ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
(A wholly owned subsidiary of ICSI and registered with IBBI)
VOL VII | NO. : 4 | PG. 1-74 | April 2023

INSOLVENCY AND BANKRUPTCY JOURNAL

Looking into the future of IBC

ICSI Institute of Insolvency Professionals (ICSI IIP)

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From Chairman's Desk

"The Insolvency and Bankruptcy Code (IBC) has nudged the behaviours of debtors and creditors and this has resulted in substantial recoveries for creditors outside the framework of the code as well."

- GC Murmu, Comptroller and Auditor General of India (CAG)

April brings with it a wave of new beginnings. Where on one hand, a new financial year brings with it the hope for new opportunities, the year gone by brings the hope for new opportunities to arise. To keep the unprecedented reform abreast with the upcoming challenges, the Government has amended the Code six times during the last six years. The Insolvency and Bankruptcy Board of India (IBBI), the Regulator, has also made 84 amendments to its 18 regulations made under the Code, out of which around 22 amendments have been made in the past one year alone. The Code has led to behavioural change in the debtor-creditor relationship.

A shift has been made to the attitude of the stakeholders, creditors and debtors alike. While creditors have gained confidence and surety, resulting in increased investments, both foreign and domestic; debtors have become wary of another professional taking over their business resulting in a more responsible and careful attitude.

The truth is that more the number of serious participants, more are the chances of realization of better value for the Creditors, and permitting Asset Reconstruction Companies to participate in the process could certainly also help in avoiding distress sale of assets. As the market for stressed asset matures, the probability of resolutions taking place would also rise proportionately. It shall facilitate ARCs holding on to the asset without distressed liquidation taking place especially in cases where there is a visibility of an industry-level improvement or revival within a short period.

On the judicial side too, there have been frequent developments. This includes a recent order by NCLAT wherein CIRP initiated against a big realty firm was stayed pursuant to a settlement between the CD and the applicant. This shows the deterrent effect of this legislation as people are now aware that if they default in payment of its dues, the consequences would be that someone else (a Professional) would be put into the management of the firm so as to run it efficiently.

Let us remember that a positive attitude towards corporate rescue is important for the Indian economy to peak. It is not job security that is going to help us achieve that goal, it is entrepreneurship, risk appetite and a 'never say die' attitude that is going to help us.

So let us embrace changes and keep looking ahead.

With warm regards,

(P.K. Malhotra)
Chairman, ICSI IIP

INSTITUTE OF INSOLVENCY PROFESSIONALS
(Subsidiary of ICSI and Insolvency Professional Agency of IBBI)

ICSI IIP'S PUBLICATIONS

HELLO,

we are your expert in providing the right solutions

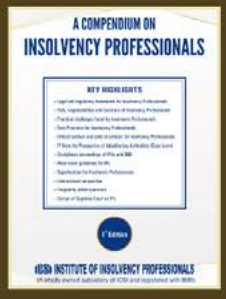
WE OFFER

BOOKS ARE UNIQUELY PORTABLE MAGIC

A Compendium on Insolvency Professionals

ICSI IIP has brought-out a comprehensive publication on Insolvency Professionals titled 'Compendium on Insolvency Profession', which the IBBI Chairperson Mr. Ravi Mital has himself released on 27th Oct 2022 at IBBI office.

The publication is a comprehensive document covering varied aspects like legal and regulatory framework for IPs, disciplinary proceedings against IPs (and their outcomes), ethical and code of conduct for IPs, opportunities for IPs and case laws related to IPs.



INR 1000/- Postage Extra

https://icsiiip.in/

LET'S GROW WITH US

Insolvency and Bankruptcy Code, 2016 (Version 1.7)

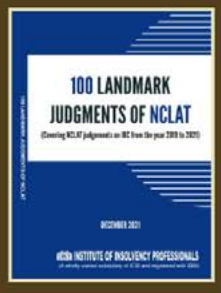
This Publication (updated upto November, 2022) covers the provisions of Insolvency and Bankruptcy (Amendment) Act, 2021 which provides the specialised forum to oversee Insolvency and Liquidation proceedings.

INR 500/- Postage Extra

Insolvency and Bankruptcy (Rules and Regulations) (Version 1.7)

This Publication (updated upto November, 2022) covers all the Rules, Regulations and Notifications along with all the Circulars and Guidelines issued by Insolvency and Bankruptcy Board of India (IBBI).

INR 600/- Postage Extra



100 Landmark Judgements of NCLAT (covering NCLAT judgements on IBC from the year 2019 to 2021)

This publication is about making the legal provisions in the Insolvency & Bankruptcy Code, 2016 and the interpretations thereof easily discernible for the readers. This is approached through the analysis of 100 crucial landmark judgments delivered by Hon'ble National Company Law Appellate Tribunal (NCLAT). The landmark judgments, as delivered by Hon'ble NCLAT, have been identified and their ratios culled out in this book.

INR 400/- Postage Extra

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COO's Message

"Before you are a leader, success is about growing yourself. When you become a leader, success is about growing others."

- Jack Welch

The month of April always seem to be bringing the new aspirations and new hopes. First of all, I would like to wish all of you the very best as we begin this new financial year. The last year has brought significant procedural changes in the Insolvency and Bankruptcy regime by the regulator, i.e. Insolvency and Bankruptcy Board of India itself. The amendments include recognition of IPEs as IPs, fixation of minimum fixed fees for the IPs, incentivising the IPs on timely completion of process and resolution driven incentives, resolution of corporate debtor in parts, change in regulatory fees to be paid by IPs to IBBI, changes in timelines, streamlining the liquidation process by increasing the scope of stakeholder consultation committee, timelines for auction, continuation of PUFE applications after closure of liquidation etc. Indeed, the last year has brought various procedural changes in the regime which has streamlined the process for the effective working of the insolvency professionals.

The constant endeavor of the Government of India and the Insolvency and Bankruptcy Board of India to address the pertinent challenges under the insolvency regime, has transformed the Code into a future ready and relevant in time, legislation. This legislation is all set to launch another set of amendments in this new year to bring in some major and substantial changes which will change in outlook of the stakeholders which includes reinstatement of the CIRP during the liquidation process, introduction of monitoring mechanism after approval of resolution plan, Intermingling the assets of the CD and its guarantors, group insolvency, Incentivizing interim finance providers, individual insolvency, use of e-platform for automation of processes, improved role of information utilities, imposing penalties by the Adjudicating Authorities etc. – *"New year, new hopes"*

The whole insolvency law revolves around the multifarious professional namely an Insolvency professional whose talent, expertise, skills will broadly decide the fate of the corporate debtor. They are the nodal agency which work under the committee of creditors. They cement together the interest of the corporate debtor, committee of creditors and other stakeholders. Accordingly, an insolvency professional should be well versed will all the Laws and the intricacies of handling an organisation and sector, though he may take the assistance of professionals. An Insolvency professional is bestowed with lot of power as well as responsibilities which requires some control, regulation and handholding. Accordingly, Insolvency and Bankruptcy Board of India and Insolvency Professional Agencies monitor, regulate and guide the insolvency professionals through proper monitoring and inspections. Regular orders are being issued by IBBI and IPAs to advise and guide the IPs to be careful and cautious in the assignments they handle. Some adverse or penalizing orders are also issued against them where clear violations & malafide intentions were found out. Through every communication, the Government of India and Regulators guide the Insolvency professionals to handle the assignments with utmost care and diligence since, they are the torch bearers of the insolvency regime and the effectiveness of Insolvency and bankruptcy Code largely depend on their performance.

ICSI Institute of Insolvency Professionals is working on various facets to provide additional support to the insolvency professionals in this coming year.

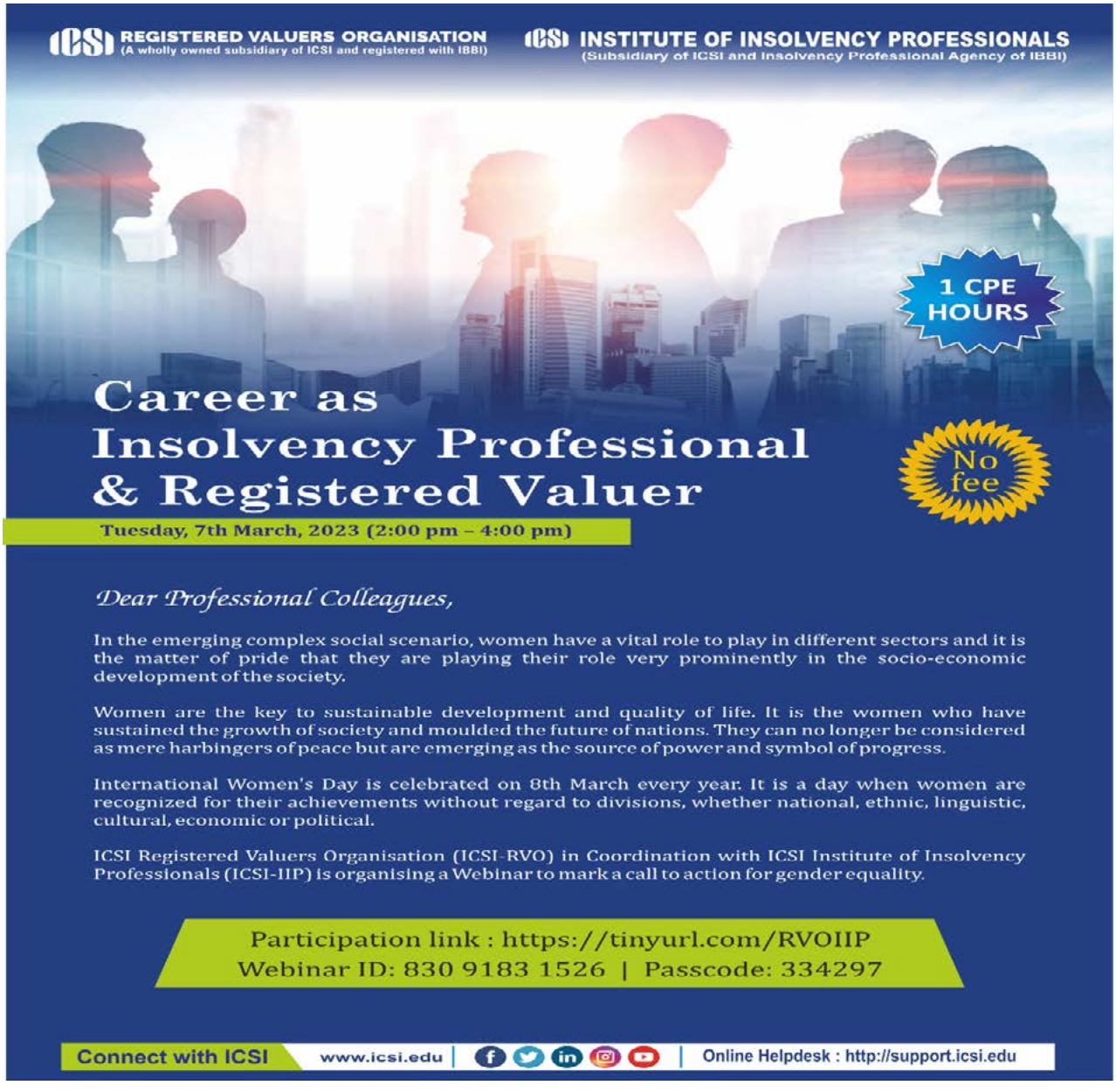
(Dr. Prasant Sarangi)

COO (Designate), ICSI IIP

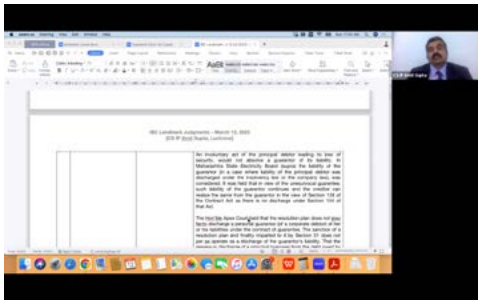
Events @ICSI IIP

(Workshops, Webinars, Round-table Discussions, Interactive Meets etc)

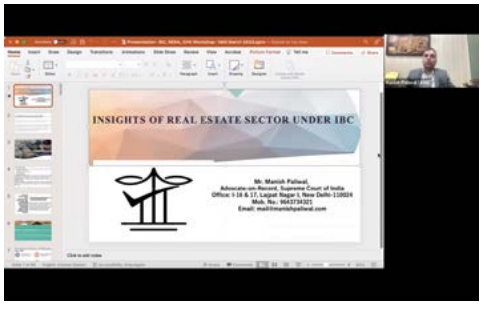
Webinar on Career as Insolvency Professional and Registered Valuer jointly organised by ICSI RVO and ICSI IIP on Tuesday, 07.03.2023



Workshop on Analyzing Changing Landscape of Insolvency Resolution from Prism of Judicial Pronouncements by CS and IP Amit Gupta on Sunday, 12th March, 2023

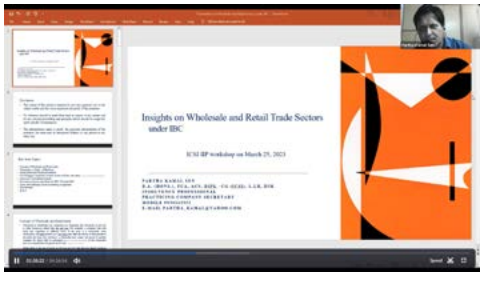


Workshop on Insights of Real Estate Sector under IBC by Advocate and IP Manish Paliwal and CA and IP Anil Goel on Saturday, 18th March, 2023



Webinar on Determination of Avoidance Transactions by Vinay Garodiya, Partner, EY India and Hon'ble James Pickering KC, King's Counsel, Deputy High Court Judge on Thursday, 23rd March, 2023

Workshop on Insights on Wholesale and Retail Sector under IBC by CS and IP Suhasini Ashok B. and CS and IP Partha Kamal Sen on Saturday, 25th March, 2023



Interviewee:
Rajesh Kumar Mittal

B.Com., FCS, IP
and Trade Marks Agent

INTERVIEW

1. What do you think have been the key achievements of Insolvency and Bankruptcy law since its inception?

TRUST plays an important role in any investment decision. With the IBC, trust of investors including foreign institutional investors increased due to financial discipline brought by the IBC Laws, which created a time bound resolution process of the defaults in the system or of the Corporate Debtors. Gaining confidence on financial discipline is the biggest achievement of this law. It has taken our country far ahead in various growth aspects. Also, compared to the earlier BIFR laws where revival of the Company took years due to control in the hands of promoters, now due to shifting of control in the hands of creditors and appointment of competent qualified resolution professional, we have time bound insolvency process to handle it with value addition or value maximisation of the Corporate Debtor, by bringing fresh capital with new investors to revive the Corporate debtors.

2. What made you pursue the field of IBC and become an Insolvency Professional considering it is relatively new field?

I believe that past is a steppingstone and not a milestone. I had six years of experience in handling various BIFR companies as Company Secretary and formulated their revival or rehabilitation schemes in consultation with Banks as Operating Agency, under

supervision of Monitoring Committee, where one nominee Director of BIFR was appointed. The said experience of handling the sick companies and working with statutory authorities, banks, operational creditors and employees and their revival encouraged me to use the said experience in the Insolvency field. The difficulties and challenges faced during the time of BIFR help me by collecting past learning and through insolvency process given an opportunity to become turn around professional as resolution professionals has always been my motto.

3. So far how was your experience as an Insolvency Professional?

Experiences are the real teachers of our life, so it has to be good. I got an opportunity to understand and solve real time problems faced by all the stakeholders including promoters. It was not less than a tug of war match where promoters are trying to get rid of their liabilities using their all efforts. They know their industry and business better than the new IP who have taken charge over it. So every assignment has provided new challenges and opportunities to use my experience and skills developed during the past while handling the BIFR and insolvency cases.

We tried various methods according to the different cases and situations for finding out the best solution to make this new law successful was my best experience out of this.

4. In reference to the assignments handled by you what practical challenges you faced as an Insolvency Professional so far?

Challenges can be seen as sign of growth and having space of improvement. Crucial challenge is of getting proper order on time from NCLT. Due to paucity of times NCLTs are burdened with the cases. I can observe that slowly and gradually Insolvency professionals are getting involved in more paper work due to non- cooperation of promoters, filing of various applications for directions and increase in compliance reporting which is unhealthy for its sustainability as IPs are getting busy with lots of paper work.

If some powers are given to an IP to handle non-cooperative promoters, auditors or creditors and also timely payment of fees to the IP, then the procedure would work faster or else NCLT/AA will be seen getting burdened with the applications of such issues.

Completing many formalities and procedures and obtaining co-operation from many stake holders in the given time conditions set by the IBBI is working out well but not able to give quality results. Some flexibilities in this will be welcomed which can give desired outputs.

5. Since, you have handled number of assignments, how has your experience been with the Promoters of the Corporate Debtors?

Confidence is silent, insecurities are louder. Being a good professional first we need to understand both by bringing them on an equal platform. It is very obvious for promoters to feel insecure at such situations. Promoters are very cooperative till you give them assurance that they will come out of their mess of defaults but once you enquire about the siphoning of funds and frauds detected by you, they become hostile and non cooperative. So, we got different types of promoters and need to use our interpersonal skills to deal with them according to the requirements.

6. How significantly do you think the regulators i.e., IBBI and IPAs serve the profession of Insolvency Professionals?

The IBBI is the main regulatory authority and a dynamic institution for monitoring the Insolvency Laws in the Country. They are monitoring the performance of the IP and other agencies and building the confidence of stakeholders to go through the Insolvency process for maximisation of their values and give better result and timely utilisation of available resources by timely implementation of the plans or realisation of values. The joint efforts of IBBI and IPAs will go long way in developing the confidence of the all stakeholders in the Insolvency Professionals.

7. How being an Insolvency Professional shaped your professional career from the time you got yourself registered?

Every change or new step taken leads to betterment in professional career at the end though the path at the initial stages seems to be rough and tough. As an Insolvency Professional given me a new identity in the market being treated as a CEO of the Corporate debtors. The Resolution Professionals are treated as a new form of professional entrepreneurs by the stakeholders who can resolve the issues and help in revival and turn around the Corporate Debtors.

8. Any advice to the prospective aspirants or Fresh Insolvency Professionals who are seeing their career in Insolvency Law?

My special words for aspirants "You get what you focus on, so focus on what you want". Stay clear what you want out of this profession, stay dedicated without giving up and be ready to bring change in the system for betterment of all. Fresh professionals carry fresh energy which if utilised with proper channel can make their future bright. Cases can be handled by them more dynamically and can have that power of creating a tough competition. So they should just jump in and explore well.

