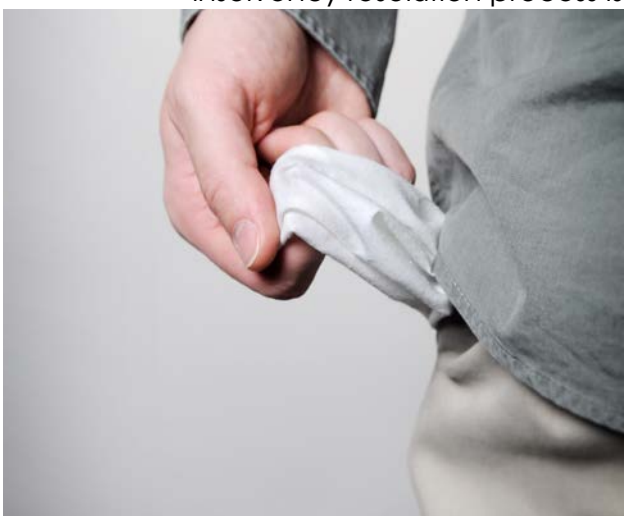
(*a*) Para 80, page 133- "When it comes to the validity of the substitution of section 30(2) by section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(*b*) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (*i*) and (*ii*) of sub-clause (*b*) *that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors.* (emphasis added)

Mrs. Madhavi Divan is correct in her argument that section 30(2)(*b*) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a *certain minimum amount,* the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (*i*) and (*ii*) of clause (*b*), *and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable.* As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). *Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section*

*53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at* (emphasis added) as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder."

(*b*) Para 49- "Protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important."

(*c*) Para 54- "If an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured FCs will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the CD is liquidated. This would defeat the objective of the Code."



(*d*) Para 56, Page 95- "UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating

with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors".

**Conclusion :** The Hon'ble Supreme Court has categorically laid down that the Provisions of Section 30(2)(*b*)(*ii*) is only for certain minimum payment to the DFCs and the mention of Section 53 in the said section is to be looked into only from that perspective *i.e.,* a detailed calculation of the liquidation value payable to a secured FC after considering the value of his security interest is not envisaged for the purposes of Section 30(2)(*b*)(*ii*).

*iii.* *India Resurgence ARC (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223 (SC)

**Facts of the Case :** The appellant (India Resurgence ARC) dissented to the approval of the resolution plan as the amount proposed for distribution to the appellant was only Rs. 2.02 Crs as compared to the value of security interest amounting to Rs. 12.00 Crs. As per the appellant, the CoC should have considered the value of the security in deciding the distribution of the proceeds as per Section 30(4) of the Code as amended on 16-8-2019. The resolution plan was approved by the CoC with 95.35% vote.

**Decision of the Hon'ble Supreme Court of India :**

(*a*) The process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority.

(*b*) The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal under section 61 of the Code.

(*c*) In the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

(*d*) The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard

to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

(*e*) *we find that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial. No case of denial of fair and equitable treatment or disregard of priority is made out. (Emphasis added)*

(*f*) *The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. (Emphasis added)*

(*g*) A dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

(*h*) *It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.* (Emphasis added)

(*i*) What amount is to be paid to different classes or sub-classes of creditors is essentially the commercial wisdom of the CoC; and a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

(*j*) The principles laid down by the Supreme Court in the judgment of Essar Steel has been reiterated in this judgment also.

**Conclusion :** The Hon'ble Supreme court of India has amply clarified that the payment to a dissenting secured financial creditor shall be as per the commercial wisdom of the CoC and the wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

The Hon'ble Supreme court has made it abundantly clear

that a dissenting secured financial creditor cannot seek payment in excess of the amount proposed for payment to other secured financial creditors just because the amount being paid to such dissenting secured financial creditor under a resolution plan is less than the value of the security interest held by the said dissenting secured financial creditor.

With regard to the calculation of the liquidation value as per Section 53 as referred to in Section 30(2)(*b*)(*ii*) under CIRP is concerned, all the secured financial creditors shall be treated as one class irrespective of the value of security interest held by each of the secured financial creditors and the liquidation value shall be calculated for the entire class of secured financial creditors in a summary manner as per priority given under section 53. Thereafter based on the voting share of the respective financial creditor, the liquidation value payable to a financial creditor whether dissenting or assenting shall be determined.

This judgment therefore brings to an end, all the confusions around the payment to be made to the DFCs.

*iv.* *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 Hon'ble Supreme Court of India

In the above judgment, the Hon'ble Supreme Court has made some very important observations with respect to the mode of payment to DFCs as stated below:

*a.* The dissenting financial creditor are entitled to receive the amount payable in monetary terms alone and not in any other term. DFCs cannot be forced to remain attached to the CD by way of equity or securities. *Hence the DFCs are to be paid in cash and not in kind.* (Emphasis added)

> "**Para 124 :** To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (*b*) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (*i.e.*, by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities"

*b.* The homebuyers as a class can either assent or dissent to a resolution plan, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting FC or an aggrieved person. The entire class of homebuyers shall either be assenting or dissenting financial creditor.

> **"Para 175 :** For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person"

## Concluding Remark

The lending by Indian banks is primarily secured based hence the value of primary and collateral securities mortgaged/ hypothecated by the borrower plays a significant role in securing lending from Indian banks. However, under CIRP all unrelated financial creditors whether secured or unsecured constitute the CoC. The voting share is determined based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. The value of security held by a financial creditor is irrelevant in determining the voting share. The liquidation value as per Section 53 under CIRP payable to a DFC is calculated based on the voting share of a financial creditor irrespective of the value of security interest held by the said financial creditor.

This can be explained with the help of an *e.g.*, say a CD under CIRP has a liquidation value of Rs. 300.00 Crs against a total claim of Rs. 1150.00 Crs as demonstrated in the table below:

| **Claim arranged as per Section 53** | | | | |
|---|---|---|---|---|
| *Sl No.* | *Claim* | *Sec 53* | *Total (Rs)* | *Share of Liquidation Value* |
| 1 | CIRP Cost | 53(1)(*a*) | 30.00 | 30.00 |
| 2 | Workmen dues | 53(1)(*b*) | 100.00 | 71.00 |
| | Secured financial creditors ( Sharing Ratio 5:14) | 53(1)(*b*) | 280.00 | 199.00 |
| 3 | Employees | 53(1)(*c*) | 300.00 | NIL |
| 4 | Unsecured creditors in respect of financial debts | 53(1)(*d*) | 20.00 | |
| 5 | Govt. dues | 53(1)(*e*) | 150.00 | |
| 6 | Operational debts | 53(1)(*f*) | 10.00 | |
| 7 | Preference shareholders | 53(1)(*g*) | 90.00 | |
| 8 | Equity Shareholder | 53(1)(*h*) | 170.00 | |
| | Total | | 1,150.00 | 300.00 |

The Details of CoC constitution is stated in the table below:

| Voting % | | | | | |
|---|---|---|---|---|---|
| *Sl No.* | *COC members* | *Claim admitted (Rs)* | *Vote % in CoC* | *Vote % amongst Secured FC* | *Share of liquidation value* |
| 1 | Secured FC-A | 30.00 | 10.00 | 10.71 | 21.32 |
| 2 | Secured FC-B | 100.00 | 33.33 | 35.71 | 71.07 |
| 3 | Secured FC-C | 150.00 | 50.00 | 53.57 | 106.61 |
| 4 | Unsecured FC-D | 20.00 | 6.67 | - | - |
| | Total | 300.00 | 100.00 | 100.00 | 199.00 |

If the liquidation value of Rs. 300.00 Crs is to be distributed under section 53, the liquidation value to secured FC shall be Rs. 199.00 Crs and the liquidation value to unsecured FC shall be Nil as detailed in the table above. For the calculation of the liquidation value, all the secured FCs shall be under one bucket, irrespective of the value of security held by the respective financial creditors. If the secured FC-(A) dissents to the approval of the resolution plan, the liquidation value payable to secured FC-(A) shall be Rs. 21.32 Crs only as demonstrated in the table above, irrespective of the value of security interest held by FC-(A). If Unsecured FC-(D) dissents to the approval of the resolution plan, the said unsecured FC-(D) shall get Nil as the liquidation value.

The initiation of CIRP under IBC is intended for resolution of insolvency and not for the purposes of recovery. There are penalties under section 65 of the Code for initiation of CIRP for purposes other than resolution of insolvency, however the mindset of the financial creditors is primarily recovery and it is a long journey before a change in the said mindset can happen. Hence wherever a FC is likely to recover an amount under a resolution plan which is less than the value of security interest held by the said FC, the said FC is likely to dissent. The problem is further compounded where unsecured FCs constitute more than 66% vote share of the CoC, the secured FCs are Likely to dissent under said circumstances as the secured FCs may not recover the value of security held by them.

# Operational Creditors : A Case for more Equitable Share in CIRP Resolution

S. SHIVASWAMY

## Background

The passing of Insolvency & Bankruptcy Code by the Parliament in Nov'16 and its implementation w.e.f 1st Dec'2016, with the setting up of Insolvency & Bankruptcy Board of India, 3 Insolvency Professional Agencies and NCLT Benches in major cities etc, are considered amongst the most epochal events in the history of resolution of stressed assets in the Banking/Financial sector. The Code also mandated appointment of qualified Insolvency Professionals with expertise in the fields of Finance, Banking, Accounting, Taxation & Law, which IBBI ensured by conducting online examinations on daily basis. The Code brought about major tectonic shift in the treatment of stressed assets by rightly putting Creditors in possession and accepting their decision on resolution as an act of commercial wisdom and non-justiciable.

## Evolutions & Challenges

However, the journey of IBC, in the last 5 years, hasn't been smooth as it was ridden with several challenges from the word go about its validity , applicability and primacy over other laws, not to speak about the disruption faced on account of covid driven pandemic. Though various aspects of the Code were confirmed, reaffirmed, clarified and lucidly explained by NCLT/NCLAT/Supreme Court, whenever challenged by affected by parties, it also consumed considerable time and resources that ultimately impacted the objective of maximisation of assets value. In the very first landmark judgment, in the matter of *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 the Supreme Court put to rest the scepticisms *inter alia* about the position of erstwhile directors *vis-à-vis* RP, its primacy over other laws including

Maharashtra Relief Undertaking (special provision) Act 1958, rationale for bringing Insolvency law under single umbrella for speedier resolutions, nature of claims ,debt, default, definition of Operational Creditors *vis-à-vis* Financial Creditors, pre-existence of disputes besides emphasising on the need to stave off liquidation by putting corporate debtors back on rails. In another significant judgment in the matter of *Mobilox Innovations (P) Ltd.* v. *Kirusa Software (P) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37, Supreme Court has held that the test of existence of a dispute: (*a*) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (*b*) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (*c*) a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed. In yet another landmark judgment on a batch of WPs & SLPs in the matter of *Swiss Ribbons (P) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365, SC clarified the special significance of Rule 11 of NCLAT, Moratorium under section 14, role of CoC in evaluating Resolution Plan, role of RP besides upholding the constitutional validity of Section 29A and stressing on the responsibility of CoC. All the above judgments besides hundreds of others in the last 5 years have helped evolve IBC into a very robust and effective legislation. IBBI also on its part responded pro- actively by introducing required amendments from time to time and contributed to its evolution though the outcome may have fallen short on expectations.

## Applicability of the Code to Home Buyers

The entire CIRP operation of the Code is driven by applications filed under Sections 7, 9 & 10 by Financial Creditors, Operational Creditors and Corporate Debtors respectively. As the nomenclature suggests, the Financial Creditors are entities that have lent money, with or without security, to the Corporate Debtors on the promise of assured return in future. On the other hand, Operational Debt arises on account of supply of goods and services. The Operational Creditors are unsecured creditors and rank lower to Employees' dues and Financial Creditors in the distribution of dividends from liquidation estate in the waterfall mechanism under section 53 of the Code. Once application for CIRP is admitted, moratorium, under section 14 of IBC, on all ongoing and fresh proceedings in various courts/tribunal comes into effect. It is pertinent to note that at time of introduction of IBC in 2017, for the purpose of CIRP, only the dues to Financial Creditors and Operational Creditors were reckoned. However, when confronted with the absence of special rights to home buyers, a largely visible and vocal group , a separate category as " Other Creditors" was inserted in CIRP Regulations dated 16th August, 2017, without specifying their stake in CoC. However, aggrieved by the ambiguity and pointed neglect , number of WPs under Article 32 were filed before SC by the home buyers. In *Chitra Sharma* v. *Union of India* (2017) 85 taxmann.com 66/143 SCL 680, the petitioner had termed IBC proviso, on account of moratorium under section 14, highly discriminatory and deeply prejudicial besides rendering them

remedy less under Consumer Forums, Real Estate Regulatory Authority (RERA), and Civil Court on account of moratorium in place. In another similar case of *Nikhil Mehta & Sons* v. *AMR Infrastructure Ltd,* (2017) 84 taxmann.com 163/143 SCL 278 *NCLAT on appeal, confirmed the status of home buyers as Financial Creditor on the grounds that money advanced was against the consideration of time value of money besides sale purchase agreement having commercial effect on the borrowings. IBBI also intervened pro-actively and introduced amendments to CIRP Regulations in August 17 & then again through an ordinance on 6th June'18,* whereby home buyers were given status of Financial Creditor. The Hon'ble Supreme Court keeping in mind the Ordinance and to do complete justice exercised its power under Article 142 of the Constitution and decided batch of Writ Petitions *vide* order dated 9-8-2018 in *Chitra Sharma* v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833 Case, *inter alia* allowing Homebuyers to be part of COC as FCs. The Hon'ble Supreme Court also rescued Homebuyers from Developer/Builder in *Bikram Chatterjee* v. *UOI* (2018) 92 taxmann.com 176/147 SCL 154 famously known as "Amrapali Group Case", and issued various directions including cancellation registration of Amrapali Group of Companies under RERA. *In Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 Corporate Debtor: Jaypee Infratech Ltd., the SC settled many knotty issues *inter alia* explaining the rationale for according status of secured FCs to home buyers in preference to Banks/FIs.

## Position of Operational Creditors

While it is heartening to note the pro -active stance taken by the Judiciary led by SC, backed by IBBI/Union Government in protecting the rights of home buyers by according them status of Financial Creditors, it can also be discerned that such an action was driven more by the desire to render social justice to an important and vibrant segment of the society than simply based on commercial wisdom. The home buyers no doubt have a right to acquire the dwelling place of their choice and should get fair return on their life savings invested. While home buyers do have equitable charge over the assets built, by virtue of the Sale deed executed, can their rights rank in priority over the charge of other Financial Creditors? Can we assume that by virtue of the sale deed in their favour, the CD has ceded charge on project land & superstructure even without the assignment by other financial creditors? Yes, as per decision of the SC, they as a separate class should be should be given rightful place in the CoC and can't be bunched as just " "Other Creditors"! Now if we extend the same logic bit further, the basic question

that arises is why similar treatment can't be given to Operational Creditors? Why they should continue to be treated like orphan/unwanted children of IBC? Before attempting to answer this question let's first understand the distinction between FC and OC *vis-a-vis* home buyers.

