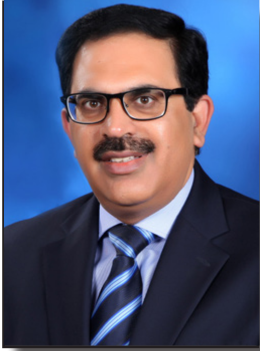

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[2018] 1 IBJ (Art.) 71

More Hits Than Misses – Analysing India's Insolvency and Bankruptcy (Amendment Ordinance), 2018

In this article, the author gives a bird's eye view of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 bringing sweeping changes in the Insolvency and Bankruptcy Code, 2016 which caused confusion amongst Insolvency Professionals and legal fraternity.

Second Ordinance in Six Months

The Indian Insolvency law is shedding its infancy sooner than expected. In a span of little over six months, the President has promulgated the second Ordinance brining sweeping changes in the Insolvency and Bankruptcy Code, 2016 (Code). It can be argued that the Government is responsive to the needs of the time, but some look at it as a result of poor drafting in the original law. Regardless of the reason, it looks like the Government is taking the emerging misperceptions seriously. The upshot of the Code is that the limited liability business entities are forced to make sweeping changes in their business dealings with the creditors. They can no longer afford to ignore their timely payments. Financial discipline is here to stay. Needless to add that the second Ordinance has its roots in Insolvency Law Committee Report, 2018.

Immediate Commencement of the Provisions

As expected of any Ordinance, this one also comes into force immediately, that is, from 6th June, 2018. But the question that begs answer is whether the Government and the Regulator are ready with the consequent amendments in Rules and Regulations? The most likely answer is 'No'. The Insolvency and Bankruptcy Board of India (Board or Regulator)and the Central Government would work on the Regulations after the promulgation of the Ordinance as they are not supposed to know its contents beforehand. This means that it will be some time before we see amended rules or regulations to be notified. Practically speaking, the provisions requiring amendment in Rules and Regulations would remain on paper unless supported by the Rules or Regulations.

Property Buyers (not only Home buyers)in a Real Estate Project are Financial Creditors

Home buyers is a misnomer in the context of the Code after he amendment. The Explanation inserted uses the term 'allottee', which expression takes the meaning from Real Estate (Regulation and Development) Act, 2016. The allottees in a real estate project or subsequent acquirers of residential, or commercial property including shops, offices, showrooms or godowns are now the Financial Creditors under the Code. Bringing property buyers under the

umbrella of Financial Creditor was a long-standing demand of the civil society. In few cases, the debt owed to them forms a majority, yet they were relegated to the fringe by the Code. To strike a balance, they are now considered as a Financial Creditor under Section 5(8)(f); *the amount paid by an allottee is now deemed as the amount having the commercial effect of borrowing*. The impact of this amendment is far reaching and the property buyers now, being a Financial Creditor, get a right to be a part of committee of creditors albeit through a representative who will be the Insolvency Professional appointed by the NCLT. How many of us know that proposal to include property buyers in Financial Creditor was dissented to by three committee members of Insolvency Law Committee? Like property buyers, there are many creditors who are neither Operational Creditors nor Financial Creditors. Ordinance has not offered any solutions for them. Amending the definition of Operational Creditors to mean "creditors other than Financial Creditors" would solve the problem. This, it seems, has to wait for now.

Authorised Representative to Vote in accordance with Preference of Financial Creditor he Represents

The appointment of authorised representative is to be made before the first meeting of committee of creditors. Already hard pressed for time, the Interim Resolution Professional has additional time bound task on hand. The authorised representative has to vote on behalf of each Financial Creditor in accordance with his voting share; undoubtedly a mammoth task for the authorised representative. This also means he must obtain the voting preference of the Financial Creditor and vote accordingly. Here 'Financial Creditor' means the class of Financial Creditors he is representing. To do this, he must assess their preference by circulating notice and agenda of meeting of committee of creditors. He has to do it by physical or electronic means. For a time-bound exercise, it has to be electronic. But sending it and then compiling their voting preference is a mammoth task. Looks like, more litigation and complaints against Insolvency professionals are on their way.