9. What are the key elements in your opinion that can be addressed to make IBC more effective?

The Whole IBC depends on the performance of IP, hence, he should be suitably protected and empowered to handle the CIRP and encourage to take innovative steps in improving the working and value of the CD. The Insolvency Professionals being court officers should be treated as public servant in performing their duties. Code of conduct for the COC to be implemented fast.

IPs should be authorised to take help of statutory authorities in acquiring assets and datas while takeover of the Corporate Debtor instead of approaching to AA for directions. The government agencies like Police and Revenue departments should support IPs in performing their duties.

The Responsibilities of existing and past Auditors of the Corporate Debtor should fixed towards disclosure of Fraudulent and avoidable transactions. Once CIRP started new auditors should be appointed and no NOC should be needed by new auditor. The existing auditors should assist to the new IRP and RP and provide necessary documents on which they relied for their opinion on accounts.

IPA should act as a self-regulatory body for IPs registered with them and only in exceptional cases IBBI should take actions against IPs to develop the IP professional. The IPs should be represented by formation of Managing Committees in IPAs where elected representatives of IPs can take participation.

From Application to Admission, time to be reduced so that Corporate Debtor can retain staff, materials and funds to keep the Corporate Debtor as going concern.

10. Lastly, according to you what are your views on the future of this law?

Fittest will survive, hence we should continuously update ourselves to handle the matters. The future of this law is very good. Industry and other stakeholders will get confidence in the Insolvency laws if they get value at the end for which IBBI and IPAs along with IPs are working very hard.

ICSI IIP – AT A GLANCE

1. DURING THE MONTH OF MARCH 2023

S. No.	Particulars	Details
1.	Members enrolled	5
2.	Members registered	0
3.	Inspections conducted	1
4.	IPs monitored	5
5.	AFA applications received	40
6.	AFA applications approved	42
7.	Complaints/Grievances received	2
8.	Complaints/Grievances disposed off	2
9.	SCN issued	NA
10.	Disciplinary action taken	NA

2. DURING THE MONTH OF MARCH 2023, FOLLOWING PROGRAMS WERE ORGANISED BY ICSI IIP,

WORKSHOPS

S. No	Date of Workshop	Topic
1.	01.03.2023 to 07.03.2023	**Perspectives on IBC - An Array (Series IV)**
2.	12.03.2023	**Analysing Changing Landscape of Insolvency Resolution from Prism of Judicial Pronouncements** -
3.	18.03.2023	**Insights of Real Estate Sector under IBC**
4.	25.03.2023	**Insights on Wholesale & Retail Trade Sector under IBC**

INTERACTIVE MEETS

S. No	Date of event	Topic
1.	07.03.2023	**Career as Insolvency Professional & Registered Valuer**

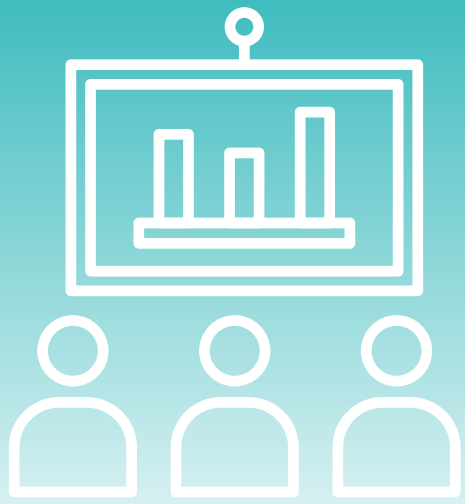
WEBINARS

S. No	Date of webinar	Topic
1.	23.03.2023	**Determination of Avoidance Transactions**

PREC

S. No	Date of event	Topic
1.	09.03.2023 to 15.03.2023	**Pre-Registration Education Course (Online Course)**

Learner's Corner



Legal Maxims

VOLENTI NON FIT INJURIA.

Meaning: No injury can be done to a willing person.

Example: *" ...that the tractor driver victim invited the incident himself by towing the heavier vehicle based in essence on the maxim volenti non fit injuria deserve to fail in this case in law as well as on facts. It may be noted that such kind of defence could have been raised only if the injuries arose out of a risk in respect of which the non-applicants did not owe any duty to the claimants, or in respect of which they had fulfilled such duty as they owed. In such a situation, the action for compensation would have failed whether or not the tractor driver ran the risk voluntarily, since the truck driver had done him no wrong at all."- National Insurance Company Ltd. vs. Kur Singh and Ors. (26.03.2007 - RAJHC)*

NULLUS COMMODUM CAPERE PROTECT DE INJURIA SUA PROPRIA.

Meaning: No man can take advantage of his own wrong.

Example: *"Maxim Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case Respondent Nos. 2 & 3 and the appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon respondent Nos. 2 & 3 and in any case on the appellant."- Eureka Forbes Limited vs. Allahabad Bank and Ors. (03.05.2010 - SC)*

RATIO DECIDENDI.

Meaning: The reason for the decision.

Example: *"It is clear from reading of the ratio decidendi of judgment in Zee Telefilms Ltd. (supra) that firstly, it is held therein that the BCCI discharges public duties and secondly, an aggrieved party can, for this reason, seek a public law remedy against the BCCI Under Article 226 of the Constitution of India."- Janet Jeyapaul vs. SRM University and Ors. (15.12.2015 - SC)*

NON OBSTANTE VERDICTO.

Meaning: Notwithstanding the verdict.

Example: *"As a parenthetical note, we point out that judgment n.o.v. literally means judgment non obstante verdicto, or a judgment not withstanding the verdict rendered by the jury. Black's Law Dictionary, 5th ed. 1979. Plaintiffs, as verdict winners, had no reason to pursue such a remedy."- McLAUGHLIN Vs . FELLOWS GEAR SHAPER CO . (24 . 03 . 1986 - 3rd Circuit)*

Insights

Harshul Shah
Company Secretary and Insolvency Professional

Nexus between IBC vis-à-vis Prevention of Money Laundering Act, 2002 ("PMLA"):

- In Innoventive Industries Ltd. v. ICICI Bank, the Supreme Court has observed: "One of the important objectives of IBC is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process."
- In Ghanashyam Mishra & Sons Pvt Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., the Supreme Court has examined the statement of 'object and reason' of IBC and opined: "Perusal of the 'object and reason' would reveal that one of the prime objects of the IBC was to provide for implementation of the insolvency resolution process in a time-bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation."

  It is pertinent to observe that reduction in litigation may be an important element for value maximisation of assets and achieving the envisaged objective of IBC. However, at times, due to different objectives under different enactments of laws (each of those objectives being relevant and essential), there may give rise to the litigations causing certain hurdles in implementing the processes of IBC.

IBC V. PMLA

Section 238 of the IBC (which is a non-obstante section) provides for overriding effect of provisions of IBC over the other laws and reads As under:

"PROVISIONS OF THIS CODE TO OVERRIDE OTHER LAWS *- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

On the other hand, PMLA was an act to prohibit and prosecute offence which are related to the commission of the scheduled offences. In P. Chidambaram v. Directorate of Enforcement, the SC have examined the object and scheme of the legislation wherein it was observed that section 3 of the PMLA stipulates "money laundering" as an offence involving proceeds of crime, directly or indirectly. Section 3 of PMLA reads as under:

"Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

Explanation.--For the removal of doubts, it is hereby clarified that,--

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:--

(a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever."

Further, Supreme Court has observed that section 5 of PMLA prescribes the power of attachment of the tainted property involved in money laundering on account of "reason to believe". Since legislation does not specifically define "reason to believe", the Supreme Court cited Section 26 of IPC, which provides as under:

"Reason to believe". —A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.

The objective of PMLA is to give the investigative agencies a tool to decipher the manner in which this money was laundered, to confiscate such 'proceeds of crime' and to punish the offenders. To fulfil the said objective, the legislature entrusted such investigative agencies with the power to provisionally attach the property which falls under the definition of or linked with 'proceeds of crime'. Such attachment is solely dependent upon the investigative agencies having 'reason to believe' that such property relates to the 'proceeds of crime'. It is pertinent to note the discretionary powers given to the investigative agencies for 'attachment of property' under section 5 of PMLA. Such discretion at times may infringe the rights of the bonafide third parties who may get punished without them being committed any crime. The powers of provisional attachment of the property has been given under Section 5(1) of the Act which empowers the Director or Deputy Director authorized for this purpose ("investigative agencies") to provisionally attach a property for 180 days if he has 'reason to believe' that; a) any person is in possession with the 'proceeds of crime'; and, b) such 'proceeds of crime' are likely to be concealed, transferred, or dealt with in any manner which may result in frustrating the proceedings related to confiscation of such 'proceeds of crime'. Thus, the suspected proceeds of crime can be seized from the possession of any person irrespective of the fact that whether the person had been indulged in any money laundering process or whether it was he who has or has not acquired, the 'proceeds of crime'. Thus, any person who may perchance/incidentally have come in the possession of the said proceeds of crime innocently, without any knowledge of any crime having been committed with respect to that property, can be deprived of his possession of the property by the Investigative Agencies. The investigative agencies only need to have reason to believe that the said property is the proceeds of crime which may be so dealt with by the

person who is in possession of the property so as to frustrate the proceeding of confiscation of proceeds of crime. Therefore, even if someone who has acted in complete good faith without any knowledge of the tainted link in the chain of transactions can be forced to go through the embarrassment of attachment of his property.

Now when these powers of attachment of investigative agencies is used for the properties of the Corporate Debtor, the complications arise. As we are aware, that once the Corporate Insolvency Resolution Process ("CIRP") is commenced against the Corporate Debtor ("CD"), the IRP/RP is not only entitled to but is also required to take custody of assets of the Corporate Debtor and thereafter to protect and preserve the value of assets. Now what happens, if the assets is already under attachment of investigative agencies under PMLA? Or what happens if during the CIRP, investigative agencies desires to attach the assets of the Corporate Debtor, as being 'proceeds of crime'? Would IBC prevail over the PMLA as stated under Section 238 of the IBC and hence IBC would have overriding effects of the PMLA? And can IRP seek direction from the Adjudicating Authority ("AA") for removal of attachment imposed by the investigative agencies? What is the correct position of law and what would be the role and duty of an Insolvency Professional in such an event?

We have tried and analyze this position in the existing scenario as set out herein-below:

Both the legislations, PMLA and IBC are special legislations in their own spheres, which govern different aspects. However, if the CD and its erstwhile management is involved in scheduled offences as prescribed under PMLA and proceedings have been initiated in terms of PMLA, simultaneously to the CIRP has been initiated in accordance of IBC, then both the proceedings shall create friction. Initially, in Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., the Supreme Court has placed reliance on its earlier judgment of Principal Commissioner of Income Tax v. Monnet Ispat & Energy Ltd. to state that provision of IBC shall override other legislations by virtue of S 238 of IBC.

It is also pertinent to understand the position NCLAT held in the matter of The Directorate Of Enforcement v. Manoj Kumar Agarwal & Ors. Company Appeal (AT) (Insolvency) No.575& 576/2019 [Date Of Judgment: April 09th, 2021 (NCLAT-Delhi Bench)]. NCLAT held - "If a property has been attached in the PMLA which is belonging to CD and CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs".

- **Facts of the Case:** -The Miscellaneous Application was filed by the RP of CD and after hearing the parties the AA by the impugned order directed that the attachment order issued by the Directorate of Enforcement under PMLA which has been confirmed by the AA under PMLA was nullity and nonest in law in view of Sections 14(1) (a), 63 and 238 of IBC, 2016.

  By the impugned order the AA permitted the RP to take charge of the properties and deal with them under IBC as if there is no attachment order. The AA clarified that the attachment only in respect of the properties of CD were covered by this impugned order.

  The Appeal was filed by the Appellant against the order of NCLT. The appellant claimed that the impugned order needs to be set aside, as the properties were validly attached under the provisions of PMLA. It was stated that in another proceeding before another Bench of the same Tribunal in the matter of Sterling Biotech Ltd Vs Andhra Bank where quashing of attachment was sought, the concerned Bench did not interfere and observed that the appeal could be filed only under the provisions of PMLA. It was claimed that there is no moratorium applicable in criminal proceedings.

- **NCLAT Observations:** - The Tribunal stated that after the attachment when matter goes before the AA under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature. In present matter, the Provisional Attachment took place before the corrigendum was issued. The CIRP started later. Once moratorium was ordered, even if the Appellant moved the AA under PMLA, further action before AA under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done, the same will have to be ignored. Section 14 of IBC

will hit institution and continuation of proceedings before AA under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur.

NCLAT stated that in regards to quasi-criminal proceeding against CD, applicability of Section 14 has been found. Considering this as well as the nature of proceedings that takes place before the AA under PMLA, it appears to us that even if the AA issues order of provisional attachment, the institution and continuation of proceedings before the AA for confirmation would be hit by Section 14 of IBC.

Alternatively, even if for any reason it was to be held that Section 14 of IBC would not help, it appears to us that Section 238 of IBC would still apply. Although it is argued that PMLA is a special statute and has an overriding effect still Section 238 of IBC is also a special statute and which is subsequent statute. If this Section is perused, the provisions of IBC would have effect notwithstanding anything inconsistent therewith contained "in any other law" for the time being in force.

- *ORDER: - The appeals were disposed of by the Tribunal stating there is no conflict between PMLA and IBC and there even if a property has been attached in the PMLA which is belonging to the CD, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A. Accordingly the appeal filed by the Directorate of Enforcement was dismissed.*

IN RAHUL CARBON COMMERCIALS PVT. LTD. V. KOHINIIR STEEL PVT. LTD., KOLKATTA NCLT OBSERVED –

It has been pointed out by the Ld. Counsel that the case of Directorate of Enforcement Vs. Manoj Kumar Aggrawal and Ors. cited on behalf of the Applicant, as noted above was before the Hon'ble NCLAT when it passed its order dated 3rd of January, 2022 and a reference to this effect has been made in Para 109 of this order passed by the NCLAT which is reproduced herein below.

"In so far as the decision in the Manoj Kumar Aggarwal case is concerned (reported in 2021 SCC Online NCLAT 121), this Tribunal is of the considered opinion that the said decision runs contra to the 'Principle of Stare Decisis"

47. Ld. Counsel pointed out that this subsequent order of Hon'ble NCLAT was passed on 3rd of January, 2022 by a bench consisting of three Hon'ble members whereas the earlier order dated 9-04-2021 in the matter of Directorate of Enforcement Vs. Manoj Kumar Aggrawal and Ors. was passed by two Hon'ble Members of the Hon'ble Appellate Tribunal and therefore the subsequent decision dated 3rd of January, 2022 which specifically took note of the earlier decision by 2 Members of the Bench of Hon'ble NCLAT will prevail in view of Paragraph 109 reproduced hereinabove.

In this order dated 3rd of January, 2022 it has been held that the AA is not empowered to deal with matters falling under the purview of another authority under PMLA and therefore, the application filed by IRP was found to be not maintainable. It was further observed in this order dated 3rd of January, 2022 that the proper course for the aggrieved person is to approach the Appellate Authority under PMLA and according to the Enforcement Directorate this Authority was very much functional as on the date of attachment order.

Enforcement Directorate has also referred to the order of NCLAT dated 2nd May, 2019 in Varrsana Ispat Limited Vs. Deputy Director of Enforcement wherein it was held that "it is clear that the PMLA relates to 'proceeds of crime' and the offence relates to 'money-laundering' resulting in confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the PMLA or provisions therein relate to 'proceeds of crime', we hold that Section 14 of the IBC is not applicable to such proceeding".

- **HELD:** We are of the view that this Adjudicating Authority, with utmost regard to the order relied upon by the Applicant, is bound by the order dated 3rd of January, 2022 passed by Hon'ble 3 Member Bench of NCLAT which took the view that NCLT is not empowered to deal with the matters falling under PMLA. In the present case since notice impugned has been issued under PMLA, therefore, this application is not maintainable and the same is hereby rejected.

- In regard to the interplay between the PMLA and IBC, the Hon'ble Delhi High Court in Nitin Jain Liquidator PSL Limited v. Enforcement Directorate examined its earlier judgement in Directorate of Enforcement v. Axis Bank has held as follows: "79. The interplay between the provisions of the IBC and PMLA and whether primacy could be accorded to one of the two enactments directly fell for consideration before a learned Judge of this Court in Directorate of Enforcement v. Axis Bank. The Court in that matter was dealing with appeals brought by the Enforcement Directorate against the decision delivered by the Appellate Tribunal under the PMLA which had held that the rights of banks and financial institutions as recognised under SARFESI, RDB or the IBC would rank superior and that the PMLA would have to take a back seat.

  While a number of other important aspects pertaining to the provisions of the PMLA have also been considered, we are, for the purposes of the present matter, concerned only insofar as the said decision deals with the question posited above.

  80. Dealing with the interplay of the statutes concerned, the learned Judge held:—

  139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions("Fis") to recover their dues, SARFAESI Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "due" to the claimant i.e. the banks/ FIs/ secured creditor, as the case may be, the claim being against the debtor (or his guarantor).

  IBC, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.

  144. The respondent have referred to the following observations of the SC in order dated 10.08.2018 in Special Leave to Appeal (Civil) No. 6483/2018, Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited:— "Given S 238 of IBC, it is obvious that the IBC will override anything inconsistent contained in any other enactment, including the Income-Tax Act. We may also refer in this connection to Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons."

  145. Noticeably, the effect of IBC on PMLA was not in issue before the SC in the aforesaid case, the prime concern being the conflict arising out of claims of revenue under Income Tax Act vis-à-vis proceedings under the IBC.

  146. The Resolution Professional appointed under IBC does not have any personal stake. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. *The moratorium enforced in terms of S 14 of IBC cannot come in the way of the statutory authority conferred by PMLA on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route.*

  After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason such assets are not lawfully his to claim.

  147. To sum up on the issue, *the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and IBC, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA.*

  81. Dealing with the ***effect of an order of attachment*** on the rights of creditors or persons in whose favour interests in property may have been created bona fide, the learned Judge proceeded to hold as follows:—

148. In view of the conclusions reached as above, rejecting the argument of prevalence of RDBA, SARFAESI Act and IBC over PMLA, the said laws (or similar other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other, with regard to assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" rendering the same "proceeds of crime", within the mischief of PMLA. The PMLA, declares, by virtue of Section 71, that it has over-riding effect over other existing laws, such provision containing non-obstante clause with regard to inconsistency apparently to be construed as referable to the dealings in "money-laundering" and "proceeds of crime" relating thereto.