## Financial Creditor *v.* Operating Creditor

Section 5(7) of IBC defines "financial creditor" as "any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to". Section 5(20) defines Operational Creditor as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". Again Section 5(21) defines Operational debt as" means a claim in respect of the provision of goods or services including employment or a debt in respect of the (payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. A plain reading of the text points to the emphasis given and primacy accorded to recover the dues of financial creditor. The intention of the framer of IBC can't be faulted as the country was passing through the worst type of financial/banking crisis, referred to as twin balance sheet effect in some quarter, owing to mounting NPAs, on account of stalling of several infra projects across the nation after sinking thousands of crores of public funds, excess capacity building in manufacturing in anticipation of projected demand having gone haywire and its domino effects in services, SME & Agri sector etc. Not much attention was paid to the recovery of Operational Creditors particularly after the Government decided to take a back seat in preference to financial creditor after coceding some minor relief the employees. This change in strategy was necessary to achieve the avowed objective of maximisation of asset value to spur economic growth. However, it resulted in handing out rather a step motherly treatment to other Operational Creditors largely coming from MSME Sectors whose contribution in economic development, no way inferior to the corporate sectors, also can't be ignored. The only concession that MSME have got is the exemption from Section 29A thus allowing even related party to submit resolution plan. "There is no harm in giving an opportunity to the MSME in accordance with the provisions of the Code for keeping the promotion of entrepreneurship alive. The CoC to negotiate with existing Resolution Applicant and MSME unit also and accept the one which is commercially viable and technically feasible" as stated in *PLBB Products (P.) Ltd.* v. *Piyush Periwal* (Company Appeal (AT) (Insol.) No. 160 of 2021, dated 7-9-2021) - NCLAT. However large number MSME units forming big chunk of OCs have been given a raw deal.

**Reasons for relative neglect of OCs** : The main culprit for such a raw deal to the OCs is to be found in Section 30(2)(*b*) of IBC that "Provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor

under section 53; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53.

The Section 30(2)(*b*) sets restrictions on the quantum of amount payable besides the order of distribution as per waterfall mechanism under section 53 for liquidation process. This clause hits OCs both ways -first by mentioning the minimum amount payable- equivalent to liquidation value and then placing them way down in the order of priority. So, what is referred as minimum amount, mostly nil, actually becomes maximum amount payable. The liquidation value arrived at for distress sale set as benchmark, is often not enough to recover even fraction of the total liability. OCs standing at the bottom of the ladder are often left with deep despair. Many OCs would have spent considerable amount of money on advocates/professionals just to file their claim. In almost all the cases of so-called successful resolutions with massive haircuts, OCs were not even informed about the terms of resolution plans leave alone getting anything in return. It has been often stated in defence of FCs that the money lent by them has a time value and based on proper appraisal and assessment in contrast to OCs who have only sold the product. I feel such an assumption is highly fallacious and ignores the struggle and sacrifice that OCs have to wage - bearing almost 6 months of interest free credit overdue - to remain in business. FCs mostly represented by Financial Institutions/Banks are publicly owned but OCs are mostly proprietary concern/closely held companies built with personal savings/investment. The loss suffered by OCs is much more painful and hurts livelihood of scores of others than the loss from technical write off resorted to by FCs. If FCs can rightly claim charge over the assets of the CD, then why not can OCs claim charge on the unpaid stocks under Sale of Goods Act? Whereas a PSB can absorb losses of several thousands of crores due higher Capital Adequacy ratio based on thin spread of risk across large customer base. OCs on the other hand mostly trust their eggs to one/two basket. A medium sized SME employing 50-100 workmen may render massive job loss if the unit is shut down overburdened with losses. Can the rightful dues of such SME units be dismissed on the specious arguments of commercial wisdom of CoC, without even giving them a rightful place in CoC or fair chance to present their side? Whether the economic/social importance of an OC represented by a SME is any way inferior to that of a Home Buyer? Is it fair to club them along with other Statutory dues by a Governmental body with humongous capacity to absorb losses? In the interest of justice and equity OCs deserve to be treated as a separate class with their rights fully protected.

## Judicial Overview

What is most galling is the marked absence of concern and lack of appreciation by both judiciary and the regulator while dealing with the issue of Operational Creditors. Whereas Financial Creditors including home buyers through AR constitute CoC, Operational Creditor can become full members only if his share is more than 10% of the total debt. That virtually rules out the admission of OCs in CoC besides any

significant say in the resolution process. Even if they are admitted in the CoC, they are denied voting rights. Why the analogy extended to Home Buyers by according them the status of FCs besides voting rights can't be extended to OCs? Section 30(2)(*b*) of IBC related to approval of Resolution Plan is unnecessarily tied to Section 53 pertaining to liquidation and carries an inherent contradiction. However, in *Binani Industries Ltd.* v. *Bank of Baroda* (2018) 99 taxmann.com 164/150 SCL 703 the NCLAT rightly observed as under:

- If the `Operational Creditors' are ignored and provided with `liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of the `I&B Code', then in such case no creditor will supply the goods ....., will ask for advance payment for such supply of goods ..... against the basic principle of the `I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the `Financial Creditors' and the `Operational Creditors' while emphasizing on maximization of the assets of the `Corporate Debtor'.

Strangely, SC in their judgment in the matter of *Committee of Creditors of Essar Steel India Ltd.* v. Satish Kumar Gupta (2019) 111 taxmann.com 234 took an entirely different stand as under than the one echoed by the NCLAT .The SC order at para 6 on Secured and unsecured creditors- the equality principle states:

> "It was held that indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution....."

Further at page 10 SC adds as under:

> ".....Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital....."
>
> ".....India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the Oil and Gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment....."

## Actual position of OC/SMEs

Based on my own experience of decades of working in Banking sector, I can firmly say with due respect to the Hon'ble SC, that all the three premises on which their

judgment is based are wide off the mark. Most of the so- called successful resolutions with massive haircuts, have been around liquidation value only, without giving much to OCs. How liquidation values were leaked to RA in advance need to be looked into separately. But if the resolution had been done taking future business prospects into account it would have resulted in maximisation of assets value and justice to all stakeholders.

As regards FCs granting WC limits to facilitate repayment of OC, the reality is totally different. WC limits sanctioned by FCs also factors in the availability of Trade Creditors and only WC gap is financed less Equity contribution. CDs enjoy 5-6 months trade credit at nil interest and would not like to settle it from their borrowings. The India Brand Equity Foundation's assertion that OCs operate with higher profit and shorter cyclical repayments is contrary to the ground realities and flies in the face of rampant sickness in the SME sector. This doesn't augur well for the growth of the economy. No society or a country can ignore the importance of SME/MSME sector in their contribution to GDP, employment generation capacity and export potential. As per Central Statistics Office, share of MSME Gross Value Added (GVA) in All India GDP for the years 2018-19 and 2019-20 were 30.5% and 30.0% respectively. The share of the MSME manufacturing gross value output were 36.9% and 36.9% respectively. Further, the share of export of specified MSME related products was 49.8% and 49.5% respectively during the same period. MSME sector is providing employment to 11.10 crores, the largest employment generation sector after Agriculture.

## Recommendations and way forward

It is imperative that the Regulators at IBBI besides those in Ministry of Finance to take cognisance of the ground realities and initiate urgent steps on the lines of Home Buyers case to protect the interest of OCs in the larger interest of the economy. IBBI can choose to file SLP in Supreme Court for review of their earlier judgment in *CoC* (*supra*) besides incorporating amendments through Ordinance route.

(2022) 135 taxmann.com 97 (SC)

## SUPREME COURT OF INDIA

**Consolidated Construction Consortium Ltd. *v.* Hitro Energy Solutions (P.) Ltd.**

DR. DHANANJAYA Y CHANDRACHUD, SURYA KANT AND VIKRAM NATH, JJ.

CIVIL APPEAL NO. 2839 OF 2020†

FEBRUARY 4, 2022

**Section 5(21) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Whether section 5(21) defines 'operational debt' as a claim in respect of provision of goods and services and operative requirement is that claim must bear some nexus with provision of goods or services, without specifying who is to be supplier or receiver - Held, yes - Whether a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt - Held, yes (Para 43)**

**Section 5(20), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational creditor - Appellant sought an operational service from proprietary concern when it contracted with them for supply of light fittings - When contract was terminated, proprietary concern encashed cheque for advance payment, hence, it gave rise to an operational debt in favour of appellant, which remained unpaid - Whether therefore, appellant was an operational creditor as defined under section 5(20) - Held, yes - Whether respondent having taken over proprietary concern and Memorandum of Association (MOA) of respondent unequivocally stating that one of its main objects was to take over proprietary concern and since MOA of respondent still stands, it could be concluded that respondent would be**

**liable to repay debt to appellant - Held, yes - Whether therefore, application under section 9 would be maintainable - Held, yes (Paras 53 and 56)**

**Section 3(12), read with section 9 of the Insolvency and Bankruptcy Code, 2016 and article 137 of the limitation Act, 1973 - Corporate insolvency resolution process - Default - Whether default is defined under section 3(12) as non-payment of debt by corporate debtor when it has become due - Held, yes - Whether limitation does not commence when debt becomes due but only when a default occurs - Held, yes (Para 59)**

## FACTS

- A project was awarded to appellant company by CMRL for light fittings. The appellant, in turn, placed three purchase orders, all dated 24-6-2013, for purchasing the abovementioned product with a sole proprietorship firm HES, (proprietary concern). The proprietary concern was required to supply the light fittings manufactured by a company TLIPL.
- On being awarded the purchase orders, the proprietary concern requested the appellant for an advance of Rs. 50 lakhs. On the request of the appellant, CMRL issued a cheque of Rs. 50 lakhs in favour of the proprietary concern as advance payment in lieu of the purchase orders.
- Then CMRL cancelled the lighting project, which the appellant informed to proprietary concern on the same day. Despite such intimation, the proprietary concern went ahead and encashed the cheque of Rs. 50 lakhs and withdrew the amount.
- Since the project had been terminated, CMRL informed the appellant that the amount would be deducted from the dues payable to it unless the amount was returned. The appellant paid the amount of Rs. 50 lakhs to CMRL and intimated this to the proprietary concern and requested them to make the payment.
- In the interim, the respondent company HESPL was incorporated on 28-1-2014, on the basis of an MOA dated 24-1-2014. Under the MOA, one of the four main objects of the respondent was to take over the proprietary concern.
- By its letter dated 23-7-2016, the appellant requested the proprietary concern to refund the amount of Rs. 50 lakhs since the contract had been terminated and the amount had been returned by the appellant to CMRL. It noted that once the amount was released by the proprietary concern, it would indemnify them against any future claim from CMRL.
- In its reply dated 25-7-2016, the proprietary concern stated that it would return the amount directly to CMRL, if it was insisted upon by them. It further noted that till date it had not received any letter from the appellant informing them that the contract had been terminated

with CMRL, and that it had never agreed to return the amount.

- A joint meeting was held between the appellant, the proprietary concern and TLIPL on 4-8-2016, where the appellant requested that the amount of Rs. 50 lakhs be returned to TLIPL. To assuage the concerns of the proprietary concern, that CMRL may also try to recover the amount from them at a later date, the representatives of the appellant agreed to provide an indemnity to the proprietary concern for the amount. However, this was refused by the proprietary concern, which instead asked for a bank guarantee of the same amount, which was refused by the appellant. Finally, the proprietary concern noted that the appellant should obtain a letter from CMRL stating that the advance paid by them to the proprietary concern belongs to the appellant, and will not be claimed by them in the future.
- Thereafter, the appellant obtained a letter dated 27-12-2016 from CMRL where it noted that it had issued the cheque for Rs. 50 lakhs only on the request of the appellant. This letter was sent by the appellant to the proprietary concern, but no payment was made.
- The appellant then sent a letter to the proprietary concern on 27-2-2017 and it demanded the return of the amount of Rs. 50 lakhs along with interest calculated at 18 per cent per annum from 4-11-2013, on or before 4-3-2017.
- In its reply dated 2-3-2017, the proprietary concern refused and noted that they only became aware of the termination of the contract with CMRL by the appellant's letter dated 23-7-2016. The light fittings were stated to be lying in their warehouse since then because they could not be resold as they had been made on customized specifications, leading to a loss. Further, it noted that CMRL's letter dated 27-12-2016 did not provide that it will not attempt to recover the amount from the proprietary concern in future.
- On 18-7-2017, the appellant sent a Form-3 Demand Notice under section 8 to the respondent, where the amount of the debt is noted as Rs. 83.14 lakhs inclusive of interest calculated at 18 per cent per annum from 1-11-2017 along with the supporting affidavits.
- By its judgment dated 6-12-2018, the NCLT admitted the application under section 9, declared a moratorium under section 14 and appointed an IRP. In its judgment, the NCLT held that, absent any contrary evidence, the Memorandum of Association being the constitutional document of the corporate debtor was an authentic documentary proof that the proprietorship firm had been taken over or converted into corporate entity.

- On appeal by respondent company against the decision of the Adjudicating Authority(NCLT) admitting the CIRP application under section 9, the NCLAT set aside the order of NCLT on the grounds that appellant was a 'purchaser' and did not come within the meaning of 'operational creditor' having not supplied any goods nor given any services to HESPL. The NCLAT rejected the claim, that respondent company's MoA was evidence of takeover and there was no contrary evidence, based on board resolution submitted by respondent company not to takeover the proprietary concern in accordance with objects clause. This board resolution was not submitted by respondent company to NCLT and was first time submitted in appeal before NCLAT.