Assets of Personal and Corporate Guarantors are outside Moratorium

Conflicting judgments of NCLT Benches, NCLAT and Allahabad High Court have been set to rest and rightly so by an amendment placing the assets of personal and corporate guarantors outside the purview of moratorium. Corporate insolvency resolution process cannot be allowed to disturb the contractual arrangement between the lender and the surety. The personal and corporate guarantors need to fend themselves without taking a shelter of moratorium under the Code.

Related Party and Relatives

The Ordinance now defines 'related party in relation to an individual' for the purposes of Corporate Insolvency Resolution Process. It is extensive and is meant to control the conflict of interest of individuals associated with Corporate Insolvency Resolution Process. Surprisingly, the definition contains the phrase 'spouse' but does not define it. Interestingly, the Companies (Amendment) Bill, 2008 also contained this phrase in the definition of relative but was omitted from the next version of Bill. The *Explanation* defines 'relative' for the purposes of 'related party in relation to an individual'. This may confound the confusion as relative is defined for the purposes of newly added clause (*24A*) in Section 5 but the term relative for the purposes of clause (*24*) – related party in relation to a Corporate Debtor- has no definition. Having not been defined, one will rely on the definition of 'relative' in the Companies Act, 2013 by virtue of Section 3(37). This may lead to a dichotomous situation – same phrase having two different meanings under the Code. This calls for super amendment now.

Correcting the Drafting errors

The Ordinance corrects many drafting errors in the Code. Supreme Court laid down the law that in Section 8, the word 'and' should be read as 'or' for the Corporate Debtor to bring to the notice of the Operational Creditor the existence of dispute or record of pendency of suit or arbitration proceedings in response to demand notice. The Ordinance seeks to correct this error. Similarly, the Ordinance corrects the situation by making a bank certificate optional for filing of application by an Operational Creditor.

Special Resolution made mandatory for initiation of Corporate Insolvency Resolution Process by Corporate Debtor

No longer would Corporate Debtors be permitted to file for their Corporate Insolvency Resolution Process on the basis of a board resolution. Filing of such application now requires a special resolution by a company or three-fourth of the total number of partners of LLP. Some consider this as against the practice that prevails in other jurisdictions. The effect of this amendment is that in a listed company, the whole world will know of this proposed application even it does not go beyond the shareholders' approval. While adding this requirement, the Government, however, missed golden opportunity to correct drafting error in clause (b) of Section 10(3) which reads as "the information relating to the resolution professional proposed to be appointed as an interim resolution professional". It should actually read as "the information relating to the Insolvency Professional proposed to be appointed as an interim resolution professional".

Lowering of the Decision-Making Threshold in Committee of Creditors

In the Code, the decisions of the committee of creditors were to be made by a majority of 75%. It stands changed as follows:

Decision	Voting Percentage in Committee of creditors Prior to the amendment	Voting Percentage in Committee of creditors after the amendment
Extension of period of Corporate Insolvency Resolution Process	75	66
Withdrawal of application for Corporate Insolvency Resolution Process	It was not allowed	90
Replacement of Resolution Professional	75	66
Actions under Section 28	75	66
Approval of Resolution Plan	75	66
Decision of the Committee of Creditors to liquidate	75	66
All other decisions	75	51

Lower threshold limit means the critical decisions such as approval of resolution plan, change of resolution professional, will now have a greater chance of getting through the committee of creditors. This may have been done to hear more success stories under the Code.

