ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
(A wholly owned subsidiary of ICSI and registered with IBBI)
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INSOLVENCY AND BANKRUPTCY JOURNAL

IBC: Challenges and Grey Areas

ICSI Institute of Insolvency Professionals (ICSI IIP)

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From Chairman's Desk

"INTEGRITY. The choice between what's convenient and what's right."

- Tony Dongy, Uncommon

It is often said that you should always choose a path which is rightful even though that path is difficult to cross. This applies to all the facets of life, be it professional, personal or for the society at large. All the choices we make in life build our future. Ethics, morality, principles, integrity etc are important for every individual and every organisation. Personal ethics define ourselves and our ability to handle a particular situation as well as how we grow and develop. Following good ethics instils a sense of trust and support, improves decision making process and motivate the individual and surrounded individuals. It is said *"In life and business, you need to be a good hearted and trustworthy, and to have integrity. This is the way to build long term relationships. It is also important to be optimistic and to look at challenges as opportunities"*. Mind and heart should work together to have a healthy, happy and peaceful life.

Work ethics plays an important role in every organization and every profession. Talking about Insolvency profession, like a captain of a ship decides the direction of the ship, the waters it will tread, the distance it will cover and how the crew coordinates; the CEO exercises leadership duties within a corporate. The role is diverse, broadly categorised in management strategy, market intelligence, planning, control, negotiation, communication, and organisational politics, this crucial position will be handed over to an Insolvency professional who will manage the whole organisation as Board of directors, CEO etc to run the organization as going concern and will preserve it from any form of malpractices. The effective role of Insolvency Professional calls for multiple skills in the field of finance, people management, court procedures, stakeholder management, business dynamics, strategic foresight, business valuation and so on. To have it all, there must be one thing which should be followed throughout is work ethics.

The Insolvency and Bankruptcy Board of India has developed ethical code of conduct for the insolvency professionals which includes integrity, objectivity, Independence, impartiality, Professional competence, Representation of correct facts, timelines, Information management, Confidentiality, Occupation, employability etc. which should be followed and abided by throughout the process. Many disciplinary orders are being issued by IPAs and IBBI against the IPs which is not a good sign. During the month of May, 2023 alone, 13 orders of IBBI have been issued against the IPs wherein some IPs were suspended, on some late filing fees was levied, some were reprimanded. The role of Insolvency professionals is vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. It creates positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn my cause inordinate delays. Consumers in a well-functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust.

I would request all the Insolvency professionals to be vigilant in performing their duties and functions and may take the assistance from the professionals wherever required, to effectively manage the functions envisaged since they are one of the important parameters who will decide the success rate of this insolvency and bankruptcy regime.

ICSI IIP is always there to support and assist its members. I wish you the very best in all the future endeavours.

(P.K. Malhotra)
Chairman, ICSI IIP

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

ICSI IIP'S PUBLICATIONS

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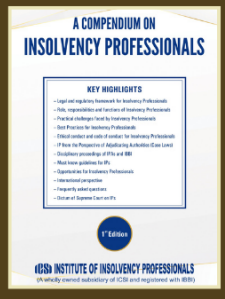
A Compendium on Insolvency Professionals

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.



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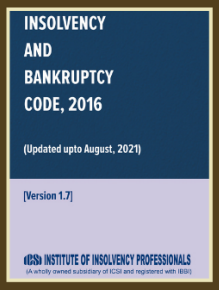
LET'S GROW WITH US



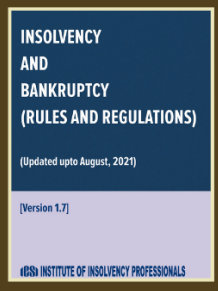
Insolvency and Bankruptcy Code, 2016 (Version 1.7)

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).



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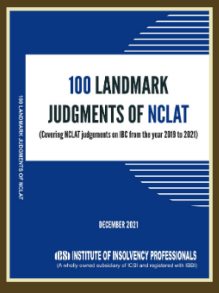

100 Landmark Judgements of NCLAT (covering NCLAT judgements on IBC from the year 2019 to 2021)

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.

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COO's Message

"Your economic security does not lie in your job; it lies in your own power to produce—to think, to learn, to create, to adapt. That's true financial independence. It's not about having wealth; it's having the power to produce wealth."

—Stephen Covey

The Indian market is expanding. The Government is bringing in constant amendments to not only bring in new business in India but also to ensure that the already existing business flourish as well. The country has been striving to work towards implementing globally accepted models and principles to the businesses in India.

The IBC has been a transformational economic legislation which has altered the face of insolvency resolution and liquidation in the country. It has not only improved the ease of doing business in the country but also given a new ray of hope to the already distressed investors. In the six years of its existence, the legislature has been constantly working towards making it a robust legislation by ironing out the wrinkles through timely interventions. The Ministry of Corporate Affairs (MCA) has started this year by floating a fascinating discussion paper inviting public comments on further changes being considered.

There is a general feeling amongst creditors and lenders that the resolution process though effective, is taking much longer than the prescribed period of 180/270/330 days, leaving them with few options and fewer solutions. The MCA through its Insolvency Law Committee has proposed certain areas for deliberation.

MCA has proposed to extend the so-called pre-packaged insolvency scheme, currently meant to resolve stress in only micro, small and medium enterprises (MSMEs), to a certain category of larger firms as well, and simplify the extant framework that has failed to gather traction so far. MCA has also suggested a special insolvency regime for real estate under which resolution process would be restricted to only those projects where the default has occurred, and won't extend to the entire company or other solvent projects. It also proposed to enable the resolution professional to transfer the ownership and possession of a plot or house to the buyers with the consent of the committee of creditors. Similarly, the ministry plans to allow multiple resolution plans for a single stressed firm (for all sectors) to maximise realisation.

These proposals indicate the willingness of the government to listen and improve upon the insolvency ecosystem to bring it at par with the established insolvency regimes of the world.

(Dr. Prasant Sarangi)

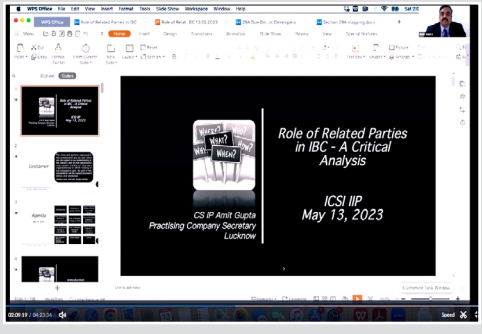
COO (Designate), ICSI IIP

Events @ICSI IIP

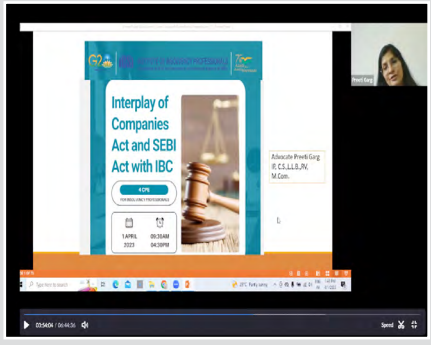
(Workshops, Webinars, Round-table Discussions, Interactive Meets etc)

Workshop on Interplay of SARFAESI Act, 2002 and Arbitration Act, 1996 with IBC by CS and Advocate Honey Satpal and Advocate and IP Manish Paliwal on Saturday, 6th May, 2023

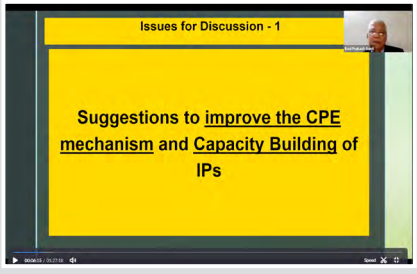
Workshop on Role of Related Parties under IBC by CS and IP Deepa Venkat Ramani and CS and IP Amit Gupta on Saturday, 13th May, 2023

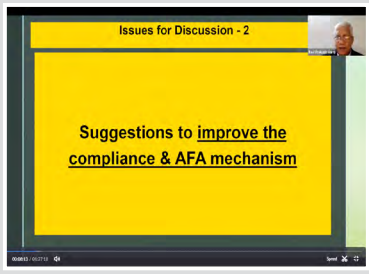


Workshop on Interplay of Companies Act and SEBI Act with IBC by CS and IP S. Dhanapal and CS and IP Preeti Garg on Saturday, 1st April, 2023

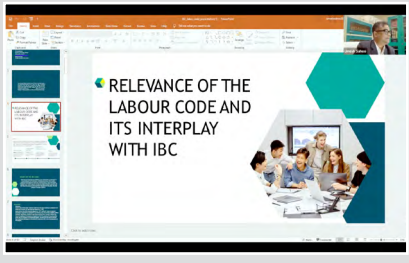


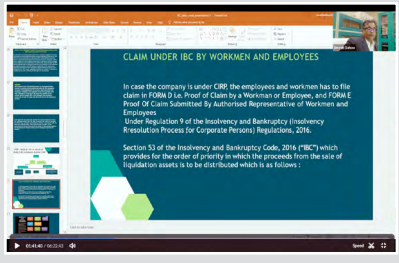
Interactive Meet on Let's Connect: A Platform for the IPs by IP Ravi Prakash Ganti on Monday, 3rd April, 2023



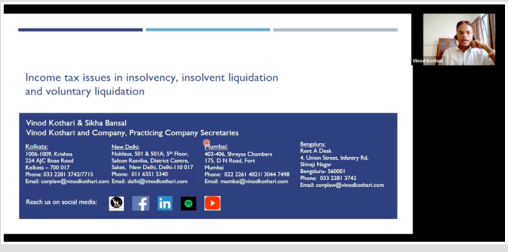


Workshop on Labor Laws & GST Law vis-a-vis IBC by Advocate and IP Umesh Chandra Sahoo and CA and IP Vipul Garg on Saturday, 15th April, 2023

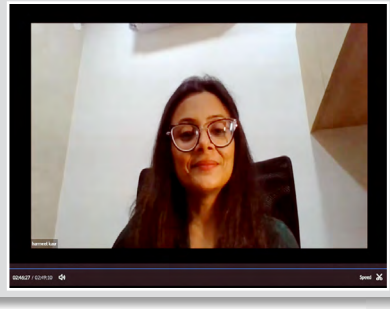




Webinar on Income Tax Quandaries with IBC by CS and IP Vinod Kumar Kothari and Ms. Sikha Bansal on Monday, 17th April, 2023



Workshop on IBC vis-a-vis Limitation Act and PMLA by CA and IP Anand Sonbhadra on Tuesday, 25th April, 2023 and CS and IP Harmeet Kaur on Wednesday, 26th April, 2023



Interviewee:
Mr. Umesh Chandra Sahoo

Practicing Corporate Lawyer, Insolvency Professional, Tax Consultant & Trade Mark Attorney

INTERVIEW

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

As an Insolvency Resolution Professional, I think that the Insolvency and Bankruptcy Code (IBC) has brought about a paradigm shift in the insolvency resolution process in India. Some of the key successes of the IBC since its commencement are as follows:

Timely resolution of stressed assets: The IBC has provided a time-bound resolution process of stressed assets, which has helped in preventing the build-up of non-performing assets in the banking system.

Level playing field: The IBC has produced a level playing field for all stakeholders, including creditors, debtors, and bidders. The Code provides for a fair and transparent process for the resolution of stressed assets

Increased recovery rates: The IBC has also led to higher recovery rates for creditors as compared to the earlier regime. Under the IBC, the goal of the resolution process is to get the most money out of the assets and give the money to the creditors in a fair way.

2. What are some strategies adopted by you to tackle assignments under the Code, keeping in mind the underlying reasons for which the Code was enacted?

As an Insolvency Resolution Professional, I adopt the following

strategies to tackle assignments under the Insolvency and Bankruptcy Code (IBC), keeping in mind the underlying reasons for which the Code was enacted:

Politeness, Self Confidence, Understanding the business, formulating a resolution plan, Engaging with stakeholders, Strict adherence to timelines, Transparency and accountability, Professionalism and ethical conduct.

3. Many of stakeholders particularly operational creditors perceive the IBC 2016 as a debt recovery tool. Is it a recovery tool?

The Insolvency and Bankruptcy Code (IBC) 2016 is not a debt recovery tool. It is not a litigation. It is a comprehensive legislation process that provides for a time-bound and transparent resolution process for stressed assets. The primary objective of the IBC is not debt recovery but the maximization of the value of assets and the resolution of stressed assets in a fair and equitable manner.

4. Since you are an Advocate, how does it help you in handling the assignments? Is the experience of Advocate an added advantage?

Yes, being an advocate definitely helps me in handling assignments as an Insolvency Resolution Professional (IRP) under the Insolvency and Bankruptcy Code (IBC). As an advocate, I have a good understanding of the legal framework and procedures involved in the resolution process, which is essential for the effective discharge of my duties as an IRP.

The experience of an advocate is an added advantage in the following ways:

As an Advocate, I have a good understanding of the legal framework and processes involved in the resolution process. This is important for me to do my job as an IRP well. This means knowing about business law, bankruptcy law, contract law, and other similar laws.

Skills for advocating: As an advocate, I have developed strong skills for advocating, which help me serve the interests of stakeholders well in the resolution process. This includes skills like communication, negotiation, and persuasion, which are crucial for finding an answer that works for everyone.

Analytical skills: As a lawyer, I've developed strong analytical skills that help me look at the business's finances and operations and figure out what went wrong and why it went bankrupt. This is important for making a workable settlement plan that maximises the value of assets and makes sure the money goes to creditors in a fair way. And maximization of asset in a stipulated time.

Skills for resolving conflicts: As an Advocate, I have experience resolving conflicts and disagreements, which is very important in the IBC's method for resolving conflicts. During the process of finding a solution, many people with different goals are involved, so there are sure to be disagreements. My experience as a lawyer helps me settle these disagreements in a fair and unbiased way.

5. While handling the assignments, what challenges are being posed by various stakeholders? How has your experience been with the Promoters of the Corporate Debtors?

Using the IBC to handle tasks means dealing with a lot of different people who have different needs. This can lead to conflicts and delays. Promoters may try to stop the settlement process because they don't want to lose control of the company. These problems can be solved with clear communication, fairness, and a focus on what is best for everyone.

6. How significantly do you think the regulators i.e., IBBI and IPAs serve the profession of Insolvency Professionals? What are some changes in the regulatory framework that could benefit the professionals?

Regulators like the IBBI and IPAs are very important because they set standards, enforce rules, and help IPs. IPs can gain from a simplified regulatory framework, high-quality training and education programs, help and direction, and more transparency. A good regulatory system can help make sure that insolvency practitioners (IPs) do their jobs in an honest and professional way while also promoting the larger goals of the insolvency and bankruptcy process. and it is a request the IPA should keep an expert team where the team

can prima facie advise the IP if require. the experts may advise in different scenario or situations. the team should be work as pro bono service, along with a strong infrastructure for reporting.

7. What are some lessons learnt in your journey as an Insolvency Professional that you have emulated in your life outside the profession too?

Being an Insolvency Professional can teach you how important it is to be able to change. The resolution process can be complicated and hard to predict, so it's important to be able to adapt to changing situations and make good choices when you're under pressure.

Another lesson is how important it is to talk to people and deal with their needs. Effective communication skills are essential for managing multiple parties with different interests and resolving conflicts to reach a successful conclusion.

8. If there was any piece of advice that you could share with the prospective aspirants of the profession and new Insolvency Professionals, what would it be?