149. An order of attachment under PMLA, if it meets with the statutory pre-requisites, is as lawful as an action initiated by a bank/ FIs/ a secured creditor, for recovery of dues legitimately claimed or for enforcement of secured interest in accordance with RDBA or SARFAESI Act. An order of attachment under PMLA is not rendered illegal only because a secured creditor has a prior secured interest (charge) in the subject property. Conversely, mere issuance of an order of attachment under PMLA cannot, by itself, render illegal the prior charge or encumbrance of a secured creditor, this subject to such claim of the third party (secured creditor) being bonafide. In these conflicting claims, a balance has to be struck. On account of exercise of the prerogative of the State under PMLA, the lawful interest of a third party which may have acted bonafide, and with due diligence, cannot be put in jeopardy.

Claim of bonafide third party claimant cannot be sacrificed or defeated. A contrary view would be unfair and unjust and, consequently, not the intention of the legislature. Legislative scheme itself justifies this view. To illustrate, reference may be made to Section 8(8) PMLA where-under a power is conferred on the special court to direct the Central Government to "restore" a property to the claimant with a legitimate interest even after an order of confiscation has been passed.

161. The law conceives of possibility of third party interest in property of a person accused of money-laundering being created legitimately or, conversely, with ulterior motive "to frustrate" or "to defeat" the objective of law against money-laundering. In case of tainted asset – that is to say a property acquired or obtained as a result of criminal activity – the interest acquired by a third party from person accused of money-laundering, even if bona fide, for lawful and adequate consideration, cannot result in the same being released from attachment, or escaping confiscation, since the law intends it to "vest absolutely in the Central Government free from all encumbrances", the right of such third party being restricted to sue the wrong-doer for damages, the encumbrance, if created with the objective of defeating law, being treated as void (S 9).

162. But, in case an otherwise untainted asset (i.e. deemed tainted property) is targeted by the enforcement authority for attachment under the second or third part of the definition of "proceeds of crime", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest in such property was acquired bona fide and for lawful (and adequate) consideration, there being no intent, while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering.

163. Having regard to the above scheme of the law in PMLA, it is clear that if a bonafide third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the product whereof is suspected as proceeds of crime, the acquisition of such interest in such property (otherwise assumably untainted) by such third party cannot conceivably be on account of intent to defeat or frustrate this law. In this view, it can be concluded that the date or period of the commission of criminal activity which is the basis of such action under PMLA can be safely treated as the cut-off. From this, it naturally follows that an

interest in the property of an accused, vesting in a third party acting bona fide, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under Section 8 PMLA.

82. As is evident from a reading of paragraph 147 of the report in the matter of Axis Bank, *the argument of IBC or for that matter RBD or SARFESI having an unbridled or overarching effect over the PMLA was unequivocally rejected.* The learned Judge while recording his conclusions in paragraph 147 of the report, took into consideration the scheme and the objects of the IBC and the PMLA and held that the two operated in distinct spheres. In any case, Axis Bank clearly holds that there is no inconsistency between the two enactments since the ".....purpose, text and context are different.""

In view of the aforesaid observations of the Hon'ble Delhi High Court in Axis Bank (supra) case, it is clear that both legislation i.e. PMLA and IBC are independent in nature governing different aspects and attempts have to be made to harmoniously resolve the conflict between the legislations.

The Hon'ble Court summarised conclusion and stated as below:-

"171. It will be advantageous to summarise the conclusions reached by the above discussion, as under:—

(i) The process of attachment (leading to confiscation) of proceeds of crime under PMLA is in the nature of civil sanction which runs parallel to investigation and criminal action vis-a-vis the offence of money-laundering.

(ii). The empowered enforcement officer is expected to assess, even if tentatively, the value of proceeds of crime so as to ensure such proceeds or other assets of equivalent value of the offender of money-laundering are subjected to attachment, the evaluation being open to modification in light of evidence gathered during investigation.

(iii). Enforcement officer has the authority of law in PMLA to attach not only a "tainted property" – *that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence – but also any other asset or property of equivalent value of the offender of money-laundering,* the latter not bearing any taint but being alternative attachable property (or deemed tainted property) on account of its link or nexus with the offence (or offender) of money-laundering.

(iv). If the "tainted property" respecting which there is evidence available to show the same to have been derived or obtained as a result of criminal activity relating to a scheduled offence is not traceable, or the same for some reason cannot be reached, or to the extent found is deficient, the empowered enforcement officer may attach any other asset ("the alternative attachable property" or "deemed tainted property") of the person accused of (or charged with) offence of money-laundering provided it is near or equivalent in value to the former, the order of confiscation being restricted to take over by the government of illicit gains of crime.

(v). If the person accused of the offence of money-laundering objects to the attachment, his claim being that the property attached was not acquired or obtained (directly or indirectly) from criminal activity, the burden of proving facts in support of such claim is to be discharged by him.

(vi). The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and IBC, the latter three legislations do not prevail over the former.

(vii). The PMLA, by virtue of section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto.

(viii). The PMLA, RDBA, SARFAESI Act and IBC (or such other laws) must co-exist, each to be *construed and enforced in harmony, without one being in derogation of the other* with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

(ix). If the property of a person other than the one accused of (or charged with) the offence of money-laundering, i.e. a third party, is sought to be attached and there is evidence available to show that such property before its acquisition was held by the person accused of money-laundering (or his abettor), or it was involved in a transaction which had interconnection with transactions concerning money-laundering, the burden of proving facts to the contrary so as to seek release of such property from attachment is on the person who so contends.

(x). The charge or encumbrance of a third party in a property attached under PMLA cannot be treated or declared as "void" unless material is available to show that it was created "to defeat" the said law, such declaration rendering such property available for attachment and confiscation under PMLA, free from such encumbrance.

(xi). A party in order to be considered as a "bonafide third party claimant" for its claim in a property being subjected to attachment under PMLA to be entertained must show, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, *the party itself not being privy to, or complicit in, the offence of money-laundering*, and that it has made all compliances with the existing law including, if so required, by having said security interest registered.

(xii). An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest (charge) in the property, within the meaning of the expressions used in RDBA and SARFAESI Act.

Similarly, mere issuance of an order of attachment under PMLA does not ipso facto render illegal a prior charge or encumbrance of a secured creditor, the claim of the latter for release (or restoration) from PMLA attachment being dependent on its bonafides.

(xiii). If it is shown by cogent evidence by the bonafide third party claimant, staking interest in an alternative attachable property (or deemed tainted property), claiming that it had acquired the same at a time around or after the commission of the prohibited criminal activity, in order to establish a legitimate claim for its release from attachment it must additionally prove that it had taken "due diligence" (e.g. taking reasonable precautions and after due inquiry) *to ensure that it was not a tainted asset and the transactions indulged in were legitimate at the time of acquisition of such interest*.

(xiv). If it is shown by cogent evidence by the bonafide third party claimant, staking interest in an alternative attachable property (or deemed tainted property) claiming that it had acquired the same at a time anterior to the commission of the prohibited criminal activity, the property to the extent of such interest of the third party will not be subjected to confiscation so long as the charge or encumbrance of such third party subsists, the attachment under PMLA being valid or operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

(xv). If the bonafide third party claimant is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

(xvi). In the situations covered by the preceding two sub-paragraphs, the bonafide third party claimant shall be accountable to the enforcement authorities for the "excess" value of the property subjected to PMLA attachment.

(xvii). If the order confirming the attachment has attained finality, or if the order of confiscation

has been passed, or if the trial of a case under Section 4 PMLA has commenced, the claim of a party asserting to have acted bonafide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court."

Conclusion: In view of the aforesaid discussion, it is apparent that both the legislation shall be construed in harmonious manner to not frustrate the intent and objects of the legislations. However, the protection prescribed under the newly inserted provision is with regard to the new management of the corporate debtor and the assets of the corporate debtor only to the extent of compliance of Section 32A of IBC.

In view of the above scenario how can an Insolvency Professional during the CIRP approach this attachment of Investigative Agencies under PMLA?

Upon his appointment as IRP/RP, the IP should firstly intimate the order of CIRP to the Investigative Agencies. The IP should clearly understand the facts of each case and peruse thoroughly the order attachment of the Investigative Agencies. Thereafter, depending upon the facts of each case, an IP can seek co-operation from the Investigative Agencies for the resolution under CIRP and/or liquidation thereafter. An IP may also seek legal opinion, if required, of a Supreme Court Judge or some renowned senior counsel about the position under law about attachment, use of proceeds of crime in property of CD and interplay between IBC vis-à-vis PMLA. If the legal position is favourable in the Opinion, one may place a representation or request before the Investigative Agencies praying for removal/lifting of their attachment (relying upon the legal opinion). Thereafter, if the attachment is not removed by the Investigative Agencies, then an appeal can be filed to the Appellate Authority under PMLA. Additionally, if the position is very clearly favourable and no proceeds of crime is involved in the property attached which can be established as per the opinion, one can also seek direction on the same from the Adjudicating Authority.

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IBC BOOSTER ON INDIAN ECONOMY

NEED OF IBC

Cause of Birth of IBC

The Insolvency and Bankruptcy Code (IBC) took well timely birth in 2016 in the form of Manna i.e., heaven send opportunity for the nation and its tax-paying citizens to prevent the economy from haywire of botched up senseless stuck-up liquidity.

The need of the hour was to give direction to the quantum of lending and ensuring that borrowing and lending must take place with a sense of responsibility. Amidst such a thinking mindset of the policy makers, the much-required IBC came into shape.

Macro Role of IBC for India

The primary function of IBC is to give the "business" a chance. It is an endeavour to give "entrepreneurship" a chance. A chance of what? A chance of getting flourished, a chance of succeeding, a chance of having an encompassing growth, a chance of providing at least a reasonable opportunity of survival before contemplating the options of winding up and disposing the business entity off to oblivion. The very word 'entrepreneur' is in itself implies the one who has the capacity to take risks. No business idea can be implemented by the creation of risk-free environment. The success or failure of any venture depends on a lot of factors. And a vital part of the process is that of borrowing, both secured and unsecured. Here comes the

role of IBC when default on the payments on the part of the entrepreneur take place. IBC focusses on addressing the issue at the root and looks for solutions to put the business back on track. It takes into confidence the views of creditors and looks for prospective buyers who believe in the product whose future is at stake. IBC takes care of the interests of workers and employees who have put in years of sweat in the making of the company of which they are an integral part of. IBC takes care of the value of the liquidity infused by the company's shareholders who have believed in the essence of the brand for encompassing gains. IBC is not a mode of recovery, rather it is an attempt to bring in the factor of stability. It is the medium of protecting the employment and protecting the future of families of employees. It is the mode of strengthening the economy of the nation by not allowing the wilful defaulters to get away by exploiting the deficiencies enshrined in the elongated process of justice delivery system.

Initial going

As it happens with every new start, IBC had its own unique hiccups and inhibitions. The naysayers were in abundance and discounted the Code as non-starter. The stakeholders were equally sceptical. The law-enforcers and regulating authority had to face with peculiar situations which were required to be tackled and streamlined as per occurrence. Slowly and steadily, things started settling down with the grit and determination of IBBI, IPAs, Adjudicating authorities, Insolvency Professionals and last but the not least, the worthy officials of the Ministries of Government involved. There is a whole hog of difference from the times of 2016 when the IBC ecosystem gets introduced and in now when we are in 2023, the steady pace of development of IBC is all pervasive. IBC has indeed come a long way in its journey. The credit of adjusting the true essence of IBC goes to all the stakeholders who have stitched in time to save nine. The noteworthy aspect is that all the changes brought in over the years in IBC are the result of exhaustive discussion with the people actually involved in the process of implementation of the Code in letter and spirit.

Role of Stakeholders

For any venture to be successful, it is the role of stakeholders involved which is paramount. IBC is a piece of document which is the guiding force to proceed on the path of addressing the issue of default. However, it is the people who are part and parcel of the system who have to shoulder the responsibility of seeing through the success of the Code. It is no gainsaying admitting that all the stakeholders have come out all guns blazing in exerting efforts in attainment of the objectives contemplated in the creation of IBC.

Replacement of toothless laws

IBC has replaced the essence of many hitherto legislations who had outlived their utility as the wilful defaulters used to chalk through their nefarious activities of holding on to the public liquidity which was provided to their business ventures in the form of loans. IBC has proved to be timely intervention by the policy makers in the government to wade through the muddy waters of ever-growing defaults of payment of loans to commence the process of further deterioration of the situation.

Journey till date

Institutional obstacles

The success or failure of any new venture hinges on the intent and deeds of the people who are involved in its functioning at its very genesis. There will always be vested interests and elements who will prove to be the obstacles in the implementation process even after intended fool proof policy formulation. Through the consistent process of revisiting the clauses of IBC and inserting of plethora of amendments as and when need has been felt for the same, IBC has become a force to reckon with. The very flexibility of IBC has proved to be its strength.

Moving through periodical amendments

The continuous efforts of the government in conjunction with IBBI in consultation with IPAs, IPEs, IPs and other stakeholders in ushering in requisite amendments, be it the clauses of the Code or the rules and regulations by taking into consideration the judicial pronouncements in the cases decided are required to be carried forward with perhaps more finesse and vitality. The importance of amendments and changes in the structure and functioning of IBC lies in the message communicated in the corporate environment that IBC is not adamant in approach and usage and will always be in tune with the futuristic needs of the realm of insolvency and bankruptcy.

Synchronisation of existing laws

For the success of IBC, its clauses have been synchronised with the existing Codes and Acts and it has been the consistent effort to avoid any overlapping so that the opportunists do not get away with the loopholes. Still, over the last 08 years of existence, IBC has to face many challenges wherein the deficiencies in the provisions of the Code, be it the Sections, adjoining Rules & Regulations or their interpretation have come to the fore.

Avoidance of overlapping of legislations

In order to avoid overlapping and conflict of interpretation with the provisions of existing laws like SARFAESI, RDDBFI, Limitation Act, Evidence Act, CrPC, CPC and even that of Constitution, no stone has been left unturned to mould the micro structure of the clauses of the IBC to ensure its viability with the essential motive of saving the businesses from getting extinct due to financial defaults and unviability of continuance.

Differentiation between wilful defaulters and circumstantial ones

The problem of humungous non-performing assets (NPAs) i.e default in the bank loans by the individuals and the business entities have put the Indian economy under pressure of entrapped liquidity. The paramount question is ultimately these loans which are lent for business purpose specifically are also public money which the banks have sometimes without due diligence passed on to those elements who have no means or intention to pay back. The breed of wilful defaulters is the core issue of concern which is required to be tackled sternly to overcome the issue of NPAs. The other set of people, who are though willing to fulfil their financial commitments in time, but, due to the adverse business cycles or due to the onset of some sudden situation, are unable to pay back the money borrowed from the banks and the financial situations. These well-intentioned good Samaritan business people, both corporates and no so big ones, require institutional support and breathing space. And what does this exactly mean? It implies restructuring their loans, giving them more time to pay back, infusing more liquidity by extending some more financial support and avoiding coercive measures for recovery for the time being so that they are able to come out of the cyclic or circumstantial situation.

Impact on Indian economy

Relative relief on NPA front

IBC has proved to be a potent weapon in imparting relief in reduction of NPAs to a considerable extent. It has created an environment of confidence amongst the business communities that it is no shame in getting failed. After all, it is the private sector which primarily generate jobs for millions of our youth. In case of inhibitions on the part of the businesses to expand, the economy will shrink. The government has done commendable work over the last couple of years since the genesis of IBC for swift adjustments in ensuring timely interventions by amending the provisions of IBC to keep them relevant.

Breathing space to the sincere entrepreneurs

IBC is the embodiment of positivity and harbinger of good times to come. It symbolises hope for those sincere entrepreneurs who intend to run the business venture with optimism and desire for all encompassing success of the people involved including shareholders and employees. IBC has provided them a window to explore the options for a second chance to make amends and move forward with institutional support.

Option of fresh start for sinking businesses

The factor of liquidation and selling off the assets is the last preference enshrined in IBC. The issue of insolvency and bankruptcy are preferably tackled by the process of restructuring through Corporate Insolvency Restructuring Process (CIRP) at the level of Financial Creditors, Operational Creditors and Corporate Debtors. The options of Fast Track Resolution Process, Pre-packaged Insolvency and Voluntary Liquidation have brought in revolutionary options for the business houses to display their well-meaning intentions of either opting for another chance to make amends or to opt for an honourable exit.

Organized support to the confidence of lenders

The support of the Union government and its entities via IBC has created a novel environment of hope amidst turmoil of losses in business which were treated as shameful in the earlier times when the very default in paying back the loans marked the advent of coercive measures of recovery leading to loss of face and reputation of the initiators of the businesses. The very presence of IBC has put in a semblance of confidence in the corporates that the government is

here to withstand their non-deliberate follies and they will be provided the opportunities to set things right in case of events beyond their effective control.

HURDLES IN EFFECTIVE IMPLEMENTATION

Existence of compromising elements

IBC has its own set of challenges which are internal in nature as well. The presence of those shabby elements which try to exploit the situation to their own benefits are required to be sorted out to make IBC work to the optimum. In this direction, the IBBI has been at the forefront with the aid and advice of IPAs in consultation with IPs who have to deliver results in the field.

Hit or Miss approach of Insolvency Professionals

The presence of some IPs who have proved themselves as black sheep by compromising the integrity of the profession is one of the bottlenecks which are required to be conquered. Furthermore, even those IPs who are ordinarily honest and dedicated but over the period of time develop the habit of inertia and lethargy either due to the institutional frustrations or lack of motivational aspects including inadequate financial compensations has resulted in periodical adjustments to cater to the glaring needs of the stakeholders.

Planless strategy of creditors

It has come to notice over a period of time, that the Committee of Creditors (CoC) which holds the most significant responsibility of determination of course of action towards either restructuring or liquidation, is found wanting in approach and intent. The CoC has to move forward in tandem with the Insolvency Professional to go for the best possible way out and create a win-win situation for all. At the end of the day, the Code, a document can work well only if the humans involved are determined to put to it to the best usage and in the minimal time.

Missing of prescribed timelines of compliances

Over the years, often, it has been felt, whether the timelines prescribed in the Code or amended rules and regulations are confined to the paper only since they keep on dragging for one reason or the other. Time is the essence of IBC. Otherwise, it will be just another piece of legislation like many others in existence with not so desirable results. In this respect, the role of Adjudicating authorities is paramount since the court of law must not be allowed to be used as a means to delay the proceedings by the practitioners of law for obvious reasons.

WAY FORWARD

More say to Insolvency Professionals

It needs to be explored whether IPs may be given more teeth during various stages of CIRP or liquidation proceedings. Is there any further requirement to allow the IPs as the arbitrator of sorts in dealing with the nuances of the creditors both within the CoC and outside it, that's the question which begs for a sincere contemplation. It may not be an exaggeration to state that Insolvency Professional is the lifeline of the whole process of CIRP. IP is the via media between CoC and the Adjudicating Authority. Be it in the capacity of Interim Resolution Professional, Resolution Professional, Liquidator, Authorised Representative, Bankruptcy Trustee or other roles enshrined in the Code and in the Rules and Regulations, the role of IP holds the ultimate place. IP may be considered a vital institution which is the eyes and ears of the whole ecosystem and that should not be allowed to just wither away by diluting its functioning or putting IP in the docks by the vested interests.