Interim Resolution Professional to continue after 30 days

The Interim Resolution Professional will now hold office until the date of appointment of the resolution professional under Section 22 and not until 30 days from the date of his appointment as per the provisions of Code. The tasks of Interim Resolution Professional are well documented. Now that he may continue beyond 30 days, it is not clear whether he will continue to perform duties of a Resolution professional? Logically, that seems to be the answer in order to achieve the end date objective under the Code. Another related aspect is how much remuneration will he be entitled and who will bear it? Similarly, the resolution professional shall continue to manage the operations of the Corporate Debtor after the expiry of Corporate Insolvency Resolution Process until an order is passed by NCLT approving or rejecting the resolution plan, provided the resolution plan has been submitted. These provisions correct the situation of uncertainty prevailing under the Code.

Interim Resolution Professional is responsible for all statutory compliances

A reigning doubt in the minds of the Interim Resolution Professionals has been set to rest by the Ordinance clearly mandating that the Interim Resolution Professional shall be responsible for complying with

the requirements under any law on behalf of the Corporate Debtor.

Banks or FI's holding shares in Corporate Debtor are no longer excluded from representation etc. in committee of creditors

Banks or Financial Institutions, even though they were Financial Creditors, had no right of representation, participation and voting in the committee of creditors if they held more than twenty percent of voting rights. This led to an anomalous situation, which has now been corrected with the addition of a proviso in S. 21(2) providing that Financial Creditors regulated by a financial sector regulator shall not be excluded from representation, participation and voting in the committee of creditors merely because of the fact that their debt was converted into equity prior to insolvency commencement date.

Unwilling Interim Resolution Professional not to be continued as Resolution professional

The Interim Resolution Professional, if not willing, cannot be forced to continue as a Resolution Professional now as the Ordinance makes it mandatory to have the consent of Interim Resolution Professional before being appointed as resolution professional. Infact, the consent of Insolvency Professionals to act as Interim Resolution Professional, Resolution professional or liquidator is now a mandatory condition under the Code.

Implementation of Resolution Plan

The Code had a gaping hole as to implementation of a resolution plan. The Ordinance makes it mandatory for NCLT to satisfy itself as to the provisions in the resolution plan for effective implementation. The onus to approve necessary approvals under any law has been fixed on the resolution applicant. These approvals will have to be obtained within a period of one year from the date of approval of the resolution plan by NCLT.

Accepted Claims can also be Appealed

The Ordinance has sorted out another anomaly in the Code by providing that claims accepted by the Liquidator can also be appealed. Earlier, only rejected claims could be appealed. This amendment was not really necessary as acceptance of lower amount of claim by liquidator was in fact a 'rejection' of the remaining amount and an appeal could lie for the partial rejection.

NCLT to exercise Jurisdiction in cases of Insolvency Resolution or Liquidation of Corporate Guarantors to a Corporate Debtor

In addition to the personal guarantors, the Ordinance now mandates that the insolvency resolution process or liquidation of a corporate guarantor to a Corporate Debtor shall be dealt by the Bench of the NCLT where the Corporate Insolvency Resolution Process or liquidation of the Corporate Debtor is under process. This is regardless of the location of the registered office of the corporate guarantor. Ordinarily, under the Code, the jurisdiction of the NCLT Bench is decided by the situation of registered office of the corporate person but in case of corporate guarantor, it will be subject to the jurisdiction of the NCLT Bench dealing with the Corporate Insolvency Resolution Process or liquidation of the Corporate Debtor. Here, corporate guarantor means a corporate person who is the surety in a contract of guarantee to a Corporate Debtor. Corporate guarantor will include company as well as limited liability partnership. The change also indicates that if the Corporate Insolvency Resolution Process or liquidation proceedings of a corporate guarantor is in process, having commenced prior in time to that of Corporate Debtor, such cases shall stand transferred to the NCLT bench dealing with Corporate Insolvency Resolution Process or liquidation of the Corporate Debtor.

Bar on Jurisdiction of Civil Courts

The Ordinance has extended the bar on jurisdiction of civil courts over the action taken in pursuance of orders passed by the Board under the Code. The Board is empowered to pass orders under several circumstances under the Code. Now, no such order can be questioned in a civil court. Earlier only orders of adjudicating authority were covered.