This is a noble profession, all the members are experienced and highly paid with High status so as a Resolution Professional, I would tell new and aspiring Insolvency Professionals to work on their communication, negotiation, and ability to change and think creatively. It's also important to keep up with changes in regulations and the market and to put respect and doing the right thing at the top of your list in all parts of the job. Lastly, look for mentoring and professional development opportunities to keep learning and getting better at your job.

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

As a professional in insolvency, I think that the Insolvency and Bankruptcy Code (IBC) could be made more successful by focusing on a few key areas. These things are:

Streamlining the resolution process: The IBC could use a more streamlined resolution process that takes less time and costs less money to resolve issues.

Enhancing stakeholder participation: Getting more people involved in the resolution process can improve the quality of choices and make it less likely that there will be disputes or lawsuits.

Alternative ways to solve problems, like mediation and arbitration, can be faster and cheaper than standard ways to solve problems.

10. What is the future of Insolvency and Bankruptcy law in the country?

As a professional in insolvency, I think the future of insolvency and bankruptcy law in this country is promising. The IBC has helped set up a more efficient and effective way to handle cases of business insolvency, and there is a lot of room for growth and development in the future. As the framework keeps changing and adapting to new market conditions, I think it will continue to be an important part of the country's economic growth and security. the main root of business Debtor and Creditor behavior will change, promotors will serious regarding the public money used in the Corporate Debtor.

ICSI IIP – AT A GLANCE

1. DURING THE MONTH OF APRIL 2023,

S. No.	Particulars	Details
1.	Members enrolled	3
2.	Members registered	4
3.	Inspections conducted	NA
4.	IPs monitored	5
5.	AFA applications received	35
6.	AFA applications approved	31
7.	Complaints/Grievances received	4
8.	Complaints/Grievances disposed off	4
9.	SCN issued	NA
10.	Disciplinary action taken	NA

2. DURING THE MONTH OF APRIL 2023, FOLLOWING PROGRAMS WERE ORGANIZED BY ICSI IIP:

WORKSHOPS

S. No	Date of Workshop	Topic
1.	01.04.2023	**Workshop | Interplay of Companies Act and SEBI Act with IBC | April 01, 2023 | 09:30 - 04:30 PM**
2.	15.04.2023	**Workshop | Labour Laws & GST Law vis-a-vis IBC | April 15, 2023 | 9:30 AM - 4:30 PM**
3.	25.04.2023	**Workshop | IBC vis-a-vis Limitation Act and PMLA | 25 & 26 April, 2023 | 3 PM to 6 PM**

INTERACTIVE MEETS

S. No	Date of event	Topic
1.	03.04.2023	**Interactive Meet (Virtual Mode) | Let's Connect: A Platform for the IPs | April 03, 2023 | 04:00 PM**

WEBINARS

S. No	Date of webinar	Topic
1.	17.04.2023	**Webinar | Income Tax Quandaries with IBC | April 17, 2023 | 4.00 pm - 6.00 pm**
2.	21.04.2023	**Webinar | Anatomy of IBC Case - 4 | April 21, 2023 | 3:00PM - 6:00PM**
3.	28.04.2023	**Webinar | Recent Important Orders by NCLAT | April 28, 2023 | 2.30pm - 4.30pm**

SEMINAR

S. No	Date of event	Topic
1.	29.04.2023	**Seminar jointly with IIP on the theme: "Voluntary Liquidation under IBC and Practical Aspects of Resolution Plan in IBC with latest Judgements" on Saturday 29th April,2023 at 04:00 PM onwards**

Learner's Corner

Legal Maxims

ACTUS REUS.

Meaning: Guilty act.

Example: *"he above bedrock necessarily introduce both, 'actus reus' and 'mens rea'. 'Actus reus' is an act or conduct, where state of mind on the part of the victim is required by the definition of the crime and, 'actus reus' means state of mind. If so, that state of mind is part of the 'actus reus and, if the prosecutions are unable to prove its existence, they must fail.": State of Rajasthan vs. Aanilal (16.12.1985 - RAJHC)*

EX INJURIA JUS NON ORITUR.

Meaning: Law (or right) does not arise from injustice.

Example: *"More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. "Subla Fundamento cedit opus" - a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. Nor can a person claim any right arising out of his own wrong doing (Juri Ex Injuria Non Oritur)": Devendra Kumar vs. State of Uttaranchal and Ors. (29.07.2013 - SC)*

OBITER DICTUM.

Meaning: That which is said in passing.

Example: *"...To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight...": Director of Settlements, Andhra Pradesh and Ors. vs. M.R. Apparao and Ors. (20.03.2002 - SC)*

Revival of A Corporate Debtor Under Liquidation:

Ninad Deshpande
Advocate and Insolvency Professional

Yash Gokhale
Advocate

ABSTRACT:

The IBC is the umbrella legislation concerning insolvency resolution of all entities in India, and its main objective is the resolution or revival of corporate debtors, where liquidation is seen as the last resort. Schemes of arrangement under Sections 230-232 of the Companies Act, 2013 have been used for revival of even those companies that are already undergoing liquidation. However, since liquidation comes under the IBC, a judicial view has emerged which highlights issues with introducing schemes of arrangement into the liquidation process, which also include procedural delays and excess judicial intervention. The Supreme Court, echoing the views of the Insolvency Law Committee, has stated that the liquidator may be given the power to settle liabilities and revive the company under the IBC itself. The apex court also stated that the company law tribunals ought to limit their intervention and primacy ought to be given to the IBC framework. In light of the above, the only existing solution for revival of corporate debtors under liquidation seems to be found in Section 60 (5) of the IBC under the supervision of the NCLT. The NCLT may use its wide discretionary powers and jurisdiction over insolvency matters to entertain a Revival Plan by a promising Applicant. Such a plan would contain all the necessary provisions for the settlement of dues and would obtain the satisfaction and approval of all stakeholders, before being approved by the tribunal. Revival in this manner seems to be the only solution to the problems facing companies under liquidation with a chance at revival as a going concern.

POSITION OF REVIVAL WITHIN THE IBC

The Insolvency and Bankruptcy Code, 2016 ("IBC" or "the Code") is the umbrella legislation for insolvency resolution of all corporate entities in India. The IBC was enacted as a critical building block of India's progression to a mature market economy. It addressed the growing need for a comprehensive and effective law. The objectives of the Code lie in resolving the insolvency of debtors, maximizing the value of assets of the firm, and promoting entrepreneurship, availability of credit and balancing the interest of stakeholders. The importance of these objectives is to be read in that order specifically, as was held by the Hon'ble National Company Law Appellate Tribunal in the case of *Binani Industries Limited vs. Bank of Baroda & Anr*[1]. Therefore, resolving the insolvency of debtors is the most important and sacrosanct objective of the IBC.

The Supreme Court of India has held, in the case of *Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors*[2], that the primary focus of the Code is to ensure revival and continuation of the firm by protecting it from its own management and from a death by liquidation. In another judgment[3], the apex court held, while noting its previous rulings, that one of the principal objects of the IBC is providing for the revival of the Corporate Debtor and to make it a going concern. The apex court highlighted that every attempt has to be first made to revive the concern and make it a going concern, with liquidation being the last resort.

REVIVAL BY SCHEME OF ARRANGEMENT UNDER THE COMPANIES ACT

Liquidation of a company is seen, as per the legislative intent, as a last resort which a company should avail. There is definitely merit to the view that liquidation is best avoided. However, that should not indicate that liquidation amounts to the immediate "death" of the company. Even when liquidation proceedings have been initiated for a company, there is still enough space in the legislative framework to allow for certain attempts at revival of the company. This space has long existed. Sections 390-391 of the Companies Act, 1956 provided for the power to make compromise or arrangements with creditors and members. Since then, many companies that were ordered to be wound up have subsequently (after years) found a new breath of life by means of a scheme of arrangement meant for revival. Section 230 of the Companies Act, 2013 ("CA 2013") carries on this aspect of the legislative framework. Schemes of arrangements can be used for a variety of purposes, revival being one of them. Importantly, any scheme of arrangement under the said provision has the requirement of the consent of creditors and shareholders. A scheme may be proposed by a shareholder, creditor, or the liquidator himself. This participation from such stakeholders gives the scheme validity, regardless of the qualification status of the promoter of the company.

On several occasions, the NCLAT and the NCLT have allowed schemes of arrangement for a corporate debtor under liquidation. Notably, in *S.C. Sekaran vs Amit Gupta and Ors.*[4], the NCLAT considered prior rulings of the Hon'ble Supreme Court of India and allowed and directed the Liquidator in the case to proceed under Section 230 of the CA 2013 with an aim for revival of the company. It was expressly echoed that ensuring revival of the corporate debtor is the primary focus of the legislation and that, even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

Notably, Regulation 2B, inserted vide the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 provided that, where a compromise or arrangement is proposed under Section 230 of the CA 2013, it shall be completed within ninety days of the order of liquidation. This clearly suggests a legislative intent that the corporate debtor under liquidation be revived, if an opportunity arises for revival, in an expedient manner. This shows that not only revival but also speedy and quick revival is sought and envisioned under the legislation, in a way that would prevent liquidation from being completed in the first place.

[1] Company Appeal (AT)(Insolvency) No. 82 of 2018 among others

[2] (2019) 4 SCC 17

[3] K.N. Rajakumar vs V Nagarajan, 2022 4 SCC 617

[4] Company Appeal (AT) (Insolvency) No. 495 and 496 of 2018

CHANGED OPINION ON USE OF SCHEME OF ARRANGEMENT

Subsequently, in *Arun Kumar Jagatramka vs Jindal Steel and Power Ltd. & Anr.*[5], a view that had been developing came to the surface. This view pertains to the lack of necessity of intertwining the scheme of arrangement mechanism of the CA 2013 with the liquidation process under the Code. In this judgment, the apex court brought up the Report by the Insolvency Law Committee from February 2020, which, as per the apex court, acknowledged that the "floating of schemes of compromise or arrangement under Sections 230 to 232 of the Act, even for companies undergoing liquidation, was not part of the framework under the IBC."[6]

Interestingly, the apex court pointed out from the said Report that the said "floating" has led to a multiplicity of issues including but not limited to the duality of the role of the NCLT as a supervisory Adjudicatory Authority under the IBC versus the driving Tribunal under the CA 2013. Most interestingly, the apex court also specifically highlighted the view of the Committee that "such a process for compromise or settlement need not be effected only through the schemes mechanism under the Companies Act, 2013, and felt that the liquidator could be given the power to effect a compromise or settlement with specific creditors with respect to their claims against the corporate debtor under the Code"[7]. The Report goes so far as to recommend that recourse to Section 230 of the CA 2013 should not be available during liquidation under the Code.

The Hon'ble Court points out that the recognition of schemes under Section 230 of the CA 2013 into the liquidation process under the IBC was only through the judicial intervention of the NCLAT in the case of *Y Shivram Prasad vs S Dhanapal & Ors*[8]. The coram of Justice DY Chandrachud offered a "note of caution" to the NCLT and NCLAT to keep their judicial intervention at a minimum and not disturb the foundational principles of the IBC which, in the court's opinion, was meant to overhaul the insolvency and bankruptcy regime in India and was a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. Therefore, the Supreme Court advised the NCLT to operate under the IBC only in its role as a supervisory authority as it was meant.

Here, it must be also be considered that the process of revival as per a scheme of arrangement under the CA 2013 would be a much more court-driven process than that under the IBC. In such a process, the role of the NCLT would be greater and the process would involve more procedural aspects such as approval by voting. All of this would inadvertently involve a greater and more significant amount of delays and costs. This may in all likelihood result in a generally slower and more inefficient process to attain the desired objective with respect to the corporate debtor. Due to a higher chance of procedural delays and inefficiency due to the increased role of the NCLT under the CA 2013, it would be even more advisable to seek alternate means to achieve revival under the IBC itself than under the CA 2013.

REVIVAL BY MEANS OF SECTION 60(5) OF THE CODE

Due to the abovementioned reasons, and also since the window of opportunity under the CA 2013 is available only for 90 days from the liquidation order as per Regulation 2B which would not allow a scheme after 90 days, another avenue under the IBC must be availed. The aforementioned Report puts forth the suggestion that a new means of conducting revival of a corporate debtor ought to be devised under the Code instead of the CA 2013. The legislature has not yet devised such a solution of which corporate debtors can avail. However, the overarching legislative intent of the Code, which aims to revive corporate debtors as going concerns and which see liquidation as a last resort, must be considered yet again. This overarching intent, combined with the need to keep an independent role of the company tribunals under the Code, leads to one existing solution to which companies can resort. This solution can be found in the residuary powers of the tribunals.

[5] (2021) 7 SCC 474, Civil Appeal No. 9664 of 2019 with Writ Petition (C) No. 269 of 2020 and Civil Appeal No. 2719 of 2020

[6] para 92 of the SC judgment in Arun Kumar Jagatramka

[7] para 93 of Arun Kumar Jagatramka

[8] Company Appeal (AT) (Insolvency) No. 224 of 2018

Section 60 (5) of the Code, read with the inherent powers and discretion of the tribunals under Rule 11 of the NCLT Rules, 2016, gives the tribunals wide-ranging residuary powers. Under this provision, the tribunals can entertain applications by or against corporate debtors for any necessary purpose. And residuary powers can certainly be used to meet the objectives of the primary intent of any legislation. It was held in *Essar Steel India Limited vs Satish Kumar Gupta*[9] that Section 60 (5) is in the nature of residuary jurisdiction vested in the NCLT so that the NCLT may decide all questions of law or fact arising out of or in relation to insolvency or liquidation under the Code. This was also reiterated by the Supreme Court in *Gujarat Urja Vikas Nigam Limited vs Amit Gupta and Ors*[10], wherein it was held that the NCLT is provided with a wide discretion to adjudicate on the same. Since a revival from liquidation of a corporate debtor would be a question directly arising out of liquidation proceedings, an application pertaining to the same would fall within the jurisdiction of the NCLT. This is more so the case in light of the ruling in A*rcelorMittal India Private Limited vs Satish Kumar Gupta*[11] wherein the Supreme Court held that the non-obstante clause in Section 60(5) is designed to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code. Thus, the apex court has made it clear that no other forum would have the jurisdiction to entertain such an application.

Considering: a) a harmonious view of all the recommendations and rulings that have been made by the Committees and Courts on this aspect, b) the need to contain liquidation-related proceedings within the framework as per the Code, and c) the absence of a new means to deal with the revival of liquidating companies, the ideal recourse seems to lie with the residuary powers of the Tribunals, specifically under Section 60 (5) of the Code. The NCLT's jurisdiction under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 has often been invoked as a comprehensive recourse to all issues concerning a corporate debtor undergoing Corporate Insolvency Resolution Process (CIRP) or liquidation. Therefore, the wider jurisdiction given by the section 60 (5) of IBC should be utilized presently to deal with the revival issue of the company under liquidation.