- On appeal by appellant to the Supreme Court :

## HELD

***Whether appellant is an operational creditor?***

- In the present case, there are few undisputed facts: (i) the appellant and the Proprietary Concern entered into a contract for supply of light fittings, since the appellant had been engaged for a project by CMRL; (ii) CMRL, on the appellant's behalf, paid a sum of Rs. 50 lakhs to the Proprietary Concern as an advance on its order with the appellant; (iii) CMRL cancelled its project with the appellant; (iv) the Proprietary Concern encashed the cheque for Rs. 50 lakhs anyways; and (v) the appellant paid the sum of Rs. 50 lakhs to CMRL. (Para 39)

- There is some factual controversy in relation to whether the appellant promptly informed the proprietary concern of the termination of its project with CMRL. The appellant alleges that they communicated it on the very same day (2-1-2014), while the respondent alleges that the proprietary concern only became aware of it through the appellant's letter dated 23-7-2016. For the purposes of the present appeal, it is unnecessary to resolve this dispute. The proprietary concern has consistently maintained that they would be willing to refund the sum of Rs. 50 lakhs if CMRL approached them directly. Thus, their ostensible dissatisfaction with the behaviour of the appellant plays no part in the debt arising from the refund. (Para 40)

- Now the 'debt' in the present appeal needs to be considered. According to the appellant, it is the advance payment CMRL made on their behalf to the proprietary concern, which was encashed even though the project between CMRL and the appellant was terminated. On the other hand, the respondent has attempted to urge that there was no privity of contract between the appellant and the respondent, and that CMRL had not transferred the debt to the appellant. Both

these submissions are to be rejected. It is amply clear from the facts that the debt arises from purchase orders between the appellant and the proprietary concern (which is the underlying contract), regardless of whether CMRL may have made the payment on behalf of the appellant. Thus, the ultimate dispute still remains between the appellant and the proprietary concern, and the debt arises from that. (Para 41)

- It is then that one comes to the core of the dispute - while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent's submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, this argument is rejected. (Para 42)

- First, section 5(21) defines 'operational debt' as a 'claim in respect of the provision of goods or services'. The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, section 8(1), read with rule 5(1) and Form 3 of the 2016. Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a *sine qua non*, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by regulation 7(2)(b)(i) and (ii) of the CIRP Regulations, 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Hence, this leaves no doubt that a debt which arises out of advance

payment made to a corporate debtor for supply of goods or services would be considered as an operational debt. (Para 43)

- In the instant case, the phrase 'in respect of' in section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the instant case, the appellant clearly sought an operational service from the proprietary concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the proprietary concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favour of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under section 5(20). (Para 45)

- However, in the instant case, the dispute is not in relation to the quality of the services provided by the proprietary concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project. (Para 46)

***Evidentiary value of respondent's MOA***

- Having established that the appellant is an operational creditor, it needs to be now analyzed whether the debt owed to the appellant can actually be realized from the respondent. In the instant case, it is uncontested that the appellant entered into a contract with the proprietary concern and continued communications with them till the very end, finally sending its notice under section 8(1) to the respondent. (Para 47)

- The dispute revolves around the MOA of the respondent, dated 24-1-2014, which states that the main objects of the company to be pursued by company on its incorporation is to take over the existing proprietorship firm viz. HES having its registered office at Chennai. The NCLT understood this to be undeniable proof that the respondent had taken over the business and liabilities of the proprietary concern, while the NCLAT took a different position. (Para 48)

- First, the relevant statutory provisions need to be considered. Section 4 of the Companies Act 2013 (Act, 2013) defines an MOA. Section 4(1) provides the relevant information that an MOA shall provide, which includes, in sub-clause (c), that it should provide the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. (Para 49)

- Section 13 provides the requirements for the alteration of an MOA. Thus, for the alteration of the MOA of a company in relation to its objects, a Special Resolution has to be first passed under section 13(1). It then

has to be filed with the Registrar in accordance with section 13(6)(a). Further, under section 13(9), when the alteration is made to the objects in the MOA, the Registrar shall register it and certify it within a period of thirty days from the filing of the Special Resolution in accordance with section 13(6)(a). Finally, section 13(10) provides that no alteration made under the section shall have effect unless it is registered in accordance with the provisions of the section. (Para 51)

- A company's MOA is its charter and outlines the purpose for which the company has been created. Some of those purposes/objects have to then be placed in the MOA, in accordance with section 4(1)(c) of the Act, 2013. The object clause in an MOA is considered to be representative of the purpose of a company and it is expected that the company will fulfil/attempt to fulfil the objects it has laid out in its MOA. (Para 52)

- In the instant case, the MOA of the respondent unequivocally states that one of its main objects is to take over the proprietary concern. However, the respondent has produced a resolution dated 1-9-2014 passed by its Board of Directors, purportedly resolving to not take over the proprietary concern. In support of the resolution, the respondent has also produced a certification from the banker of the proprietary concern, on 10-4-2018 and from the Chartered Accountants of the proprietary concern, on 27-4-2018. (Para 53)

- Admittedly, there was no reference to the resolution in the counter-statement dated 18-1-2018 and additional counter-statement dated 9-3-2018 filed by the respondent before the NCLT. However, in their appeal filed before the NCLAT, the respondent states that the resolution was, in fact, brought to the notice of the NCLT. The NCLT in its judgment dated 6-12-2018 made no mention of this resolution or the auditor's certificate. The conduct of the respondent in bringing up this resolution for the first time before the NCLAT would lead to an adverse inference against them for having suppressed this document earlier, if at all it was in existence. (Para 54)

- In any case, section 13 of Act, 2013 provides for the procedure which has to be followed when the MOA is to be amended. In cases where the object clause is amended, it requires the Registrar to register the Special Resolution filed by the company. However, the respondent has provided no proof that : (i) the purported resolution dated 1-9-2014 was a Special Resolution; (ii) it was filed before the Registrar; and (iii) that the Registrar ultimately did register it. Thus, in terms of section 13(10) of Act, 2013, the purported amendment to the MOA would not have any legal effect. (Para 55)

- Consequently, the MOA of the respondent still stands and the presumption will continue to be in favour of the appellant. Thus, it can be concluded that the respondent took over the Proprietary Concern and was liable to repay the debt to the appellant. Hence, the application under section 9 of the IBC was maintainable. (Para 56)

***Whether application under section 9 is barred by limitation ?***

- The respondent urged that the application under section 9 is barred by limitation. The respondent has argued that the date of default mentioned by the appellant is 7-11-2013, when the cheque was issued by CMRL to the proprietary concern. As such, the submission is that the limitation of three years under article 137 of the Limitation Act, 1963 would expire on 7-11-2016, while the application under section 9 was only filed on 1-11-2017. (Para 57)

- The respondent's submission that limitation commences from 7-11-2013 has to be rejected. In its application under section 9, the appellant has mentioned this as the date on which the debt became due. However, limitation does not commence when the debt becomes due but only when a default occurs. As noted earlier in the judgment, default is defined under section 3(12) as the non-payment of the debt by the corporate debtor when it has become due. (Para 59)

- In the present case, CMRL issued the cheque of Rs. 50 lakhs to the proprietary concern on 7-11-2013. However, at that time, it was issued as an advance payment for the purchase order of the appellant. It was only on 2-1-2014 that CMRL terminated its project with the appellant, and it was after this that the proprietary concern encashed the cheque. Subsequently, correspondence was exchanged between the appellant and the proprietary concern in July 2016 in relation to the re-payment of the amount. Thereafter, a joint meeting was also held on 4-8-2016. Till this point in time, both the parties were in negotiation in relation to the re-payment and the minutes of meeting show that the proprietary concern was willing to make the re-payment if CMRL issued a letter stating that they will not pursue a claim in the future or if the appellant provided a bank guarantee for the amount. (Para 60)

- A final letter was addressed by the appellant to the proprietary concern on 27-2-2017, demanding the payment on or before 4-3-2017. The proprietary concern replied to this letter on 2-3-2017, finally refusing to make re-payment to the appellant. Consequently, the application under section 9 will not be barred by limitation. (Para 61)

***Conclusion***

- Therefore, it is held as follows:

(*i*) The appellant is an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor;

(*ii*) The respondent will be considered to have taken over the proprietary concern in accordance with its MOA; and

(*iii*) The application under section 9 of the IBC is not barred by limitation. (Para 62)

- The appeal is allowed by setting aside the impugned judgment and order of the NCLAT dated 12-12-2019. Since the CIRP in respect of the respondent is ongoing due to this Court's order dated 18-11-2020, no further directions are required. (Para 63)

## CASE REVIEW

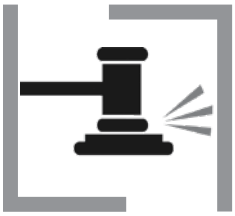
*N.S. Rangachari* v. *Consolidated Construction Consortium Ltd.* (2022) 134 taxmann.com 368 (NCLAT - New Delhi) (para 63) *set aside* (**See Annex**).

## CASES REFERRED TO

*Consolidated Construction Consortium Ltd.* v. *Hitro Energy Solutions (P.) Ltd.* (CP/708/(IB)/CB/2017, dated 6-12-2018) (para 2), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 33), *Pioneer Urban Land & Infrastructures Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 34), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 35), *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 36), *Kay Bouvet Engg. Ltd.* v. *Overseas Infrastructures Alliance (India) (P.) Ltd.* (2021) 129 taxmann.com 133 (SC) (para 37), *Phoenix ARC (P.) Ltd.* v. *Spade Financial Services Ltd.* (2021) 124 taxmann.com 24/165 SCL 21 (SC) (para 44) and *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 58).

† Arising out of order passed by NCLAT in New Delhi *N.S. Rangachari* v. *Consolidated Construction consortium Ltd.* (2022) 134 taxmann.com 368.

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 135 taxmann.com 97 (SC)**



(2022) 136 taxmann.com 55 (SC)

## SUPREME COURT OF INDIA

**Amit Katyal *v.* Meera Ahuja**

M.R. SHAH AND B.V. NAGARATHNA, JJ.

CIVIL APPEAL NO. 3778 OF 2020†

MARCH 3, 2022

**Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and Article 142 of the constitution of India - Corporate Insolvency Resolution Process - Withdrawal of application - Respondents were home buyers in housing project being developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by respondents asking them to refund consideration amount - Despite granting several opportunities to corporate debtor, when amount in question was not refunded, respondents filed instant application under section 7 - It was noted that respondents as well as other home buyers have settled dispute with corporate debtor and a settlement had been entered into, under which, corporate debtor had agreed to refund consideration amount with applicable/ accrued interest to respondent - Corporate debtor also undertook to complete entire project and hand over possession to home buyers (who want possession), within a period of one year - Whether thus, this was a fit case to exercise powers under Article 142 and to permit respondents to withdraw CIRP proceedings which would be in larger interest of home buyers who were waiting for possession since more than eight years and thus, respondents were permitted to withdraw application filed by them under section 7 - Held, yes (Para 14)**

### FACTS

- The Corporate debtor had come out with a Gurgaon based housing project. The corporate debtor could not complete the project even after a period of eight years. Therefore, respondents who were the home buyers preferred section 7 application before the Adjudicating Authority/NCLT seeking initiation of CIRP against corporate debtor. The respondent sought refund of an amount of Rs. 6.93 crore due to an inordinate delay in the completion of the project and failure to handover possession within the stipulated time.
- The NCLT admitted said application and appointed the Interim Resolution Professional and declared a moratorium. The corporate debtor challenged the order of admission of section 7 application before the NCLAT. The NCLAT had dismissed the appeal against order of NCLT.

## HELD

- The respondents now have filed an interlocutory application praying for permitting them to withdraw the CIRP proceedings initiated by them against corporate debtor by submitting, *inter alia*, that the corporate debtor has agreed to pay to the home buyers consideration amount and they do not propose to thereafter proceed further with the insolvency proceedings. Similarly, 82 (79+3) home buyers out of the total 128 home buyers, who are also represented before instant Court, have stated that they are satisfied with the undertaking given by the corporate debtor before instant Court recorded in the joint statement regarding the proposed settlement plan, under which the corporate debtor have undertaken to complete the project within a period of one year and to hand over the possession to them. Thus, out of 128 home buyers of 176 units, 82 home buyers + respondents have agreed to the settlement and agreed to withdraw the CIRP proceedings and/or have no objection if the CIRP proceedings initiated by home buyers are permitted to be withdrawn. (Para 5.1)

- In the present case although the CoC was constituted on 23-11-2020, there has been a stay of CIRP proceedings on 3-12-2020 (within ten days) and no proceedings have taken place before the CoC. It is to be noted that the CoC comprises 91 members, of which 70 per cent are the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside, subject to the corporate debtor company honouring its undertaking as per the settlement plan dated 3-2-2022. (Para 8)

- Therefore, in the peculiar facts and circumstances of the case, where out of 128 home buyers, 82 home buyers will get the possession within a period of one year, as undertaken by the corporate debtor, coupled with the fact that original applicants have also settled the dispute with the appellant/corporate debtor, we are of the opinion that this is a fit case to exercise the powers under article 142 of the Constitution of India read with rule 11 of the NCLT Rules, 2016 and to permit the original applicants to withdraw the CIRP proceedings. Thus, the same shall be in the larger interest of the home buyers who are waiting for the possession since more than eight years. (Para 9)

- If the corporate debtor and the majority of the home buyers are not permitted to close the CIRP proceedings, it would have a drastic consequence on the home buyers of real estate project. If the CIRP proceedings are continued, there would be a moratorium under section 14 and there would be stay of all pending proceedings and which would bar institution of fresh proceedings against the builder, including proceedings by

home buyers for compensation due to delayed possession or refund. If the CIRP is successfully completed, the home buyers like all other creditors are subjected to the pay outs provided in the resolution plan approved by the CoC. Most often, resolution plans provide for high percentage of haircuts in the claims, thereby significantly reducing the claims of creditors. Unlike other financial creditors like banks and financial institutions, the effect of such haircuts in claims for refund or delayed possession may be harsh and unjust on home buyers.