Limitation Act applies to the Code

The Ordinance settles the dust over the applicability of law of limitation. Henceforth, no creditor with time barred debts can approach the NCLT for initiating the Corporate Insolvency Resolution Process against the corporate person. This effectively nullifies the judgments of the NCLAT which first held that law of limitation cannot apply to proceedings before modifying it to a substantial extent in a later judgment, which is under a stay by the Supreme Court. Now that

case becomes infructuous.

Relief to Micro, Small and Medium Enterprises

The Central Government has been delegated the power to determine the applicability of the provisions of the Code to micro, small and medium enterprises. The big relief also comes into the form of removing disqualification to act as a resolution applicant in two circumstances, namely, clause (c) and (g) of Section 29A. Further, if a person was convicted for any offence punishable with imprisonment for two years or more, he was not eligible to be a resolution applicant. Offences were not restricted to specific laws. The Ordinance has now added the Twelfth Schedule giving a list of 25 Acts, the offences of which shall make a person ineligible to act as a resolution applicant.

Transfer of Winding-up Proceedings to the Tribunal

Interestingly a proviso has been added in Section 434 of the Companies Act, 2013 to provide that proceedings relating to winding-up of companies pending before High Court or any other Court prior to commencement of the Code can be directed to be transferred by such Court to the NCLT on an application made by any party to the proceedings. Such transferred proceedings shall be treated as an application for Corporate Insolvency Resolution Process under the Code. This provision may trigger transfer of winding-up cases from the High Courts to the NCLT. The language employed is, however, confusing and may lead to unintended results.

Firstly, it is not clear whether the intent is to transfer applications pending consideration of the Court whether to pass winding-up order or not, or to all cases including those where winding-up has been ordered or provisional liquidator has been appointed. The language suggests all cases including where winding-up is under process can be transferred.

Secondly, all such transferred cases will assume the status of application for initiation of Corporate Insolvency Resolution Process. It is not clear how the cases where winding-up is under process and substantially advanced be treated as application for initiation of Corporate Insolvency Resolution Process.

Thirdly, winding-up under the Companies Act, 1956 and 2013 was possible on many grounds including inability to pay debts. The Code has omitted only 'inability to pay debts' as a ground of winding-up from the Companies Act but not others. Inability to pay dents has been included in the Code broadly classifying it as 'default'. The Corporate Insolvency Resolution Process is triggered on occurrence of default and not on any other ground. If a winding-up was pending before the High Court due to 'other ground' on the date of commencement of the Code, its transfer to the NCLT and treating it as a case of Corporate Insolvency Resolution Process defies reasoning and logic.

The confusion, it seems will be settled by the Courts. The agony of poor drafting, however, continues. Intriguingly, the Insolvency Law Committee did not deal with this aspect. It only suggested to amend Section 434 of the Companies Act, 2013 by amending paragraph 34 of Schedule XI of the Code to state that if a petition for winding up on the grounds of inability to pay debts is pending and an order for winding up of the company has been made or a provisional liquidator has been appointed, the leave of the court hearing the winding up proceeding must be obtained, if applicable, for initiation of the CIRP proceedings against such Corporate Debtor under the Code. The intent and content seem to be at variance. Law will take its own interpretational course.

Conclusion

The Ordinance was the need of the hour and irons out the blunt edges of the Code, which caused confusion amongst Insolvency Professionals and legal fraternity. The Benches of the NCLT, NCLAT and Supreme Courts were also at variance with each other,passing diametrically opposite judgments on some aspects. Making similar conceptual changes in Part III can be regarded as a missed opportunity. The experience of Corporate Insolvency Resolution Process is here and that could have been applied to the provisions of individual and partnership insolvency resolution and bankruptcy. It seems we will see another Ordinance after the commencement of Part III of the Code. But like it or hate it, insolvency law is here to stay. The full colour of the provisions of the Code is yet to be seen by the corporate persons, promoters, directors and Insolvency Professionals. One thing is clear, ignorance of this law will hit the debtors very hard.