Fast Track decisions on pending litigations

The desired success of IBC depends upon the effectiveness of adjudicating authorities to deal with the proceedings with situational promptness. The Hon'ble Courts of law are doing a commendable job amidst the ever-rising pile up of cases. The only aspects which may be looked into are that the compliance of the decisions of the Hon'ble Courts and decisions are not countered with the deliberate interventions by the vested interests in frustrating the very core objective of IBC.

Creation of awareness about positive impact of IBC

IBC is a process in the making. It has undergone vast number of amendments since its inception. The aspect of adjustment to the needs of the extant times has proved to be the strength of IBC. Still there is inhibition on the part of businesses in allowing themselves involved via the mode the IBC to come out of the situation of stressed assets. There is a dire need to spread the word of positivity about the benefits of IBC to the entrepreneurs, of all cap sizes to believe in the efficacy of Insolvency and Bankruptcy Code.

Anang Kumar Shandilya
CS, Advocate &
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INSOLVENCY CODE : AN EFFECTIVE TOOL OF FINANCIAL RESTRUCTURING IN COMING DECADE

IBC: THE MOTIVE OF PROMULGATION

Prior to the commencement of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016 or code), the legislative framework in India dealing with the insolvency and restructuring procedures of corporate entities, partnership firms and individuals was very complex and fragmented across multiple legislations viz. the Companies Act, 1956, the Sick Industrial Companies (Special Provisions) Act, 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), the Recovery of Debts due to Banks and Financial Institutions Act (RDDBFI Act), 1993, etc. The presence of multiple laws, forums and complexities resulted in delays in the timely resolution of the distressed entities, partnership firms or individuals, which further lead to the devaluation of the assets of the borrower, making insolvency negotiations redundant.

To deal with the inconsistencies prevalent in this space, the Insolvency and Bankruptcy Code, 2016 ("Code") was enacted by the legislature as a regulatory reform for addressing the companies/ partnership firms/ individuals ("Corporate") in financial distress or sometimes in operational distress through reorganisation and process of insolvency resolution.

The new Code replaced all the foregoing debt recovery laws and created an unified procedure to resolve the corporate distress pertaining to

insolvency and bankruptcy. The Code empowered the creditors to examine and inspect the viability of the debtors before making business decisions. Further the delays in disputes were addressed by formulating a time-bound mechanism for resolutions which further helped in promoting entrepreneurship and availability of credit in the market. The quintessence of the new Code is to balance out the interests of all stakeholders and revive the Corporate as a going concern by way of timely resolutions.

The Code introduced a completely new mechanism of Corporate Insolvency Resolution Process ("CIRP") that granted corporate debtors a moratorium period during which financial creditor, operational creditor or debtor himself, resolves the insolvency of a debtor through financial restructuring and creditor management approach. Further to facilitate a formal and time bound CIRP, the Code created a robust institutional framework, comprising of Insolvency Professionals, Insolvency Professional Agencies, Information utilities, Adjudicating Authorities and Insolvency and Bankruptcy Board.

Present status of execution of the Code

On completion of over five years of new Code, the regime has drifted away from the debtor in control to the creditor in control. The latter model curbs out the unfair benefit that the Debtors had over the creditors during the recovery process by giving the managerial control of corporate debtor to the creditors. The creditor appoints its managers to run the company till the time company is fully revived and able to function again effectively. This concept was essential to ensure the continuance of business and to get the maximum value of the company by way of resolution. The adjudicating authority and the apex court has time and again cleared the objective of the new Code which is to ensure revival and continuation of business of the corporate debtor as a going concern. In a country where we still find the existence of pre-colonial laws, the new code even in its nascent stage has been a subject of various judicial pronouncements.

The Indian insolvency laws have seen a drastic change post-enactment of the new Code. At the present time there have been disciplined borrowings amongst corporates and there are more potential investor pitching in because of the assurance of repayment against the debts. Moreover, the promotors are taking extra precautions while doing business due to the fear of losing control of their enterprise to the creditors in the event of default. There has been an increase in the number of insolvency resolutions that have taken place within the time limit of 330 days due to the effective adjudication of the matter. The key issues that the Code has faced during the last five years are pertaining to low recovery rates, huge haircuts, prolonged delays, digitalisation of insolvency ecosystem and shortage of resources.

WAY FORWARD FOR MAKING THE CODE EFFECTIVE & SUCCESSFUL

The laws relating to insolvency and bankruptcy have come a long way since the inception of the Code. However, it is pertinent to note that there are certain benchmarks that still need to be addressed and probably be covered by the year 2025. Some of them are as follows:

1. *Increasing the Resolution, Diminishing the Liquidation:*

The object of the legislation was to ensure the effective resolution of the corporate debtor, however, it is seen that more than half of the companies go into liquidation after the initiation of the CIRP. The main reason behind the rising number of liquidation cases may be that the corporate debtors under CIRP neither have any assets nor any lucrative business out of which debts can be recovered by the resolution applicant. It is pertinent to note that the resolution applicant only submits its resolution plan when there is unsold inventory, land bank or receivables from clients. Another reason may be that the resolution plan presented by Committee of Creditor is not found to be commercially feasible and the haircut or mode of commissioning is unacceptable by the resolution applicant. Thus, it is expected that in the next three years the number of liquidation cases for corporates undergoing CIRP will be reduced.

2. Resolving bottlenecks of delay:

The essence of the Code is the time-bound mechanism of insolvency resolution, however, there have been prolonged delays seen in numerous cases thereby breaching the statutory deadline of 330 days. It is noted that the value of the assets of the debtors diminishes over time due to long delays in insolvency process. The government is expected to improve facilities to upskill the insolvency resolution professionals, infrastructure, and digitalisation of insolvency eco-system. Further

it is expected that the prolonged delay at the stage of admission by the Adjudicating authorities are addressed in a proper manner.

3. Value difference between resolution and liquidation:

It is eminent to note that the value of company vide resolution should always be higher than the value vide liquidation, however, it has been seen that over the period this gap between the value of resolution and liquidation has been narrowing. The goal is to make genuine efforts to save the lucrative businesses by way of resolution and restructuring and only when no option is left, liquidation should be resorted to. The nature of the Code is to augment the chances of preserving the business of the corporate debtor because liquidation would mean the death of the business. Generally, liquidation is resorted in cases where resolution plan is not workable, or the Committee of Creditors determines liquidation or adjudicating authority rejects the resolution plan. A robust mechanism is expected in the following years to increase the gap between resolution and liquidation.

4. Keeping the interest of creditors supreme:

A haircut is when a creditor gives up a part of his share of the debt. Apparently, in the last five years, the haircuts have gone up to 95% in certain cases thereby affecting the business and profitability of the creditors. Large haircuts affect the potential investor from lending money because the value of money lend becomes very less against the money recovered at a later stage. A benchmark for the quantum of haircut is expected in the upcoming years and large and unjustified haircuts should be addressed in a structured manner. It should emphasize on securing the rights of the creditor which would lower the borrowing costs as the risk will be minimized. The vision should be to recover the maximum value from the corporate debtor and impose justified haircuts.

5. Pre-packaging Insolvency Model:

A quick resolution process where the resolution takes place not by way of public bidding but through an agreement between secured creditors and investors. The key feature of pre-pack insolvency is the quick and timely resolution process of maximum of 120 days for distressed companies. The corporates prefer pre-pack insolvency over CIRP as the managerial control stays with the corporate debtor and approval of the court is not compulsory. However, outcome is binding on all stakeholders. It is eminent to note that the pre-pack insolvency is currently only limited to Micro, Small and Medium Enterprises. Therefore, it is expected that in the forthcoming years pre-pack insolvency resolution will also be applicable to other corporate structures.

6. Global integration and standardization of IBC practices:

In the past few years there has been a tremendous shift in the insolvency regime yet the provisions relating to Cross border insolvency have been stagnant. Currently, there are no standards to restructure the firms participating in cross border jurisdictions. It is noteworthy that foreign creditors are eligible to make claims against an Indian company, however, the Code does not have standard tools for automatic recognition of insolvency proceedings in foreign jurisdiction. It is expected in the coming years, relevant amendments will be made in the code pertaining to the Cross-border insolvency to enhance the effectiveness of the insolvency resolution process and cater to cross border insolvency resolution.

CONCLUSION

In spite of all the resistance to change, frequent modifications and ambiguity all around, the Code has affected companies and assets across industries and has been established as a safer tool of investment vis-à-vis acquisition for potential investors. To make it more effective, practical and robust, it is important that the legal framework is clear and practically enforceable to facilitate investment and ensure definitive mechanism of recovery of distressed assets. In spite of frequent amendment, modifications and clarifications at regulatory level, ambiguity exists regarding so many relevant issues that may have practical implications for prospective investors and resolution applicants. Therefore, the vision in the coming years should be to come up with full proof mechanism which caters to the present challenges being faced by insolvency laws in India. The Code is still evolving and emerging and it has introduced substantial changes in the insolvency landscape.

NPAs has substantially reduced over the period of five years by emergence of the Code. It has not only helped in the survival of the businesses but also secured the creditors from risk. Undoubtedly, there is still a lot to be achieved to stand up to the benchmark set by the developed jurisdictions, however, the Code is yet to see some remarkable improvement in the forthcoming years.

VOLUNTARY LIQUIDATION UNDER INSOLVENCY & BANKRUPTCY CODE, 2016

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INTRODUCTION OF VOLUNTARY LIQUIDATION UNDER INSOLVENCY & BANKRUPTCY CODE, 2016 (IBC, 2016)

Voluntary liquidation is a process by which a company, on its own initiative, chooses to wind up its affairs and cease its operations. Under the Insolvency and Bankruptcy Act 2016 and the rules made thereunder, voluntary liquidation has been introduced as a mechanism for companies to liquidate their assets and distribute the proceeds among their creditors and shareholders in an orderly and systematic manner.

The Insolvency and Bankruptcy Code (IBC) 2016, which is the primary law governing insolvency in India, provides for a framework for voluntary liquidation of corporate entities. In the article, we understand at the process of voluntary liquidation under section 59 of IBC together with the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 provide the mechanism for voluntary liquidation of a corporate person.

MEANING OF VOLUNTARY LIQUIDATION

Voluntary Liquidation is a process initiated by the company itself.

Section 59 of the IBC provides for the process of voluntary liquidation. According to this section, a corporate person (company or LLP) can initiate voluntary liquidation if it meets the following conditions:

1.The decision to liquidate must be taken by the shareholders or partners, as the case may be, through a special resolution.

2. the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation.

3. the company is not being liquidated to defraud any person.

4.The company must not have been declared insolvent by a court or tribunal.

The process of voluntary liquidation begins with a resolution passed by the board of directors of the company proposing the liquidation. The resolution must be approved by a special resolution passed by the shareholders of the company. Once the special resolution is passed, the company must appoint a liquidator who will take charge of the affairs of the company and carry out the liquidation process.

The liquidator is responsible for taking stock of the assets and liabilities of the company, settling any outstanding debts, and distributing the proceeds among the creditors and shareholders of the company. The liquidator is also responsible for filing the necessary documents with the Registrar of Companies and complying with the requirements of the Insolvency and Bankruptcy Code.

VOLUNTARY LIQUIDATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE (IBC 2016)

Company Voluntary Liquidation (Section 59 of the Insolvency and Bankruptcy Code, 2016) this is a relatively new method of voluntary liquidation. Voluntary liquidation is the dissolution of a solvent company with the approval of its shareholders and creditors.

The entire Voluntary Liquidation Procedure must be completed in 270 days from the date of Voluntary Liquidation Commencement where creditors have approved the voluntary liquidations and 90 days from the date of Commencement of Voluntary Liquidation in the case where there are no creditors. The process of voluntary liquidation is governed by the Insolvency and Bankruptcy Code and the rules made thereunder. The rules set out the procedures to be followed by the company and the liquidator, the timeline for the completion of the liquidation process, and the requirements for the submission of documents and reports.

PROCEDURE TO BE FOLLOWED FOR VOLUNTARY LIQUIDATION:

1. Check Articles of Association of the Company Articles must contain provision for the voluntary liquidation of a Company under Insolvency and Bankruptcy Code, 2016. In case there is no such provision in Articles, it must be altered by passing Special Resolution. Articles of association must authorize the Voluntary Liquidation of the Company.

2. Request a Board Meeting Send out a notice not less than seven days before the scheduled board meeting.

3. Call a Board Meeting to discuss and approve the following matters, subject to approval by Members at the General Meeting: -

i. Voluntary Liquidate up of the company
ii. To consider and approve Declaration of Solvency and affidavit by the directors of the Company.
iii. Board of Directors Will Propose the Name of Insolvency Professional as liquidator of the Company. An insolvency professional shall be eligible to be appointed as a liquidator if he is independent of the corporate person. The eligibility for appointment as liquidator defines thereunder IBC (Voluntary Liquidation) Regulations, 2017.

A person shall be considered independent of the Corporate Person, if he- Is eligible to appointed as an independent director on the board of the Corporate Person under section 149 of the Act of 2013, where the Corporate Person is a Company; is not a related party within the meaning of Section 188 of the Act of 2013; Has not been an employee or proprietor or a partner-

(i) of a firm of auditors or company secretaries or cost accountants or cost auditors of the Corporate Person;
(ii) of a legal or consulting firm, that has or has had any transactions with the Corporate Person contributing ten per cent or more of the gross turnover of the firm. Additionally, remuneration payable to the Liquidator shall form a part of the Liquidation process, here the remuneration due to the liquidator shall form part of the liquidation cost.
(iii). To fix day, date, time and to send notice for General Meeting.

4. Filing of E-form the declaration of solvency should be filed in Form GNL-2 with the Registrar of Companies within 7 days from the date of Board meeting.

Attachments: – Audited Financial Statements of Previous 2 Financial year Provisional Balance Sheet as on liquidation commencement date, Declaration of Solvency and Valuation Report Statement showing Realization of Assets and liabilities

5. After filling the respective form, as per section 59(3) sub section (c) Convene General Meeting of Shareholders Within four weeks of declaration, An Extra Ordinary General meeting of the shareholders of company will be conducted for the purpose of Obtaining Consent of members to voluntarily liquidate the Company and Appointment of Liquidator Provided that where the corporate Person is a company, creditors representing two third in value of the debt owed to the company have to support the resolution within seven days of such resolution(Liquidation Commencement Date) Subject to approval of the creditors, the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution in general meeting.

From this date the liquidator steps into the shoes of the Directors. And will perform all the functions to carry on the business of corporate person. Liquidator shall inter alia have the following power and duties under IBC (Voluntary Liquidation) Regulations, 2017

(a) to verify claims of all the creditors;

(b) to take into his custody all assets, property, effects and actionable claims of the corporate person;

(c) to evaluate the assets and property of the corporate person in the manner as may be specified by the Board and prepare a report;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) to sell the immovable and movable property and actionable claims of the corporate person in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;

(g) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(h) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities; The liquidator shall not engage a professional who is his relative, is a related party of the corporate person or has served as an auditor to the corporate person at any time during the five years preceding the liquidation commencement date.

(i) to perform such other functions as may be specified by the Board

6. Filing of E-form: - The company has to file Form MGT-14 to Registrar of Companies and inform the Insolvency and Bankruptcy Board of India within seven days of the passing of the resolution or subsequent approval by the creditors as the case may be. Attachments for this e form True Copy of the Resolution. The company also has to notify the Registrar of Companies in form GNL-2 Appointment of Liquidator. Attachments for this e form.

7. Public Announcement: - The liquidator should make a Public Announcement (PA) in Form A within 5 days from his appointment to be published in one English Newspaper and one Regional Language Newspaper having wide circulation where the registered office and the principal office if any, of the Company is situated calling stakeholders to submit their claims within 30 days from liquidation commencement date.

8. Necessary Intimations: -The liquidator must notify the IPA, IBBI, and Income Tax authorities of his/her appointment and the start of the Voluntary Liquidation.

Previously, the liquidator must obtain a No-Objection Letter from the Tax Authorities of the location of the company's registered office. The Insolvency and Bankruptcy Board of India (IBBI) clarified in its Circular-IBBI/LIQ/45/2021 dated 15.11.2021 that an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income Tax Department as part of compliance in the said process under the provisions of the Code and Regulations read with Section 178 of the Income-tax Act, 1961.

9. Preliminary Report:- The liquidator shall submit a preliminary report to the company within 45 days from the commencement of liquidation stating: the capital structure of the corporate person; the estimates of its assets and liabilities as on the liquidation commencement date based on the books

of the corporate person: whether he intends to make any further inquiry in to any matter relating to the promotion, formation or failure of the corporate person or the conduct of the business thereof; and the proposed plan of action for carrying out the liquidation, including the timeline within which he proposes to carry it out and the estimated liquidation costs.

10. Opening of Bank Account: - The liquidator shall open a bank account in a scheduled bank in the company's name followed by the words "in voluntary liquidation' for receiving all the money's due and realized to meet liquidation cost. For Example; All payments made above Rs. 5000 shall be done only by drawing cheque or through online banking transaction.

11. Realization of Assets: - The liquidator shall recover and realize the assets of the company in a time-bound manner maximizing the value of the stakeholders. The money realized shall be deposited in the bank account opened for this purpose. Practical Aspect to be covered here under is the Payment of Capital Gain tax (if any). It is the responsibility of Liquidator to make sure that there is no pending tax liability on account of any capital gain.

12. Distribution: - The liquidator must distribute the proceeds from realization within Six Months from the receipt of the amount to the stakeholders. The liquidation costs (including liquidator fees) will be deducted before such distribution is made.

13. Completion of Liquidation: - The liquidator has to complete the process of liquidation within 270 days from the date of commencement of liquidation where creditors have approved the resolution under section 59 and 90 days from the liquidation Commencement date in all other cases.

14. Final Report :- Once the liquidation process is complete, the liquidator must prepare the Final Report, which must include: audited accounts of the Company after repayment of liabilities showing no Assets and liabilities a statement showing the assets have been disposed of, debts have been discharged, and no litigation is pending a sale statement of assets showing realized value, cost, manner and mode of sale, any shortfall, to whom it is sold, and so on Unclaimed funds must be deposited in the Corporate Liquidation Account by the liquidator. The liquidator must submit the Compliance Certificate in FORM-H to the adjudicating Authority along with the Final Report and application under Section 59(7).