This recourse available by means of Section 60 (5) may be exercised as follows: A Revival Plan may be proposed by a willing Applicant company, and may be submitted to the Liquidator. The Liquidator would then, in turn, present the plan before the stakeholders committee and obtain its approval, and then submit it to the Tribunal for its approval. The Revival Plan must be one which is in the interest of all the stakeholders and revive the corporate debtor as a going concern, and which would be executed in a time-bound manner. It shall be one where the Applicant gains the control or the business of the corporate debtor, on a going concern basis, in exchange for settling all its liabilities with its various creditors, which would not be otherwise settled owing to the status of the corporate debtor as being under liquidation. This would include financial debts and operational debts as well as statutory dues and liquidation costs. In return, the creditors, on being satisfied as to the repayment of their dues as per the Plan, would release their claims against the corporate debtor. Specific directions regarding consents/notices may be issued by the NCLT based on the facts and circumstances of each case. The stakeholders would also grant their consent to being bound by the Revival Plan, and this consent would thereon receive sanction by the NCLT. This would make the corporate debtor debt-free for the Applicant to take over the business.

All the stakeholders would be satisfied in this way, where the corporate debtor gets to continue its existence as a going concern, which is in line with the core concern and objective of the IBC altogether. Therefore, in conclusion, powers of Adjudicating Authority under Section 60(5) are available to be used for revival of corporate debtor in liquidation, at least until the legislature comes out with a specific provision for resolution of this issue.

[9] (2020) 8 SCC 531

[10] 2021) 7 SCC 209

[11] (2019) 2 SCC 1

STREAMLINING THE CORPORATE INSOLVENCY RESOLUTION PROCESS:

(A BRIEF STUDY ON THE CHALLENGES AND RECOMMENDATIONS)

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SUMMARY:

A strong and reliable credit culture is vital to a nation's economic development. Ideally, The Insolvency and Bankruptcy Code, 2016, a game changer in Indian economic laws, strengthened the insolvency resolution process by providing a "creditor-in-control" model. However, the process is still infused with bottlenecks and leakages. In this research article, the authors make an attempt to analyse such bottlenecks in the Corporate Insolvency Resolution Processes and provide suitable suggestive solutions to the same. The first chapter dissects the four pillars of IBC. The second chapter talks about the financing, namely interim financing and litigation financing for the CIRP. The third chapter expounds on the creation of a code of conduct for the committee of creditors. The fourth chapter analyses the restrictions on the resolution plans, and the final chapter deliberates on the creation of a strong distressed asset market.

A PERSPECTIVE ON THE BOTTLENECKS:

A strong and reliable credit culture is vital to economic development, for it encourages people to plunge into entrepreneurial ventures and enhance their business aspirations. A robust legal and institutional insolvency regime aids in the balancing of the credit culture by providing businesses with the "freedom of exit." The Insolvency and Bankruptcy

Code, 2016, a game changer in Indian economic laws, strengthened insolvency resolution and liquidation in India. The act emphasizes "value maximization" and "time-bound processes," which were overlooked in previous economic legislation such as SARFAESI, 2002, and the RDB Act, 1993.

The Corporate Insolvency Resolution Process (CIRP) is envisaged under the code as a restructuring tool whereby the application for initiation of CIRP is filed by the financial creditor, operational creditor, or corporate debtor himself, provided the debt becomes due and payable. Admission of the application by the adjudicating authority (AA) results in a situation where the business is transferred to the resolution professional, who conducts the business as per the commercial wisdom of creditors. According to the Insolvency and Bankruptcy Board of India (IBBI) newsletter, only 64.7% of cases were admitted for the resolution process. Among those, 11% have been withdrawn, 14% got settled, 30% went into liquidation, and only a minuscule 9% got resolved.[12] The liquidation rate is higher than the resolution rate, which indicates a serious problem with the CIRP's resolvability. In order to streamline the process, it is essential to analyze the supporting pillars of IBC as well. The need of the hour is to identify those bottlenecks to provide a frictionless transition into a successful resolution and this research paper is an attempt to rectify such problems by suggesting measures against it.

FOUR PILLARS OF THE IBC:

The four pillars of the IBC regime in India are *(i) Insolvency Professionals (IP), (ii) Information Utilities (IU), (iii) Insolvency and Bankruptcy Board of India (IBBI), and (iv) Adjudicating Authority*. Critically, there are bottlenecks that impact the efficiency of the insolvency system in India.

i) Insolvency Professional (IP)

After the initiation of the resolution process, a company's management and operations are automatically transferred to the Insolvency Professional. Hence, an IP must have multi-faceted approach to the case at hand, whereby he is able to analyse the distressed business through legal, financial and management lens. Consequently, a team of IPs is required through which work can segregated and performed with utmost quality. Permitting the Insolvency professional Entity (IPE) to act as IP is a welcome step towards achieving successful quality resolutions. However, the IPs suffer overarching pressure from the promoters and workmen of the corporate debtor. Adequate protective mechanisms such as insurance and security must be created and popularised. Moreover, the profession is alleged to be overregulated by the Insolvency and Bankruptcy Board of India (IBBI) which obstructs the autonomy of the IPs. Ideally, the Code and the courts should be encouraging decentralization in CIRP which in turn reduces the court burden and emphasises a market-friendly approach.

ii) Informational Utility (IU)

The Bankruptcy Law Reforms Committee (BLRC) report specifically stated that *"asymmetry of information is a critical barrier to fair negotiations or ensuring swiftness of the process,"* thereby emphasizing the issue of information asymmetry and a lack of access to trustworthy information. Thus, the BLRC report anticipated that the creation of information utilities would enable predictability through incentivizing information gathering and dissemination. Despite the fact that the Information Utility is one of the code's ground breaking features, creditors are not effectively utilizing it, and it is still uncommon to provide relevant financial data to IUs in order to facilitate access for all stakeholders. The use of IUs is mandated by a number of case laws, observations made by the Adjudicatory Authorities ("AA"), and court rulings. But it was determined in the case of *Univalue Projects v. UOI*[13] that the mandatory filing with IU is not required considering the low stakeholder inertia. The proposition of adopting block chain technology to improve the use of IUs should be mooted. Considerably, the paid up capital for establishment of the IU should be reduced. Moreover, there should be a gentle push to motivate many private players to come into this industry.

iii) Adjudicating Authority (AA)

The stakeholder community thought a time frame of 180 days with a potential extension of 90 extra days

[12] Neeti Shikha, We must rethink the insolvency ecosystem before it loses appeal, 20-06-2022, Available at: https://www.livemint.com/opinion/online-views/we-must-rethink-the-insolvency-ecosystem-before-it-loses-appeal-11655743058539.html

[13] Univalue Projects Pvt Ltd v Union of India, W.P. No 5595 (W) of 2020.

was optimistic at the time the IBC was first enacted. In reality, the average resolution time in the IBC was around 400 days. It differs from the intended timelines but is still far superior to other previous insolvency mechanisms. It is expected that as time passes, these timelines will become even shorter. The executive difficulties were unaccounted for and not practically thought through when this legislation came into effect. Indian courts are notorious for their backlog of cases. One of the IBC's adjudicating authorities is the NCLT, which also has the same problem. The dearth of competent judges in the judicial infrastructure is also worrisome. There is a substantial delay in the transfer of assets due to legal complications in the admission of cases. Moreover, the *Vidharbha Judgment* opened a Pandora's Box, whereby the adjudicating authorities are permitted to accept or reject the admission by application of their judicial wisdom. Overall, these delays can be attributed to factors like infrastructure, the nature of the cases (particularly the multidisciplinary approach in insolvency matters), and delay in appointments of vacancies. To alleviate this problem, the Ministry of Law and Justice should take proactive actions in filling vacancies. The authors offer the creation of specialized IBC benches consisting of members with the requisite acumen and, for the time being, establish circuit benches as a potential remedy.

iv) Insolvency and Bankruptcy Board of India (IBBI)

The IBBI's main objective is to use all of its legislative, executive, and adjudicative authority to make sure that India's bankruptcy system functions as the BLRC intended. These include high NPV recovery rates, short timelines, comprehensive coverage of the broadest possible class of claims, and ultimately establishing a widespread belief among those in the economy that India's bankruptcy procedure is efficient and effective. On the other hand, there exists an allegation from the insolvency professionals on the account of frequent and stringent measures taken by the board vide a wide array of notifications. Frequent change in the system results in an uncomfortable resistance for adaptation among professionals. Numerous disciplinary committee proceedings prove the strict view taken by the board over the working professionals. The modus operandi of the insolvency profession should be let out to be regulated by the market to a greater extent, instead of the board.

FINANCING DURING CIRP:

Maintenance of the corporate debtor as a "going concern" and carrying out quality CIRP requires financing. The authors explore the concepts of interim financing and litigation financing in this chapter.

i) Interim Financing

The code envisages an insolvency professional raising interim finance during the CIRP process to ensure that the operations of the corporate debtor (CD) remain a going concern and meet the costs involved during the CIRP. The Insolvency and Bankruptcy Code has given interim financing, including accrued interest, a higher priority status than all other creditors' debts because it is seen as a necessary expense for resolving corporate insolvency and is given priority over other creditors. Interim finance is treated as *"Pari Passu"* to the resolution professional's fees. Since there are fewer parties offering interim financing, funds are issued at interest rates that are higher than the market rate. Lenders are eligible for interest payments even after the liquidation process has begun, and they also get preferential treatment during it. Interim financing appeals to potential lenders primarily because of its high level of security, low long-term interest rates, and top priority during repayment.

ii) Litigation Financing

A predetermined sum of money known as "litigation funding" will be used to cover the cost of attorneys' fees and other costs. These litigation funds, anticipating contentious legal proceedings, provide funding for litigation expenses and profit from the proceedings. Devoted financiers see litigation funding as a component of new business opportunities. These financiers may benefit from the avoidance transaction claims in CIRP because the claims can be separated from the CIRP progress independently. Such litigation funders usually have their own risk assessment team that does risk assessments for their investments. In addition to providing financial resources, there are other advantages associated with litigation funding. In the United Kingdom, the entry of litigation funding has built a reputation that their mere entry signals to a tribunal and the defendant that an investment expert is ready to put in its own money, thereby supporting the claim.

"The biggest challenge that litigation funders might face is when they make upfront payments against the

claims. Besides the risks of non-recovery of the claim, they could also be subject to scrutiny where there are windfall gains against such claims. A way to resolve such issues could be to provide in the agreement with the IP, a clause that some benefit be passed on to the creditors or the CD in cases where the recovery is substantially more than the initial pay out to creditors."[14]

Interim financing has benefits, but the market for raising it is not readily available. India has a long way to go before realizing the full potential of such funding. Many stakeholders, however, are taking this very seriously in order to cover the litigation costs associated with claim payment. A solid business plan can pique potential investors' interest in the venture. With the implementation of the IBC, jurisprudence on a wide range of issues has emerged in a relatively short period of time. We are not far behind when it comes to better ways to pay for legal expenses, particularly for IBC avoidance proceedings. This could lead to better outcomes in the avoidance proceedings, increasing the value of the CD and furthering one of the IBC's goals.

Futuristic start-ups like Legalpay[15] are creatively exploiting such investment avenues in India. Such investment models need to encouraged and popularised.

CODE OF CONDUCT FOR COMMITTEE OF CREDITORS:

The UNCITRAL legislative guide on insolvency law provides, *"It may be desirable, however, for an insolvency law to require committee members to act in good faith in carrying out committee functions and to provide that members of the committee would be immune from liability in respect of actions and decisions taken by them as members of the committee, unless they are found to have acted fraudulently or wilfully or to have breached a fiduciary duty to the creditors they represent,"*[16] such as taking advantage of confidential information received as a committee member. The Parliamentary Standing Committee on Finance report stated that *"there is an urgent need to have a professional code of conduct for the Committee of Creditors (COC) that will define and circumscribe their decisions, as these will have larger implications for the efficacy of the code."*[17] *The working group of the Insolvency Law Academy (ILA) proposes "a voluntary code of conduct of the COC comprising best practices; a mechanism for independent, periodical assessment of the performance of the members of the COC against the code of conduct; and incentives for higher standards of performance and disincentives for non-observance"*[18]. If seen closely, while other components of the insolvency ecosystem, such as insolvency professionals, are regulated, CoC functions in an unregulated environment. It is suggested by the authors that a code of conduct be implemented in order to increase the COC's accountability and responsibility. It is to be noted that the utmost freedom to commercial wisdom of CoC risks yielding in non-reasonable judgments. However, such code of conduct cannot be statutorily regulated, for it may contribute to litigation, which might in turn affect the timely resolution of cases. Instead, it should enacted comprising a Statement of Standards and best practices.

PRACTICAL RESTRICTIONS IN RESOLUTION PLANS:

"Law is not to provide guidance or limit the range of solutions that the creditors could come up with to turnaround a business"[19] In other words, the BLRC considered that the methodology of resolution should be a judgement of market participants and there should be no constraining by law on the same. It is further noted in the report that these methodologies would evolve over time and space in a dynamic manner. Initially, only regulation 37 and 39 of the CIRP were present, which provided for a list of actions done through a resolution plan and other features of the plan, respectively. Thereafter, many amendments and judicial precedents came, which restrictively added

[14] Debajyoti Ray Chaudhuri & Radhika Agarwal, Litigation Funding: A breakthrough for avoidance proceedings under IBC, Available at: https://ibbi.gov.in/uploads/resources/7e99c866b866e02fa7b8549752e55914.pdf

[15] https://legalpay.in/

[16] UNCITRAL Legislative Guide on Insolvency Law, United Nations, Available at: https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law

[17] C.K.G Nair & M.S. Sahoo, A code for the committee of creditors, Available at: https://www.business-standard.com/article/opinion/a-code-for-the-committee-of-creditors-122011301511_1.html

[18] Code of Conduct for Committee of Creditors, Draft report by Working group of Insolvency Law academy, 03-12-2022. Available at: www.insolvencylawacademy.com

[19] Report on the Bankruptcy Law Reform Committee, 2015, Vol I.

more compliance and guidance for the resolution plans submitted under the IBC. Majorly, two types of resolution plans were followed. The first type is where the resolution applicant, either by itself or through a special purpose vehicle, buys the majority stake in the CD through acquisition. Otherwise, the CD is merged with the Resolution Applicant. Most of the resolution plans under IBC can be brought under this umbrella with a few tweaks. Nevertheless, the scope of possibilities for resolution should not be constricted to only these two types. Paving the way for the BLRC report's idea of allowing varied possibilities for resolution, other methodologies such as "turnaround to sell" and "group insolvency" should also be deliberated and given structure. Critically, sufficient attention is not given to the implementation of the resolution plan after the AA's approval. Constitution of a monitoring committee has been a commercial decision but the authors propose that a legal framework shall be put forth statutorily where the committee consists of one member appointed by the resolution applicant and one by the committee of creditors.

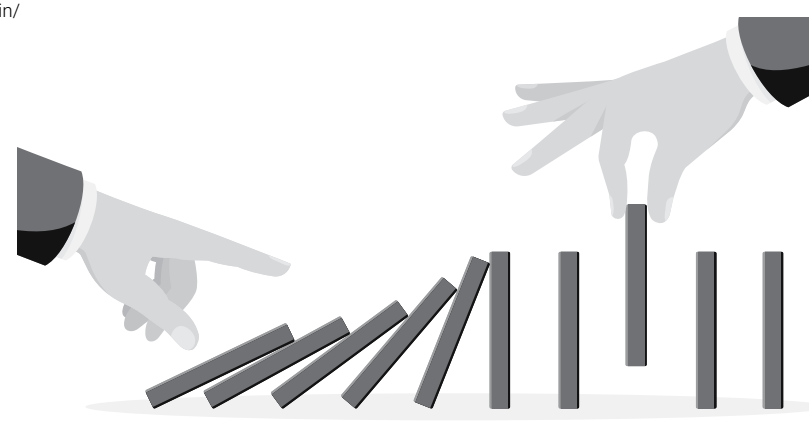
MARKETABILITY OF DISTRESSED ASSETS

In India, selling distressed businesses is difficult because of their complexity and low visibility. According to the Reserve Bank of India's (RBI) Financial Stability Report, 2019, the gross non-performing assets ratio was 9.3%, indicating that the distressed asset market in India has significant potential. As a result, it is essential to develop a one-stop website where investors can learn about potential firms and assets that satisfy their investing needs in any particular industry. The website can be created similar to that of InvestIndia[20] (Government of India) for specifically dealing with stressed assets. The website should have filters like debt size, location, sector, etc. By and large, Indian players should be encouraged to participate in such distressed markets.