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Liquidation under the Insolvency and Bankruptcy Code, 2016 vis-a-vis Sections 230-232 of the Companies Act, 2013

This article is intended to provide an insight into the liquidation process envisaged in Section 33 of the Insolvency and Bankruptcy Code, 2016 and the IBBI (Liquidation Process) Regulation, 2016 vis-a-vis Sections 230-232 of the Companies Act, 2013 dealing with compromise/ arrangement/amalgamation in respect of a company. The article also analyses implications of the order of the Adjudicating Authority in the case of Gujarat NRE Coke Ltd.

Introduction

In the matter of Gujarat NRE Coke Ltd. ("GNCL or Corporate Debtor"), the National Company Law Tribunal, Kolkata Bench, ("Adjudicating Authority") vide its Order dated May 15, 2018, has accepted an application for compromise or arrangement filed under Section 230-232 of the Companies Act, 2013 [C.A. (CAA) No. 198/KB/2018] by the promoter of the Corporate Debtor. It is pertinent to note here that the said application was filed after an order for liquidation of GNCL was passed by the Adjudicating Authority in C.P. (I.B.) No. 182/ KB/ 2017, allowing the slump sale of GNCL on a 'going concern' basis, under Section 33 of the Insolvency and Bankruptcy Code ("Code").

Background

GNCL is a listed company and an application was filed by it for initiation of Corporate Insolvency Resolution Process ("CIRP") under Section 10 of the Code, before the Adjudicating Authority. The Adjudicating Authority admitted the application on April 7, 2017 and put GNCL under CIRP.

A resolution plan was submitted by the promoter of GNCL under Section 30 of the Code, however, by virtue of Section 29A of the Code as per which the existing promoters of the corporate debtor under specific circumstances got debarred from submitting a resolution plan, thereby making the resolution plan so submitted by the promoter of GNCL, void and infructuous.

Subsequently another resolution plan was submitted by an independent resolution applicant, however, the same was not approved by the COC. Further, a resolution plan was also proposed on behalf of the employees and workmen

of the Corporate Debtor but the same could not be considered as the extended period of 270 days for completion of CIRP as per Section 12 of the Code was nearing expiry. Furthermore, after expiry of the extended duration of 270 days as prescribed under Section 12 of the Code, an order for liquidation of the Corporate Debtor was passed by the Adjudicating Authority.

However, an affidavit was filed by the employees and workmen of the Corporate Debtor, stating that the Corporate Debtor had 1178 employees on its rolls and stated that Corporate Debtor was functional and had regular customers for its products. Also, the Corporate Debtor had overcome its period of crisis and had made profits in the preceding months. The affidavit further highlighted that closure of the Corporate Debtor would affect nearly 10,000 people, including the employees, their families, the workers, vendors, contractors, etc.

The counsel representing the employees of the Corporate Debtor emphasized on the sale of the Corporate Debtor as a going concern, which would save the livelihood of the workers and employees and at the same time would take care of the interest of the creditors, in view of Section 33 (7) of the Code.

Thus, considering the above facts, the Adjudicating Authority allowed the Liquidator to make an attempt to the sell the Corporate Debtor as a 'going concern' through slump sale for protection of the means of livelihood of the employees and workmen of the Corporate Debtor, within a period of three months from the date of the order.

Meaning of Liquidation under Section 33 of the Code

Section 33 (1) provides that the Adjudicating Authority may pass an order requiring the liquidation of the corporate debtor where it does not receive a resolution plan before the expiry of CIRP period or the maximum period of 270 days for completion of CIRP under Section 12 of the Code, or where the resolution plan is rejected for non-compliance of the requirements specified under the Code in this regard.