15. The Liquidator is then required to file the Final report with the Registrar and the IBBI.

16. Application to the NCLT When the company's affairs are completely wound up, the liquidator must apply to the NCLT for the company's dissolution.

17. Order Filing The liquidator must send a copy of the order to the registrar where the company is registered in form INC-28 within 14 days of receiving it.

18. Records preservation: The liquidator must keep the reports, registers, and books of accounts for at least 8 years after the company is dissolved.

ADVANTAGE OF VOLUNTARY LIQUIDATION UNDER IBC, 2016

1. One of the advantages of voluntary liquidation is that it allows a company to wind up its affairs in a planned and orderly manner, without the need for court intervention. This can save time and money compared to the traditional insolvency resolution process, which can be lengthy and expensive.

2. Voluntary liquidation can also help to protect the interests of the company's creditors and shareholders, as the liquidation process is carried out in a transparent and systematic manner. Creditors are given an opportunity to file their claims and receive payment according to the priorities set out in the Insolvency and Bankruptcy Code.

3. It is a speedy and more cost-effective process compared to compulsory liquidation.

CONCLUSION

In conclusion, voluntary liquidation is a valuable tool for companies that wish to wind up their affairs in an orderly and systematic manner. The process provides a cost-effective and efficient alternative to traditional insolvency resolution processes, while ensuring that the interests of all stakeholders are protected. With the introduction of voluntary liquidation under the Insolvency and Bankruptcy Act 2016, companies now have a new option for resolving their insolvency issues in a timely and efficient manner.

INTERIM FINANCING: NEED AND IMPORTANCE IN CIRP

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OBJECTIVES OF IBC

Insolvency & Bankruptcy Code, 2016 ("Code") is aimed towards financial rehabilitation of a business facing financial distress, revival of its business in a timely manner so as to bail it out from the risk of capital erosion. When a Company is brought under insolvency, in most of the cases, it is imperative to understand that it has incurred heavy financial losses or some sort of financial mismanagement and the cash flow of the Company is in most of the cases are in bad shape. In such scenarios, Interim Finance is a kind of "sanjeevani" when it comes to an insolvent company in corporate insolvency resolution process.

LIQUIDITY REQUIREMENTS AND ITS IMPORTANCE DURING CIRP / LIQUIDATION

To maintain the going concern status of the Corporate Debtor, during the process of insolvency, or sometimes even to maintain the legal entity status, it is crucial to have a minimum liquidity. For companies already running into losses and has nil or negative cash reserves, interim finance provides for these emergency/urgent outflows. Keeping in view the importance of interim financing, it has been kept at the top as far as water fall payment mechanism has been prescribed under the code at the time of Resolution / Liquidation. However, from the lenders point of view, blocking investment in the form of an interim finance in an entity facing insolvency proceedings is not at all commercial wisdom inspite of the privilege of super-priority.

As we know, while the CIRP is under process, the RP has to ensure the going concern status of the Corporate Debtor. While doing so, the RP has to make certain payments at any circumstances like payment to professionals appointed (valuers, RPs fees, etc.), payment to the workmen, payment to the security personnel etc, which are vital and cannot be kept on hold until the approval of the resolution plan. The cashflows of the entity may have dried up completely or may be insufficient to make such outlays.

NEED OF INCENTIVIZING THE INTERIM FINANCIER

As such, the interim financier has to be duly incentivised in terms of "return on investment" vis-à-vis surety of getting back the investment, so as to encourage interim-lending practices. Keeping in view the importance of this, the Liquidation Regulations were amended to provide for interest on interim-finance post commencement of liquidation. Interim financing, known by various names such as rescue financing, S-o-s Financing, is a very important way for companies into resolution proceedings to finance themselves for immediate funding needs, sometimes for keeping the show on and sometimes for getting out of the financial distress.

In so many foreign countries, rescue financing is not merely the way for financially stressed companies to find their way to survival, it is also an attractive lending opportunity.

REGULATORY CHANGES IN THE FIELD

As per section 5(15) of the Insolvency and Bankruptcy Code, 2016 ("Code"), "interim finance" means any financial debt raised by the resolution professional during the insolvency resolution process period. In simple words, as the name suggests, the term refers to the funds that the RP raises during the CIRP so as to retain the going concern nature of the entity and to carry out regular expenditure required for the same, until a resolution plan is approved by the CoC and subsequently by the NCLT.

NEED OF INTERIM FINANCE

To make such payments, the RP surely requires funds and, at times, the company is not in a position to generate even the bare minimum amount required to cater the payments illustrated above. In such cases, the RP raises interim fund subject to the permission of the CoC. What is the priority of repayment of interim fund? As per section 53 read with section 5(13), "the amount of any interim finance and the costs incurred in raising such finance" being a part of insolvency resolution process cost takes the first priority under sec 53 (1) (a). This is true for both the repayment of principal as well as payment of interest on interim financing. Both of these qualify, along with other insolvency resolution and bankruptcy process costs for the first layer of payment to be made in the waterfall, in priority to any payments to any other stakeholders. Even though the status of interim funds is that of a "super priority loan" i.e. the loan that shall be repaid before all other loans that exists in the books of the company, lenders were hesitant to lend funds. This is because, as per the Code, the lenders were entitled to interest only for the period up to the order of liquidation of Corporate Debtor or completion of moratorium period (along with extension of 90 days), whichever is earlier.

BENEFITS OF REGULATORY CHANGES:

1. *Higher Interest Rate:* Interest rates on which funds are provided is higher than the market rate of loans, because the risk involved is comparatively higher. Also, while with the discussed amendment, interim funding becomes quite an interesting and lucrative market to explore, however, as a matter of fact, currently there are only handful of players and that also is one more reason for better interest rates from the point of view of lender. In our experience of interim financing, the rates quoted by lenders, and approved by committees of creditors, have been at least 500-600 bps higher than comparable lending rates to normal companies. This is a huge net interest margin for lenders.

2. *Repayment priority of interim finance:* The lenders enjoy a super priority status of loan i.e. their loan is repaid before any other loan existing in the books of the Corporate Debtor.

3. *Repayment security:* That the interim funds are repaid as super priority (even before the workmen and the secured creditors), they are super secured. There is no security for interim financing as such – that is, no collateral rights over assets. However, since the super priority is statutory, there is no need for any security as such.

4. Accrual of interest for one year: The biggest advantage of the amendment has been that the lenders will now be entitled to interest even after commencement of liquidation and will enjoy the priority status during the liquidation process too.

CONCLUSION

One of the most critical aspects of rescuing companies under insolvency from the risk of liquidation is the availability of sufficient funds and the aforementioned amendment has made the availability of such funds easier. Lenders will now be more confident about lending funds to companies during the CIRP, which will make interim financing lucrative, and availability of such funds easier. This might also reduce the probability of the companies going into liquidation.

The least this amendment will do is save a company from going into liquidation for mere scarcity of funds during CIRP. Thus, it will not be an exaggeration to say that the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 can prove to be a game changer in the CIRP process.

Manish Gupta
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CIRP CHECK LIST

PREAMBLE TO THE CHECK LIST

IBC code were introduced in December 2016, since then, there have been some amendments in the Code/Regulations, issue of various notifications/Circulars, which an Insolvency professional (IP) has to adhere to of the same. Any, non-compliance/un-intended omission of the same, do entail, penalties, disciplinary proceedings against an IP which are quite painful.

Keeping this aspect in mind, I thought to prepare an administrative check list for CIRP assignment, though model time line as stipulated under regulation 40 A of the Insolvency Resolution Process regulations is already provided in the regulations, which can be referred to by an IP while executing the CIRP assignment.

Below is the Check List:

Check List for CIRP Assignments

1 File IP1 with in 3 Days of Giving Consent @IBBI to FC/OC

2 Download Appointment Order from NCLT site

3 On Receipt of Appointment File INC28 in MCA

4 Inform IIPA for your Appointment by filing the order of Appointment

5 Register @ NCLT site with the Order of Appointment (Might have to visit NCLT too for getting yourself registered)

6 Open E mail A/c with the name of CD (Circular Dtd. 16.09.22)

7 Register yourself as Authorized Signatory @GST portal & File Order of Appointment

8 Register yourself as Authorised Signatory in Income Tax Portal & file order of appointment

9 Ask for Stock Audit Reports/Forensic Audit Reports/Assets & Liabilities Details of CD from FC (Pl. Read Circular Dt. 14.06.22)

10 Inform Electricity/Water Dept for Continuation of Electricity/Water

11 Change Signatory to the Bank A/c immediately

12 Inform to PF office/Any other Labour Office for your Appointment

13 Inform to Local Police Station of CD/IRP jurisdiction for your Appointment so that in case of any untoward incident, help of Police can be sought.(Optional)

14 Do Public Announcement for Inviting Claims

15 File CIRP 1 within 7 days of making Public Announcement @IBBI

16 Submit Public Announcement @ IBBI site

17 File Disclosure of Interest within 3 days @ IPA as & When IRP/RP appoint any Professionals/with CD/ with FC (Read Circular Dt. 04.07.2022)

18 In Case CD is a Listed Co., Inform to Stock Exchange immediately on receipt of Admission of CIRP proceedings

19 Notice to Directors of CIRP with Order & Public Announcement

20 Notice to Workmen and employees of CIRP and to instruct to provide support and information as and when required

21 May Also Inform Union Leaders in case CD is having Labour Union & Have meetings with them

22 Notice to Banks of CIRP and to instruct to provide support and information as and when required

23 Notice of CIRP to Regulators – ROC, RD, SEBI, NSE, BSE and local stock exchange etc. with copy of order and public announcement

24 Important Information to be sought from CD

- Intimation of the initiation of CIRP by the order of the Hon'ble NCLT
- Details of all bank accounts being maintained
- Details of KMPs and directors
- Audited financial statements
- Details of all receivable of the company
- All information required for preparation of an information Memorandum
- Details of pending litigations
- Details of statutory authorities
- Intimate provisions of moratorium under Section 14 to all statutory authorities and to authorities for pending litigations

26 Visit CD Factory, Take Charge of Accounts, Appoint new Security Agency & Take Custody of all Records

27 Send Communications to all Creditors for Filing the Claims (Refer Circular Dt. 16.09.22)

28 Follow New Time Lines of Regulation 40 A (Refer Circular Dt. 16.09.22)

29 File CIRP 2 to 8 as applicable @ IBBI site

30 File Bi-Monthly/quarterly progress Report in NCLT

31 Write to CD not to transfer/Alienate/dispose of any Property

32 Maintain all records of Correspondence (Soft as well as Hard Copies)

33 Follow section 25 & 28 of IBC code

34 RECORD KEEPING : MIS reports, every activity performed by the IRP/RP to form part of the Progress report.

35 Get physical verification done; generate discrepancy report with book data; inform CoC and AA

36 Deposit Annual Return in Form E with 1% of Fee Earned payment @ IBBI site

37 Deposit 1 % of Cost of Fee paid to professionals to IBBI & File Form EA

38 Check How the Fee is to be paid. Online or Off Line Mode (Circular 18_10_22)

39 To give the name of IP, address, E mail, Regt No, AFA validity in all communications (Circular 04.07.22)

40 To raise the bill in his own name or in the name of IPE (Circular 04.07.22)

Vinit Nagar
Lawyer and
Practicing Company Secretary

CONFLICT OF INTEREST AMID THE APPROVAL OF RESOLUTION PLAN

PREFACE

The Committee of Creditors (CoC) possesses the most dominant position as far the decision making powers during the Corporate Insolvency Resolution Process (CIRP) is concerned including the approval of Resolution Plan for the stressed Corporate Debtor as provided under Sec. 30 of the Insolvency and Bankruptcy Code (the Code), which is subject to its final endorsement by the Hon'ble Adjudicating Authority (AA) but while sanctioning the proposed Plan, the AA limits its judicial review only up to the extent of overseeing the compliance of the provision of Sec. 30(2) of the Code by the Resolution Applicant and does not interfere into the commercial wisdom and the decisions of the CoC.

Time & again, the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India (SC) have upheld the supremacy of the CoC as far as the evaluation of the commercial viability and feasibility of any Resolution Plan is concerned including the determination of the criteria for the invitation and submission of the Resolution Plan for the Corporate Debtor as provided under Sec. 25(2)(h) of the Code.

It is a well-accepted fact that, the Financial Creditors play a significant role in the nurturing the business operations of the Company and their

contribution to the Company in form of Debt Capital is usually higher than that of the capital contribution of the Shareholders and immediately up on the triggering of the Corporate Insolvency Resolution Process (CIRP) and constitution of the CoC, the Financial Creditors get all the powers and control in their hands including but not limited to the ones as provided under Sec. 28 of the Code, which otherwise are the powers conferred upon the Equity Shareholders during the phase when the Company is going concern.

The focus of this article is to highlight upon the need to extend the judicial interference of AA and its scrutiny over the commercial wisdom of the Committee of Creditors during the CIRP of the Corporate Debtor specially in those circumstances in which the Member of the CoC itself is proposing the Resolution Plan, judging and according consent to its own proposed plan and therefore such situation specifically requires the AA to interfere upon the Commercial Wisdom of such Resolution Applicant over its own sponsored resolution plan.

CRITICAL ASPECTS OF SEC. 30(5) OF THE INSOLVENCY & BANKRUPTCY CODE, 2016

Injudiciously, the provision of sub-section (5) of Sec. 30 of the Code permits a Resolution Applicant to vote at the Meeting of the CoC, if such applicant is also a Financial Creditor but resulting to the said provision, there establish one unclear argument over the question of the conflict of interest and vested interest of such Resolution Applicant while approving its own Resolution Plan and therefore, there is an intense need to have the judicial scrutiny by the Adjudicating Authority from time to time over the decisions taken by such members right from their induction as the member of the CoC.

The provision of Sec. 30 (5) of the Code in general permits the resolution applicant to vote at the Meeting of CoC, if the Resolution Applicant is a Financial Creditor but due to the absence of any clarification and explanation to this sub-proviso, the Resolution Applicants are taking the undue advantage of its voting shares in the CoC either by hindering the approval of the Resolution plan for the Corporate Debtor as set forth by some other Resolution Applicant(s) or by determining the judicial wisdom over its own promoted plan in the midst of the conflict of interest.

This proviso is being liberally interpreted and therefore is defeating the principle of the natural justice, nemo judex in causa sua, that no person can judge a case in which they have an interest and no man shall be a Judge in his own cause. On application of this rule against bias in a situation where the financial creditor, also being the Resolution Applicant is casting its vote for the approval of the resolution plan as proposed by him, the personal bias is bound to set in, and therefore shall defeat the very objective of the Code which actually aims at striking a balance between various stakeholders of the Corporate Debtor.

Notwithstanding the commercial feasibility and the viability of other Resolution plans, such interested Member of the CoC qua Resolution Applicant shall always avail the undue benefit of its locus and voting shares in the COC if the AA does not to interfere upon in such circumstances. This open-ended proviso to sub-section (5) of Sec. 30 of the Code has led to the rampant practice of endorsing its own resolution plan by such Financial Creditor in the meeting of the CoC and therefore this creates a huge distinction in the possible success among the resolution applicants who are the member of the CoC and those who are not in the CoC and the situation gets more biased and prejudiced when the voting share of the Resolution Applicant is sufficient in quantum to disapprove and block all the other resolution plans to get an approval or is sufficient to approve its own Resolution Plan single-handely.

The self-evaluation of the Resolution Plan by the Resolution Applicant qua the Financial Creditor & Member of CoC is mainly caused due to the lenient interpretation Sec. 30(5) of the Code which is causing a serious prejudice to the interest of other Resolution Applicants due to the vested interest of such applicant and its control over the approval of the resolution plan and this is also giving a rise to a chain of litigations amongst the resolution applicants. In such circumstances, the Commercial Wisdom of the CoC always remains under doubts and therefore it hampers the time bound resolution process and the fortunes of the Corporate Debtor.

FINAL THOUGHT

Though it is a settled principle that the NCLT and NCLAT cannot sit in appeal over the commercial wisdom of

the CoC, but this practice of judging and voting over its own resolution plan requires more discipline and strictness in the Code due to the principles of natural justice and the paramount status given under the Code to the commercial wisdom of the CoC, and therefore, the judicial intervention and the persistent interference of the AA in given circumstances is sincerely required to make the process more transparent and fair. If in the light of this Code, the powers of the AA are fettered, then the legislature is required to step-in by the virtue of its powers to amend the Code for restraining such financial creditors to evaluate and vote over its own resolution plans wearing the hat of the Resolution Applicant in the process of CIRP.

The referred provision of the Code is required to be amended in lines with the provisions of Sec. 184, 188 of the Companies Act, 2013 and Reg. 23 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 as their foundational principle is to avoid the conflict of interest. Under the provisions of the Companies Act, 2013, the Directors and the Members of companies are not permitted to vote in the situations where there is conflict of interest i.e., on those contracts or arrangements in that they are directly and indirectly interested. Not only this, their presence is also not counted to determine the quorum for discussion on those contracts and arrangements. The similar provisions are required to be inserted in the Insolvency and Bankruptcy Code, 2016 to debar the resolution applicant to evaluate its own Resolution Plan even if such applicant is the financial creditor and the member of CoC, which will enable faith among the stakeholders in the commercial wisdom and decisions' of the CoC and this will further encourage the fair play among the all the resolution applicants and that will ultimately benefit the Corporate Debtor as a whole.

Our Experiences: Some Success Stories

IP & CS Mahadev Tirunagari

Insolvency Professional and Practicing Company Secretary

The journey as Insolvency Professional so far has given me a variety of experiences. Each assignment is having a wide variety of issues and is unique in its own sense. Today I am sharing my experience in handling those peculiar situations and the learning curve involved in such scenarios.

For the sensitivity involved and also for various other reasons, I am not divulging the name of the Corporate Debtor, but the facts mentioned here will throw light on very peculiar scenarios, wherein it enlightens the Insolvency professionals about the kind of care and caution to be exercised while dealing with any assignments under Insolvency and Bankruptcy Code.

UNEARTHING THE HIDDEN ASSETS OF THE CORPORATE DEBTOR:

In one of the assignments where we are supporting the Resolution Professional, the facts relating to the Corporate Debtor (CD) which was admitted into CIRP are as under:

1. The CD has one fixed asset in the form of an industrial plot mentioned in its Books of Accounts.
2. There is one more adjacent industrial plot in the name of a different company (say X Private Limited) not associated with CD.
3. During the site visit, we observed a passage connecting both these plots, and when enquired with the promoter during that visit, he said it belongs to some other company and not clearly gave any reason for the open connecting passage between the two plots.
4. Since CD has not divulged anything about the adjacent industrial land, we enquired with the local people and somehow obtained the survey number of that other plot.
5. In the meantime, we have conducted the RoC search of the documents of the CD.
6. We have got the Encumbrance Certificate of that plot and to our

surprise, the name of the company X Private Limited, which holds that plot was a company that got merged into CD vide High Court Order in the year 2004.