- On the other hand, if the CIRP fails, then the builder-company has to go into liquidation as per section 33. The home buyers being unsecured creditors of the builder company stand to lose all their monies that are either hard earned and saved or borrowed at high rate of interest, for no fault of theirs. (Para 10)

- Even the legislative intent behind the amendments to the IBC is to secure, protect and balance the interests of all home buyers. The interest of home buyers is protected by restricting their ability to initiate CIRP against the builder only if 100 or 10 per cent of the total allottees choose to do so, all the same conferring upon them the status of a financial creditors to enable them to participate in the CoC in a representative capacity. Being alive to the problem of a single home buyer derailing the entire project by filing an insolvency application under section 7, the legislature has introduced the threshold of at least 100 home buyers or 10 per cent of the total home buyers of the same project to jointly file an application under section 7 for commencement of CIRP against the builder company. (Para 11)

- In the present case, out of the total 128 home buyers of 176 units, 82 home buyers are against the insolvency proceedings and the home buyers have also settled their dispute with the corporate debtor. Even the object and purpose of the IBC is not to kill the company and stop/stall the project, but to ensure that the business of the company runs as a going concern. (Para 12)

- In view of the aforesaid facts and circumstances, more particularly when the withdrawal of the CIRP proceedings initiated by the corporate debtor is allowable by the NCLT in exercise of its powers under rule 11 of the NCLT Rules, 2016 and in the peculiar facts and circumstances of the case, instead of relegating the original applicants to approach the NCLT/ Adjudicating Authority by moving an application under section 12A of the IBC, this is a fit case to exercise powers under article 142 of the Constitution of India as the settlement arrived at between the home buyers and the corporate debtor-company shall be in the larger interest of the home buyers

and under the settlement and as undertaken by the corporate debtor, out of 128 home buyers, 82 home buyers are likely to get possession within a period of one year, for which they are waiting since last more than eight years after they have invested their hard earned money. This shall be in furtherance of the object and purpose of IBC. (Para 13)

- As agreed, respondents shall be paid consideration amount, out of the amount deposited by the appellant. Respondents are permitted to withdraw the application filed by them under section 7 pending before the NCLT. Consequently, all the orders passed by the NCLT, including appointment of IRP and constitution of CoC are hereby quashed and set aside. Consequently, the impugned judgment and order passed by the NCLAT also stands quashed and set aside. (Para 14)

## CASE REVIEW

*Amit Katyal* v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62/163 SCL 549 (NCLAT - New Delhi) (para 14) *reversed*.

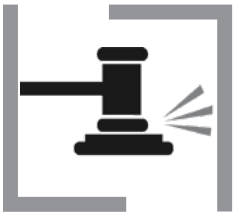
## CASES REFERRED TO

*Amit Katyal* v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62/163 SCL 549 (NCLAT - New Delhi) (para 1A), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 4.2), *Kamal K. Singh* v. *Dinesh Gupta* (Civil Appeal No. 4993 of 2021, dated 25-8-2021) (para 4.2) and *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* 2018 SCC Online SC 3154 (para 7).

**Ms. Sheena Taqui**, **Dhvanit Chopra**, **Akansha Saini**, **Shiv Vinayak Gupta**, Advs. and **Mrs. Bina Gupta**, AOR *for the Appellant.* **Nakul Dewan**, Sr. Adv., **Kapil Shankla**, Adv., **Shyam D. Nandan**, AOR, **Ms. Meghna Shankla**, **Ms. Radhika Gupta**, Advs., **Hrishikesh Baruah**, **Archit Upadhayay**, **Randhir Kumar Ojha**, AORs, **K. V. Viswanathan**, Sr. Adv., **Bhargavi Kannan**, **Pracheta Kar**, **Rahul Sangwan**, **Amartya Sharan**, Advs. **Siddhant Buxy**, **Amarjeet Singh**, AORs, **Shiv Kumar Pandey**, **Chandrashekhar A. Chakalabbi**, **Awanish Kumar**, **Anshul Rai**, **Abhinav Garg**, **D. Girish Kumar**, **Kumar Vinayakam Gupta** and **Batra Shubham Parveen**, Advs. *for the Respondent.*

† Arising out of *Amit Katyal* v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62 (NCLAT - New Delhi).

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 55 (SC)**



(2022) 136 taxmann.com 315 (SC)

# SUPREME COURT OF INDIA

## Prakash Corporates v. Dee Vee Projects Ltd.

DINESH MAHESHWARI AND VIKRAM NATH, JJ.

CIVIL APPEAL NO(S). 1318 OF 2022†

FEBRUARY 14, 2022

**Section 13, read with section 16, of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and Order VIII rule 1 of Code of Civil Procedure, 1908 - Appeals from decrees of commercial courts and commercial divisions - Following a payment related dispute between parties, respondent instituted civil suit against appellant - Appellant was served with summon for appearance and for filing written statement - Trial Court declined appellants application dated 22-6-2021 seeking time to file written statement on ground that permitted period of 120 days for filing written statement was expired on 6-5-2021, and thus, appellant forfeited right to submit their written statement - It was noted that due to COVID-19 pandemic, Apex Court in Cognizance for Extension of Limitations, In re (2021) 132 taxmann.com 123/168 SCL 784 had extended limitation period from 15-3-2020 until 2-10-2021 - Whether thus, time limit for filing written statement by appellant did not come to an end on 6-5-2021 and therefore, impugned order passed by Trial Court declining prayer of appellant for submission of written statement was to be set aside - Held, yes (Para 20.3)**

## CASE REVIEW

*Prakash Corporates* v. *Dee Vee Projects Ltd.* (2022) 136 taxmann.com 314 (Chhattisgarh) (para 28) *affirmed* (**See Annex**).

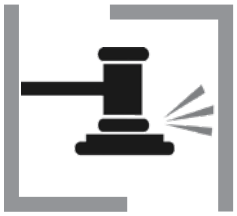
## CASES REFERRED TO

*Cognizance for Extension of Limitations, In re* (2020) 117 taxmann.com 66 (SC) (para 2.1), *SCG Contracts (India) (P.) Ltd.* v. *K.S. Chamankar Infrastructure (P.) Ltd.* (2019) 12 SCC 210 (para 6.1), *SS Group (P.) Ltd.* v. *Aaditiya J. Garg* 2020 SCC OnLine SC 1050 (para 6.1), *Sagufa Ahmed* v. *Upper Assam Plywood Products (P.) Ltd.* (2020) 119 taxmann.com 231/(2021) 163 SCL 201 (SC) (para 6.2), *S. Kasi* v. *State*: (Criminal Appeal No. 452 of 2020, dated 19-6-2020) (para 10.3), *Cognizance for Extension of Limitations, In re* (2021) 127 taxmann.com 72/167 SCL 99 (SC) (para 14.4) and *New India Assurance Co. Ltd.* v. *Hilli Multipurpose Cold Storage (P) Ltd.* (2020) 5 SCC 757 (para 21).

**Sidharth Luthra**, Sr. Adv., **Rajesh Ranjan**, **Anand Mohan Thakur**, **Prateek Yadav**, **Archit Chauhan**, Advs. and **Joel**, AOR *for the Petitioner*. **Dr. Manish Singhvi**, Sr. Adv, **Ravi Bharuka**, AOR, **Rishabh Garg** and **Ankit Agarwal**, Advs. *for the Respondent*.

† Arising out of order of High Court of Chhattisgarh in *Prakash Corporates* v. *Dee Vee Projects Ltd.* (2022) 136 taxmann.com 314.

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 315 (SC)**



(2022) 135 taxmann.com 187 (Kerala)

# HIGH COURT OF KERALA

**Tharakan Web Innovations (P.) Ltd. v. National Company Law Tribunal, Kochi**

T.R. RAVI, J.

W.P.(C) NOS. 27636 OF 2020 & 14158 OF 2021†

FEBRUARY 1, 2022

**Section 4 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Application of - Whether corporate insolvency resolution process gets triggered moment there is a default as mentioned in section 4 - Held, yes - Whether triggering can be at instance of corporate debtor itself or a financial creditor or an operational creditor - Held, yes - Whether section 4, after amendment on 24-3-2020 clearly says that Part II of IBC shall apply to matters relating to insolvency and liquidation of corporate debtors where minimum amount of default is Rs. 1 crore - Held, yes - Whether therefore, no application could have been filed after 24-3-2020 regarding an amount where default was less than Rs. 1 crore, even if date of default was prior to 24-3-2020 - Held, yes (Paras 23 and 25)**

**Circulars and Notifications : Notification No. S4/1205 (E) dated 24-3-2020**

## CASE REVIEW

*Tharakan Web Innovations (P.) Ltd.* v. *Cyriac Njavally* (2021) 127 taxmann.com 288 (NCLT - Kochi) (para 27) *set aside*.

*Manish Kumar* v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 25) *followed*.

## CASES REFERRED TO

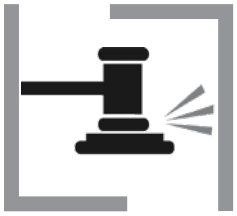
*Bomin (P.) Ltd.* v. *Union of India* 1981 (8) ELT 18 (Guj.) (para 14), *Ram and Shyam Co.* v. *State of Haryana* (1985) 3 SCC 267 (para 14), *Calcutta Discount Co. Ltd.* v. *ITO* AIR 1961 SC 372 (para 14), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 15), *Sulochana Gupta* v. *RBG Enterprises (P.) Ltd.* (2020) 119 taxmann.com 390 (Ker.) (para 15), *Doypack Systems (P.) Ltd.* v. *Union of India* (1988) 2 SCC 299 (para 15), *George* v. *District Munsiff, Kanjirapally* (1965) KLT 819 (para 15), *Kolkata Municipal Corpn.* v. *Union of India* (2021) 127 taxmann.com 253/166 SCL 1 (Kol.) (para 15), *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 17), *Pratap Technocrats (P.) Ltd.* v. *Monitoring Committee Reliance Infratel Ltd.* (2021) 129 taxmann.com 132/167 SCL 508 (SC) (para 18), *Kay Bouvet Engg. Ltd.* v. *Overseas Infrastructure Alliance (India) (P.) Ltd.* (2021) 129 taxmann.com 133 (SC) (para 18), *Manish Kumar* v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 19), *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (1940) AC 1014 (HL) (para 25), *Chandvarkar Sita Ratna Rao* v. *Ashalata*

*S. Guram* (1986) 4 SCC 447 (para 25) and *B. Parmanand* v. *Mohan Koikal* (2011) 4 SCC 266 (para 25).

**Joseph Kodianthara**, Sr. Adv., **Isaac Thomas** and **Sharad Joseph Kodanthara**, Advs. *for the Petitioner.* **S. Manu** and **G. Harikumar**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, Kochi Bench, Kerala in *Tharakan Web Innovations (P.) Ltd.* v. *Cyriac Njavally* (2021) 127 taxmann.com 288 (NCLT - Kochi).

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 135 taxmann.com 187 (Kerala)**



(2022) 136 taxmann.com 317 (Bombay)

# HIGH COURT OF BOMBAY

## Satyanarayan Bankatlal Malu v. Insolvency and Bankruptcy Board of India

SANDEEP K. SHINDE, J.

WRIT PETITION NO. 2592 OF 2021

FEBRUARY 14, 2022

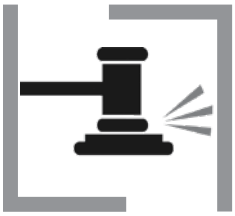
**Section 236 of the Insolvency and Bankruptcy Code, 2016, read with section 435 of the Companies Act, 2013 - Special Court - Trial of offence by - Whether Special Court which is to try offences under Insolvency & Bankruptcy Code is established under section 435 (2) (b) of the Companies Act, 2013 which consists of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office of A sessions Judge or Additional Session Judge - Held, yes (Para 14)**

## CASES REFERRED TO

*Sachida Nand Singh* v. *State of Bihar* (1998) 2 SCC 493 (para 13)

**Amir Arsiwala**, **Piyush Deshpande** and **Farzeen Pardiwala**, Advs. *for the Petitioner.* **Pankaj Vijayan**, **Mohammed Varawala**, Advs. and **Y.M. Nakhawa**, App *for the Respondent.*

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 317 (Bombay)**



(2022) 136 taxmann.com 319 (NCLAT - Chennai)

# NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

**Axis Bank Ltd. v. Samruddhi Realty Ltd.**

M. VENUGOPAL, JUDICIAL MEMBER AND
KANTHI NARAHARI, TECHNICAL MEMBER
COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 261 OF 2021†
FEBRUARY 22, 2022

**Section 5(8), read with sections 42 and 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was engaged in business of construction and development of residential accommodation - Allottees/retail home buyers had approached appellant bank for financial assistance which was disbursed by appellant as Loan amounts to respective allottees which was then disbursed by allottees to corporate debtor - CIRP application in respect of corporate debtor was admitted by Adjudicating Authority - Appellant submitted its claims before RP which was rejected - Subsequently, Adjudicating Authority passed an order for initiating liquidation proceedings against corporate debtor and a liquidator was appointed - Appellant submitted its claim before liquidator which was also rejected on ground that disbursement of amount for time value of money had been made by appellant in favour of allottee i.e. borrower and not corporate debtor and further appellant was not a financial creditor in terms of provisions of Code - Whether appellant when it questions determination of liquidator to effect that appellant is not a 'financial creditor', then, as per section 42, in respect of accepting or rejecting claim, an 'Appeal' is to be preferred against decision of liquidator to 'Adjudicating Authority' within 14 days of receipt of such decision - Held, yes - Whether liquidator having accepted allottees claim, appellant was not entitled to vary/modify same, especially when allottees were not parties to application before Adjudicating Authority - Held, yes - Whether appellant not having subjectively satisfied Tribunal that money which it was claiming was disbursed to 'corporate debtor' for time value of money as per section 5(8), Adjudicating Authority was right in dismissing application - Held, yes (Paras 47, 52 and 53)**

## CASE REVIEW

*Axis Bank Ltd.* v. *Samruddhi Realty Ltd.* (2022) 136 taxmann.com 318 (NCLT - Beng.) (para 53) *affirmed* (***See Annex***).

## CASES REFERRED TO

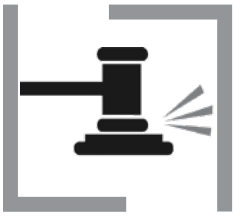
*Chinnaswamy* v. *Official Liquidator of Karnatka Ball Bearings Corpn. Ltd.* (CA No. 172 of 2013, dated 31-1-2013) (para 24), *Asmi Enterprises* v. *Yog Industries*

*Ltd.* (CA No. 82/IBC/NCLT/MB/MAH/2017, dated 10-4-2019) (para 25), *UCO Bank*, In re (2018) 91 taxmann.com 46/146 SCL 293 (NCLT - Kol.) (para 25), *Mangalam Cotton Industries* v. *GV Ravikumar Liquidator of Thirupur Surya Textiles (P.) Ltd.* (Manu/NC/0770/2021) (para 27), *Indiabulls Housing Finance Ltd.* v. *Rudra Buildwell Projects (P.) Ltd.* (2019) 108 taxmann.com 56 (NCLT - New Delhi) (SB) (para 44) and *Indiabulls Housing Finance Ltd.* v. *Rudra Buildwell Projects (P.) Ltd.* (2019) 108 taxmann.com 57/155 SCL 32(NCL - AT) (SB) (para 45).

**Sharad Tyagi** and **Yukti Makan**, Advs. *for the Appellant.* **Abhishek Anand**, Adv. *for the Respondent.*

† Arising out of order passed by the Adjudicating Authority, (National Company Law Tribunal, Bengaluru Bench) in *Axis Bank Ltd.* v. *Samruddhi Realty Ltd.* (2022) 136 taxmann.com 318.