Section 33(2) provides that in cases where the resolution professional intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, during CIRP but before confirmation of a resolution plan, the Adjudicating Authority may pass an order requiring the liquidation of the corporate debtor.

Section 33(7) provides that an order for liquidation of the corporate debtor, passed by the Adjudicating Authority shall be deemed to be a discharge notice to the officers, workmen and employees of the corporate debtor. However, the only exception to discharge of employees and workmen of a corporate debtor under liquidation is when its business continues to be operational during the liquidation process.

Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

Regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 prescribed the manner of sale i.e., the liquidator may –

(*a*) sell an asset on a standalone basis; or

(*b*) sell

- (*i*) the assets in a slump sale,
- (*ii*) a set of assets collectively, or
- (*iii*) the assets in parcels; or;

(*c*) sell the corporate debtor as a going concern[1].

Meaning of 'going concern'

The phrase 'going concern' is not defined under the Code. It must, therefore, be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business 'so that the business remains the same but in different hands'.

That the concept of "going concern" as per clause 10 of Accounting Standard-I issued by the Institute of Chartered Accountants of India provides that

1. Clause (c) of regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 with regard to the sale of the corporate debtor as a going concern was inserted vide Notification No. IBBI/2017-18/GN/REG028, dated 27th March, 2018.

"The enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations."

Further that Auditing and Assurance Standards AAS 16, "going concern'', issued by the Council of the Institute of Chartered Accountants of India, provides that – "When a question arises regarding the appropriateness of the Going Concern assumption, the auditor should gather sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future."

In the case of *Harrisons Malayalam Ltd.* v. *ACIT* [I.T.A. No. 54/Coch/2009], it was observed by the Income-tax Appellate Tribunal that in case of transfer as a "going concern", the activities need to be continuous and uninterrupted and should be carried out on a regular basis, without any interruption.

Compromise or arrangement under Section 230-232 of the Companies Act, 2013 (the 'Act')

The provisions relating to compromise under Section 230 of the Act envisages a scheme between a company and its creditors or any class of them; or between a company and its members or any class of them on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members. Sub-section (1) of Section 230 provides as below:

"(1) Where a compromise or arrangement is proposed –

(*a*) between a company and its creditors or any class of them; or

(*b*) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation – For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods."

Sub-section (1) of Section 232 of the Act provides as below:

"(1) Where an application is made to the Tribunal under Section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that Section, and it is shown to the Tribunal –

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct."

Scope and limit of schemes of compromise

The scope of Section 230 is very wide and applies to a company in winding up also.

The Bombay High Court in the matter of *Vasant*

Investment Corporation v. *Official Liquidator* [1981] 51 Comp Case 20, while approving a scheme of compromise under Section 391 of the erstwhile Companies Act, 1956 (corresponding to Section 230 of the Act), held that all further proceedings for winding up be altogether and permanently stayed and the company be taken out of liquidation. There are many judicial pronouncements which support the argument that arrangement under this Section can take a company out of winding up.

The Delhi High Court in *Rajdhani Grains & Jaggery Exchange Ltd., In re.* [1983] 54 Comp Case 166 observed:

> "A member would still be member of the company, notwithstanding the winding-up order having been passed, and even under the different provisions of the Companies Act a reference is made to members even though a winding-up order has been passed. (See Sections 469(2[2]) and 511[3])".

Accordingly, even though a winding up order was made under the Act, not only the liquidator but a member also has the right to file an application under Section 230 of the Act, taking the same corollary to a logical end, if a liquidation order was passed under the Code, a member of the company has a right to approach the Adjudicating Authority under Section 230.

Meaning of Winding-up and Liquidation

The term, "winding-up" was neither defined under the Companies Act, 1956 nor was the same defined under the Act. However, the position got changed when Section 255 of the Code got notified with effect from November 15, 2016, by virtue of which, the Act stands amended in accordance with Schedule XI of the Code. In the Act, new clause (94A) was inserted in Section 2 and accordingly, "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.