7. After verification of the ROC records, both X Private Limited and CD have common promoters
8. Technically, due to the merger order passed by Hon'ble High Court, another industrial plot should also belong to the CD.
9. Since the merger order was already passed X Private Limited should have been liquidated.
10. However, the promoters of CD have incorporated one more company in the name and style of "X Pvt Ltd" after the merger with the same name with the only difference of writing the words "Pvt Ltd" in place of "Private Limited" relating to the liquidated company.
11. The promoters have created the title documents of that another industrial plot in the records of the Sub Registrar office in the name of X Pvt Ltd.
12. Since the Sub Registrar is not having any idea about the merger and thinking that "X Private Limited" and "X Pvt Ltd" are one and the same, he is continuing the title documents in X Pvt Ltd
13. There is another twist to the said issue, the Financial Creditor who is the sole creditor for CD has given a loan to erstwhile X Private Limited against that industrial land which was supposed to be the asset of CD.
14. After unearthing the creativity in the fraud involved, we have filed an Interlocutory Application with the Adjudicating Authority stating all the facts and making the Financial Creditor also a respondent along with the promoters of the CD.

As per the above facts, one can imagine the innovative ways and means of doing fraudulent transactions by the promoters and obviously, a great amount of responsibility is bestowed on the shoulders of the Insolvency Professional under IBC to protect the assets of the CD. This requires an investigative eye and the skill set to unearth the frauds as acumen to the Insolvency Professionals. The code expects this kind of attention and involvement while undertaking any assignment from Insolvency Professionals.

In the given case, a small suspicion about why there is an open connecting passage between two different industrial plots belonging to two different companies has triggered the whole investigation and could dwell deep into bringing the following actual facts into light which no one can assume in the ordinary course of handling the assignment:

1. Happening of a merger transaction around 2004 which is nearly twenty years back under the regime of High Court approvals though there is no necessity of mentioning that transaction in the latest years' books of accounts.
2. Identifying the similarity between X Private Limited which was merged and lost its existence and incorporating another company with the same name X Pvt Ltd with the creativity of showing the difference in writing full form of Private Limited and writing in short form Pvt Ltd
3. Searching the documents publicly available in MCA Site, Sub Registrar Office, High Court Orders, Documents available with Financial Creditors etc
4. Enquiring the unconnected people in the surroundings of the CD to get information to understand the factual situation.

With this, I conclude my sharing of experience and wish all the Insolvency Professionals to be more vigilant and do a proper investigation into the unimaginable creativity brought in by various stakeholders in performing the transactions.

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Harmeet Kaur

Insolvency Professional, Practicing CS, Lawyer

It started with a presentation! While enjoying my corporate life as a company secretary for more than sixteen years and a corporate trainer for over a decade; just came across this new law, named Insolvency and Bankruptcy Code, 2016 and out of habit made a power point presentation for training my colleagues. Found it interesting with 3600 shift from the existing alternatives of debt resolution. Moreover, it was not a recovery tool, and therefore the first impression was positive. 'Resolution' was the key word! And who knew I would myself be a Professional working for the Resolution one day soon.

The joint venture company, wherein I was serving as the company secretary, got into trouble due to non-availability of the working capital and some dispute amongst the joint venture partners. The cyclical agro-industry also saw its rough patch exactly at the same time. Due to the liquidity constrains and lack of supply of the key raw material, operations came to a halt. Being a part of that crunch, it seemed back then, to be one of the biggest crises of my professional life. In 2017, an application under section 9 was filed against the company. Fought with full might, attended hearings, made appearances on behalf of the corporate debtor (the new name of my beloved company), but the inevitable admission and commencement of CIRP occurred after ten months and a new chapter of our lives started. Being an employee of the corporate debtor was not giving any positive vibes and the nice first impression of the Code became grey.

The law was evolving and the community just started understanding the law, practices were getting established. During those days, the IPs themselves were struggling to implement the law correctly, and we were at the recipients end. Once going through the entire corporate insolvency resolution process up to the approval of the resolution plan, this practical experience gave me a whole new confidence, and charm for the new legislation. I kept educating the students of ICSI, and others about the law and the theory infiltrated in the mind space.

I switched to practice and worked in all possible capacities and roles which the Code had to offer. While working with a resolution professional during

the most crucial phase of inviting EOIs till the vetting of the resolution plan. Thereafter with a resolution applicant, drafted plan, and made representations before the committee of creditors. And the challenging environment ignited the wish to walk down a new professional path which leads to a position of being a CEO and a legal officer at the same time.

EXPERIENCE AS AN INSOLVENCY PRACTITIONER

Having had the hands-on experience in the fields of legal compliances, legal drafting, appearances, financial and corporate restructuring, joint ventures, negotiations, contracts, project development, corporate communication, in addition to the routine corporate secretarial works with listed entity, and the whole new world of insolvency practice, gave me enough strength to venture into this challenging profession requiring multifarious traits. The Pre-Registration Educational Course by the ICSI-IIP was happening to be 'online' for the first time ever, after much postponement, in April 2020, and I received the registration from IBBI, while they, along with the entire world were working from home. Still there was a light at the end of the tunnel and I received an offer to partner in an upcoming IPE, which I accepted enthusiastically. The idea behind the firm was born in June 2020 along with me but I was fortunate enough to be partner with the maestros having age long experience in the financial restructuring and legal knowledge.

As an insolvency professional and also as being one of the designated partners of RRR Insolvency Service Experts LLP, an IPE, I have been privileged to achieve valuable practical knowledge by working with a variety of clients in different industries, including real estate, textiles, metals, services, engineering, pharma and chemicals, hospitality, etc. Working on the assignments received by the fellow partners, and while providing support services to the other insolvency professionals, I could further enhance my professional traits in the complete insolvency spectrum. Alongside, I could continue following my passion to teach, but this time, including new audience – the insolvency professionals.

HARDSHIPS FACED AND THE LEARNINGS

The most critical of all the learnings out of working in this field has been to be open to experience the new challenges every day. Other great learning is to create an appropriate infrastructure in line with the scale of work. An IP needs a battery of professionals to help him perform his tasks, including the advocates, accountants, company secretaries, industry experts, and people with administrative and clerical capacities amongst others.

Another learning is that each assignment brings with it new challenges and experiences and every case has its own special features. There is no 'one size fits all' approach. Every day, solutions have to be found out; compliances need to be made; going-concern status needs to be taken care of, fresh information needs to be worked upon, reporting/filings need to be made, and in case the operations are going on, or there are multiple locations, then the real-life experience of the role of a managing director is assumed by a court appointed officer.

The hardships start right from the stage of getting assignments, but I understand that is common for the practitioners/professionals. The branding/marketing of insolvency practitioner can be compared with those of the insurance providers, which the client does not want to listen in the first place, but when they understand the possibility of complete resolution, the scheme is sold. Second hardship is to get cooperation from existing promoters and employees etc, which is well explained and heard in the ecosystem, but is practically still posing one of the biggest challenges to the working of insolvency professional. The application filed with the Hon'ble adjudicating authority rarely has any impact on the promoters who start getting immune from the date an application is filed for initiation of the CIRP.

Other hardships are the legal compliances of the CD, difficulties in taking over the possession and control, tight timelines, relevant industry experience etc, however, these are manageable with the assistance of suitable staff and experts.

EXPECTATIONS

Ms. Nirmala Sitharaman, Hon'ble Minister of Finance and Corporate Affairs has emphasized the need to address the challenges before the IBC ecosystem, particularly with respect to timely identification of stress, reducing delays and improving resolution.

IPs also have similar expectations, wherein all the stakeholders play their roles diligently and reduce delays. The primary objective of the Code i.e. the maximization of value cannot be achieved if there are delays in admission of an application, or implementation of resolution plan etc. The crucial expectations from our alma mater are being fulfilled already as is evident from the steps for the development of IPs viz developing capacity building through conducting webinars, workshops, interactive sessions, round tables, publishing weekly newsletters; promoting professional and ethical conduct; etc. The IBBI and government have also been vigilant and have been constantly reviewing the existing legal framework, issuing relevant circulars, notifications and amendments etc from time to time. The Code has witnessed six amendments and is soon getting revised again.

SUGGESTIONS WHILE WORKING AS PROFESSIONAL

My suggestions to the fellow insolvency professionals and the new aspirants would include primarily the knowledge of law, and updation thereof, time management, and setting the priorities right, creating an infrastructure and delegating the work appropriately, develop clarity in communication, follow a solution oriented approach, accept the assignments in coherence of your scale of operations and last but not the least, be empathetic towards the other stakeholders.

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Judicial Pronouncements

DELHI HIGH COURT

Case title: Srei Multiple Asset Investment Trust Vision India Fund vs. Deccan Chronicle Marketeers & Others

Case no.: CM APPL. (S).1706 of 2023

Decision Date: 21st February, 2023

Facts:

- The pertinent case, has been filed by the Successful Resolution Applicant of the Corporate Debtor (Deccan Chronicle Holdings Ltd.) whose Resolution Plan was approved by 81.39% voting by the CoC and conditionally by the Adjudicating Authority.
- As per the records, Corporate Debtor/DCHL was incorporated on 16th December, 2002 under Certificate of Incorporation issued by the Registrar of Companies, Hyderabad and has been into the business of printing, publication and sale of daily newspapers under the trade names, "Deccan Chronicle" and "Andhra Bhoomi".
- Corporate Insolvency Resolution Process was initiated under the Insolvency and Bankruptcy Code, 2016 against DCHL by Canara Bank and on 11th December, 2018 the Resolution Plan of the appellant was found to be in compliance with the mandatory provisions of Section 30(2) of the IBC and the relevant regulations. Later the same was approved by the AA.
- With reference to the right over the brand name/ trademark an application was pending for seeking a declaration by the Corporate Debtor that it is the owner of the trademarks ("Deccan Chronicle" and "Andhra Bhoomi") and the said trademark to be treated as the asset of CD.
- Later the AA decided on the said application with a direction that the Resolution Professional has established that it is the CD who has an exclusive right to use the trademarks and declaration that the trademark belongs to CD. The said order became the subject matter of challenge at the instance of the first respondent by way of an appeal before the NCLAT.

- The NCLAT, after hearing the parties held that the declaration made by the NCLT holding the ownership rights of the Corporate Debtor over the trademarks amount to a modification/alteration of the approved Resolution Plan by CoC, which is impermissible in law and held that the order of the adjudicating authority, in fact, has transgressed its jurisdiction and accordingly set aside the order.
- The said order of NCLAT was challenged in appeal before the Hon'ble Supreme Court.

Held:

- In the abovementioned matter, it will be relevant to note that as per the Resolution Plan, the CD is confined to the perpetual exclusive right to use the brands i.e., "Deccan Chronicle" and "Andhra Bhoomi", etc. without any financial implications for the purpose of running its business and same was approved by the adjudicating authority. In this said order declaration was made that holding that trademarks "Deccan Chronicle" and "Andhra Bhoomi" belong to the Corporate Debtor, which indeed does not reconcile with the Resolution Plan approved by the CoC.
- After taking into the records, NCLAT observed that the ownership of the Corporate Debtor declared over the trademark after the approval of the Resolution Plan by the CoC, would amount to modification/alteration of the approved Resolution Plan by CoC which is impermissible in law and is not in terms of Section 60(5) of IBC.
- It was clarified by the Apex Court that in the Resolution Plan nowhere indicates regarding the right of ownership over the trademarks/ brands, "Deccan Chronicle" and "Andhra Bhoomi" of the Corporate Debtor. Hon'ble SC referred to the judgement Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Another, held

"….Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the adjudicating authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute… Permitting such a course of action would either result in a downgraded resolution amount of the corporate debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of IBC…

If the legislature in its wisdom, were to recognise the concept of withdrawals or modifications to a resolution plan after it has been submitted to the adjudicating authority, it must specifically provide for a tether under IBC and/or the Regulations"

- Hon'ble Supreme Court further held that as per Resolution Plan CD had the perpetual exclusive right to use the brands which were available to SRA. That certainly the right to exclusive use of the trademarks belonging to the Corporate Debtor but not the ownership rights of the trademarks. The said appeal was dismissed.

Cases Referred:

Embassy Property Developments Private Limited v. State of Karnataka and Others (2020) 13 SCC 308; Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Another (2022) 2 SCC 401

Case title: Abhishek Singh vs. Huhtamaki PPL Ltd. & Anr

Case no.: SLP (Civil) No.6452 of 2021

Decision Date: 28th March, 2023

Facts:

- In the present matter, appeal has been filed by a suspended Director of the Corporate Debtor assailing the correctness of the order dated 13.04.2021 passed by NCLT, Ahmedabad Bench on rejection application of the appellant under section 12A of IBC, 2016 for withdrawal of CIRP.
- CD is in the business of manufacturing and distribution of fruit beverages. It has approximately

700 employees and a turnover of Rs.984.96 Crores in the Financial Year 2018-2019. The Operational Creditor Huhtamaki PPL Ltd. (respondent no.1) used to supply packaging material to the CD.

- An application was filed by the Respondent under section 9 of IBC, 2016 before the NCLT, stating a total outstanding amount of Rs.1,31,00,825/- against the CD.
- Both the parties reach to a settlement wherein the CD was required to pay an amount of Rs.95.72 lakhs. On 4th March, 2021, the OCs received Rs.50 Lakhs and again on 8th March, 2021, it received the balance amount of Rs.45.72 lakhs. Thus, the total amount to be paid as per the settlement, was paid to the OCs.
- On 10th March, 2021 IRP moved an application under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 20188 seeking withdrawal of CIRP against the CD along with the application filed on OCs under section 12A of the code.
- In the meantime, an appeal was preferred against the admission order dated 01.03.2021 before the NCLAT apparently on the ground that section 9 of IBC petition was not maintainable as there was a pre-existing dispute. Later, the appeal was withdrawn before the NCLAT with liberty to apply for revival of the appeal in case the settlement failed.
- NCLT by the impugned judgment and order dated 13.04.2021 rejected the settlement application and fixed the matter for disposal of the application under Regulation 30A of IBBI Regulations after hearing all creditors.
- However, the NCLT rejected the withdrawal application inter alia on grounds that the the Appellant made payments to the OC from the account of the Corporate Debtor in violation of the moratorium moreover, the withdrawal application would adversely affect the rights of 35 creditors who had filed their respective claims against the Corporate Debtor; and Regulation 30A of IBBI Regulations was not binding upon the NCLT.
- Therefore, the Appellant filed an appeal before the Supreme Court challenging the impugned order on the following grounds-

  (i) Section 12A of the IBC, Regulation 30A of IBBI Regulations and Rule 11 of the NCLT Rules, 2016 permit withdrawal of proceedings even prior to the constitution of the CoC;

  (ii) The NCLT committed a grave error of law in holding that regulation 30A of the IBBI Regulations was not binding on it. The IRP and other creditors of the Corporate Debtor filed intervention applications and opposed the present appeal to inter alia uphold the findings in the Impugned Order.

Held:

- In the pertinent matter Hon'ble Supreme Court allowed the appeal for withdrawal application and made following observations: -
- While Section 12A of the IBC permits withdrawal of applications admitted under Sections 7, 9 and 10 of the IBC with the approval of 90% voting share of CoC, only after the CoC has been constituted, it does not expressly bar entertaining the applications for withdrawal prior to the constitution of the CoC.
- The Apex Court referred to the decision in Swiss Ribbons (P) Ltd. v. Union of India, Regulation 30A of the IBBI Regulations was substituted to allow applications for withdrawal of CIRP to be entertained even before the constitution to CoC. Regulation 30 of the IBBI Regulations is not in conflict with Section 12A of the IBC and the same only furthers the cause introduced in Section12A of the IBC.
- Hon'ble SC further clarified that Regulation 30A of IBBI Regulations provides a complete mechanism even for the purposes of dealing with the claim for expenses of the IRP.
- That the other creditors of the Corporate Debtor have their independent rights against the Corporate Debtor which would not be adversely affected if the settlement between the Corporate Debtor and Operation Creditor is accepted in the

present case and the proceedings are allowed to be withdrawn.

- The Supreme Court also clarified that its observations would not affect the other creditors who would be free to raise their own independent claims in appropriate proceedings which would be dealt in accordance with law.

Cases Referred:

Swiss Ribbons Private Limited & Anr. v. Union of India & Ors.(); Dena Bank (Now Bank of Baroda) v. Shiva kumar Reddy & Anr.1(2021) 10 SCC 330; Indian Overseas Bank v. Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited (2017) SCC Online NCLAT 584; Manoj K. Daga v. ISGEC Heavy Engineering Limited and others (2020) SCC Online NCLAT 869; Ram Saran Das v. CTO Calcutta & Anr. AIR 1962 SC 1362; Titaghur Paper Mills Co. Ltd. v. State of Orissa (1983) 2 SCC 433.

Case title: Ajay Kumar Radheyshyam Goenka v. Tourism Finance Corporation of India Ltd

Case no.: CA No.172 OF 2023

Decision Date: March 15, 2023

Facts:

- Tourism Finance Corporation of India Limited had advanced a sum of Rs. 30,00,00,000/- (thirty crore) as a corporate loan to the Rainbow Papers Limited, Corporate Debtor. Ajay Kumar Radheyshyam Goenka was the Managing Director of the Corporate Debtor at the relevant point. The transaction between the parties took place on 31.03.2012. Rs. 10.88 crore was repaid before the disputes arose between the parties. In 2016, the complainant issued a notice to the corporate debtor to settle the balance amount. On 16.05.2016, a complaint was lodged under Section 138 of the NI Act by the complainant against the corporate debtor and the appellant (Ajay Kumar Radheyshyam Goenka, Managing Director of the Corporate Debtor) for dishonour of the three cheques issued by the appellant for discharge of the debt.
- The aforesaid complaint under Section 138 of the NI Act was registered in the Court of the Chief Metropolitan Magistrate, Saket Court, New Delhi.
- In 2017, one of the operational creditors filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process. The application was admitted on 12.09.2017.
- On 3.10.2017, the complainant filed its claim of Rs. 22,50,00,000/- crore (approximately) before the Interim Resolution Professional.
- On 26.05.2018, the resolution applicant filed its resolution plan under the terms of which, the payment to the Tourism Finance Corporation of India Ltd was in full and final settlement of all its claims against the corporate debtor. On 05.06.2018, the Committee of Creditors (for short, 'the CoC') approved the resolution plan.
- The appellant preferred an application before the trial court seeking exemption from his personal appearance invoking a moratorium under Section 14 of the IBC. The Magistrate vide order dated 12.11.2018 rejected the said application on the ground that the criminal proceedings under the NI Act had nothing to do with the proceedings under the IBC.
- On 27.02.2019, the NCLT approved the resolution plan.
- The appellant filed an application dated 20.07.2019 before the trial court, praying that he be discharged from the criminal proceedings. The case of the appellant before the Magistrate was that as the debt stood settled in the proceedings under the IBC, the criminal proceedings would not survive.
- The trial court vide order dated 01.11.2019 rejected the aforesaid application essentially on the ground that it had no jurisdiction to discharge an accused in a summons triable case.