WAY FORWARD

The World Bank's Insolvency Resolution ranking drastically dropped from 108th to 52nd place in the entire world due to the enactment of IBC. This reflects a paradigm shift in how distressed businesses are perceived in India, where a variety of creditors now have faith in the IBC regime. India's credit market has evolved over several decades and has constantly fought against weak recovery processes and politicized lending. The Insolvency and Bankruptcy Code, 2016 provided a revolutionary manner of resolution whereby the traditional "debtor-in-possession" model was replaced by the "creditor-in-control". However, there are leakages and bottlenecks, such as insufficient court capacity and a weak documentation management system. In parallel, there have also been a number of amendments to the IBC and the CIRP regulations aimed at fine-tuning the conduct of CIRP and addressing practical challenges on the ground. Nevertheless, with the entry of new classes of creditors and the mushrooming of new models of business, the adjoining legal framework must also evolve to cater to the needs and wants of the economy. The four pillars need to be strengthened and renovated periodically. Moreover, the chasm between the letter of the law and practice should be adequately bridged by adopting a pragmatic approach, so that IBC will stay relevant in any given time and space as a viable restructuring and resolution tool.

[20] https://www.investindia.gov.in/



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CUSTOMS DUTY DUES ARE OPERATIONAL DEBT UNDER IBC– SUPREME COURT

The Customs authorities can only assess the value of goods and the levy of custom duty thereon and submit its claim (operational debt in terms of IBC law) as per the procedure and time lines prescribed under the IBC Code before the adjudicating authority. On the other hand, the interim resolution professional or resolution professional or liquidator, as the case may be, can secure goods from the Customs authorities to be dealt with appropriately under the IBC Code.

In *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs (2022) 381 ELT 731; (2022) 8 TMI 1161; (2022) 141 taxmann.com 471 (Supreme Court),* dated 26.08.2022, the insolvency professional (Interim Resolution Professional and Liquidator) of corporate debtor, M/s ABG Shipyard Ltd. filed an appeal before the Supreme Court against the order of National Company Law Appellate Tribunal (NCLAT) to restrain the indirect tax authorities from recovery of tax dues on the basis that the IBC Code, 2016 over rides the provisions of the Customs Act, 1962.

Factually, ABG Shipyard Ltd. was engaged in the business of ship building and used to regularly import and warehouse goods in the Custom bonded warehouses prior to initiation of corporate insolvency proceedings against it in August, 2017 and the present appellant was appointed as an interim resolution professional (IRP) on 01.08.2017. The NCLT also declared a moratorium under section 13(1)(a) of the IBC.

The corporate debtor used to import various materials for the purpose of constructing ships which were to be exported on completion. Some

of these goods were stored by the Corporate Debtor in Custom Bonded Warehouses in Gujarat and Container Freight Stations in Maharashtra. Bills of entry for warehousing were submitted at the relevant time.

While the Customs office was informed of CIRP in August, 2017 itself with request not to dispose of or auction the goods, the Customs authorities issued notice to company in 2019 of non-fulfillment of export obligations and demanded over Rs. 17 lakh with interest.

On 25.04.2019, the NCLT passed an order commencing liquidation against the Corporate Debtor under Section 33(2) of the IBC. Vide the said order, the NCLT declared that the earlier moratorium imposed under Section 13(1)(a) of the IBC shall cease to have effect by the operation of Section 14(4) of the IBC. However, a fresh direction was passed under Section 33(5) of the IBC barring the institution of any suit or legal proceeding by or against the Corporate Debtor. Further, the NCLT also appointed the appellant as the liquidator.

The respondent tax authorities filed claims before the appellant for goods warehoused in both Gujarat and Maharashtra in May, 2019 under the IBC. On 27.06.2019, the appellant informed the respondent through its officers that liquidation proceedings had commenced against the Corporate Debtor and that the goods were to be released to the appellant. Due to inaction by the respondent, the appellant filed application before the NCLT under Section 60(5) of the IBC seeking a direction against the Respondent to release the warehoused goods belonging to the Corporate Debtor on 01.07.2019.

For the first time on 11.07.2019, the Customs Authority issued a notice to the Corporate Debtor under Section 72(1) of the Customs Act for custom dues amounting to Rs. 763,12,72,645/- on 2531 Bills of entries. It also filed a concurrent claim for the said amount before the appellant under the IBC.

The NCLT allowed the application filed by IRP and considered Section 238 of the IBC and held that the non-obstante clause in the IBC, being part of a subsequent law, shall have overriding effect on proceedings under the Customs Act. Further, looking to the waterfall mechanism under Section 53 of the IBC, the NCLT held that distribution of proceedings from sale of liquidation of assets shall also prevail over the Customs Act provisions. The NCLT held that, as Government dues, the claims by the respondent would have to be dealt with in accordance with Section 53 of the IBC.

The Customs authority filed an appeal before NCLAT challenging the NCLT order on 22.11.2021, the NCLAT passed the impugned order, whereby it allowed the appeal filed by the respondent and set aside the directions of the NCLT requiring the respondent to release the warehoused goods to the possession of the appellant without seeking the custom dues. The NCLAT rather directed that the warehoused goods can be 'released or disposed of as per Applicable Provisions of Customs Act by the Proper Officer'.

The NCLAT, in allowing the appeal held that the goods lying in the customs bonded warehouse were not the Corporate Debtor's assets as they were neither claimed by the Corporate Debtor after their import, nor were the bills of entry cleared for some of the said goods. By not filing the said bills of entry, the NCLAT held that the importer, i.e., the Corporate Debtor, had relinquished his title to the imported goods. The NCLAT held that the Corporate Debtor is deemed to have lost his title to the imported goods by action of Sections 48 and 72 of the Customs Act. As such, the respondent is empowered to sell the goods and recover the government dues.

The NCLAT held that 'imported goods', which are subject to levy of Customs, stand on a different footing as payment of customs duty is a consequence of importing the goods rather than a liability on the Corporate Debtor to pay it. The appellant cannot stand at a better footing than the Corporate Debtor that he represents and cannot take possession of assets which the Corporate Debtor itself could not have obtained. Customs duty therefore needs to be paid for the release of the warehoused goods.

Further, NCLAT held that the Customs Act is a complete Code which provides that warehoused goods cannot be released until the import duties are paid. Mere filing of claims under 'Form C' by the respondent before the appellant cannot be taken to signify the relinquishment of the right of the respondent over the warehoused goods.

On the issue of priority of IBC over the Customs Act, the NCLAT held that the issue did not arise in the present case, as the goods in question were imported prior in time to the initiation of the CIRP. While the

containers were imported between 2012 to 2015, the CIRP was initiated only in 2017 and the Corporate Debtor went into liquidation in 2019. By not paying the import duties, the Corporate Debtor had lost the right to the warehoused goods prior to the initiation of the CIRP. The NCLAT held that these warehoused goods stand on a different footing and cannot be considered assets of the Corporate Debtor which were subject to the IBC provisions.

The appellant (Resolution Professional) filed civil appeal before the Supreme Court against grant of custody of warehoused goods to Customs Authorities by the NCLAT. The question before Apex Court was to decide as to whether the IBC Code, 2016 will override Customs Act, 1962 or ***vice versa*** if there is any conflict between the two enactments.

The liquidator- insolvency professional submitted before Apex Court that:

a) Corporate debtor is the owner of goods.

b) The Corporate Debtor has not lost ownership of the goods as alleged by the respondent. The respondent, by issuing notice under Section 72 of the Customs Act and filing its claim with the liquidator, has admitted that the Corporate Debtor was the owner. Neither Sections 72 nor 48 of the Customs Act signifies any transfer to the respondent.

c) By submitting claims under Section 38 of the IBC, the tax authority has elected to subject its dues to be governed by IBC, and more specifically, to the distribution matrix provided Section 53 of the IBC.

d) The tax authority could not have exercised its right under the Customs Act, as the statutory charge of the respondent under Section 142A of the Customs Act is expressly subordinate to the IBC.

e) The tax department's custody of the Corporate Debtor's goods is in violation of Sections 14 and 33 of the IBC. Section 14(1)(a) of the IBC expressly prohibits the institution or continuation of proceedings against the Corporate Debtor during the moratorium period. Further, Section 14(1)(c) states that foreclosure, recovery, or enforcement of any security interest against the Corporate Debtor is prohibited.

On the other hand, respondent Customs authority contended that :

a) The goods left in the Custom Bonded Warehouse are not the assets of the Corporate Debtor because these goods were never claimed after being imported.

b) Despite receipt of various demand notices by the respondent, the Corporate Debtor did not clear the goods and hence the same are liable to be sold by the respondent under the Customs Act.

c) The liquidator can take into his possession only the assets of the Corporate Debtor as under Section 35(1)(b) of the IBC. The warehoused goods cannot be termed as assets of the Corporate Debtor, until and unless the same are legally cleared from the warehouses upon payment of relevant dues and duties.

d) Section 45 of the Customs Act lays down restrictions on custody and removal of imported goods.

e) The goods cannot be removed without payment of import duties and charges.

f) The Corporate Debtor has abandoned the imported goods for several years, refused to pay the import duties and other charges, and has not taken any effort to take possession of the goods for several years.

g) Customs duty is an incidence or consequence of import. Even before the CIRP was initiated, the Corporate Debtor could not have secured the possession of the warehoused goods without paying the due charges. Hence, the liquidator, representing the Corporate Debtor, cannot stand on a better footing than the Corporate Debtor itself.

h) Merely because the respondent had filed its claim before the liquidator, it cannot be said that the respondent had relinquished its rights over the warehoused goods. The claim was filed by the respondent only to realize its dues, and hence cannot be viewed as a relinquishment or abandonment of its rights.

The moot issues before the Apex Court was to answer the following :

(a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?

(b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

In the instant case, the warehoused goods belonging to the Corporate Debtor which is under liquidation were sought to be sold by the Customs Authorities in lieu of custom dues and had relied on certain provisions of the Customs Act to assume such power.

The Customs Act, 1962 and the IBC Act, 2016 in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to ascertain as to whether there is a conflict in the operation of two different statutes in the given circumstances. The court is mandated to harmoniously read the two legislations, unless this Court finds a clear conflict in its operation.

The Apex Court noted that IBC Code, being a more recent law shall clearly override the Customs Law. The Apex Court observed and held that the IBC would prevail over the Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC, as the case may be. The respondent authority only has a limited jurisdiction to assess/ determine the quantum of customs duty and other levies. The Customs Authority does not have power to initiate recovery of dues by means of sale / confiscation, as provided under the Customs Act. Further, tax authorities does not have the power to initiate recovery of dues by means of sale / confiscation, as provided under the Customs Act.

The Apex Court observed that in the present case, the Corporate Debtor as part of its business used to regularly import and warehoused goods in the custom bonded warehouses from at least 2011. As has already been mentioned above, the CIRP process commenced against the Corporate Debtor on 01.08.2017 by the order of the NCLT. It appears from the record that no notices were issued by the respondent against the Corporate Debtor with respect to the warehoused goods prior to initiation of the CIRP. In fact, all the duty demand notices issued by the respondent were from March 2019 onwards. Therefore, it was necessary for the court to ascertain whether the IBC overrides the Customs Act or vice versa.

Insolvency and Bankruptcy Code came into force in India from 28.05.2016 to combine provisions relating to insolvency found across different statutes into a single comprehensive instrument. Under the earlier legal regime, different statutes were resulting in multiple parallel proceedings, which inevitably resulted in uncertainty for the creditors over their recovery. One of the objectives behind the enactment of the IBC was to end the conflict between different statutes.

The purpose behind insolvency law has been captured in Halsbury's Laws of England (para 8, vol. III, 4th edition) in the following manner:

"A man has a perfect right, so long as he is solvent, to continue a losing business; but the moment he becomes insolvent he does so at the risk of his creditors. As soon as he finds that he cannot pay loop in the pound, although he may nevertheless think that if he goes on he may be able to retrieve his position, he ought to call together his creditors, who will have to bear the loss in case his calculations are wrong, and leave them to determine whether the business shall be continued or not. Moreover, it is not enough to consult only the largest creditors. There is no insolvency within the meaning of this offence if a careful, prudent, and unhurried realization of the assets would produce enough to pay loop in the pound on the amount of liabilities."

When the insolvency process commences, the adjudicating authority is mandated to declare a moratorium on continuation or initiation of any coercive legal action against the Corporate Debtor.

The Apex Court further observed that Insolvency and Bankruptcy Code came into force in India from 28.05.2016 to combine provisions relating to insolvency found across different statutes into a single comprehensive instrument. Under the earlier legal regime, different statutes were resulting in multiple parallel proceedings, which inevitably resulted in uncertainty for the creditors over their recovery. One of the objectives behind the enactment of the IBC was to end the conflict between different statutes.

One of the motivations of imposing a moratorium in terms of section 14(1)(a), (b), and (c) of the IBC to

form a shield that protects pecuniary attacks against the Corporate Debtor. This is done in order to provide the Corporate Debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself. Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved. The IBC, being the more recent statute, clearly overrides the Customs Act. This is also clearly made out by a reading of Section 142A of the Customs Act.

Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process.

Further, Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC. Section 238 of IBC provides 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."*

It was held that the respondent tax authorities under Customs Act could only initiate assessment or reassessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.

The NCLAT, while playing down the effect of Section 142A of the Customs Act and Section 238 of the IBC, has held that the Customs Act is a complete code in itself and no person can seek removal of goods from the warehouse without paying customs duty. The NCLAT relied on the judgment in Collector of Customs v. Dytron (India) Ltd., 1999 ELT 342 Cal., by the High Court of Calcutta, which laid down that customs duty carry first charge even during the insolvency process under Section 529 and 530 of Companies Act, 1956. However, reliance on the said precedent is not appropriate as the NCLAT has failed to notice that such interpretation has been legislatively overruled by the inclusion of Section 142A under the Customs Act, through Section 51 of the Finance Act of 2011.

Thus, the Customs Act and the IBC act in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to ascertain as to whether there is a conflict in the operation of two different statutes in the given circumstances. As the first effort, Court is mandated to harmoniously read the two legislations, unless the Court finds a clear conflict in its operation.

Apex court formed a view that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be complete unless this Court examines the extent of powers which the respondent authority can exercise during the moratorium period under the IBC.

Apex Court in *SV Kondaskar v. V.M. Deshpande (1972) AIR 878 (SC),* held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. This ratio squarely applies to the interplay between the IBC and the Customs Act in this context.

Thus, that the respondent could only initiate assessment or reassessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.

The Customs Act and IBC can be read in a harmonious manner wherein authorities under the Customs Act have a limited jurisdiction to determine the quantum of

operational debt – in this case, the customs duty – in order to stake claim in terms of Section 53 of the IBC before the liquidator. However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in line with the ruling in Gujarat *Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209,* wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential encroachment on the legitimate jurisdiction of other authorities. The NCLAT has misinterpreted the aforesaid judgment of Apex Court in Gujarat Urja Vikas Nigam Case.