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 319 (NCLAT - Chennai)**



(2022) 135 taxmann.com 142 (NCLAT- New Delhi)

# NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

## Union Bank of India v. National Housing Bank

M. VENUGOPAL, JUDICIAL MEMBER V.P. SINGH AND
DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 461 OF 2021
FEBRUARY 7, 2022

**Section 14 of the Insolvency and Bankruptcy Code, 2016, read with section 16B of the National Housing Bank Act, 1987 - Corporate insolvency resolution process - Moratorium - General - DHFL availed financial assistance from National Housing Bank (NHB) under its refinance and other schemes - Loans granted by NHB were secured by way of pari passu charge inter alia over movables including receivables of DHFL - Whether such assets/receivable under refinance scheme of NHB be deemed to be held by DHFL in trust for benefit of refinancing institution, i.e. NHB in terms of section 16B of NHB Act and DHFL could not use these receivables for its purposes or uses or treat them as its property - Held, yes - Whether therefore, when CIRP was initiated against DHFL, Adjudicating Authority had not erred in excluding from scope of moratorium those assets which were owned by a NHB being a third party and which were in hands of DHFL under a contract - Held, yes (Para 18.39)**

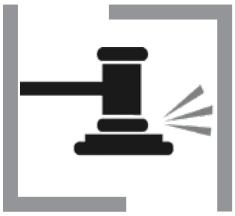
## CASES REFERRED TO

*Innoventive Industries Ltd.* v. *ICICI Bank* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 5.16), *Rajendra K. Bhutta* v. *Maharashtra Housing and Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC) (para 5.16), *Pr. CIT* v. *Monnet Ispat and Energy Ltd.* (2018) 18 SCC 786 (para 5.16), *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 5.16), *Duncans Industries Ltd.* v. *A.J. Agrochem* (2019) 110 taxmann.com 131/156 SCL 478 (SC) (para 5.16), *ICICI Bank Ltd.* v. *ABG Shipyard Ltd.* (2018) 91 taxmann.com 89 (NCLT - Ahd.) (para 5.16), *Kalparaj Dharamsheel* v. *Kotak Investments Advsiors Ltd.* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 5.16), *Allahabad Bank* v. *Canara Bank* (2000) 4 SCC 406 (para 5.16), *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.* (2001) 30 SCL 59 (SC) (para 5.16), *Directorate of Enforcement* v. *Manoj Kumar Agrawal* (2021) 126 taxmann.com 210/168 SCL 433 (NCLAT - New Delhi) (para 5.17), *Kansara Abdul Rehman Sadruddin* v. *Trustees of the Maniar Jamat* 1967 SCC OnLine Gujarat 10 (para 5.18), *Ku. Chandan* v. *Longa Bai* AIR 1998 MP 1 (para 5.18), *Himansu Kumar Roy Chouadhoury* v *Moulavi Hasan Ali Khan* AIR 1938 Cal 818 (para 5.18), *W. O. Holdsworth* v. *State of Uttar Pradesh* AIR 1957 SC 887 (para

5.18), *Rajgopal Raghunathdas Somani* v. *Ramchandra Hajarimal Jhavar* 1967 (69) Bom LR 472 (para 5.18) and *Municipal Corporation of Greater Mumbai (MCGM)* v. *Abhilash Lal* (2019) 111 taxmann.com 405/(2020) 157 SCL 477 (SC) (para 5.27).

**Raunak Dhillon**, **Ms. Madhavi Khanna**, **Shubhankar Jain**, **Animesh Bisht** and **Ms. Saloni Kapadia**, Advs. *for the Appellant.* **Mohammed Himayatullah**, **Jinella Gogri** and **Negandhi Shah**, Advs. *for the Respondent.*

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 135 taxmann.com 142 (NCLAT- New Delhi)**



(2022) 136 taxmann.com 294 (NCLAT- New Delhi)

# NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

**Writer Business Services (P.) Ltd. v. Ashutosh Agrawala, Resolution Professional for Cox & Kings Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND
DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 956 OF 2021†
FEBRUARY 4, 2022

**Section 235A, read with sections 14 and 236, of the Insolvency and Bankruptcy Code, 2016 - Punishment where no specific penalty or punishment is provided - Whether where Adjudicating Authority is empowered to impose penalty, specifically, it has been provided in Code - Held, yes - Whether section 235A is a provision for awarding a punishment of fine and provision is for punishment of an offence - Held, yes - Whether trial of such offence has to be as per section 236 on taking cognizance by Special Court by complaint made by Board or Central Government for punishment of a person - Held, yes - Whether therefore, where Resolution Professional filed an application alleging that appellant had violated Moratorium by refusing to provide its record management services, however, there was neither any prayer for imposition of fine, nor any kind of punishment was prayed for, imposition of penalty on appellant by Adjudicating Authority in exercise of powers under section 235A was beyond jurisdiction, hence, unjustified - Held, yes - Whether since there was allegation of commission of an offence, punishment could have been awarded after following procedure under section 236 - Held, yes (Paras 17, 24, 25, 27 and 28)**

**Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Whether Record Management Services being provided by appellant are critical services within meaning of section 14(2A) which should not be terminated during period of Moratorium, hence, there was no error in direction issued by Adjudicating Authority to appellant to continue providing its services to corporate debtor, during CIRP period - Held, yes - Whether further, since it was on record that appellant had issued invoices for payment for services provided during CIRP and part payment was made during period, prayer of Resolution Professional that direction be issued to appellants that they are not entitled to receive any payment for services during CIRP period could not have been granted - Held, yes (Paras 30 and 32)**

## CASE REVIEW

*Ratan India Finance (P.) Ltd. v. Cox & Kings Ltd.* (2022) 136 taxmann.com 293 (NCLT - Mum.) *partly affirmed* (***See Annex***).

*Director of Enforcement* v. *M.C.T.M Corpn. (P.) Ltd.* (1996) 2 SCC 471 (para 17) *distinguished.*

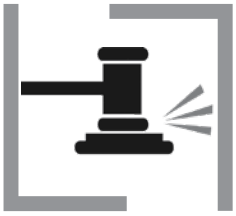
## CASES REFERRED TO

*Director of Enforcement* v. *M.C.T.M Corpn. (P.) Ltd.* (1996) 2 SCC 471 (para 4) and *State of U.P.* v. *Sukhpal Singh Bal* (2005) 7 SCC 615 (para 20).

**Arun Kathpalia**, Sr. Adv., **Ms. Ishani Mookherjee**, **Ms. Prabh Simran Kaur**, **Vaijayant Paliwal**, **Ameya Gokhale** and **Ms. Diksha Gupta**, Advs. *for the Appellant.* **Nirman Sharma**, **Pulkitesh Dutt Tiwari** and **Bency Ramakrishnan**, Advs. *for the Respondent.*

† Arising out of order passed by Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, in *Ratan India Finance (P.) Ltd.* v. *Cox & Kings Ltd. (2022) 136 taxmann.com 293.*

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 294 (NCLAT- New Delhi)**



(2022) 136 taxmann.com 321 (NCLAT- New Delhi)

# NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

**Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional for Jet Airways (India) Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND
DR. ALOK SRIVASTAVA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 628 OF 2020†
FEBRUARY 14, 2022

**Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - CIRP in case of corporate debtor was admitted - Appellant, a registered Trade Union representing 95 per cent of aircraft maintenance engineers of corporate debtor submitted its claim and RP had admitted its claim - Thus, appellant being a stakeholder in CIRP filed instant appeal questioning order of NCLT by which it had granted approval to proposal of CoC and RP to sell subject assets of corporate debtor - Whether since appellant being stakeholder in CIRP had interest in assets of corporate debtor and it was value of those assets which would be relevant for determination of its claim either in Resolution Plan or in liquidation proceedings, submission of RP that appellant was not an aggrieved person would not be acceptable and appellant being a person aggrieved within meaning of section 61, appeal on behalf of appellant would be fully maintainable - Held, yes (Para 13)**

**Section 25, read with section 14, of the Insolvency and Bankruptcy Code, 2016 and regulation 29 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Whether regulation 29(1) specifically empowers RP to sell unencumbered asset(s) of corporate debtor, if he is of opinion that such sale is necessary for better realization of value - Held, yes - Whether therefore, despite declaration of Moratorium under section 14(1)(b), RP is empowered to conduct sale of unencumbered assets, if he is of opinion that it is necessary for better realization of value - Held, yes - Whether prohibition in transferring assets of corporate debtor is on corporate debtor and said prohibition ipso-facto does not prohibit RP or CoC, who were empowered by specific provision of Code to undertake any such sale - Held, yes - Whether therefore, decision of RP to proceed with sale of property of corporate debtor after approval of CoC was permissible and was not interjected by virtue of declaration of Moratorium under section 14(1)(b) - Held, yes (Paras 25 and 28)**

**Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether when Moratorium is declared any action to foreclose, recover or enforce any security interest created by corporate debtor in respect of its property is prohibited - Held, yes - Whether prohibition to foreclose or to recover any security interest is in interest of corporate debtor, so that secured creditors do not enforce its security during continuance of CIRP - Held, yes - Whether law does not permit secured creditors to enforce their security, since, if permitted, secured creditors will be more than inclined to enforce their securities and realize their debt during currency of CIRP, which shall defeat entire object of insolvency resolution, hence, not permissible - Held, yes (Para 30)**

## CASE REVIEW

*Ashish Chhawchharia Housing Development Finance Corporation Ltd.* v. *Jet Airways* (2022) 136 taxmann.com 320 (NCLT - New Delhi) *affirmed* (**See Annex**).

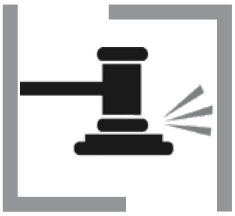
## CASES REFERRED TO

*P. Mohanraj* v. *Shah Brothers ISPAT (P.) Ltd.* (2021) 125 taxmann.com 39/167 SCL 327 (SC) (para 17), *Rajendra K. Bhutta* v. *Maharashtra Housing and Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC) (para 18), *Anand Rao Korada, Resolution Professional* v. *Varsha Fabrics (P.) Ltd.* (2019) 111 taxmann.com 474/(2020) 157 SCL 350 (SC) (para 31), *Sandeep Khaitan* v. *JSVM Plywood Industries Ltd.* (2021) 127 taxmann.com 38/166 SCL 494 (SC) (para 32), *SM Milkose Ltd.* v. *Parvinder Kumar Bhatt* 2021 SCC Online NCLAT 308 (para 33), *Indian Overseas Bank* v. *Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd.* (2017) 88 taxmann.com 132/(2018) 145 SCL 138 (NCL - AT) (para 33), *Association of Aggrieved Workmen of Jet Airways (India) Ltd.* v. *Jet Airways (India) Ltd.*, (Co. Appeal (AT) (Insolvency) No. 643 of 2021, dated 20-1-2022) (para 35) and *Bank of Baroda* v. *MBL Infrastructure Ltd.* (2022) 134 taxmann.com 190 (SC) (para 36).

**Vikas Mehta**, **Kumud Shekhar** and **Mayan Prasad**, Advs. *for the Appellant.* **Arun Kathpalia**, Sr. Adv., **Rohan Rajadhyaksha**, **Ms. Amrita Sinha**, **Dhiraj Kr. Totala**, **Parimal Kashyap**, **Ms. Tanya Chib** and **Nishant Upadhyay**, Advs. *for the Respondent.*

† Arising out of order passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in *Ashish Chhawchharia Housing Development Finance Corporation Ltd.* v. *Jet Airways* (2022) 136 taxmann.com 320.

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 321 (NCLAT- New Delhi)**



(2022) 136 taxmann.com 323 (NCLAT- New Delhi)

# NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

## Standard Surfa Chem India (P.) Ltd. v. Kishore Gopal Somani

M. VENUGOPAL, JUDICIAL MEMBER V.P. SINGH AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 684 OF 2021†

FEBRUARY 14, 2022

**Regulation 47A, read with regulation 47 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 - Exclusion of period of lockdown - Appellant emerged as successful bidder in e-auction of Pondicherry unit of corporate debtor - Liquidator issued a letter of intent stipulating 90 days timeline for making full payment to complete auction - Before expiry of said 90 days, appellant preferred an IA before NCLT seeking time extension in complying with auction proceedings - However, NCLT vide impugned order dismissed said IA - On appeal, it was found that applicant had sought an extension of 3 months due to 2nd wave of Covid-19 outbreak on ground of regulation 47A which provided that period of Lockdown imposed by Central Government in wake of Covid-19 outbreak shall not be counted for computation of timeline for any task that could not be completed due to Lockdown in relation to any liquidation process - It was found that regulation 47 which deals with Model Timeline for Liquidation Process is only directory in nature and was provided under regulation as a guiding factor to complete liquidation process in a time-bound manner and in exceptional circumstances, such a time limit can be extended - Further, E-Auction Process Information Document also provided discretion to liquidator to extend timeline and since impact of 2nd wave of Covid-19 was everywhere in India, of which judicial notice could be taken - Whether therefore, in said special circumstances, liquidator ought to have sought permission of Adjudicating Authority to extend timeline and Adjudicating Authority should have extended timeline to extent permissible under applicable laws and regulations - Held, yes - Whether Adjudicating Authority did not consider that satisfaction of creditor claims while ensuring asset maximization is underlying principle of IBC, which cannot be overridden on account of meagre delays induced by a force majeure event - Held, yes - Whether therefore, appeal deserves to be allowed by setting aside impugned order - Held, yes (Paras 28, 31, 33 and 35)**

## CASE REVIEW

*State Bank of India* v. *Advance Surfactants India Ltd.* (2022) 136 taxmann.com 322 (NCLT - New Delhi) (para 35) *set aside* (***See Annex***).

*Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 30) *followed.*

## CASES REFARRED TO

*Asstt. Commissioner, Commercial Tax Department* v. *Shukla & Bros.* (2010) 3 taxmann.com 537 (SC) (para 23) and *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 30).

**P.H. Arvindh Pandian**, Sr. Adv. and **Goutham Shivshankar**, Adv. *for the Appellant.* **Ms. Anju Bhushan** and **K.G. Somani** *for the Respondent.*

† Arising out of order passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi in *State Bank of India* v. *Advance Surfactants India Ltd.* (2022) 136 taxmann.com 322.

**FOR FULL TEXT OF THE JUDGMENT SEE**
**(2022) 136 taxmann.com 323 (NCLAT- New Delhi)**

# Code of Conduct of Insolvency Professionals

## Introduction

The insolvency professional or a Resolution Professional is the backbone of the process. Resolution Professional is the first person appointed and the last person to be relieved. The primary role of the Resolution Professional is to ensure the revival of the corporate debtor. However, more important for the Resolution Professional is to keep the process transparent and fair.