- The appellant filed application before Additional Sessions Court, challenging the order passed by the Magistrate dated 01.11.2019 referred to above. The Additional Judge vide the impugned order dated 23.11.2019 rejected the Revision Application. Hence the appellant file appeal before Supreme Court.
- The Appellant submitted that:
  - The trigger of Section 138 of the NI Act, is the non-payment of legally enforceable debt. Once the debt itself gets extinguished either under Section 31 of the IBC or in the process from Sections 38 to 41 and 54 of the IBC, the basis of Section 138 of the NI Act no longer remains. The term debt would mean the 'legally enforceable debt' under the explanation to Section 138 of the NI Act.
  - The liability is primarily of the company and prosecution of natural persons under Section 141 of the NI Act is vicarious to the prosecution of the company. It is for this reason that a director cannot be prosecuted without making the company as an accused.
  - The nature of proceedings under Section 138 of the NI Act is primarily compensatory and the punitive element is incorporated at enforcing the compensatory provisions.
  - If the debt of the company is resolved then payments would be governed under the resolution plan. If the debts are not resolved then the assets of the company are to be distributed in terms of Section 53 of the IBC. Permitting two proceedings to continue would therefore defeat either Section 31 or Section 53 of the IBC, as the case may be.
- The Respondent submitted that:
  - The criminal proceedings under the NI Act were initiated much before the proceedings under the IBC came to be initiated.
  - None of the provisions of the IBC bars the continuation of the criminal prosecution initiated against the corporate debtor or its directors or officials.
  - If the company is dissolved as a result of the resolution process, the criminal proceedings against it would stand terminated, however, the signatory to the cheque or its erstwhile directors are not entitled in law to take advantage of such a situation created by operation of law.
  - Section 32A of the IBC states that every person who was a 'designated partner' or an 'officer who is in default' or was in any manner in charge of/responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence in accordance with the report submitted or complaint filed by the investigating authority shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under the provision of Section 32A of the IBC.

Held:

- Hon'ble Supreme Court observed that assuming there is a clash between Section 14 IBC and the first proviso of Section 32-A(1), this clash is best resolved by applying the doctrine of harmonious construction so that the objects of both the provisions get subserved in the process, without damaging or limiting one provision at the expense of the other. If, therefore, the expression "prosecution" in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in.
- By operation of the provisions of the IBC, the criminal prosecution initiated against the natural

persons under Section 138 read with 141 of the NI Act read with Section 200 of the CrPC would not stand terminated.

- While interpreting Sections 14, 31 & 32A of the IBC vis-a-vis Section 138 and 141 of the NI Act, the principle of harmonious construction should be applied and followed. By permitting to proceed against the signatories/directors even after the approval of the plan, what is achieved is uniformity in the functioning of the law by removing the anomalous and absurd situations, thereby, making it compliant with Article 14 of the Constitution. The said interpretation shields the relevant provisions from attack of being manifestly arbitrary.
- Hon'ble Supreme Court held that,

  "Thus, the upshot of all the decisions referred to above is where the proceedings under Section 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint and during the pendency, the company gets dissolved, the signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by citing its dissolution. What is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act.

  (a) After passing of the resolution plan under Section 31 of the IBC by the adjudicating authority & in the light of the provisions of Section 32A of the IBC, the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new management.

  (b) Section 138 proceedings in relation to the signatories/directors who are liable/covered by the two provisos to Section 32A(1) will continue in accordance with law.

National Company Law Appellate Tribunal, (New Delhi)

Case title: Continuous Dyeing & Printing Mills vs. Bhavika Apparels Pvt. Ltd.

Case no.: Company Appeal (AT)(Insolvency) No. 301 of 2022

Decision Date: 18th April, 2023

Facts:

- The present appeal was filed under Section 61 of the IBC, 2016 by the Appellant arises out of the order passed by the Adjudicating Authority. Adjudicating Authority dismissed the application filed by Operational Creditor under Section 9 of the IBC seeking initiation of CIRP against CD.
- That the Appellant was involved in the work of printing and finishing of woven fabrics and was approached by CD. Operational Creditor raised invoices from 04.01.2019 to 05.02.2019 and raised GST bills for the same.
- It has been further submitted that the Corporate Debtor on receipt of the printed fabrics used to check the goods and clear the bills for the invoices

submitted after making TDS deductions and that payments were cleared on running account basis instead of bill wise payments. Moreover, Form 26A shows acknowledgment of invoices by the Corporate Debtor.

- It was further submitted that only when the OC took up the matter in January 2019 with the Corporate Debtor for release of payment that the CD for the first time sent debit notes dated 31.01.2019 by email on 05.02.2019 to the Operational Creditor. However, the Appellant/Operational Creditor sent a reply email on 06.02.2019 to the Corporate Debtor conveying the non-acceptance of the debit notes as baseless.
- A payment of Rs. 10 lakhs were released by CD, thereafter due to delay in receipt of further payments, the Appellant sent details of invoices and balance payments to the CD on 19.08.2019.
- Learned Counsel for the Appellant submitted that disputes were raised after 6 months of sharing invoices and it was a not a genuine dispute. With regards to the pre-existence of dispute Counsel submitted that the existing civil suit was filed by one of the Directors of the CD in his personal capacity.
- Moreover, several emails were sent for release of outstanding payment from 30.12.2018 onwards and the total outstanding amount as on 04.01.2019 stood at Rs.35,33,737/- and the payment was still not cleared even after the receipt of the demand notice. That the dispute raised is moonshine and an afterthought.
- Learned Counsel for the Respondent refuted the submissions of the Appellant and contended that there was pre-existing dispute with respect to quality of goods supplied by the OC which was raised on 23.08.2019 prior to the issue of demand notice under Section 8.
- That the fabric supplied was of inferior quality due to which the Corporate Debtor faced deduction of payment from their client and a civil suit was also filed on 06.09.2019 which too predated the issue of demand notice.

Held:

- The Hon'ble Tribunal in the present matter held that the defence raised by the Corporate Debtor cannot be held to be moonshine, spurious, hypothetical or illusory. That the letter dated 23.08.2019 clearly manifested existence of dispute prior to the date of Section 8 demand notice on 16.09.2019.
- It was observed that Adjudicating Authority has correctly noted that the application filed by the Operational Creditor under Section 9 has been hit by Section 9(5)(ii)(d) and accordingly rejected it as it is well settled that in Section 9 proceeding, there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor.
- It was further clarified by the Tribunal that it is satisfied with the findings of Adjudication Authority as it did not commit any error in rejecting the Section 9 Application filed by the Appellant.
- Therefore, this appeal was dismissed

Case title: Vistra ITCL (India) Ltd. V. Torrent Investments Pvt. Ltd. & Ors.

Case no.: Company Appeal (AT) (Insolvency) No. 132, 133 & 134 of 2023

Decision Date: March 02, 2023

Facts:

- On 29.11.2021, Reserve Bank of India superseded the Board of Directors of Reliance Capital Limited (Corporate Debtor) and appointed Administrator. Corporate Insolvency Resolution Process against Reliance Capital Limited was initiated by NCLT order dated 06.12.2021.
- Invitation for Expression of Interest and Request for Resolution Plan (RFRP) were issued. Challenge Mechanism Process was conducted in which two Resolution Applicants namely (i) Torrent Investments Pvt. Ltd. (for short 'Torrent') (ii)

IndusInd International Holding Ltd. (for short 'IIHL') participated. IIHL participated until third round of the Challenge Mechanism with final NPV of Rs.8110 Crores and Torrent Investments Pvt. Ltd. submitted bid till fourth round with final NPV of Rs.8640 Crores.

- The Committee of Creditors opined that outcome of the Challenge Mechanism undertaken was sub optimal and not satisfactory. The CoC in its commercial wisdom proposed that an extended round of Challenge Mechanism with the existing bidders be conducted. Thereafter, a resolution was passed by the CoC with 98% votes in favour of the extended Challenge Mechanism.
- An application against the decision of CoC was filed with NCLT. NCLT directed the administrator to take the resolution process of the Corporate Debtor to its logical conclusion and the Administrator and the CoC were not to allow deviation in the highest NPV financial proposal of INR 8110 Crore of IIHL and the highest NPV financial proposal of INR 8640 Crore of the Applicant – Torrent. NCLT held that "We are, thus, of the view that CoC cannot device an illegal mechanism to circumvent the scheme of Code to indirectly be able to negotiate further with the resolution applicants post conclusion of the statutory scheme of challenge process under Regulation 39(1A)."
- Aggrieved against the order of NCLT Vistra ITCL (India) Ltd, financial creditor of the Corporate Debtor and IIHL filed appeals with NCLAT.
- The major issues for consideration of NCLAT are as follows:
  - Whether after completion of Challenge Mechanism on 21.12.2022, the Committee of Creditors was obliged to put the draft plans submitted by the Resolution Applicants on 22.12.2022 to vote without it having any other option?
  - Whether after the result of Challenge Mechanism held on 21.12.2022 under Regulation 39(1A) (b) value maximization was achieved and Committee of Creditors was prohibited to take any further steps towards value maximization?
  - Whether the decision of the Committee of Creditors taken in the meeting dated 06.01.2023 to conduct an extended Challenge Mechanism amongst both the Resolution Applicants is impermissible and violative of Regulation 39(1A) (b)?
- Regulation 39 (1A) of the IBBI (CIRP) Regulations, 2016 is reproduced below:

"39. Approval of resolution plan

(1A) The resolution professional may, if envisaged in the request for resolution plan-

(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or

(b) use a challenge mechanism to enable resolution applicants to improve their plans."

Held:

- Sub-regulation (1A) begins with the expression "Resolution Professional may, if envisaged in the request for resolution plan -- (a) allow modification of resolution plan received under sub-regulation (1), but not more than once: or (b) use a Challenge Mechanism to enable resolution applicants to improve their plans". The insertion of Regulation 39(1A) was with clear object to reduce the delay, which is caused in submission of final Resolution Plan. It has been submitted that although in sub-clause (a), there is restriction in modification of Resolution Plan not more than once, but there is no such restriction in clause (b). The Challenge Mechanism by its nature envisages multiple rounds of challenge, hence, no other expression was required in the Regulation, except the word "a Challenge Mechanism". The consequence of insertion is that the Resolution Professional may either permit Resolution Applicant to modify its Plan, but not more than once, or to use a 'Challenge Mechanism' to enable Resolution Applicant to improve their Plan.
- Regulation 36B, sub-regulation (7), empowers Resolution Professional with the approval of the CoC to re-issue request for Resolution Plans, if the Resolution Plans received in response to an earlier request are not satisfactory. Regulation 36B, sub-regulation (7) is self-explanatory even

if Resolution Professional with the approval of CoC uses a Challenge Mechanism to enable Resolution Applicants to improve their Plans and consequently the Resolution Applicants submit their improved Plan, the power under Regulation 36B, sub-regulation (7) can very well be exercised by the CoC to decide to re-issue request for Resolution Plan.

- The Regulation 39(1A) cannot be read containing any fetter on the right of the CoC to take further action as per RFRP after receipt of the Resolution Plan consequent to Challenge Mechanism.
- Section 30, sub-section (4) statutorily contemplate approval of Resolution Plan by a vote, not less than sixty six per cent of voting share of the Financial Creditors "AFTER CONSIDERING ITS FEASIBILITY AND VIABILITY". Thus, voting has to be there after consideration, which clearly negates the submission that after receipt of the Plan, subsequent to Challenge Mechanism, the CoC is obliged to put the Plan to vote and it has no other option.
- Regulation 39(1A) cannot prohibit any negotiation or any further steps of the CoC. The view of the Adjudicating Authority that "no negotiation or value maximizatioin exercise can be individually undertaken by the CoC dehors the mandate of Regulation 39(1A)" is contrary to the Scheme delineated by the Code and CIRP Regulations.
- Hon'ble NCLAT held that,

"we, thus conclude that even after completion of Challenge Mechanism under Regulation 39(1A)(b), the CoC retain its jurisdiction to negotiate with one or other Resolution Applicants, or to annul the Resolution Process and embark on to re-issue RFRP. Regulation 39(1A) cannot be read as a fetter on the powers of the CoC to discuss and deliberate and take further steps of negotiations with the Resolution Applicants, which resolutions are received after completion of Challenge Mechanism."

Cases referred:

Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors,; K. Sashidhar vs. Indian Overseas Bank and Ors.; Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries

National Company Law Tribunal, Mumbai

Case title: Coalnergy Minerals Pte. Ltd. vs. Flash Forge Private Limited

Case no.: CP (IB) No. 587/MB-IV/2021

Decision Date: 19th April, 2023

Facts:

- This application was filed by the Operational Creditors (Coalnergy Minerals Pte. Ltd.) under section 9 of IBC, 2016 seeking initiation of CIRP against CD (Flash Forge Private Limited).
- The Operational Creditor is a Company and the said application is filed by director of OC claiming total outstanding amount of USD 1,008,145.49 i.e., Indian Rs.7,33,88,455.02/- with the date of default to be 31.03.2019. Operational Creditor is Singapore based Company and is in the business of trading in a wide spectrum of base metals steels products and general commodities.
- Corporate Debtor entered into various Sales Contracts dated 14.07.2018, 30.07.2018 and 06.10.2018 with OC for purchase of commodities. OC performed its part as per the contract and sent

the goods to CD. On 23.10.2019, a reminder was sent to the Corporate Debtor to pay the overdue and outstanding payments with agreed interest charges to which CD acknowledged its liability, and sent a payment plan.

- CD time and again gave false assurance to OC at several occasions. Therefore, a legal notice was issued to OC for an amount of USD 1,400,000.00. The Operational Creditor issued Demand Notice dated 11.01.2021 in Form-3 upon the Corporate Debtor claiming total outstanding of USD 1,008,145.49.
- The Corporate Debtor submitted that there is a prior dispute in relation to the amount claimed by the Operational Creditor and submitted that OC is merely an intermediary in the sale and purchase trades, giving rise to the debt claimed & referred in the Demand Notice; and sales contract categorically states that the contract shall be governed and construed in accordance with the law of Singapore.
- That the Operational Creditor has not provided copies of Bill of Lading, Delivery receipt duly signed by the Corporate Debtor, LC created if any and purchase orders placed by the Corporate Debtor and the proof of placing orders, etc.
- It was also noted that CD did not appear before the tribunal at several date when matter was listed.

Held:

- While allowing the present appeal, Adjudicating Authority observed that as per the contract CD was responsible to make payments of goods against supply thereof to the Ultimate Buyer, as nominated by it.
- That CD has sent two repayment plans and agreed to pay the outstanding dues within the period prescribed.
- Further, the condition under the Contract as to jurisdiction lying in Singapore cannot preclude the Operational Creditor to take recourse to the Code, as it is a special statute and deal with defaults of the Corporate Debtor to have it resolved.
- It is found from the letter(s) proposing payment plan that these letter(s) cannot said to result into a new obligation thereby shifting the date of default in accordance with such letter(s). It is settled law that the date of default does not change, even if the creditors allow some further time to make payments due from the debtor.
- It was further clarified by the court that "..letter(s) can not make the obligation of the Corporate Debtor dependent upon the receipt of payment from the Ultimate Buyer, as there was no understanding under the Contract(s) to this effect, under which goods were supplied and gave rise to the debt claimed in this application."
- Hence the court opined that there exists an operational debt of more than Rs. 1,00,00,000/- and the said debt has not been paid.

National Company Law Tribunal, Ahmedabad Bench

Case title: Bank of India vs M/s Mayfair Leisures Ltd.

Case no.: IA 608 of 2020 in CP(IB) 213 of 2018

Decision Date: 6th March, 2023

Facts:

- The application was filed by the Applicant under section 60(5) and 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 11 of NCLT Rules, 2016 (NCLT Rules) seeking release of attachment of property by the Enforcement Directorate, Ahmedabad.
- M/s. Mayfair Leisure Limited, Corporate Debtor was admitted in Corporate Insolvency Resolution Process (CIRP) vide NCLT order dated 02.06.2020 in Petition filed by the sole Financial Creditor i.e. Bank of India under Section 7 of the IBC.
- The property of the Corporate Debtor had been attached by Central Bureau of Investigation (CBI)

on 05.04.2018 and the same was confirmed by the Hon'ble Gujarat High Court in 2019. The property was also attached by the Enforcement Directorate (ED) vide its provisional attachment order dated 24.04.2018. The said order was confirmed by the Hon'ble PMLA Appellate Tribunal vide its order dated 03.12.2018. The Hon'ble PMLA Appellate Tribunal vide order dated 12.05.2020 had directed that the status of the property of the Corporate Debtor has to be maintained as it was on 07.04.2018 during the course of investigation of the money laundering under PMLA.

- Chandra Prakash Jain, Interim Resolution Professional of M/s. Mayfair Leisures Limited submitted that in view of order dated 12.05.2020 passed by Hon'ble PMLA Appellate Tribunal, he is not able to take the possession of the property nor he is able dispose it off. Further, the ED has not even filed its claim. Further, the IRP submitted that vide letter dated 17.06.2020 he had intimated ED about initiation of CIRP of the Corporate Debtor. In response to the letter, ED confirmed vide letter dated 26.06.2020 that the immovable assets of the Corporate Debtor are attached by their office. The Applicant in response issued another letter dated 21.07.2020 and requested the ED to release the attached property in order to take charge of the Corporate Debtor.
- Director of Enforcement, Department of Revenue, Ministry of Finance submitted that the money laundering case was recorded by ED on 05.04.2018 and the provisional attachment order of the immovable assets was issued on 24.04.2018, which is prior to the initiation of CIRP. Further, the moratorium are in respect of proceedings of civil nature as well as disposal of the properties of the Corporate Debtor, whereas the action taken by the Directorate under PMLA, is a criminal matter as the said properties are derived from criminal activities.