It ignored the fact that there was no "abandonment of goods" which would authorize the Customs Authorities to initiate the adjudicatory process to transfer title to themselves. Before any goods can be declared to have been "abandoned", the same must be adjudged by some authority after due notice. The position cannot be assumed or deemed. There is no such adjudication or notice has been placed on record to suggest that such abandonment of the warehoused goods had taken place prior to the imposition of the moratorium.

The NCLAT clearly ignored the mandate of Section 72(2) of the Customs Act relating to sale. This interpretation of the NCLAT clearly ignores the effects of the moratorium under Sections 14 and 33(5) of the IBC. The fact is that the duty demand notice and notice under Section 72(2) of the Customs Act, were issued during the moratorium period, which has been completely ignored by NCLAT and has resulted in rendering the moratorium otiose.

The Apex Court in this judgment also portrayed the inconsistency between the Customs Act, 1962 and IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was issued by the respondent under Section 72 of the Customs Act, in clear breach of the moratorium imposed under Section 33(5) of the IBC. Issuing a notice under Section 72 of the Customs Act for nonpayment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of IBC.

The Apex Court therefore, answered the issues as follows:

(a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?

The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/ confiscation, as provided under the Customs Act.

(b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

The respondent could not claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated.

The Apex Court thus, concluded as follows:

(i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

(ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.

(iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC.

The Supreme Court therefore, allowed the appeal and set aside the impugned order of NCLAT.

Er CMA IP Rajendra D Aphale

AMENDMENTS TO IBBI (LIQUIDATION PROCESS) REGULATIONS SEPTEMBER 2022

In September 2022, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 were amended. This article examines the major amendments and their potential impact on liquidation of corporate debtor.

The objectives of the amendments are stated to be (Ref - PIB Delhi announcement on 20/Sep/2022)

a. **To enable better participation of stakeholders**
b. **Streamline liquidation process to reduce delays, and**
c. **To realize better value**

A. ENABLE BETTER PARTICIPATION OF STAKEHOLDERS

Regulations amended in June 2019 introduced the concept of Stakeholder Consultation Committee (SCC). Prior to that, there was no significant participation of stakeholders in liquidation. While in Corporate Insolvency Resolution Process (CIRP), the Committee of Creditors (COC) is in driver's seat, in Liquidation, the liquidator was and largely still is, in the driver's seat.

While composition of SCC was defined in 2019 amendments,

i. **The SCC was to be formed within 60 days of commencement of Liquidation.**

ii. **There were no specific provisions relating to conducting meetings etc**

iii. **The role of SCC was advisory, and not binding on the Liquidator.**

As it can be seen, in the first 60 days there was no SCC in the past. As the Liquidation process is time bound and has only one year to complete the process, the decisions must be taken at breath neck speed and a lot of decisions and actions must happen within the first 60 days.

Reg 31A was inserted in 2019 and has been amended in Sep 2022. Accordingly, the SCC will now advice the liquidator on the matters of remuneration of professionals (appointed under reg 7); sale under Reg 32, including manner of sale, pre bid qualifications, reserve price, marketing strategy and auction process; fees of the liquidator, valuation under 35(2); and the manner of proceedings under avoidance; and fraudulent or wrongful trading transactions after the closure of liquidity proceedings, and the manner of distributing any proceeds from such transactions. The last one was an open issue and the only recourse was guidance from Adjudication Authority (AA).

The Sept 2022 amendments provide that the COC that is formed during CIRP will function as SCC for the first 60 days of Liquidation phase. We may note that COC is formed as per the provisions of Section 21, and consists of primarily Financial Creditors (FC) and have voting power in proportion to their admitted claims. COC includes operational creditors only if the Corporate Debtor (CD) has no Financial Creditors (FC) or all FCs are related parties. SCC, on the other hand includes all stakeholders. The composition of SCC is amended in Sept 2022. Earlier, there was no provision of voting in SCC meetings. Now, there are provisions relating to voting hence the question of vote share arises. The vote share is defined to be in proportion to the claims admitted. This is additional activity to the liquidator, to keep calculating vote shares, based on admitted claims as the amounts may keep changing based on the evidences provided and directions by AA. Though theoretically the claim admission process should conclude within T+60 (T= liquidation commencement date), in reality it is difficult to achieve it.

In terms of constitution, the COC included all financial creditors, and they have voting power proportionate to their admitted claims. SCC, however is constituted based on categories of creditors, and the liquidator is expected to facilitate the same. Presumably, other provisions relating to class of creditors and their representation will apply. One representative representing multiple creditors may have to vote differently depending on the instructions of the creditors he may represent. It is observed that large creditors would like to represent themselves, as their stakes are high. It is also noted that though shareholders are part of the SCC, they have no claims, and hence by default cannot have voting power.

Secured creditors who have not relinquished their securities will not be a part of the

First meeting of the SCC must be held within 7 days of liquidation commencement date (Reg 31A(6)). For subsequent meetings there is no time or frequency specified, and the liquidator may convene SCC meetings based on the need, on a request from one or more members of the SCC. For conducting meetings, Reg 18 to 26 of the CIRP regulations will apply mutatis mutandis, as provided in Reg 32B.

As it can be seen, SCC has a larger representation of all stakeholders, including operational creditors, employees, and shareholders. The liquidator is expected to facilitate nomination of representatives for participation in the SCC (Reg 31A(3)). If stakeholders in any class fail to nominate, such representatives shall be selected by majority of vote in that class of stakeholders (Reg 31A(4)). This is additional activity, and potential to raise issues. In short, the responsibility and activity of the liquidator increases and more and more people will watch and have a say in his remuneration.

In the earlier provisions, the shareholders, and creditors that are related parties had no presence at all. In the Sept 2022 amendments they have a representation, though no voting power (Proviso to Reg 31A(2)).

SCC now steps in the shoes of the COC, though with limited powers. SCC has a very significant power that they can recommend to change the Liquidator, by a vote of 66% and then filing an application with the AA.

Liquidator now has to present agenda to SCC on various matters including fees of the liquidator, fees of professionals, fresh valuation, and avoidance proceedings after closure. The SCC shall advice

the Liquidator by a vote of not less than 66% of the representatives of the SCC voting (Reg 31A(9)).

SCC is a consultation committee. The advice of the SCC is not binding on the Liquidator. In the amended provisions, if the decision of the Liquidator is at variance with the SCC recommendation, the Liquidator has to file a report within 5 days, to AA and Insolvency and Bankruptcy Board of India (IBBI), and also include this report in the next (quarterly) Progress Report as per Reg 31A(10).

Fees of the Liquidator is an important issue. The COC is expected to fix these fees in the meeting they recommend liquidation of the Corporate Debtor (CD), under Regulation 39D of CIRP Regulations. If they have not done it, the SCC may fix it in its first meeting.

B. STREAMLINE PROCESS

i. Compromise and Arrangement Regulation 2B provided for 90 days to arrive at completion of Compromise or Arrangement. This was impractical. The amendment now states that - Wherever COC decides, under regulation 39BA(1) of CIRP Regulations, that process of compromise or arrangement may be explored; the liquidator shall file application (only in such cases) before AA for considering the proposal of compromise or arrangement, if any, within thirty days. The issue therefore will be kept open, under supervision and guidance of the AA.

ii. Minutes of meetings with SCC are to be filed along with the quarterly Progress Reports to AA and IBBI, as per the amended Reg 15. The format is to be stipulated by the IBBI.

iii. An explanation has been added to Reg 21A relating to presumption of security interest. This refers to the communication about relinquishing security interest and presumption with reference to it. The explanation states that the requirements of this Reg 21A apply to liquidation processes commencing on or after the date of the amendment regulations of 2019, that is after 25/07/2019.

iv. Reg 32A(4) – newly inserted, states that sale of assets of the CD as a going concern can be done only under the first auction.

v. Timelines for auction events have now been specified (Schedule I- Mode of Sale, amendments 1A to 1F). They are –

   a. The first auction notice must be issued within 45 days from the liquidation commencement date

   b. In case of failure of auction, the notice of second auction must be issued within 15 days of a failed auction, unless SCC extends this time line stating reasons.

   c. Auction process must be completed within 35 days from the date of issue of public notice for the auction

   d. Prospective bidders will have minimum 14 days to submit eligible documents

   e. Qualified bidder will get at least 7 days for inspection or due diligence of assets, from the date of declaration of qualified bidder. (blanket 7 days may be difficult to follow, particularly if the CD has many assets spread out over multiple locations, but the time stated here is minimum and the SCC and the liquidator can provide more time).

   f. Prospective bidder shall deposit EMD at least 2 days before the date of auction.

   If the first auction notice was in respect of sale as going concern only, then the second auction notice shall include sale of assets in other manner as well.

vi. Schedule I (7) states that the liquidator shall sell the assets only through an electronic auction platform empanelled by the IBBI. This will be from a date to be notified by the IBBI.

vii. Asset Memorandum (AM) – earlier provisions stated that the AM should be prepared within 75 days of commencement of liquidation. Amended provisions (Reg 34) state that AM should be prepared within 30 days if the valuation carried out during CIRP (information from Information Memorandum or IM) is being considered. If not, the time limit of 75 days applies.

   There was no provision to share the AM with the SCC members. This provision has now been made in the Sep 2022 amendment. The AM can

be shared with stakeholders (members of SCC) after taking confidentiality undertaking (Reg 24(5)).

viii. Claim submission – it was often found that many creditors have filed claims during CIRP but they did not file claims during Liquidation (perhaps being unaware of the announcement or of the procedure. As per the Sep 2022 amendments –

If any claim is not filed during liquidation process, then claim collated during CIRP shall be deemed to be submitted for the purpose of section 38 of Code.

Further, the Liquidator shall verify all claims (claims submitted during liquidation as well as claims collated during CIRP but not submitted during liquidation). Amendment to Reg 30 states that the liquidator shall also verify the claims collated during the corporate insolvency resolution process but not submitted during the liquidation process, within thirty days from the last date for receipt of claims during liquidation process.

This adds to the work considerably as the claim amounts will have to be updated to calculate the claim as of the date of commencement of liquidation. Also the number of claims can be large, particularly for a manufacturing company involving large number of workmen.

ix. A helping provision has come in that the process email id shall be handed over to the liquidator from the RP (or from a liquidator to another liquidator, if the liquidator is replaced). This email id is to be created by the IRP in accordance with Reg 4C if CIRP Regulations, which state that The interim resolution professional shall open an email account and use it for all correspondences with stakeholders and in the event of his replacement by a resolution professional, shall handover the credentials of the email to him; and the resolution professional shall, in case of his replacement with another resolution professional or a liquidator, hand over the credentials of the email to the other resolution professional or the liquidator, as the case may be.

The liquidator is expected to operate this email id. Earlier, at times, in absence of co-ordination it was difficult for the Liquidator to figure out what happened during CIRP.

x. Now, a consent form for acting as a liquidator has been provided, form AA of Schedule II, in case of replacement of the liquidator; to be submitted to the AA, by SCC seeking replacement of the liquidator.

xi. Reg 44A, newly inserted puts the onus on the liquidator to provide for the manner in which proceedings in respect of avoidance transactions, or fraudulent or wrongful trading will be pursued after closure of liquidation proceedings. This will be provided for under advice of the SCC, and will be filed along with the final report filed under Reg 45. It may be worth noting that outcome of avoidance transactions must go to the creditors of the CD (63 Moon Technologies V Administrator of Dewan Housing Finance 2022 95 NCLAT– case relating to insolvency resolution, stating the proceeds belong to the creditors).

Question arises as to who will pursue the matter of avoidance and such other transactions after closure, as the job of the liquidator is over with closure. It is suggested that the liquidator may convene a meeting of SCC for this purpose and hand over the matter to creditors or their representative. As the creditors will be receiving the proceeds of these transactions, if any, they may appoint a representative for this purpose to pursue the matter.

xii. Preservation of records Reg 45A, newly inserted provides for a list of documents (minimum) to be preserved. This regulation also provides for the time period – relating to the liquidation process - 3 years in physical form and 8 years in electronic form. Responsibility of record keeping is with the liquidator. In case of general records of the CD – the records have to be preserved as per the Companies Act – by the liquidator or if the CD is sold as a going concern, then the buyer has to keep the records.

Overall, there are efforts to empower SCC without adversely affecting liquidator's powers; streamline liquidation process and remove difficulties faced during the liquidation stage. Only time can tell to what extent they help the main objectives of the Code.

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COMMITTEE OF CREDITORS & CONFLICT OF INTEREST

Committee of Creditors is the pillar of decision making in the resolution process under IBC.

Through catena of decisions prominent among them being ***COC of Essar Steel Limited Vs. Satish Kumar Gupta & K. Sashidhar Vs Indian Overseas Bank***, it has been clarified by the apex court that COC is the supreme body and the adjudicating authority should not interfere with the decision arrived at by this body unless there is violation of legal principles. All this is based on the presumption that COC is under fiduciary duty to take care of the interest of all the stakeholders while arriving at their decisions. However, it has been observed that COC consists of mostly secured creditors, i.e. banks/FI that have lent money against the security of the various assets of the promoters and the corporate debtor. The other stakeholders consisting of operational creditors can become a part of COC only if their admitted claims are > 10% of the total admitted claims and in that case also, a representative of all the operational creditors will be participating in the CIR process. The submission of claims and their acceptance by the Insolvency Professional is a process that becomes long and tardy for the operational creditors due to continuous performance of various contracts and it has been observed that by the time, the COC is formed, the claims of the operational creditors are rarely admitted and their participation in the whole process is delayed. Since, the decision taken by the COC formed without the participation of the OC is not revisited even after their admission into the COC, the probability of influencing the resolution by the OC is very meagre. This leaves the CD totally in the hands of the secured financial creditors, as the IP has

been christened as gatekeeper only with no decision making powers.

In this background, the COC when driven by the secured FC only, has an inherent conflict of interest. A conflict of interest arises when an individual or organization has competing interests that could influence their decision-making, actions, or judgment. Conflicts of interest matter because they can undermine the integrity and trust of the decision-making process. When individuals or organizations have competing interests, they may be more likely to make decisions that benefit themselves at the expense of others, which can lead to ethical violations, legal liability, or reputational damage. In addition, conflicts of interest can have broader social and economic implications. For example, if a public official has a financial interest in a policy decision they are making, it could lead to decisions that benefit themselves or their associates, rather than the public interest. This can erode public trust in government and the rule of law, which can have significant long-term consequences for society as a whole. The secured Financial Creditors are interested parties as the insolvency situation of the Corporate Debtor has been the result of the participation or non participation of themselves in the working of the subject entity and moreover, the outcome of the resolution is going to effect the financial position of the Secured Financial Creditors. It is noteworthy that to prevent the conflict of interest of other participants in the CIRP, there are declarations and undertakings to be submitted by the Resolution Professional, Registered Valuer, other Professionals appointed to provide various services. Even, the Adjudicating Authority has been provided with the option to recuse herself from the hearing of application that have any direct or indirect conflict of interest. However, the same principle is not made applicable to the Committee of Creditors.