The IPs being the "officer of court" who keeps an eye on the day to day process of corporate debtor during Corporate Insolvency Resolution Process or Liquidation Process is the caretaker which has to abide by the Regulatory Framework for the better, transparent & organized Resolution plan.

The "Rule of Equity" plays a major role while managing a concern and special care needs to be taken while saving a drowning corporation. The Resolution Professional's most important function is to ensure the operations of the corporate debtor as a going concern. This means that even though the corporate debtor is

undergoing an insolvency process, its operations must be preserved until such process concludes.

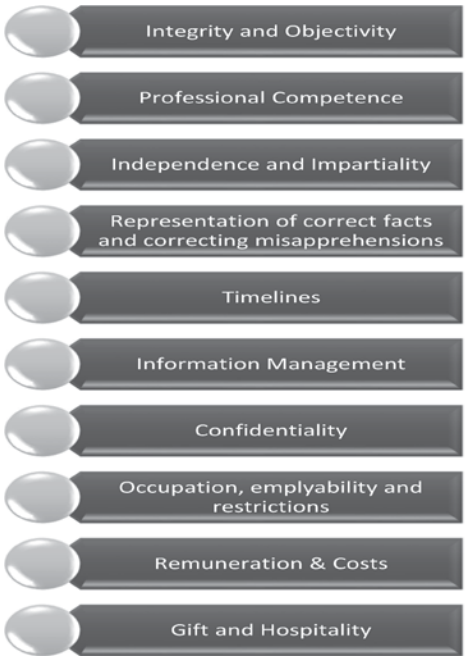
The Resolution Professional has professional freedom to ensure that the operations do not fester. The Resolution Professional also takes control of the assets and finances of the corporate debtor. He also protects and preserves the value of such assets and ensures that they remain unfettered until a resolution plan is executed. Based on this, the Resolution Professional also prepares an information memorandum which in turn assists the resolution applicant to compile a resolution plan[1].

## Code of Conduct for Insolvency Professionals

A Code of conduct is generally derived from Codes of ethics. These ethical norms are benchmark of right actions at a given point of time which the society or the system expects from an individual and are responsible for evolution of the mankind and strengthening the legal system. All the religious scriptures prescribe a code of conduct for the followers. Ancient society in India was governed by the principles of Dharma which may mean, though not exactly, righteousness and subjected the king and the subject alike to the rule of law to ensure well-being of all, not only of human beings but the entire environment. These principles are found in teachings of Bhagavad Gita, Old Testament, edicts of Buddha and Ashoka, etc. In addition to the ethical norms propounded by saints and sages in various religious scriptures, eminent scholars and statesmen also spelt out ethical norms in their principles and practices, *e.g.*, Mahatma Gandhi gave new dimension to the national struggle based on truth, and nonviolence and expressed in relation to Ahimsa as:

'vaishnav janto te kahiye jo peer parai jane re'

The Indian Constitution also provides code of conduct for its citizens under Article 51A as 'Fundamental Duties' which forms the foundation of human dignity and national character. Further, the principles of natural justice are in the nature of code of conduct for every judicial 15 and *quasi judicial* authority. In *Tulsiram Patel* v. *Union of India*, the Supreme Court held that the term natural justice means certain rules of conduct supposed so just that they are binding upon all mankind and observed: The principles of natural justice constitute the basic elements of fair hearing, having their roots in the innate sense of man for fair play and justice which is not the serve of any particular race or country but is shared in common by allmen.'



The First Schedule to IBBI (Insolvency Professionals) Regulations, 2016 throws light on the "Code of Conduct for IPs"

The summary of the said regulation is mentioned hereunder: As said, IPs are required to abide by the Code of Conduct to ensure smooth functioning of the process with a transparent and clear view towards the outcome which corporate Debtor will face.

Thus, maintaining integrity and being straight forward, not misrepresenting any facts and working ethically is the code for IPs to follow.

Since the process of maintaining and re-building a corporate debtor is a task which requires utmost wisdom and fairness, IPs must maintain complete independence throughout the process by being impartial and refraining themselves from taking the bias decision.

Managing a sinking ship is not only a task which is to be taken by wise professionals but it is also time-taking and burdensome, therefore to enable the efficient working of IPs, "An insolvency Professional may, at any point of time, not have more than 10 assignments as Resolution Professional in Corporate Insolvency Resolution Process, of which not more than three shall have admitted claims exceeding ₹ 1000cr. each"

As quoted by George Bernard Shaw,

> *"Justice is impartiality. Only strangers are impartial.''*

To abide by the law and run a corporation requires unbiasedness and fairness towards everyone. Insolvency Professionals, being the corporate saver, shall not engage or appoint any of his relatives or related parties.

As per Regulation 23A. "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".

Disclosures make the process transparent, reliable and trustworthy for the public and to win this war, proper disclosures regarding expenses incurred and fees paid to the various professionals are required. Therefore, an insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

Lastly, independence is the most crucial factor which derives the conduct of a human being. Thus, an Insolvency Professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an IP.

## Conclusion

The institution of IP stands on conduct and capability of the professionals.

The capability needs to be enhanced continuously because of evolving legal and regulatory framework as also jurisprudence and evolution of best practices including use of technology. Every function which an IP is required to perform under the Code requires highest level of professional excellence including financial engineering and value maximizing management.

Not only the Adjudicating Authorities but "legal officer of court" *i.e.,* Insolvency Professional shall make every endeavour to follow the principle of natural justice on his duty.

The essence of serving justice lies in being fair & equitable rather than being pragmatic.

Thus, an IP must take the midway by adhering to the "intent of legislature" and by being "realistic".

The objectives of the Code cannot be achieved unless the resolution professional strives for excellence and follows the Code of Conduct in various processes under the Code for establishing fairness in the conduct of the processes in order to inspire confidence among all the stakeholders.

1. Drishti Saxena-India Filings

# FAQs on inspection conducted by IPAs

**1. What are the governing provisions of Insolvency and Bankruptcy Code (Code) related to Inspection of professional members enrolled with it?**

The role of Insolvency Professional Agencies (IPAs) are envisaged under section 204 of the Code which *inter alia* includes monitoring performance of the professional members enrolled with it.

The mandates relating to Monitoring the Professional Members are specified in IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (hereinafter called 'IBBI (IPA) Regulations') and IBBI (Insolvency Professionals) Regulations, 2016 (hereinafter called 'IBBI (IP) Regulations'). The same are as follows:

- Clause 8(1)(b) of the Schedule to the IBBI (IPA) Regulations requires every the Governing Board of an Insolvency Professional Agency (IPA) to constitute a Monitoring Committee. Further, clause 8(2) thereof requires the Chairman of the Monitoring Committee to be an Independent Director of the IPA.
- Regulations 15 to 20 of IBBI (IPA) Regulations lays down the monitoring mechanism in detail.
- Clause18 of the Schedule to the IBBI (IPA) Regulations requires every IPA to have a Monitoring Policy that shall *inter alia* cover the manner and format of submission or collection of information and records of the professional members including by way of inspection.
- Clause 18 of first Schedule to IBBI (IP) Regulations states that an Insolvency Professional must appear, cooperate and be available for inspection and investigations carried out by the Board, any person authorised

by the Board or the Insolvency Professional Agencies with which he is enrolled.

## 2. What is the objective of conducting inspection of Insolvency professionals?

- To ensure that IPs complies with the provisions of Code and Rules and Regulations made thereunder in true letter and spirit.
- To improve and simplify the process adopted by IP while handling assignments under the Code and to ensure that assignments are handled by IP in transparent, accountable and efficient manner.
- To ensure that requirements of record maintenance as required under the Code and rules and regulations made thereunder are duly complied and IP has worked keeping in consideration the interest of all the stakeholders at large.
- To strengthen the regulatory framework for IPs by identifying, and responding appropriately to misconduct and poor performance.
- To increase the confidence in insolvency framework and regulatory regime and to ensure better and more consistent outcomes for all stakeholders.
- To ascertain whether adequate internal control systems, procedures and safeguards have been adopted and established and are being regularly followed by the registered members (Insolvency Professionals) to fulfill their obligations under the Code, relevant regulations, circulars et al;
- To ascertain whether any circumstance exists which would render a registered member (Insolvency Professional) unfit or ineligible; and
- To inquire into all reasonable and credible complaints received from any aggrieved person on any matter having a connection with or bearing on the activities of a registered member (Insolvency Professional);

Further, Inspections are also instruments/ mechanisms to:

- Keep a tab on and put in place checks and balances on any unauthorised action(s) of the registered members (IPs) and take cognizance of all reasonable and credible complaints against such registered members and provide appropriate relief to the aggrieved person.
- Ensure that no false or misleading information is provided by any of the registered member (IPs) w.r.t the assignments handled by him/ her.
- Give a fair chance of hearing to the Insolvency Professionals.

## 3. What type of inspections are conducted by IPAs?

As per the Monitoring policy and Inspection policy of ICSI IIP, the inspections are of two types:

(*i*) **Routine Inspection:** The routine inspection may be carried out on the basis of Annual Inspection Plan, *if any* as approved by the monitoring committee including percentage of Insolvency Professionals and frequency of inspection.

(***ii***) **Event-based Inspection:** The event based inspection may be carried out as per the circumstances prescribed in the monitoring policy and approved by MD of ICSI IIP.

The monitoring policy states that Event-based Inspection - The Board may decide to conduct an inspection of an IP:

(*a*) Professional Member(*s*)flagged under Desktop Monitoring;

(*b*) On receipt of a complaint against the Insolvency professional

(*c*) On the direction of IBBI or Governing Board or Committee;

(*d*) In case, it has material available on record to believe that the insolvency professional has contravened any of the provisions of the Code or the rules or regulations made, or directions issued by the Board;

(*e*) On receipt of any order of court or tribunal or Board that directs inspection or makes adverse observations/remarks against the professional members;

(*f*) Such other event as may be deemed fit.

## 4. What is the process of inspection conducted by IPAs?

**Step 1:** Constitution of Inspection Authority

**Step 2:** Conduct of Inspection by IA

- Issuance of Notice by IA to the IP
- Desktop Appraisal/On-Site Inspection by IA

**Step 3:** Submission of draft inspection report to IP

**Step 4:** Submission of final inspection report post incorporation of his comments

**Step 5:** Placing of inspection report before monitoring committee meeting

## 5. What are the common errors and omissions observed by IPAs during inspection of IPs?

**Some of the errors are produced below for reference:**

1. Deviation in timelines: It has been observed that many Insolvency Professionals do not adhere with the timelines prescribed under the Code and regulations.
2. Non-adherence to reporting requirements
3. Non-maintenance of website during CIRP: It has been observed that there is no updation on the website of the Corporate Debtor w.r.t. ongoing CIRP process in many cases despite of having the website. Further, the website should not contain confidential information about the proceedings of CIRP.

4. Lack of transparency/Non-maintenance of records during CIRP

5. In many cases fees were not placed before the CoC for ratification or approval. Further, Costs not ratified by COC to forming a part of CIRP cost.

6. Related to registered valuers

    1. IP appointing Individual valuers not registered under any class.

    2. Non-disclosures of all RVs appointed.

    3. 2 Registered Valuers not appointed for each class of assets.

    4. IPs have not appointed registered valuers within the prescribed timelines.

7. Non-obtaining of declaration of confidentiality from CoC members while sharing Information Memorandum and fair and liquidation value of the corporate debtor

# Regulatory updates

(1) The MCA *vide* its notification dt. 11th February, 2022 (S.O. 408(E)) notified concerning appointment of Shri Ravi Mital, as Chairperson of the Insolvency and Bankruptcy Board of India. Shri Ravi Mital assumed the office of the Chairperson on the 9th February, 2022. Shri Ravi Mital is a 1986 batch Indian Administrative Service (IAS) officer of Bihar cadre, and holds degrees of B.E. in Mechanical Engineering and M.Phil. in Environmental Science. Prior to joining the IBBI as Chairperson, he superannuated from the position of Secretary, Department of Sports, Ministry of Youth Affairs and Sports. He has also served as Secretary, Ministry of Information & Broadcasting and Special Secretary, Department of Financial Services, Ministry of Finance. He has also served on Boards of various organisations including State Bank of India, Punjab National Bank, GIC Re etc. During his service, he has served in varied capacities in various Ministries and Departments of the Government.

(**The notification can be accessed at https://ibbi.gov.in/uploads/whatsnew/c6b82651947e461f1f3f1ec6e2e71185.pdf**)

(2) The IBBI notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016 (CIRP Regulations) on 9th February, 2022.

(**The notification can be accessed at https://ibbi.gov.in/uploads/legalframwork/dbe9d181c132daf2d18090d873b1adbc.pdf**)

# Ruchi Soya : A Brief Analysis

In the Indian Insolvency scenario the insolvency and bankruptcy is governed by a uniform law of Insolvency and Bankruptcy Code, 2016 ("Code") which came into force in 2016. In the past more than 5 years since its inception, the Code has seen a lot of important landmark judgments (and orders) being given by the National Company Law Tribunal ("NCLT")/National Company Law Appellate Tribunal ("NCLAT") as well as the Apex Court of India. These orders have helped to resolve some contentious issues encountered as also plugged-in the gaps discovered in the implementation of this codified law, as well as the issues left by the legislation to the decided based on facts and circumstances of the every case.

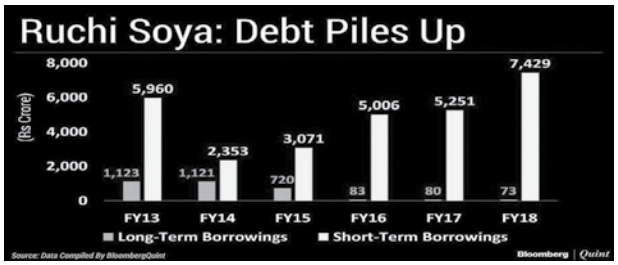
To provide some statistics, since the coming into force of the provisions of CIRP (*i.e.* with effect from December 1, 2016), 3312 CIRPs were commenced (till the end of December 2019). Of these, 246 have been closed on appeal or review or settled; 135 have been withdrawn; 780 have ended in liquidation and 190 have ended in approval of resolution plans.[1] One of these resolved cases is that of M/s Ruchi Soya Industries Limited ("Ruchi Soya"). Since the case involves a This Article highlights the flow of events and the pertinent questions answered by the Courts in this matter.