Held:

- NCLT noted that M/s. Mayfair Leisure Limited who is the Corporate Debtor was admitted in CIRP vide order dated 02.06.2020 by this Adjudicating Authority in Petition No. CP (IB) 47 of 2017 filed by the Financial Creditor i.e. Bank of India under section 7 of the IBC. However, the property was already attached by the ED.
- NCLT also noted that complaint has already been filed before Hon'ble Special Court vide PC No. 21 of 2018 under PMLA, 2002 for confiscation of the attached properties and prosecution of the accused persons. Hence, criminal action under PMLA, 2002 was already taken by the Director of Enforcement, Department of Revenue, Ministry of Finance on 24.04.2018 which is prior to the admission of the instant application by this Adjudicating Authority.
- NCLT also noted the judgement of Hon'ble High Court of Madras in the matter of Deputy Director, office of the Joint Directorate of Enforcement vs. Asset Reconstruction Company of India Ltd. and others (Writ Petition No. 29970 of 2019 and WMP Nos. 29872 and 34971 of 2019) wherein it was observed that NCLT has no jurisdiction to go into the matters governed under the PMLA, 2002 and, therefore, section 14, having consequent upon an order passed by the Adjudicating Authority declaring moratorium, would not apply to the PMLA which is a distinct and special statute having its own objective and as such section 14 would not bar a proceeding under the Act.
- NCLT rejected the application and held that it is clear that the proper recourse to be resorted by the 'Corporate Debtor' is to approach the 'Competent Forum' under the PMLA, 2002 to its logical end or any other 'Jurisdictional Forum' (other than the purview of IBC, 2016,) in the manner known to Law and in accordance with Law.

Cases Referred:

- Deputy Director, office of the Joint Directorate of Enforcement vs. Asset Reconstruction Company of India Ltd. and others (Writ Petition No. 29970 of 2019 and WMP Nos. 29872 and 34971 of 2019), High Court of Madras

Code & Conduct

CASE NO	IBBI/DC/139/2022
DATE OF ORDER	10th November, 2022

CONTRAVENTION-1

Conduct of meeting of Committee of Creditors (CoC) without sole Financial Creditor of CoC.

The Insolvency Professional constituted CoC with only one financial creditor. However, IP conducted the 2ndCoC meeting without FC, the sole CoC member, in contravention to the provision of the Code. Although no resolution was passed in the aforesaid 2nd CoC meeting, however, a meeting without the any CoC member was technically void in absence of requisite quorum of the meeting. Hence, IP violated sections 18(1)(c), 21(2), 24(6), 24(8), 208(2)(a) of the Code, regulations 17(2), 22(1), 22(2), 24(3), 24(4) of the CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with Clauses (1), (2), (3), (5), (9), (12) and (14) of the Code of Conduct.

Provisions Referred

Regulation 17 of the IBBI (CIRP) Regulations provides that

"17. Constitution of committee.

(1) The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received under sub-regulation (1) of regulation 12.

(1A) The committee and members of the committee shall discharge functions and exercise powers under the Code and these regulations in respect of corporate insolvency resolution process in compliance with the guidelines as may be issued by the Board.

(2) The interim resolution professional shall hold the first meeting of the committee within seven days of filing the report under this regulation..."

Further, the regulation 22 of the IBBI (CIRP) Regulations provides that:

"22. Quorum at the meeting.

(1) A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means:

Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.

(2) Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day..."

Contravention-2

Appointment of single registered valuer and providing inconsistent information with regard to appointment of valuers in the relationship disclosures and progress reports

The Disciplinary Committee of IBBI observed that there was inconsistency in disclosure of the date of appointment of valuer. The date of appointment of registered valuer indicated in the Relationship Disclosure was 23.09.2019. However, in the 2nd progress report dated 01.01.2020, 3rd progress report dated 01.04.2020 and 4th progress report dated 15.07.2020 it was mentioned that valuer is yet to be appointed. The 5th progress report dated 30.09.2020 mentions that the appointment of valuer was during the period of 4th progress report. Hence, there was no clarity as to the date of appointment of the valuer and various inconsistent dates were mentioned in relationship disclosure and the progress reports and the appointment letter was also undated. There was lapse on the part of IP in making clear and transparent disclosure.

The IP appointed one registered valuer. The Disciplinary Committee observed that the Code and the Regulations made thereof mandates the requirement of two registered valuers to conduct valuation. The DC was inclined to take a lenient view as prevailing circumstances of COVID-19 pandemic and lack of valuers in Kutch may have prevented IP from adhering to the stipulations of the statute.

Provisions Referred

The regulation 35 of the IBBI (CIRP) Regulations provides that:

"35. Fair value and Liquidation value

(1) Fair value and liquidation value shall be determined in the following manner:-

(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be."

Contravention-3

Claiming of excessive CIRP cost

The CIRP of CD was initiated vide AA order dated 1-11-2019. However, vide order dated 13-11-2019, the AA set aside the admission order on the ground of settlement between the OC and the CD and also made the observation that an initial amount of Rs. 1,00,000 has been paid to the IRP the expenditure of which has not been accounted for.

Further, in the order of the AA dated 26.03.2021 it was observed that IP has demanded a fee and expenses of the IRP amounting to Rs.6,49,000/- (5,50,000/- +99,000 as IGST @ 18%) for a CIRP of 13 days. The Disciplinary Committee of IBBI observed that IP claimed a CIRP Cost of Rs. 6,49,000/- (inclusive of Rs. 1,50,000/- IRP fees) which is excessive for a CIRP that lasted for mere 13 days and is a steep charge as proposed by IP are not in proportion to the work done by IP. However, keeping in view that no payment has been received towards the bills for the expenses raised by IP, DC took a lenient view on this issue.

Provisions Referred

The IBBI Circular No. IP/004/2018 on 'Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional' dated 16-1-2018 clarifies as follows:

"3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills/invoices in his name towards such fees, and such fees shall be paid to his bank account."

Contravention-4

Delays in filing of Progress Reports with NCLT

The Disciplinary Committee of IBBI observed that IP skipped the reporting of an entire quarter to ensure alignment with delayed timelines. The Progress Report in the liquidation process is an essential report as it enables the AA and the Board to supervise the activities, functioning and financial position of the CD. Hence, the conduct of IP omitting reporting of a quarter to suit delayed timelines is a negligence and is a contravention of section 208(2)(a) of the Code, regulation 15 of Liquidation Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clauses (12), (13), (14), (16) and (19) of the Code of Conduct.

Provisions Referred

Regulation 15 of the Liquidation Regulations provides that:

"15. Progress reports.

(1) The liquidator shall submit Progress Reports, in the format stipulated by the Board, to the Adjudicating Authority and the Board as under-

(a) the first Progress Report within fifteen days after the end of the quarter in which he is appointed;

(b) subsequent Progress Report(s) within fifteen days after the end of every quarter during which he acts as liquidator; and

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

Contravention-5

Maintenance of records in improper manner

The Disciplinary Committee of IBBI noted that IP furnished unsigned editable word format documents to Inspecting Authority. The authenticity of those documents could not be verified. Further, IP provided limited information to Inspecting Authority during the inspection. The Disciplinary Committee observed that IP had taken casual and inattentive approach in discharging duties and has failed to provide relevant documents to the IA. Hence, contravention could be made out of section 208(2)(a) of the Code, regulation 39A of CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clauses (10), (16) and (19) of the Code of Conduct.

Provisions Referred

The regulation 39A of the CIRP Regulations provides that,

"39A. Preservation of records.

(1) The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of all such records which are required to give a complete account of the corporate insolvency resolution process...

(2) The interim resolution professional or the resolution professional shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations..."

Contravention-6

Filing of incomplete information for dissolution of CD

The AA vide its order made observations regarding the incomplete Application for dissolution of CD and annexures submitted by the IP. Later on IP submitted the documents to the AA. The Disciplinary

Committee of IBBI observed that IP should have submitted the documents at the first instance when dissolution of the CD was being decided by AA and the information was crucial for getting the complete picture of the CD. It was observed that IP has casual and neglectful approach in discharging duties and contravention of section 208(2)(a) of the Code read with regulation 45(3), regulation 46(1) of Liquidation regulations, regulation 7(2) (h) and clause (12), (14), (15) of the Code of Conduct could be made out.

Provisions Referred

The regulation 45 of the Liquidation Regulations provides that:

"45. Final report prior to dissolution.

(1) When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated.

(2) If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same.

(3) The liquidator shall submit an application along with the final report and the compliance certificate in Form H to the Adjudicating Authority for –

(a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or

(b) for the dissolution of the corporate debtor, in cases not covered under clause (a)."

DECISION

In view of the aforesaid contraventions, IBBI imposed penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on the Insolvency Professional and directed to work as probationer for four months with other experienced IP so nominated by her IPA under which IP is registered. Till completion of this probation, the Authorisation for assignment (AFA) of IP will remain in suspended animation and IP will not take any fresh assignment or service under the Code in the capacity of Insolvency Professional.

Knowledge Centre

FAQs on Authorised representatives under IBC

1. In what scenarios authorised representatives are appointed under Insolvency and Bankruptcy Code, 2016?

As per Section 21(6A) of the Code,

Where a financial debt

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative

(b) is owed to a class of creditors exceeding the number as may be specified (at least 10 financial creditors)

the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors.

2. What is the remuneration an authorised representative is entitled to receive during the corporate insolvency resolution process?

(i) The authorised representatives under clauses (a) and (c) of sub-section (6A), if any, shall be paid as per the terms of the financial debt or the relevant documentation.

(ii) The authorised representatives under clauses (b) of sub-section (6A) shall be paid as per Regulation 16A(8) of IBBI (CIRP) Regulations, 2016, The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	15,000
101-1000	20,000
More than 1000	25,000

Further, as per Regulation 31 of IBBI (CIRP) Regulations, 2016, fee payable to authorised representative and out of pocket expenses of authorised representative

for discharge of his functions under Section 25A shall form part of Insolvency resolution process costs.

3. Can individual financial creditor may appoint an insolvency professional to be represented in the CoC meetings?

Subject to Section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors.

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

4. Who may act as the authorised representative for representing the class of creditors under Section 21(6A) of the Code?

As per Regulation 4A of IBBI (CIRP) Regulations, 2016,

On an examination of books of account and other relevant records of the corporate debtor, the interim resolution professional shall as certain class(s) of creditors, if any. For representation of creditors in a class ascertained in the committee, the interim resolution professional shall identify three insolvency professionals who are-

(a) not his relatives or related parties;

(b) having their addresses, as registered with the Board, in the State or Union Territory, as the case may be, which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor:

Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;

(c) eligible to be resolution professional under regulation 3; and

(d) willing to act as authorised representative of creditors in the class

5. Whether authorised representative has any role in receipt or verification of claims?

No, the AR has no role in the receipt or verification of claims of creditors. His role is to act on behalf of the creditors in a class.

6. What is the process followed by the authorised representative w.r.t voting of financial creditors in a class?

Pre CoC meeting: As per Regulation 16A(9) of IBBI (CIRP) Regulations, 2016, the authorised representative shall circulate the agenda to creditors in a class, and may seek their preliminary views on any item in the agenda to enable him to effectively participate in the meeting of the committee.

Provided that creditors shall have a time window of at least twelve hours to submit their preliminary views, and the said window opens at least twenty-four hours after the authorised representative seeks preliminary views.

Provided further that such preliminary views shall not be considered as voting instructions by the creditors.

During CoC meeting: As per Section 25A of the IBC Code, 2016, the authorised representative shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

Post CoC meeting: The resolution professional shall,

(a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorised representative, if any, within forty-eight hours of the conclusion of the meeting

(b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes.

The authorised representative shall circulate the minutes of the meeting received under sub-regulation (5) to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

RUCHI SOYA: A BRIEF ANALYSIS

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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 almost 4 years of its inception, the Code has seen a lot of important 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 resolved the gaps in the codified law as well as issues left by the legislation to the facts and circumstances in the cases.

Since the coming into force of the provisions of CIRP with effect from December 1, 2016, 3312 CIRPs have commenced by 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 Ruchi Soya Industries Limited ("Ruchi Soya"). 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 the Reserve Bank of India flagged for resolution. In December 2017, the NCLT had referred Ruchi Soya for insolvency proceedings on the application

1 IBBI Newsletter, Oct-Dec 2019, available at https://ibbi.gov.in/uploads/publication/62a9cc46d6a96690e4c8a3c9ee3ab862.pdf

of financial creditors Standard Chartered Bank and DBS Bank. Shailendra Ajmera was appointed as resolution professional (RP) to manage the affairs of the company and undertake the insolvency proceedings.

Ruchi Soya in 2015 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 percent 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 percent 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 crore 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.

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

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 ₹6,000 crore takeover bid.Patanjali group came second with its bid of around ₹5,700 crore, including the infusion of about ₹1,700 crore 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 ₹200 crore to ₹4,350 crore for Ruchi Soya. This excluded capital infusion of ₹1,700 crore 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 ₹4,350 crore offered by Patanjali group, ₹4,235 crore would be utilised to pay creditors while ₹115 crore would be used for capital expenditure and working capital requirements of Ruchi Soya.As per the regulatory filing made by Ruchi Soya, ₹4,053.19 crore would be paid to secured financial creditors, ₹40 crore to unsecured financial creditors, ₹90 crore to operational creditors, ₹25 crore to clear statutory dues, ₹14.92 crore to workmen/employees and ₹11.89 crore to provide counter bank guarantee.[2]

Ruchi Soya was delisted in November 2019, about two years after the insolvency proceedings against the

2 https://www.livemint.com/companies/news/patanjali-ayurved-completes-acquisition-of-bankrupt-ruchi-soya-for-rs-4-350-crore-11576684912487.html

company were initiated in 2017 by the lenders. The final sale transaction was completed in December 2019 and Patanjali Ayurved paid Rs 4,350 crore to take over Ruchi Soya. The company was then relisted in January 2020.

PERFORMANCE OF THE COMPANY- PRE CIRP, DURING CIRP, POST LIQUIDATION

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).

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. 1000000 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]:

	POST CIRP	DURING CIRP		PRE-CIRP	
Particulars	**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
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

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

	POST CIRP	DURING CIRP		PRE-CIRP	
Particulars	**2020**	**2019**	**2018**	**2017**	**2016**
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 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 have sent notices/letters recalling their loans given and 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

Order Dated	Order passed by	Brief of Order
15.12.2017	NCLT, Mumbai Bench	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. Despite an appeal in a winding up petition being pending before the High Court, the admission application was admitted and Shailendra Ajmera was appointed as the Resolution Professional in the matter.
01.08.2018	NCLT, Mumbai Bench	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. 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.
31.01.2019	Supreme Court	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.

Order Dated	Order passed by	Brief of Order
		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.
24.07.2019	NCLT, Mumbai Bench	The resolution plan of Patanjali was approved by the Adjudicating Authority after directions for some modifications in the plan. 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. 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.
14.08.2019	NCLT, Mumbai Bench	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.

Order Dated	Order passed by	Brief of Order
22.08.2019	NCLAT	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. 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	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 vs. Satish Kumar Gupta &Ors.'*, NCLAT cannot sit in appeal on commercial wisdom of the 'Committee of Creditors', to annul the resolution plan. NCLAT also directed that no further litigation would take place in this matter.

to the orders passed in the Insolvency Process of Ruchi Soya by the NCLT and the NCLAT.

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*[5] and *Swiss Ribbons*[6] 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.

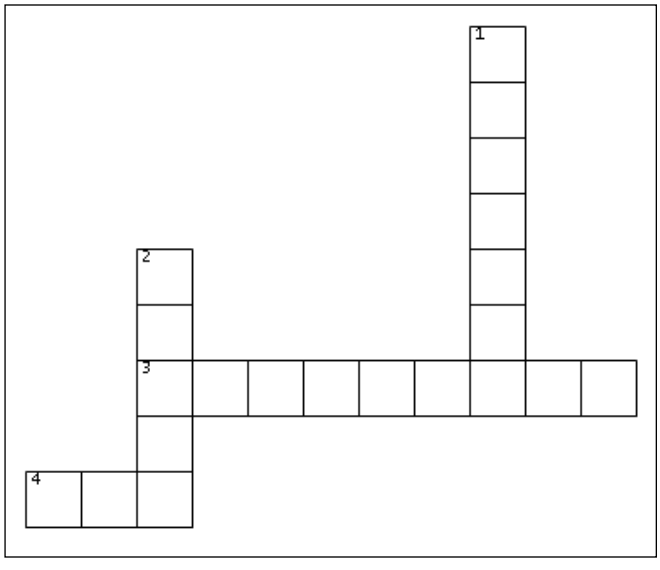
The outbreak of Coronavirus (COVID-19) pandemic globally and in India is causing significant disturbance and slowdown of economic activity. The Government ordered a nationwide lockdown to prevent community

5 https://ibbi.gov.in//uploads/order/d46a64719856fa6a2805d731a0edaaa7.pdf

6 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.%2037,99,100,115,459,598,775,822,849%20&%201221-2018%20In%20Special%20Leave%20Petition%20(Civil)%20No.%2028623%20of%202018_2019-01-25%2013:07:58.pdf

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.

Crossword Quiz:



ACROSS

3. Insolvency and Bankruptcy Board of India
2. Incolvency and Processional Entity

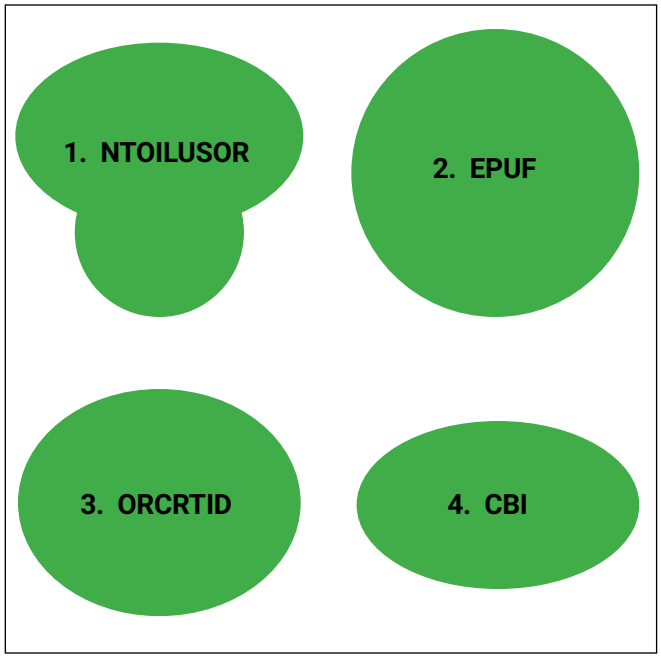
DOWN

1. Code of _____
2. Number of Insolvency Processional Agencies

Answers:

1. Conduct 2. Three 3. Regulator 4. IPE

Solve the Jumbled Words:



Answers:

1. Resolution 2. PUFE 3. Creditor 4. IBC

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