The secured creditors while providing loans to the CD are presumed to carry out the due diligence of the CD as well its assets to be mortgaged so as to cover the risks involved in financing matters. Thereafter a constant monitoring of the operations of the CD along with the assets mortgaged and created out of the proceeds of the loan need to be performed regularly so as to remain vigilant of the evolving situation of the borrowers. However, it has been seen in many cases that came under financial stress and thereafter under insolvency that due to negligence/oversight on the part of the secured creditors, the loan is disbursed without proper due diligence and monitoring is performed in a very casual manner. This results into lack of adequate security to cover the amount lent and thus in the event of insolvency, the resolution value offered by the resolution applicants is only a fraction of the total amount due from the borrower. The resolution process ending into liquidation is mainly for the entities that have borrowed working capital and due to lack of monitoring, the Insolvency Professionals find that there are either no current assets available with the Corporate Debtors in the form of Inventory or the trade debtors are hard to realise due to improper recording of their credentials. It should be noted that the Financial Creditors carry out annual review of the financial facilities granted by satisfying themselves with the stock audit and debtors report. Despite these shortcomings, the secured creditors are asked to decide upon the resolution of the stress that is the result of the negligence and/or breach of trust by themselves.

Therefore, there is no independence of the decision maker which in most cases is COC consisting of secured financial creditors from the decision of approval or disapproval of the proposed resolution plan. The resolution plan also entails the distribution of the total amount proposed by the Resolution Applicant to all the stakeholders including the non represented ones viz., Operational Creditors, Employees, Government authorities, etc. The decision arrived at by the COC is termed as wisdom of COC and considered as non questionable, while there is always a risk of unequal treatment of the competing stakeholders that were never given the opportunity to represent themselves in the whole process.

There have been various decisions by the apex court on the subject of Conflict of Interest and in one such case in **Common Cause vs Union of India (2017)** the Supreme Court directed the Government to set up a committee to formulate guidelines for prevention of conflict of interest in the Medical Council of India that used to decide upon the affiliation and operation of a medical institute for providing medical education.

The realisation of the stated fact has made the regulatory body think of putting necessary checks and balances to the unbridled powers of COC by introducing the code of conduct for the COC. However,

despite many attempts, there has not been any code of conduct to regulate the COC members. The Banks/ FI/NBFC have been vocal about being regulated by any other body than RBI. Ideally, all the parties in the insolvency process should be regulated by the insolvency regulator for the purpose of achieving resolution. Therefore, any justification of being regulated by a third party outside the process for the specific purpose of resolution or liquidation should be outrightly rejected. Incidentally, the all powerful COC is the only stakeholder that refused to be governed by the IBBI, the regulator. The other major stakeholders including CD and the IP are required to submit various information related to the CIRP with the only exception of the COC members. The COC is also absolved of providing any reasonable explanation of the decision arrived at by them while controlling most of the activities through which the decision is arrived at. It should be noted that the votes of the COC members decide the fate of the CD under resolution, however, the members of the COC are not required to provide any reason for their voting behaviour.

This seems to be a big anomaly of the whole insolvency process. In the whole process of CIRP, IP is the only neutral person, yet she has not been entrusted with the decision making power. The role of the IP has been confined to being a gatekeeper and to run the process with the consent of the COC members, who are all interested parties. In order to stay above water, the COC should have been given an advisory role, while the decisions should have been taken by the IP, however, the whole process has been reversed. The COC has been given the power to change the IP at any point and the AA does not question their wisdom. So any IP interested in protecting the hapless operational and other creditors is shown the door by the all powerful one class of creditors dominating the COC. In order to protect their positions, the IP has to side with the COC and forego the interest of other stakeholders. This creates a situation, whereby, the dissatisfaction is built into the whole process. As a result, there are multitudes of litigations resulting into the delay of achieving a timely and acceptable resolution.

The multiplicity of litigation can be resolved to a good extent if various class of stakeholders are provided the opportunity of hearing and the related matters are discussed in the COC with minutes of the proceedings recorded and the decision of the COC on all related matters is recorded with reasons that are well communicated to the stakeholders along with the recording of dissent of the stakeholders. The Adjudicating Authority should be provided with the overview of the various decisions taken by the COC along with the proportion of dissenting stakeholders so that the equanimity of the decision makers can be verified. This would not only reduce the time taken to achieve the complete resolution but also helps the resolution applicant to integrate the newly acquired entity into its existing operations in a smooth manner.

The resolution and not the recovery is the motto of IBC, where, the long term takes precedence over the short term. The secured creditors are only one of the stakeholders but in practice, they become the only stakeholders that choose the insolvency professional, set the criteria for eligible resolution applicants, negotiate with the prospective resolution applicants, vote on the resolution plans and ultimately nominate themselves into the monitoring committee. Thus, eventually, the whole process is indirectly run by the secured creditors only. The plight of the situation is that the Adjudicating Authorities have also sided with them and made the Insolvency Professional only a gatekeeper.

The Insolvency Code definitely requires an overhaul.

Judicial Pronouncements

SUPREME COURT

Case title: M. Suresh Kumar Reddy vs Canara Bank

Case no.: Civil Appeal No. 7121 OF 2022

Decision Date: 11th May, 2023

Facts:

- Respondent filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Hyderabad, Telangana against a Corporate Debtor M/s Kranthi Edifice Pvt. Ltd and NCLT by an Order dated 27th June 2022, admitted the application filed by the respondent and declared a moratorium for the purposes referred in Section 14 of the IB Code.
- In the application under Section 7 of the IB Code, the Syndicate Bank (now merged into Canara bank) stated that as on 30th November 2019, the liability of the corporate debtor under the Secured Overdraft Facility was Rs.74,52,87,564.93. The liability of the Corporate Debtor towards outstanding Bank Guarantees was Rs.19,16,20,100.
- Appellant claiming to be an aggrieved person preferred an appeal against the said Order before the National Company Law Appellate Tribunal (for short, 'NCLAT'). By the impugned judgment dated 5th August 2022, NCLAT dismissed the appeal.
- Appellant then moved the Supreme Court challenging the order of NCLAT dismissing the appeal.

Held:

- In the cases of Innoventive Industries and E.S.Krishnamurthy and others, the SC had held that in case CD commits default of financial debt, AA has to merely see the records of information utility and other evidence produced by FC to satisfy that default has occurred.

- Once AA is satisfied that the default has occurred, there is a hardly a discretion left with AA to refuse admission under section 7 of the Code.
- Even non- payment of a part of debt becoming due and payable will amount to default on the part of CD.
- The SC in the Vidarbha Industries case has held that:

> *"even though Section 7(5)(a) IBC may confer discretionary power on the adjudicating authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.*

Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt, unless there are good reasons not to admit the petition."

Hon'ble Supreme Court iterated that on the review petition observations that its decision in Vidarbha Industries case was in the setting of facts of the case and observations in the judgments are not to be read as provisions of statute. It held that,

> *"13. Thus, it was clarified by the order in review that the decision in the case of Vidarbha Industries was in the setting of facts of the case before this Court. Hence, the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries and E.S. Krishnamurthy. The view taken in the case of Innoventive Industries still holds good."*

- The Hon'ble Supreme Court dismissed the appeal

Cases Referred:

- Vidarbha Industries Power Limited v. Axis Bank Limited
- E.S. Krishnamurthy and others v. Bharath HiTecch Builders Private Limited
- Innoventive Industries Limited v. ICICI Bank and Another

Supreme Court

Case title: ***M.K. Rajagopalan Vs. Dr. Periasamy Palani Gounder & Anr.***

Case no.: SLP (Civil) No. 1682-1683 of 2022

Decision Date: 03.05.2023

Facts:

- CIRP against the corporate debtor got initiated on 05.05.2020. The resolution plan submitted by M.K. Rajagopalan was approved with 87.39 per cent. majority of voting share on 22.01.2021. However, the CoC recommended certain changes to be made in the resolution plan. After incorporating the changes as suggested by CoC, an application was moved before the Adjudicating Authority (NCLT) under Section 30(6) of IBC for approval of the resolution plan but the revised plan was not placed before the CoC. NCLT vide order dated 15.07.2021 approved the resolution plan.
- Appeals were made before NCLAT challenging the approval of resolution plan. NCLAT set aside the aforesaid order dated 15.07.2021; rejected the resolution plan so approved by the NCLT; declared the resolution applicant ineligible in terms of Section 88 of the Indian Trusts Act, 1882 and disqualified in terms of Section 164(2)(b) of the Companies Act, 2013; and issued directions to the resolution professional to proceed with CIRP from the stage of publication of Form 'G' while inviting EOI afresh as per the CIRP Regulations. The Appellate Tribunal also issued directions to the resolution professional to place the settlement proposal of promoter and erstwhile director of the corporate debtor for consideration before the CoC. The Appellate

Tribunal also directed that the claim of the related party financial/operational creditors be not discriminated from that of the unrelated financial/operational creditors.

- The aforesaid order of NCLAT was challenged before Supreme court on following counts:
  - Regulation 35 of the CIRP Regulations does not mandate sharing of the valuation report to the CoC and instead mandates only sharing of liquidation value.
  - The non-core assets were not significant in value and the valuation was communicated to and agreed upon by the members of the CoC on 15.12.2020.
  - Non-publication of Form G on the designated website was a mere procedural irregularity which did not prejudice interests of any of the parties.
  - The commercial wisdom of CoC was not justiciable and once the CoC had approved the resolution plan by the requisite majority, there was very limited scope of interference by the Courts.
  - The Appellate Tribunal has overstepped its jurisdiction by declaring the resolution applicant ineligible under Section 88 of the Trusts Act and disqualified under Section 164(2)(b) of the Companies Act.
  - The claims of related party creditors cannot be treated at par with the unrelated creditors.
  - Section 12-A IBC application of the promoter was merely a dilatory tactic and that he was not entitled to file any such application

Held:

- Hon'ble Supreme Court held that the impugned order would not be interfered with only insofar as the Appellate Tribunal has not approved the resolution plan in question. Other findings, observations, and directions of the Appellate Tribunal were set aside.

"we are clearly of the view that even while respecting the commercial wisdom of CoC, in the present case, the resolution plan in question could not have been approved by the Adjudicating Authority for two major reasons: one, for the ineligibility of the resolution applicant; and second, for not placing of the revised resolution plan in the CoC before seeking approval from the Adjudicating Authority. Of course, on the questions relating to the valuation reports, and want of publication of Form G on the website, we are at one with the Adjudicating Authority that these aspects were not of material bearing in the process in question and the resolution professional had taken reasonable steps as permissible in law and feasible in the circumstances. Similarly, we are not inclined to endorse the views of the Appellate Tribunal regarding the treatment of related party in the resolution plan as also regarding the settlement offer of the promotor; and the process in that relation cannot be said to be suffering from any illegality."

Code of Conduct

CASE NO	IBBI/DC/122/2022
DATE OF ORDER	16th August 2022

Submission by IP	***Violation***	***Findings by Discipline Committee***
IP stated that he could not conduct audio-video meetings on account of refusal of infrastructure by advocate of applicant Financial Creditor. He further submitted that he had rectified the same in 5th CoC meeting	Regulation 21(1) and 23(1) of the CIRP Regulations	The contention of IP pertaining to lack of infrastructure was not accepted. Suitable arrangement shall be made by IRP/ RP to facilitate the effective participation of CoC members. Mere audio/voice conference would limit the participants/ members without any visual access to PPTs/reports/ agendas being discussed.
IP stated that the list of creditor was not filed on the account of absence of infrastructure promised by advocate of applicant FC.	Regulation 13 of the CIRP Regulations	Being the supervising authority and not filing the list of creditors with the Adjudicating Authority is a gross negligence as it brings to question the integrity, transparency and accountability in the process conducted.
IP stated that appointment of valuers was deferred in absence of custody of sites of CD and that Regulation 27 is directory in nature, not mandatory. Delay in IM was due to non-cooperation of CD and with regards to appointment of RV, documents were in possession of AC so it was impractical to appoint without possession of land and documents.	Regulation 27 & 40A of the CIRP Regulations	Submission of IP were accepted by Discipline Committee.

IP submitted that an amount of Rs. 5,567 was charged on CDs account for air ticket of Mr. Kriplani's son who accompanied him as his security. It was further clarified that the alleged amount had been reversed as submitted before the IA and is reflected in the enclosed voucher on the CIRP costs incurred.	Regulation 31 of CIRP Regulations, clause 1 of Code of Conduct under regulation 7(2) (h) of IP Regulations.	It was observed that IP had not taken the approval of the CoC for the appointment of IP as his security personnel nor was the expenses ratified by the CoC but still the cost was charged to the IRPC. Further, had the Inspecting Authority not pointed out the contravention, the violations would have gone unrectified. Hence, contravention could be made out.
IP submitted that he appointed a reputed professional on competitive terms to collate and verify claims of as much as about 2000 home buyers in a short span of 7 days. IP submits that he is ready and willing to reverse the fees charged by the professional and take the same upon himself and pay him when he himself realizes his CIRP costs.	Section 18(1) (b) of the Code read with regulation 13(1) of the CIRP Regulations. IBBI Circular no. IP/003/2018 dated 03.01.2018	The invoice raised by the professional for Rs. 5,72,536 was not approved by CoC. It was observed that IP must obtained approval of CoC for the independent professional for assistance in verification of claims. Therefore, the submission of IP was not accepted.
IP submitted that it was the direction of CoC & IRP combined and he asked for a minimal amount to meet petty expenses on as and when required basis. Further submitted that it was the decision of CoC to pass the resolution, resolving to eliminate Voting Rights of the non-contributors	Section 21(2) of the Code and regulation 13(1) of CIRP Regulation.	It was observed that the Code/Regulations do not envisage removal of any CoC member or rejecting the voting rights of CoC on non-payment of interim finance/ CIRP finance/CIRP costs. It was concluded that there is gross negligence in the conduct of IP and blatantly violated the section 21(2) of the Code and regulation 13(1) of CIRP Regulation.
IP submitted that the hand over was completed on 04.07.2021 and the same Page 11 of 12 was delayed due to prevailing pandemic. Moreover, he mentioned that the handover has taken place due to pressures mounted on him and not voluntarily and not at the instance of AA and not under law.	Section 23(3) of Code and clauses (1) & (2) and 14 of Code of Conduct prescribed under regulation 7(2) (h) of IP Regulations.	DC observed that IP failed to handover the records of the CD and the hand over process was completed only on 4.07.2021 after a period of 118 days delay. DC finds that IP has violated the provisions of section 23(3) of Code and clauses 1, 2 and 14 of Code of Conduct prescribed under regulation 7(2) (h) of IP Regulations.

Knowledge Centre

FAQs on record retention under IBC

1. What is the time limit for the preservation of records of the corporate insolvency resolution process for an insolvency professional?

As per Regulation 39A(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the interim resolution professional or the resolution professional shall preserve

(a) electronic copy of all records (physical and electronic) for a minimum period of eight years, and

(b) a physical copy of records for a minimum period of three years from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

The records referred here includes records pertaining to the period of a corporate insolvency resolution process during which the interim resolution professional or the resolution professional acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion.

2. What records are required to be preserved by an interim resolution professional or a resolution professional during CIRP?

As per Regulation 39A(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,

The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of records relating to or forming the basis of:-

a) his appointment as interim resolution professional or resolution professional, including the

b) terms of appointment;

c) handing over / taking over of the assignment;

d) admission of corporate debtor into corporate insolvency resolution process;

e) public announcement;

f) the constitution of committee and meetings of the committee;

g) claims, verification of claims, and list of creditors;

h) engagement of professionals, registered valuers, and insolvency professional entity,

i) including work done, reports etc., submitted by them;

j) information memorandum;

k) all filings with the Adjudicating Authority, Appellate Authority and their orders;

l) invitation, consideration and approval of the resolution plan;

m) statutory filings with Board and insolvency professional agencies;

n) correspondence during the corporate insolvency resolution process;

o) insolvency resolution process cost; and

p) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading.