Brief Facts of the matter:

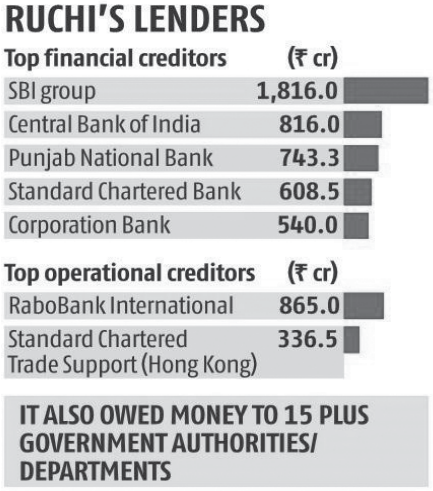
Ruchi Soya has many manufacturing plants and its leading brands include Nutrela, Mahakosh, Sunrich, Ruchi Star and Ruchi Gold.

Ruchi Soya was a part of the second list of 28 defaulters that the Reserve Bank of India flagged for resolution. In December 2017, the NCLT had, on an application by the financial creditors *viz.*, Standard Chartered Bank and DBS Bank, admitted a petition in respect Ruchi Soya for initiation of insolvency proceedings. IP Shailendra Ajmera was appointed initially as the Interim Resolution Professional and later as the Resolution Professional (RP) to manage the affairs of the company and undertake the insolvency proceedings.

Ruchi Soya, in 2015, had bet on castor seeds as prices rose as high as Rs. 5,000 a quintal. The company didn't hedge the exposure and a 40 per cent crash after the new crop arrived and weak global demand left it with cash losses in the quarter ended March, 2016. It was also on the radar of Securities and Exchange Board of India's scanner for allegedly manipulating castor seed futures. The February, 2016 contract for castor seed fell by 20 per cent in January, and Ruchi Soya and its group entities allegedly had a large portion of the open interest, according to SEBI's probe, which forced the National Commodity and Derivatives Exchange to suspend trading. The SEBI investigation also revealed that Ruchi Soya had transferred Rs. 76.77 crores in January that year to at least five entities also holding significant positions in castor seed contracts. Finding Ruchi Soya guilty of market rigging, the regulator barred the company from the securities market. The financial impact from its exposure to the contract wasn't big but Ruchi Soya failed to recover from the setback.(https://www.bloombergquint.com/insolvency/ruchi-soyas-run-of-bad-luck-and-a-self-inflicted-injury-footnote)




Ruchi Soya had a total debt of about Rs. 12,000 crore. Ruchi Soya Industries owed around Rs. 9,345 crore to financial creditors and another Rs. 2,750 crores to operational creditors. Among financial creditors, the State Bank of India (SBI) had the maximum exposure of around Rs. 1,800 crores, followed by Central Bank of India (Rs. 816 crores), Punjab National Bank (Rs. 743 crores) and Standard Chartered Bank India (Rs. 608 crores).




Source : Business Standard

After the Reserve Bank of India identified it among the largest bad loan cases, SBI-led lenders dragged the edible oil maker to the National Company Law Tribunal under the Insolvency and Bankruptcy Code. Patanjali Ayurved Ltd. and Adani Wilmar Ltd. swooped in, with the Adani

Group firm emerging as the highest bidder.

Initially, Resolution Plans were submitted, *inter alia*, by Adani Wilmar Limited ("Adani Wilmar") and Patanjali Group to acquire Ruchi Soya. The Resolution Plan submitted by Adani Wilmar was approved by the Committee of Creditors in August 2018. Patanjali Ayurved had approached NCLT challenging the decision of Ruchi Soya's lenders to approve Adani Wilmar's Rs. 6,000 crores takeover bid. Patanjali group came second with its bid of around Rs. 5,700 crores, including the infusion of about Rs. 1,700 crores into the edible oil company.

However, Patanjali Group challenged, *inter alia*, eligibility of Adani Wilmar to submit the Resolution Plan under section 29A of the Code and process for negotiation.

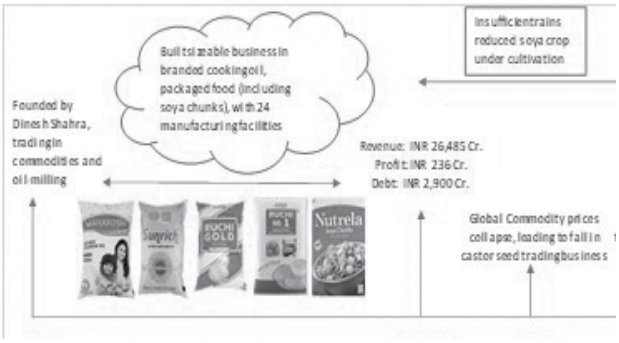
While the application filed by Patanjali Group was being argued before the NCLT Mumbai, Adani Wilmar withdrew its Resolution Plan citing delays in the CIRP. Subsequently, Patanjali Group negotiated its Resolution Plan with the Resolution Professional ("RP") and Committee of Creditors. Adani Wilmar, which emerged as the highest bidder, after a long drawn battle with Patanjali, had in December 2018 written to the RP regarding significant delays in resolution process that led to deterioration of Ruchi Soya's assets.Later, Adani Wilmar, which sells edible oil under the Fortune brand, withdrew from the race.

Patanjali, the lone player left in contention after the exit of Adani Wilmar, had last increased its bid value by around Rs. 200 crores to Rs. 4,350 crores for Ruchi Soya. This excluded capital infusion of Rs. 1,700 crores into the company. Committee of Creditors ("CoC") met to discuss the revised bid of Patanjali and decided to conduct the voting process on 30th April, 2019.

The CoC had then approved the Resolution Plan submitted by Patanjali Group with approx. 96% vote in favour.

As per the plan proposed by Patanjali, out of the Rs. 4,350 crores offered by Patanjali group, Rs. 4,235 crores was to be utilised to pay creditors, while Rs. 115 crores were to be used for capital expenditure and working capital requirements of Ruchi Soya. As per the regulatory filing made by Ruchi Soya, Rs. 4,053.19 crores were to be paid to secured financial creditors, Rs. 40 crores to unsecured financial creditors, Rs. 90 crores to operational creditors, Rs. 25 crore to clear statutory dues, Rs. 14.92 crores to workmen/employees and Rs. 11.89 crores to provide counter bank guarantee.[2]

Ruchi




Ruchi Soya was delisted from stock exchange in November 2019, about two years after the insolvency proceedings against the company were initiated in 2017 by the lenders. The final sale transaction was completed in December 2019 and Patanjali Ayurved paid Rs. 4,350 crores to takeover Ruchi Soya. The company was then relisted in January, 2020.

Before and during CIRP, the Company was exposed to commodity price fluctuations in its business. Looking at the nature of products, all major raw materials as well as finished goods being agro-based are

subjected to market price variations. Prices of these commodities continue to be linked to both domestic and international prices, which in turn are dependent on various Macro/Micro factors. These Commodities are also increasingly becoming asset classes. Prices of the Raw materials and finished products manufactured by Ruchi Soya were also fluctuating widely due to a host of local and international factors. However, they have continued to place a strong emphasis on their risk management and have successfully introduced and adopted various measures for hedging the price fluctuations in order to minimize its impact on profitability.

The following table highlights the financial performance of Ruchi Soya in the last five years.

| | POST CIRP | DURING CIRP | | PRE-CIRP | |
|---|---|---|---|---|---|
| Particulars (In Crs.) | 2020 | 2019 | 2018 | 2017 | 2016 |
| Revenue | 13,117.79 | 12,729.23 | 11,994.13 | 18,526.90 | 27,734.62 |
| Other Income | 57.58 | 100.02 | 35.15 | 93.48 | 70.82 |
| Total Income | 13,175.37 | 12,829.26 | 12,029.28 | 18,620.38 | 27,805.43 |
| Expenditure | -5,381.57 | -12,614.29 | -17,899.16 | -20,094.75 | -27,995.37 |
| Interest | -112.32 | -6.99 | -855.73 | -832.21 | -618.74 |
| PBDT | 7,793.80 | 214.96 | -5,869.88 | -1,474.38 | -808.68 |
| Depreciation | -135.77 | -138.24 | -140.37 | -156.06 | -149.88 |
| PBT | 7,658.02 | 76.72 | -6,010.24 | -1,630.43 | -958.56 |
| Tax | -- | -- | 436.96 | 373.23 | 79.86 |
| Net Profit | 7,672.02 | 76.72 | -5,573.28 | -1,257.20 | -878.70 |
| Equity | 59.15 | 65.29 | 65.29 | 65.29 | 66.82 |
| EPS | 871.28 | 2.35 | -170.73 | -44.41 | -26.30 |
| CEPS | 263.99 | 6.58 | -166.41 | -33.73 | -21.81 |
| OPM % | 59.41 | 1.69 | -48.94 | -7.96 | -0.68 |
| NPM % | 58.49 | 0.60 | -46.47 | -6.79 | -3.17 |

Source: BSE

From the financials of Ruchi Soya, it is clear that the authorised share capital of the Patanjali Consortium as on December 18, 2019 is merged with the authorised share capital of the Company. As a result, authorised share capital of the Company was increased from 25,305.00 Lakh consisting of 1,01,02,50,000 equity shares of Rs. 2 each and 51,00,000 preference shares of Rs. 100 each to Rs. 95,305.00 Lakh consisting of 2,11,20,50,000 equity shares of Rs. 2 each and 5,30,64,000 preference shares of Rs. 100 each. Further, with effect from December 17, 2019, the existing issued, subscribed, paid up 2,00,000 cumulative redeemable preference shares of Rs. 100 each stand fully cancelled and extinguished. As prescribed in the Resolution Plan, the reduction in the share capital of the Company amounting to Rs. 6,632.75 Lakh is adjusted against the debit balance as appearing in its profit and loss account (*i.e.* retained earnings) *(footnote https://trendlyne.com/fundamentals/results-notes/1157/31-dec-2019/quarterly-notes/*

*ruchi-soya-industries-ltd/).*

As per the Resolution Plan approved, out of funds received amounting to Rs. 4,35,000 Lakh, Rs. 4,23,500 Lakh was to be utilised towards settlement of claims of creditors and Rs. 11,500 Lakh for improving the operations of the Company. Out of above, as on 31st March 2020, amount of Rs. 4,01,770.38 Lakh has been used to settle existing secured financial creditors, unsecured financial creditors (other than related parties), statutory dues, operational creditors (other than a related party) CIRP costs and pending utilisation Rs. 21,729.62 Lakh is kept in separate escrow accounts.[3]

As per approved resolution plan, the contingent liabilities and commitments, claims and obligations, stand extinguished and accordingly no outflow of economic benefits is expected in respect thereof. The Resolution plan further provides that implementation of resolution plan will not affect the rights of the Company to recover any amount due to the Company and there shall be no set-off of any such amount recoverable by the Company against any liability discharged or extinguished. As a part of the Resolution Plan, the Company has transferred identified entities to the identified buyer its entire equity investment/ ownership interest held in those identified entities, at a fair market value on "as is where is" and "as is whatever is" basis.

After the amalgamation, the company has also issued equity shares of face value of Rs. 2 for every 1 equity share of face value of Rs. 7 of SPV, aggregating 29,25,00,000 equity shares of Rs. 5,850.00 Lakh are issued. 0.0001% cumulative redeemable preference shares of face value of Rs. 100 each for every 1 (one) 0.0001% cumulative redeemable preference shares of face value of Rs. 100 each of the SPV, aggregating 4,50,00,000 preference shares of Rs. 45,000.00 Lakh are issued. 9% cumulative non-convertible debenture of face value of Rs. 10,00,000 for every 9% cumulative non-convertible debenture of face value of Rs. 10,00,000 each of SPV, aggregating 4,500 debentures of Rs. 45,000.00 Lakh are issued.

***Subsequently, the paid-up equity shares capital and preference share capital of the Company was increased to Rs. 5,916.82 Lakh and Rs. 45,000 Lakh, respectively, after the amalgamation of Patanjali with Ruchi Soya.***

To gather a better understanding of the performance of the Company, a comparative chart of some financial ratios is produced below[4]:

| Particulars | POST CIRP | DURING CIRP | | PRE-CIRP | |
|---|---|---|---|---|---|
| | 2020 | 2019 | 2018 | 2017 | 2016 |
| Basic EPS (Rs.) | 871.28 | 2.35 | -170.73 | -44.41 | -32.52 |
| Revenue from Operations/ Share (Rs.) | 443.52 | 389.90 | 367.39 | 567.49 | 848.24 |
| PBDIT/Share (Rs.) | 15.50 | 6.80 | -153.59 | -20.04 | 3.50 |
| PBIT/Share (Rs.) | 10.91 | 2.56 | -157.89 | -24.82 | -1.41 |
| PBT/Share (Rs.) | 258.92 | 2.35 | -184.10 | -49.94 | -38.72 |
| Net Profit/Share (Rs.) | 259.40 | 2.35 | -170.71 | -38.51 | -32.52 |
| PBDIT/Share (Rs.) | 15.50 | 6.80 | -153.59 | -20.04 | 3.50 |

| Particulars | POST CIRP | DURING CIRP | | PRE-CIRP | |
|---|---|---|---|---|---|
| | 2020 | 2019 | 2018 | 2017 | 2016 |
| PBIT/Share (Rs.) | 10.91 | 2.56 | -157.89 | -24.82 | -1.41 |
| PBT/Share (Rs.) | 258.92 | 2.35 | -184.10 | -49.94 | -38.72 |
| Net Profit/Share (Rs.) | 259.40 | 2.35 | -170.71 | -38.51 | -32.52 |
| Enterprise Value (Cr.) (EV) | 8,177.57 | 7,082.62 | 6,990.88 | 5,359.35 | 5,404.82 |
| EV/EBITDA | 17.84 | 31.91 | -1.39 | -8.19 | 47.34 |
| MarketCap/Net Operating Revenue | 0.38 | 0.02 | 0.04 | 0.05 | 0.04 |
| Price/Net Operating Revenue | 0.38 | 0.02 | 0.04 | 0.05 | 0.04 |
| Earnings Yield | 1.52 | 0.35 | -10.77 | -1.42 | -0.99 |

The ratios help understand the position of the company through a profitability, liquidity and valuation turnpoint and how they have fared pre and post their CIRP Process.