On a bare reading of the definition, it shall be safe to conclude that the terms "winding up" and "liquidation" are interchangeable. In the general parlance also, there is only titling difference between winding-up and liquidation, While liquidation refers to the process of sale of the assets of the entity under liquidation, winding up refers to the various steps involved in dissolution of the entity and includes the winding up of its affairs.

Overlap between Section 33 of the Code and Section 230-232 of the Act

As explained earlier, in the matter of *GNCL* (*supra*), which was under liquidation, an order for slump sale on a 'going concern' basis, was passed. Subsequently, in the course of liquidation proceedings of GNCL, an application was filed by a promoter shareholder of GNCL before the Adjudicating Authority under Sections 230-232 of the Companies Act, 2013 for obtaining the sanction of the Adjudicating Authority to a scheme of compromise or arrangement, with respect to the corporate debtor.

The Adjudicating Authority has been pleased to accept the said application and has passed an order for meeting of the shareholders/ FCCB holders/ unsecured creditors/ secured creditors of the corporate debtor to be convened on July 16, 2018, in full compliance with the provisions as contained in Section 230 of the Act, including sending out of notices to the governmental authorities as per the requirement of Section 230 (5). Further, the Tribunal has directed that the meetings as aforesaid would be chaired by the Liquidator of the corporate debtor, who would file a report with the Adjudicating Authority within 10 days of conclusion of the meetings.

Analysis of the implications of the order rendered by the Adjudicating Authority in the matter of Gujarat NRE Coke Ltd [C.A. (CAA) No. 198/KB/2018)/C.P. (I.B.) No. 182/ KB/ 2017]

- The promoters of a corporate debtor who are debarred from submitting a resolution plan by virtue of Section 29A of the Code may submit

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2. *Section 295(2) of the Act*
3. *Section 320 of the Act*

a scheme of compromise or arrangement before the Adjudicating Authority, thereby using the provisions of Sections 230-232 of the Act as a backdoor entry to submit resolution plan.

- If scheme under Section 230 of the Act gets implemented after liquidation order under the Code, whether the distribution of assets will take place as per the waterfall mechanism under Section 53 of the Code or as per the terms of of scheme of compromise or arrangement with respect to the corporate debtor.
- The Section 238 of the Code prescribed that the provisions of the Code shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force. Accordingly order of the scheme of compromise under Section 230 in mid of liquidation proceedings interfere with the provision of the Code and dilute stringent requirement of the Code.
- The government authorities have an important role to play in case of a scheme of compromise or arrangement under Section 230(5) of the Act, whereas they do not have any major role under liquidation.
- Under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the liquidator is entitled to certain fees and there is a proper structure for incentivisation, if he is able to realize the assets or distribute the amounts due to the stakeholders of the company under liquidation. However, under the circumstances as mentioned above, there would be ambiguity with regard to determination of the structure of payment to be made to the liquidator.

Conclusion

The order passed by NCLT in the matter of Gujarat NRE Coke Ltd. is a watershed event which sets up a judicial precedent in resolution of stressed assets. It would not be wrong assumptions that the liquidation of a company has adverse effects on various stakeholders, especially the workmen & employees, small vendors and contractors. Accordingly, allowing the scheme of compromise under the Act, would provide a second chance to the company for revival as a "going concern".

However, this judgment has also opened Pandora's box by giving promoter shareholder (who are disqualified under Section 29A of the Code) to make a backdoor entry to get hold of the company and the scheme of compromise under the Act can be used deviously to defeat the purpose of Section 29A of the Code. Accordingly, the Adjudicating Authority needs to ensure that unscrupulous promoters should not get hold of the company by taking refuge under of Sections 230-232 of the Act. Further, the Adjudicating Authority and the liquidator will have to play a pro-active role in supervising the scheme of compromise so that the timelines as envisaged under the Code are adhered to in letter and spirit and the workmen & employee are able to get their due.

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