3. What is the time limit for the preservation of records of the Liquidation for a Liquidator?

As per Regulation 45A(3) of IBBI (Liquidation) Regulations, 2016, The liquidator shall preserve:

(a) electronic copy of all records (physical and electronic) for a minimum period of eight years, and

(b) a physical copy of records for a minimum period of three years;

from the date of dissolution of the corporate debtor or closure of the liquidation process or the conclusion of any proceeding relating to the liquidation process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

In case of replacement of liquidator, the outgoing liquidator shall handover the records to the new liquidator and be responsible for preserving the records not handed over, for any reason, to the new liquidator.

The records referred here include records pertaining to the period of a liquidation process during which the liquidator acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continued the assignment till its conclusion.

4. What records are required to be preserved by a Liquidator during Liquidation?

As per Regulation 45A(1) & (2) of IBBI (Liquidation) Regulations, 2016, the liquidator shall preserve copies of all such records which give a complete account of the liquidation process.

The liquidator shall preserve copies of records relating to or forming the basis of:-

a) his appointment as liquidator, including the terms of appointment;

b) handing over and taking over of the assignment;

c) admission of corporate debtor into liquidation;

d) public announcement;

e) the constitution of consultation committee and minutes of consultation committee

f) meetings during liquidation process;

g) claims, verification of claims, and list of stakeholders; details of relinquishment or otherwise by secured creditors in liquidation process;

h) engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;

i) Invitation, consideration and approval of plans / proposals / scheme received, in case of going concern sale in liquidation process or compromise or arrangement under section 230 of the Companies Act, 2013;

j) all filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;

k) statutory filings with Board and insolvency professional agencies;

l) correspondence during the liquidation process;

m) cost of liquidation process;

n) all reports, registers, documents such as preliminary report, asset memorandum, progress reports, asset sale report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in regulations 5 and 6 of these Regulations.

o) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading.

p) any other records, which is required to give a complete account of the process.

5. What is the time limit for the preservation of records of the corporate insolvency resolution process for an insolvency professional?

As per Regulation 41(3) of IBBI (Voluntary Liquidation) Regulations, 2016, The liquidator shall preserve:

(a) electronic copy of all records (physical and electronic) fora minimum period of eight years; and

(b) a physical copy of records for a minimum period of three years;

from the date of dissolution of the corporate person, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

In case of replacement of liquidator during the process, the outgoing liquidator shall handover the records to the new liquidator.

The records referred here includes records pertaining to the period of a liquidation process during which the liquidator acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion.

6. What records are required to be preserved by a Liquidator during Voluntary Liquidation?

As per Regulation 41(1) & (2) of IBBI (Voluntary Liquidation) Regulations, 2016,

The liquidator shall preserve copies of all such records which are required to give a complete account of the voluntary liquidation process.

The liquidator shall preserve copies of records relating to or forming the basis of:-

a) his appointment as liquidator, including the terms of appointment;

b) handing over / taking over of the assignment;

c) initiation of voluntary liquidation process;

d) public announcement;

e) claims, verification of claims, and list of stakeholders;

f) engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;

g) all filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;

h) statutory filings with Board and insolvency professional agencies;

i) correspondence during the voluntary liquidation process;

j) cost of voluntary liquidation process;

k) all reports, registers, documents such as preliminary report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in Regulation 8 and 10 of principal regulations; and

l) any other records, which is required to give a complete account of the process

Policy and Regulatory Updates

❖ GOVT ANNOUNCES 20% TCS ON INTERNATIONAL CREDIT CARD USAGE

The Central Government notified the amendment of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 on 16th May 2023 and has the same enforcement date. The government has amended the rules within the powers conferred by section 5 and sub-section (1), clause (a) of sub-section (2) of section 46 of the Foreign Exchange Management Act.

❖ RAJYA SABHA PASSES COMPETITION AMENDMENT BILL, 2023

The Rajya Sabha approved the Competition Amendment Bill, 2023, aimed at modernizing the two-decade-old anti-trust law to align with changes in the economy. The Competition Amendment Bill, 2023 aims to modify the Competition Act, 2002, which authorizes the Competition Commission of India (CCI) to prevent practices that adversely impact competition and consumer interests.

The proposed changes include reducing the time limit for assessment of combinations, broadening the scope of anti-competitive agreements, and changing penalties.

Under the new bill, mergers and acquisitions exceeding Rs. 2,000 crores in value must be notified to the Competition Commission of India (CCI), provided that the party being acquired has substantial business operations in India.

❖ THE RESERVE BANK OF INDIA (RBI) DECIDES TO WITHDRAW THE RS 2000 DENOMINATION BANKNOTES FROM CIRCULATION

The central bank has advised the public to deposit Rs 2000 banknotes, which were introduced after Rs 500 and Rs 1000 notes were withdrawn during the demonetisation exercise six years ago, into their bank accounts and /or exchange them into banknotes of other denominations at any bank branch. The Rs 2000 banknote will continue to maintain its legal tender status. Members of the public can continue to use Rs 2000 banknotes for their transactions and also receive them in payment. However, they are encouraged to deposit and/ or exchange these banknotes on or before September 30, 2023. The RBI has not clarified the status of these notes after September 30.

THE CASE OF JYOTI STRUCTURES LTD.– FROM LIQUIDATION TO RESOLUTION

INTRODUCTION

The advent of the Insolvency and Bankruptcy Code, 2016 brought unprecedented changes in the landscape of insolvency laws in India. It is considered to be a well-intentioned piece of economic legislation as it was implemented to address NPA issues affecting the economy. The major test for the IBC has been the entry of twelve large cases identified by the Reserve Bank of India.

In June 2017, an Independent Advisory Committee (IAC) for RBI had its first meeting on June 12, 2017. In the meeting, IAC decided to focus on large stressed accounts at that time and accordingly took up for consideration the accounts which were classified partly or whollyas non-performing from amongst the top 500 exposures in the banking system. The IAC came up with an objective, non-discretionary criterion, whereby those accounts were shortlisted whose fund and non-fund based outstanding amount was greater than Rs 5,000 crore, along with 60% or more classified as nonperforming by banks as on March 31, 2016. According to the recommended criteria, the IAC identified 12 accounts totalling about 25% of the current gross NPAs of the banking system to be referred to NCLT. The RBI also requested the NCLT to accord priority to these cases.

Together they had an outstanding claim of *Rs.3.45 lakh* crore as against liquidation value of ***Rs.73,220*** crore. Of these, resolution plan in respect of seven CDs have been approved and orders for liquidation have been passed in respect of two CDs. Due to failure of implementation of approved resolution plan in respect of one CD (Amtek Auto Ltd.), the process has restarted. Thus, CIRPs in respect of three CDs and liquidation in respect of two CDs are ongoing and are at different stages of the process.

Jyoti Structures Ltd. is first among the 12 large accounts referred by the Reserve Bank of India under India's new Insolvency and Bankruptcy Code 2016 (IBC).

DETAILED STUDY OF THE CASE

Jyoti Structures Limited (JSL) was registered as a private company in 1974 and it begin its commercial operations in 1979. The company went public in 1989. Jyoti Structures is involved in executing projects related to power transmission and distribution. The company manufactures transmission line towers, sub-station structures, antenna towers and railway electrification structures.

Jyoti Structures Ltd is one of **India's leading providers of turnkey solutions in the field of electricity transmission, distribution and sub-station.** The company is engaged in the business of providing turnkey solutions in the field of power transmission. They have three main lines of operation namely Transmission Lines Substations and Rural Electrification.

The company is an ISO 9001 ISO 14001 and OHSAS certified company. They undertake turnkey projects on a global scale offering a complete range of services from design engineering and tower testing to manufacturing construction and project management. The company has established manufacturing plants at Nashik and Raipur with a combined manufacturing capacity of 110,000 MT for fabrication and galvanising of towers and structures. The factories are equipped with Computerized Numerical Control (CNC) machines for the fabrication of towers. They also have an in-house world class tower testing facility at Ghoti, Igatpuri. Jyoti Structures Ltd was incorporated on May 27, 1974 as a private limited company with the name Jyoti Structurers Pvt. Ltd. On October 21, 1974 the name of the company was changed to Jyoti Structures Pvt Ltd. Also, the company was converted into public limited company and the name was changed to Jyoti Structures Ltd with effect from October 21, 1974. In April 1979, they commenced commercial production at Nasik Factory. In September 1988, the company entered into their first turnkey contract with Maharashtra State Electricity Board. In February 1989, they made an initial public offering of 920,000 equity shares of Rs.10 each at a premium of Rs.5 per equity share aggregating Rs.13.8 million. In April 1989, the company's shares were listed on Bombay Stock Exchange. In March 1993, the company commissioned a manufacturing unit at Urla Industrial Area Raipur.In July 1995, the company shares were listed on National Stock Exchange. In December 1996, they set up an in-house world class tower testing facility at Ghoti, Igatpuri.

During the year 2008-09, the company increased the installed capacity of Transmission Lines/Towers/ Structures by 14200 MT to 95800 MT. In March 2010, the company became the first company in India to test a 1200 KV tower.

FLOW CHART DEPICTING SERIES OF EVENTS:

- Admission of Application by NCLT, Mumbai
- Signing and uploading of order. Appointment of Resolution
- Submission of Resolution Plan by sole
- E-Voting on Resolution Plan by Committee of Creditors
- Change in voting percentage of creditors
- Resolution Professional submitted application to the tribunal for approval of Resolution Plan

- NCLT rejected the resolution plan and ordered for submission of Liquidation Application
- NCLAT stayed the Liquidation Proceedings of the
- NCLAT remmitted the matter back to the NCLT with direction to approve the revised Resolution Plan submitted by the Resolution Applicant by reducing the repayment period from 15 years to 12 years
- NCLT, Mumbai Bench approved the Resolution

The application under section 7 of the IB Code for initiation of Corporate Insolvency Resolution Process of Jyoti Structures (Corporate Debtor) was filed by State Bank of India (Financial Creditor) for a default of Rs.1600.74 crores as on 20.06.2017. Corporate Debtor had availed a loan of Rs.1,227.25 crores from State Bank of India through fund and non-fund based arrangements, thereafter defaulting in payment.

The application was admitted by NCLT, Mumbai Bench on 04.07.2017 and the order was signed and uploaded on 12.07.2017. Ms. Vandana Garg* was appointed as an Interim Resolution Professional and later also appointed as Resolution Professional.

• VOTING ON RESOLUTION PLAN

- **Resolution Plan was submitted on 25.03.2018 by Mr. Sharad Sanghi, sole bidder (who heads software firm Netmagic Solutions) along with Kedaara Capital Advisors Managing Partner Manish Kejriwal and Reliance Capital's former chief investment strategist Madhu Kela and the same was put to vote via e-voting on 26.03.2018. However, resolution did not achieve minimum requisite percentage of 75% votes in terms of that time prevailing Section 30(4) of the Code.**
- **62.66% votes were polled in favour of the Resolution Plan, 23.12% votes were cast against the said plan and remaining 14.21% abstained from e-voting.**
- **Subsequent to conclusion of e-voting, on 27.03.2018 one of the Financial Creditors named IDBI Trusteeship Services requested RP to accept its assenting vote of 0.42% as it could not vote on the prescribed date due to technical glitches. Similarly, Indian Bank on 28.03.2018 indicated its desire to put affirmative vote of 6.31% to the Resolution Plan. On 02.04.2018, Standard Chartered Bank who earlier voted with 3.31% against the plan issued a letter for reconsideration of its dissenting vote as assenting vote.**
- **Resolution Professional on 02.04.2018, circulated an email to COC informing the same.**
- **Bank of India, holding the voting share of 9.11% filed an application stating that once vote on Resolution is cast by a member of the Committee such members shall not be allowed to change subsequently. The same bank later has consented in favour of approval of the resolution plan.**

• REJECTION OF RESOLUTION PLAN AND ORDER FOR FILING LIQUIDATION APPLICATION

The Resolution Professional submitted the Resolution Plan before Adjudicating Authority (NCLT) Mumbai Bench on 06.04.2018 stating that the Resolution Plan for the CD was approved by 81.81% of consent by the CoC members after re-considering the revised votes of the earlier dissenting/ absenting creditors.

Singapore-based DBS Bank had approached NCLT to challenge the resolution plan, claiming that the voting for the resolution plan had not been conducted in a "fair manner". DBS Bank was one of the dissenting secured financial creditors and DBS Bank would have got more out of liquidation as it was a secured creditor holding the first charge on the immoveable assets of the CD.

Adjudicating Authority by impugned order dated 31.07.2018 rejected the resolution plan and ordered the Resolution Professional for filing of Liquidation Application for the CD.

• GROUNDS OF REJECTION OF RESOLUTION PLAN AND IMPOSING OF COST ON RESOLUTION PROFESSIONAL AS PER ORDER DATED 31-07-2018

Resolution Plan was rejected by the Adjudicating Authority mainly on the following two grounds:

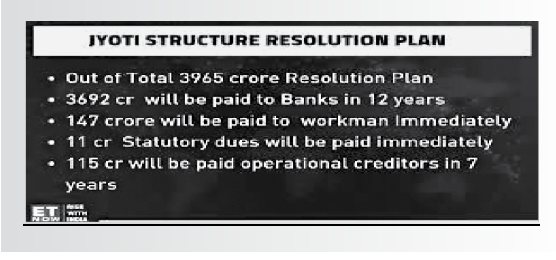
- **Firstly, CIRP period for the corporate debtor after an extension of 90 days ended on 31.03.2018. Therefore, total period of 270 days had lapsed by the time last voting took place on 2nd April, 2018.**
- **Secondly, as on 26th and 27th March, 2018, when resolution plan was put to vote, the voting percentage was 62.66%, which was less than 75%.**

The advocate argued that the RP had taken charge w.e.f. 12.07.2017, i.e., 8 days after the admission of Company Petition as the written and signed order of NCLT was delivered/ uploaded on that day. So, 8 days should be excluded while counting the period of 270 days. This exclusion enabled the RP to get the affirmative vote of 81.81% for approval of Resolution Plan. Further, the advocate argued that threshold for approval of resolution plan is directory in nature and not mandatory as Sec 30(4) of the Code states *'the committee of creditors may approve a resolution plan by a vote of not less than 75%'*. It was also stated that object of the Code is to promote restructuring of the Debtor Company through resolution over liquidation, therefore, to achieve the purpose and object despite requisite votes not given at the time of voting, but later given affirmation, resolution plan shall be considered approved.

The Adjudicating Authority was of the view that in Section 30(4) of the Code the word 'may' denotes discretion as to whether to approve or reject the resolution plan, but not in respect to as to whether voting could be less than 75% of voting. It is a discretion given to the CoC for approval of plan depending upon feasibility and viability of the plan. It further stated that after closure of e-voting facility on 27th March, 2018 voting share obtained in respect of the approval of final Resolution Plan was only 62.66% which was given by Resolution Professional herself in the MA 491/2018 and this being factual situation the RP should have filed report stating that company has to go for liquidation under Section 33 of the Code. The AA held that it is true that the Code has enunciated to try for restructuring of the CD by way of resolution before liquidation, if it does not happen within timeframe, it is also laid that it shall go for liquidation. As per Regulation 26(2) of the IBBI Regulations a person already voted on the resolution shall not be allowed to change its decision subsequently. The RP in this case tried to muster strength saying that she got consent from dissenting creditors and resolution plan needs to be approved.