**Pre-CIRP** : Ruchi Soya had made losses during the years 2016, 2017 and 2018. As a result of the losses the liquidity position of the company was substantially affected resulting in default in payment of its debts and adversely affecting the operations of the company. The liquidity and valuation ratios indicate the existence of uncertainty about the ability of the company to continue as a going concern. The Management of Ruchi Soya had initiated various steps such as cost rationalization, negotiations for debt restructuring and disposal of non-core assets to keep it as a going concern. The Company had incurred losses, its liabilities exceeded total assets and its net worth had been fully eroded as at 31st March, 2018. In view of the continuing default in payment of dues, certain lenders had sent notices/letters recalling their loans given and had called upon the Company to pay entire dues and other liabilities, receipt of invocation notices of corporate guarantees given by the Company, while also invoking the personal guarantee of Promoter Directors. Certain lenders had also issued wilful defaulter notices and filed petition for winding up of the Company. *Owing to the huge amount of debt that the company was under and the sale of non-core assets done to recover those losses, the profitability, valuation and liquidity ratios reflect a negative picture, determining that the company was in trouble.*

**Post-CIRP** : After implementation of approved resolution plan, the contingent liabilities and commitments, claims and obligations, stood extinguished and accordingly no outflow of economic benefits was expected in respect thereof. The Resolution plan, among other matters provide that upon the approval of this Resolution Plan by NCLT and settlement and receipt of the payment towards the IRP Costs and by the creditors in terms of this plan, all the liabilities demands, damages, penalties, loss, claims of any nature whatsoever, whether admitted/ verified/submitted/rejected or not, due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, disputed or undisputed, present or future, including any liabilities, losses, penalties or damages arising out of non-compliances, to which the Company is or may be subject to and which pertains to the

period on or before the Effective Date (*i.e.* September 06, 2019) and were remaining as on that date shall stand extinguished, abated and settled in perpetuity without any further act or deed. *Ruchi Soya's liquidity position remained adequate as of end of financial year 2020, considering the absence of fixed debt obligations during financial year 2021, a low average collection period and availability of unencumbered liquid assets of over Rs. 380 crore for meeting its required working capital needs.* The rating agencies have predicted that the company has to ramp up operations under the new management which will improve its credit profile over the medium term. Once Patanjali took over Ruchi Soya, it expanded into different products as well as amalgamated its operations and profits thereof with Ruchi Soya's. This led to improvement in the profitability ratios of the company. *The infusion of capital and merger of assets along with reduction in debt through creditors being paid off, led to increase in the valuation and liquidity ratios, thus projecting a healthy company to the market.*

Ruchi Soya now has 29.59 crore shares, of which 28.59 lakh or 0.97% are owned by public, while the Patanjali group holds 99.03%. If the company is to remain listed then Patanjali group will have to over time reduce its shareholding to the maximum permissible limit of 75% as per market regulations. Till then, the miniscule public shareholding and hence short supply of shares may be one reason for rising prices of its shares.

**March of law :**

As per the table produced below, the flow of events and the march of law have been described according to the orders passed in the Insolvency Process of Ruchi Soya by the NCLT and the NCLAT.

| Order Dated | Order passed by | Brief of Order |
|---|---|---|
| 15-12-2017 | NCLT, Mumbai Bench[5] | A company petition under section 7 of the Code was filed by Standard Chartered Bank against Ruchi Soya Industries. The order of admission also raised the concern whether the Code will be applicable to agreement for ECB facility which is governed by English Law. The Tribunal decided that since the company is located in India and is governed by the laws of India, insolvency proceedings, if any, will be initiated in India too. |
| | | In another relevant statement made by NCLT, they concluded that since Insolvency and Bankruptcy Code is a complete code in itself, the provisions of Power of Attorney Act, 1882, cannot override its provisions.<br>Despite an appeal in a winding up petition being pending before the High Court, the insovlency application was admitted and Shailendra Ajmera was appointed as the Interim Resolution Professional in the matter. |
| 01-8-2018 | NCLT, Mumbai Bench[6] | The erstwhile director of Ruchi Soya, Mr. Vijay Kumar Jain, had filed an application because he was disallowed to attend the meeting of the CoC as well as he was not receiving the documents being presented to the CoC. |

| Order Dated | Order passed by | Brief of Order |
|---|---|---|
| | | The order passed by the NCLT was that the director would be allowed to attend the meeting of the CoC but would not be given any information which is considered confidential by the RP or the CoC. |
| 31-1-2019 | Supreme Court[7] | The Hon'ble NCLT on August 1, 2018 held that the directors have the right to attend the CoC meetings as per Section 24 of the Code. However, the directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans. In the first appeal, the decision of the NCLT was upheld by the appellate tribunal on August 9, 2018. The director then moved the Supreme Court, challenging the decision of the appellate tribunal.<br>The Hon'ble Supreme Court held that the scheme of the Code makes it clear that the directors, though not members of the CoC, have a right to participate in every meeting of the CoC. In addition, for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the CoC. The Hon'ble Supreme Court also clarified that under Regulation 21(3)(*iii*) of the CIRP Regulations, the notice of the CoC meeting, which is required to be given to the directors as well, must contain copies of all the documents relevant for matters to be discussed, including the resolution plans. |
| 24-7-2019 | NCLT, Mumbai Bench[8] | The resolution plan of Patanjali was approved by the Adjudicating Authority after directions for some modifications in the plan.<br>It was further discussed that under section 43 if the Adjudicating Authority finds that a property is transferred by the Corporate Debtor to a creditor in preference to its other creditors, then, the Adjudicating Authority may order such creditor to transfer back to the Corporate Debtor the property so transferred in preference. However, such reverting of the property to the Corporate Debtor does not automatically entitle the creditor to file a proof of claim with the Resolution Professional for the debt that was discharged. Further, the discretion to allow the creditor to file a revised claim, in such circumstances, is left with the Adjudicating Authority under section 44(1)(*g*) of the I&B Code.<br>It was observed that neither the Tribunal nor the Hon'ble NCLAT has given any such liberty to file a revised claim to the ICICI. In the absence of any directions from this Tribunal or the Hon'ble Appellate Tribunal, it is submitted that the RP cannot admit the additional claim that arose after Insolvency Commencement Date as also it would be determining a matter which is *sub judice* before the Hon'ble Appellate Tribunal. The Resolution Professional also relied on Swiss Ribbons case to emphasize that the Resolution Professional is only given administrative powers as oppose to quasi-judicial powers. |

| Order Dated | Order passed by | Brief of Order |
|---|---|---|
| 14-8-2019 | NCLT, Mumbai Bench[9] | The Mumbai Bench had approved the resolution plan of Patanjali Ayurved Limited, subject to the submission of additional affidavit for acceptance of modifications in the resolution plan and other information as per the directions in the order. In compliance of the said order, dated 24-7-2019, the Resolution Applicant has filed an affidavit, providing information relating to the source of funds. The Resolution Applicant was directed to submit the additional affidavit for acceptance of the modification in the Resolution Plan on 27-8-2019, failing which liquidation order was to be passed. |
| 22-8-2019 | NCLAT[10] | The RP had filed an application under section 43(1) of the Code for seeking reversal of the amounts debited from the account of the CD maintained with the ICICI Bank Limited before the insolvency commencement date and alleged to have been utilised against the payment of dues made by the CD in favour of the ICICI Bank Limited pursuant to Letter of Credit (LoC) issued by the ICICI Bank.<br>Hon'ble NCLAT held that all the three transactions, in question, were made in ordinary course of business. This apart, that the transactions made on 8th December, 2017; 11th December, 2017 and 14th December, 2017 are either on the date of commencement of the 'corporate insolvency resolution process' or during the pendency of 'Corporate Insolvency Resolution Process'. Therefore, in terms of sub-section (4) of Section 43 of the Code the transaction, in question, cannot be treated to be made 'one year preceding the insolvency commencement date' and hence is not said to be a preferential transaction. |
| 12-03-2020 | NCLAT[11] | After the approval of the Resolution Plan of Patanjali by the CoC and the NCLT, the appeal against the order or resolution was preferred with a delay of 17 days after the 30 days of appeal was over. NCLAT stated that they could not entertain the appeal having no jurisdiction to condone the delay of more than 15 days after 30 days.Further in view of the decision of the '*Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta (2019) 108 taxmann.com 69*', NCLAT cannot sit in appeal on commercial wisdom of the 'Committee of Creditors', to annul the resolution plan.<br>NCLAT also directed that no further litigation would take place in this matter. |

## Conclusion

Looking at the above flow of events and the stance of the courts in the litigation of the matter, it is very clear that the Adjudication Authorities are highly motivated to comply with the objectives of the Insolvency and Bankruptcy Code which is to bring the company to resolution and avoid liquidation of the company. Highlighting the importance of judgments passed by Supreme Court which have now given a much needed precedence,

the matters of *Essar Steel*[12] and *Swiss Ribbons*[13] were heavily relied on to drive home the point that the powers of the Resolution Professional are administrative and the supremacy of the wisdom of CoC is prevalent.

The resolution process of Ruchi Soya saw healthy competition between Resolution Applicants resulting in the best possible value for the Corporate Debtor, the importance of the wisdom of CoC, the calculation and power of the Resolution Professional in a matter of late submission of claims and preferential transactions.

The outbreak of Coronavirus (COVID-19) pandemic globally and in India is causing significant disturbance and slowdown of economic activity. The Government ordered a nationwide lockdown to prevent community spread of COVID-19 in India resulting in significant reduction in economic activities. Most of the manufacturing units of Ruchi Soya are in the business of essential commodities like edible oils and soya food products. The capacity utilization of the plants had been affected due to various factors like unavailability of labour, disrupted supplies of packing material, delays in port clearances for crude edible oil, limited availability of trucks and tankers for movement of raw material and finished goods and subdued availability of soya/ mustard seeds for crushing plants. Though the distribution & supply chain network had been impacted but the Company was ensuring the movement of edible oils and soya food products to the end consumers. However, the Company's operations were not much impacted due to COVID-19 pandemic. Patanjali Ayurved Ltd.'s investment in Ruchi Soya Industries Ltd. has multiplied in value as shares of India's largest edible oil maker jumped manifold since relisting - on the back of an illiquid stock and capital infusion-led prospects of a turnaround. This was despite a spike in volatility amid the coronavirus pandemic.

1. IBBI Newsletter, Oct-Dec 2019, available at https://ibbi.gov.in/uploads/publication/62a9cc46d6a96690e4c8a3c9ee3ab862.pdf
2. https://www.livemint.com/companies/news/patanjali-ayurved-completes-acquisition-of-bankrupt-ruchi-soya-for-rs-4-350-crore-11576684912487.html
3. https://www.bseindia.com/corporates/resultNotes.aspx?Scrip_cd=500368&scripName=RUCHI%20SOYA%20INDUSTRIES%20LTD.&qtrcode=105.00
4. https://www.moneycontrol.com/financials/ruchisoyaindustries/ratiosVI/rsi#rsi
5. https://ibbi.gov.in//webadmin/pdf/order/2017/Dec/15th%20Dec%202017%20in%20the%20matter%20of%20Ruchi%20Soya%20Industries%20Ltd.%20CP%201371%20&%20CP%201372-I&BP-NCLT-MAH-2017_2017-12-22%2012:33:39.pdf
6. https://ibbi.gov.in//webadmin/pdf/order/2018/Aug/STANDARD%20CHARTERED%20BANK%20MA%20518-2018%20CP%201371-2018%20%20NCLT%20ON%2001.08.2018%20FINAL_2018-08-09%2009:46:45.pdf
7. https://ibbi.gov.in//webadmin/pdf/order/2019/Jan/In%20the%20matter%20of%20Vijay%20Kumar%20Jain%20Vs%20Standard%20Chartered%20Bank%20&%20Ors%20Civil%20Appeal%20No.%208430-2018_2019-01-31%2023:14:57.pdf
8. https://ibbi.gov.in//uploads/order/9fe19063d2ab4fcebae37607485e0f5c.pdf
9. https://ibbi.gov.in//uploads/order/c5b6c01ec0407c10a87fbe63e8dca5e8.pdf
10. https://ibbi.gov.in//uploads/order/849aed18e03e5917631d69b9343979f5.pdf
11. https://ibbi.gov.in//uploads/order/f33c4e5ab60dc6882100db77c7010e15.pdf
12. https://ibbi.gov.in//uploads/order/d46a64719856fa6a2805d731a0edaaa7.pdf
13. https://ibbi.gov.in//webadmin/pdf/order/2019/Jan/25th%20Jan%202019%20in%20the%20matter%20of%20Swiss%20Ribbons%20Pvt.%20Ltd.%20&%20Anr.%20Writ%20Petition%20(Civil)%20No.%2037,99,100,115,459,5-98,775,822,849%20&%201221-2018%20In%20Special%20Leave%20Petition%20(Civil)%20No.%2028623%20of%202018_2019-01-25%2013:07:58.pdf

# ORDER FORM

## SPECIAL OFFER
## ICSI IIP MEMBERS
### On Special Rates Mentioned as under

| Name of Products | Price : ₹ |
|---|---|
| ☐ **ICSI IIP (In Print Journal) -** Insolvency and Bankruptcy Journal (Resolve) | 5500/- |
| ☐ **COMBO** Company & SEBI Laws + Insolvency & Bankruptcy Laws FEMA/Banking & Insurance Laws + Competition Laws | 20,900*/- |
| ☐ **Company & SEBI Laws Module** | 8,100*/- |
| ☐ **Insolvency & Bankruptcy Code Module** | 7,100*/- |
| ☐ **FEMA/Banking & Insurance Laws** | 7,300*/- |
| ☐ **Competition Laws** | 10,700*/- |

*GST @18% extra

**Pay by Cheque:**

Please send your cheque/demand draft in favour of **Taxmann Publications Private Limited** at:
**Taxmann, 59/32, New Rohtak Road, New Delhi-110005**

**Pay by NEFT:**

Make payment by NEFT in favour of following account details and send us the remittance details at sales@taxmann.com:

| | |
|---|---|
| Name of the Account | **Taxmann Publications Pvt. Ltd.** |
| Account Number | **4611673257** |
| Name of the Bank | **Kotak Mahindra Bank** |
| Address | **D-10, No. 1 and 2, Local Shopping Centre Vasant Vihar, D Block, New Delhi-110057** |
| IFSC Code: | **KKBK0000182** |
| MICR Code: | **110485013** |
| SWIFT Code: | **KKBKINBB** |
| GSTIN of Taxmann Publications Pvt. Ltd. | **07AAACT2774P1ZT** |

**Contact Details**

Name ..... Designation .....

Name of the Firm/Organization .....

GSTIN .....

Flat/Door No. ..... Street/Road No. .....

City: ..... State: ..... Pin code: ☐☐☐☐☐☐

Email: ..... Phone/Mobile No. ☐☐☐ ☐☐☐☐☐☐☐☐☐☐

**PLEASE FILL ALL THE FIELDS TO ACTIVATE YOUR SUBSCRIPTION**

For more details call **011-45562222** or give a missed call at **91-8688939939** | e-mail : **sales@taxmann.com**