Resolution professional has been imposed with the cost of Rs.50,000 for going beyond the duties endowed upon her. The Resolution Professional who should have remained impersonal in discharging her duties as the IP, has simply gone out beyond the Sections and the Regulations.

As per the Resolution Plan submitted before the Tribunal, admitted claim against the Corporate Debtor is Rs.7,010.55 crores, liquidation value is Rs.1,112.52 crores. There was a haircut of 43% to the creditors of the Company. Value of the amount of Resolution Plan shall be Rs.3,965.06 crores. Rs.50 crores shall be paid upfront. Rs.75 crores shall come in 1 year and remaining will be paid as staggered payments in a period of 15 years, later reduced to 12 years, from the effective date.



• STAY ON THE LIQUIDATION PROCEEDINGS BY NCLAT

An Appeal was filed by 800 employees of the corporate debtor to stay the liquidation proceedings. NCLAT on August20, 2018 stayed the liquidation of Jyoti Structures Ltd, and asked the Mumbai bench of National Company Law Tribunal and the Resolution Professional of the company to maintain the going concern and preserve asset of the company until further order.

• RECONSIDERATION OF RESOLUTION PLAN VIDE NCLAT ORDER DATED 19.03.2019

NCLAT vide its ordered dated 19.03.2019 stated that it is clear that the 'Committee of Creditors' is required to notice the 'Resolution Plan' to find out its viability and feasibility apart from the financial matrix and in appropriate cases may ask the 'Resolution Applicant' to improve the plan. The date of approval for 'Resolution Plan' isfixed by the 'Committee of Creditors'. They may fix the date of voting and in appropriate case they may extend the period of voting. There is no provision that once a voting is made, after the final result, if it comes to the conclusion finally in absence of approval of the plan, the 'Corporate Debtor' may be ordered for liquidation. It is always open to the 'Committee of Creditors' to change their opinion.

It further held that as far as voting is concerned, Regulation 26(2) being directory cannot override the power of the 'Committee of Creditors', which is the final decision-making authority in accepting or rejecting a 'Resolution Plan'. The Insolvency and Bankruptcy Board of India also noticed that Regulation 26(2) is not workable and will amount to interference with the power of the 'Committee of Creditors' as vested under the Insolvency and Bankruptcy Code, 2016 and therefore, the Insolvency and Bankruptcy Board of India deleted Regulation 26(2) w.e.f. 4th July, 2018.

A 'Resolution Plan' which may be viable, feasible and of acceptable financial matrix and which is not against the provision of Section 30(2), if majority of the members having voting shares approve it but falls short of the 75% (now 66%) limit as has been prescribed and later on it comes to the notice of one or other members that because of the failure the 'Corporate Debtor' will be liquidated, it is always open to the members to change its opinion subsequently with the approval of the rest of the members of the 'Committee of Creditors' but it should be within 270 days.

It also held that the period of non-joining of the Resolution Professional, i.e., 8 days shall be excluded in considering the time frame of 270 days as the order was signed and uploaded on 12.07.2017. On exclusion of this period, Resolution plan was approved within 270 days.

Submissions made by DBS Bank opposing the Resolution Plan, stating that it does not distinguishes between first charge holder and second charge holder, was not accepted as at the 'Resolution Process', 'Financial Creditor' claims are decided as per provision of the 'IB Code'. All the 'Financial Creditors' are treated to be similar, if similarly situated.

The case was remitted to the Adjudicating Authority, Mumbai Bench, to approve the plan in terms of Section 31 of the Insolvency and Bankruptcy Code, 2016 with modification, i.e., that the plan is to be implemented within the period of 12 years asoffered by the 'Successful Resolution Applicant'.

• APPROVAL OF RESOLUTION PLAN VIDE ORDER DATED 27.03.2019

NCLT Mumbai Bench, approved the Resolution Plan in terms of Sec 31 of the IB Code 2016 with modification that the plan shall be implemented within the period of 12 years as offered by the resolution applicant. It held that Adjudicating Authority can scrutinise the approved Resolution Plan only under parameters of Sec 30(2) and Sec 31 of the Codeand Hon'ble NCLAT has already given a finding that Resolution Plan conforms with the provision of Sec 30(2) of the Code.

NCLT, Mumbai Bench vide its order dated 27.03.2019 approved the resolution plan of Jyoti Structures.

• RELIEF TO THE RP VIDE ORDER DT. 26.10.2018

The Resolution Professional has preferred and appeal before NCLAT against the impugned order of NCLT against her. The NCLAT observed that taking into consideration the fact that the Resolution Professional acted in bona fide on the request of the Financial Creditors, who are the members of the Committee of Creditors and allowed their voting share to ensure that Corporate Debtor do not go for liquidation, we are of the view that there was no occasion for the Adjudicating Authority to pass any observation against the Resolution Professional, which will affect her career in future. We are also of the view that before making any observation against the Resolution Professional individual notice should have been given to the Resolution Professional asking him/her to state as to why observations be not made against him/her for alleged act of omission or commission. It is only after hearing the Resolution Professional any observation should have been made by the Adjudicating Authority.

The NCLAT vide its order dated 26.10.2018 expunge the remarks made against the Resolution Professional and set aside the part of the order dated 25th July, 2018 so far it relates to imposing costs on her.

• PERFORMANCE ANALYSIS OF JYOTI STRUCTURES

The following table highlights the financial performance of Jyoti Structures in the last five years:

	DURING CIRP		PRE-CIRP	
Particulars (In Crs.)	**2019**	**2018**	**2017**	**2016**
Revenue	98.23	255.98	856.92	2,494.98
Other Income	5.94	4.52	18.37	64.51
Total Income	104.16	260.50	875.29	2,559.49
Expenditure	-1,834.99	-4,400.09	-2,307.27	-2,471.10
Interest	-1,103.52	-1,010.02	-842.08	-558.78
PBDT	-1,730.83	-4,139.59	-1,431.98	-470.39
Depreciation	-20.01	-27.09	-50.79	-30.84
PBT	-1,750.83	-4,166.68	-1,482.77	-501.23
Tax	-	-	0.04	-0.54
Net Profit	-1,750.83	-4,166.68	-1,482.73	-501.77
Equity	21.91	21.91	21.91	21.91
EPS	-159.85	-380.42	-135.38	-45.84
CEPS	-157.99	-377.87	-130.71	-42.99
OPM %	-1762.11	-1617.15	-167.11	3.54
NPM %	-1782.47	-1627.74	-173.03	-20.11

Source: BSE

The authorized share capital of the Company as on March 31, 2019 was Rs.85,00,00,000/- (Rupees Eighty Five Crores only) divided into 30,00,00,000 (Thirty Crores) numbers of equity shares of Rs. 2/- (Rupees Two) each and 25,00,000 (Twenty Five Lakhs) numbers of preference shares of Rs.100/- (Rupees One Hundred) each. The authorized share capital structure remained unchanged during the financial year under review. The paid-up Share Capital of the Company as on March 31, 2019 was Rs.46,90,55,420/- (Rupees Forty Six Crores Ninety Lakhs Fifty Five Thousand Four Hundred and Twenty only) and remained unchanged during the financial year under review. The Company experienced various challenges including tight liquidity in execution of the projects. The Company took necessary and rigorous steps to the best of its ability and available means of finance for closing projects which impacted the margins due to cost associated with project closure.

Company Secretary of JSL resigned from her post vide resignation letter dated May 18, 2018, without serving notice period, with no handover of work/ details/ relevant passwords and documents. Due to no handover of documents and other relevant details, the RP refused to accept her resignation. During her tenure, the Company defaulted in filing of financial results under Regulation 33 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR") for quarter ended September 2017 and December 2017. The Company also defaulted in filing of Corporate Governance Report for quarter ended March 2018 and June 2018. The Company also defaulted in convening Annual General Meeting to adopt financial statements for financial year ended March 31, 2017.

Due to irregularities in payment to the intermediaries like Depositories and Transfer Agents, the Company was unable to file the shareholding pattern with the

Stock Exchanges on the due dates as Depositories declined to provide the required information. The Company faced many internal challenges during the financial year under review, inter alia, significant limitation in present systems, sub-optimal utilisation of SAP, manual records & reporting are potentially prone to errors, limited decision making, lack of competent personnel, absence of CFO, delays in execution of contracts, non-payment of salaries, loss of reputation, absence of efficient monitoring mechanism & ongoing attrition of employees of the Company along with external factors like competition, financial position, market sentiments.

However, in the given tough and challenging scenario, the Resolution Professional steered the Company in completion of all its pending compliances since March, 2018 to March, 2020 (including Annual General Meeting for FY 2016-17, FY 2018-19 and FY 2018-19) pertaining to regulations of SEBI LODR.

The ratios help understand the position of the company through a profitability, liquidity and valuation turn point and how they have fared pre and during CIRP Process.

	DURING CIRP		PRE-CIRP	
Particulars (In Crs.)	**2019**	**2018**	**2017**	**2016**
Basic EPS (Rs.)	-159.85	-380.42	-135.38	-45.73
Revenue from Operations/Share (Rs.)	8.97	23.26	77.57	227.56
PBDIT/Share (Rs.)	-57.27	-285.73	-53.86	11.42
PBIT/Share (Rs.)	-59.10	-288.21	-58.50	6.59
PBT/Share (Rs.)	-159.85	-380.42	-135.38	-45.68
Net Profit/Share (Rs.)	-159.85	-380.42	-135.38	-45.73
PBDIT/Share (Rs.)	-638.64	-1,228.31	-69.43	5.01
PBIT/Share (Rs.)	-659.01	-1,238.94	-75.40	2.89
PBT/Share (Rs.)	-1,782.47	-1,635.36	-174.51	-20.07
Net Profit/Share (Rs.)	-1,782.47	-1,635.35	-174.51	-20.09
Enterprise Value (Cr.) (EV)	3,935.08	3,546.58	3,293.20	3,718.37
EV/EBITDA	-6.27	-1.13	-5.58	29.72
MarketCap/Net Operating Revenue	0.25	0.34	0.10	0.05
Price/Net Operating Revenue	0.25	0.34	0.10	0.05
Earnings Yield	-70.11	-48.22	-16.69	-4.20

Jyoti structures had made losses during the 2016 and 2017. There was decline gross revenue every year compared to previous years.

The Company continued to be under financial stress during the year as most of the banks did not release the enhanced working capital facilities. With this, the Company was unable to adhere to milestones stipulated in restructuring package and the lenders had to invoke Strategic Debt Restructuring Scheme (SDR) in terms of the extant RBI guidelines. Since then, the lenders decided to restructure the debt and evaluate investment proposal submitted by strategic investor, outside SDR. Subsequently, in June 2017, State Bank of India had made an application for commencement of Corporate Insolvency Resolution Process ("CIRP") of Jyoti Structures Limited("Company") before the Hon'ble National Company Law and initiation of CIRP of the Company, which was allowed by NCLT order dated 04.07.2017.

During the CIR Process, as per the Code the management of the affairs of the Company has been vested in the IRP, and not the management or operations of the Indian or foreign subsidiaries of the Company. However, the IRP made multiple attempts to obtain from the Directors or

erstwhile Management of Company's subsidiaries and associate companies their respective audited financial results for consolidation purposes. After all the persistent efforts, financial statements of few subsidiaries were made available. Further, the alignment of accounting policies of foreign subsidiaries has not been done in the absence of appropriate information. In the absence of documentary supporting of the transactions, the subsidiary accounts are incorporated in the financial statements based on the transactions available in the books of the subsidiaries maintained in the accounting package of the respective subsidiaries. While facilitating the collection and dissemination of the said information, the RP has relied upon and assumed the accuracy / veracity of information provided without confirmation or verification of their correctness, by placing good faith on Company's/ subsidiary companies' management compiling and providing the said financial statements of the subsidiaries.

In spite of best efforts, the approved resolution plan is still to be implemented by the successful Resolution Applicant. The RP has approached NCLT in January 2020 for seeking guidance and directions for implementation of the Approved Resolution Plan. After 6-7 months closure of NCLT functioning due to COVID-19 pandemic lockdown, when it resumed functioning, the hearings are continuing. The Resolution Applicant has filed an affidavit in NCLT on 16.12.2020 indicating his commitment for implementation of the Approved Resolution Plan, subject to fulfilment of certain pre-conditions. Presently, NCLT is monitoring the process of implementation of the Approved Resolution Plan and directing the stakeholder to fulfil the pre-requisites as per the affidavit of the RA.

CONCLUSION

Jyoti Structures became the first company among the RBI "Dirty Dozen" list to be liquidated. However, it could not be liquidated and finally headed towards Resolution. The Company was under great loss pre and during CIRP. The performance of the company post CIRP period cannot be determined due to unavailability of the financial data of the company. As per the annual report of FY.2018-19, the process of taking over by the successful resolution applicant was going on and which got bit delayed by the pandemic of COVID-19. In terms of the Approved Resolution Plan, till the date of transfer of control of the Company to the proposed investors, the Company is being managed and controlled by the RP under the guidance of the Secured Financial Creditors, in close co-ordination with the proposed investors.

Going through the scenarios of this case it can be said that IBC has actually given more teeth to lenders in terms of taking companies to Insolvency Courts. The objective of IBC keeping resolution before liquidation always considered and acted upon. The government has been hailing the IBC as a key determining factor in improving 'India's Ease of Doing Business' rankings. In the recent World Bank's ease of doing business 2020 report, the country jumped to 63rd position, among 190 nations. The IBC has gained an extremely favourable response from a wide range of industry experts. The presence of the IBC framework goes a long way in changing the business landscape.

However, it is worth to note that the stipulated period of decision on a Corporate Debtor's resolution or liquidation is stipulated by the Code is 270 days (now amended to 330 days). However, the judicial system has not been made robust to support the strict timeline prescribed in the Code. In the case of Jyoti Structures Ltd., the Resolution Plan was approved on 27.03.2019 by the Adjudicating Authority, i.e., after 631 days from initiation of CIRP on 04.07.2017. As of 31.03.2021, the Approved Resolution Plan is still to be implemented, i.e., after 735 days of the NCLT approval and 1366 days of initiation of the CIR Process, the Company has so far not seen its resolution to happen.

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Guess the Clues!!!!

1. Who files an application for insolvency under Section 7 of the Insolvency and Bankruptcy Code?
2. Which is the Appellate Authority as envisaged under the Insolvency and Bankruptcy Code?
3. In which case did Supreme Court rule that the Adjudicating Authority has only discretionary power to admit Section 7 application?
4. Which committee oversees the implementation of the Resolution Plan once it is approved by the Adjudicating Authority?
5. What mechanism under Section 53 of the IBC is followed for the distribution of assets during liquidation?
6. Pre-pack insolvency is introduced for which category of industries?
7. Which section of Income Tax Act was amended by IBC to exempt the liquidator to comply with the said section?
8. Under which section of the IBC, is a non-cooperation application filed against Directors of the Corporate Debtor?

Answers:

1. Financial Creditor
2. NCLAT
3. Vidarbha Industries
4. Monitoring Committee
5. Waterfall Mechanism
6. MSME
7. Section 178
8. Section 19

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