ANNUAL PUBLICATION

2024-25

INSOLVENCY PROFESSIONAL AGENCY OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

(A section 8 company registered under companies act 2013)

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA - ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its bye laws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just, and ethical practices, in performing our functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in all aspects of Insolvency and Bankruptcy Code and related domains to Insolvency Professionals and other stakeholders of the IBC ecosystem by conducting round tables, webinars, workshops, and periodical publications sending which keep the insolvency professionals updated with all developments relating to Insolvency and Bankruptcy.

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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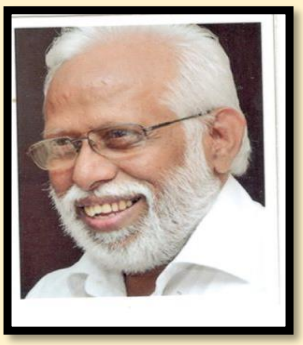
BOARD OF DIRECTORS



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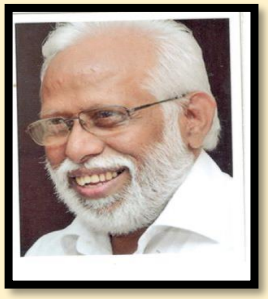
MESSAGE FROM THE CHAIRPERSON'S DESK



DR. JAI DEO SHARMA

Dear Valued Readers and Contributors,

I am delighted to welcome you to this year's edition of our annual publication. It is remarkable to see how our initiatives have flourished into essential resources for understanding the evolving landscape of the Insolvency and Bankruptcy Code (IBC), 2016.

Looking back over the years, it is evident that the IBC continues to reshape the corporate insolvency framework in India. Our commitment to fostering a robust platform for intellectual discourse and practical insights has remained strong. The foundational principles of the IBC—expeditious resolutions, enhancement of asset value, and balanced stakeholder engagement—underscore its crucial role in revitalizing distressed companies and contributing to a sustainable economic environment.

While we celebrate the progress made under the IBC, we must also recognize ongoing challenges. Ensuring compliance with established timelines, maintaining transparency in processes, and promoting fairness in the selection of resolution professionals are vital for building trust in the system.

Navigating the intricacies of insolvency proceedings is no small feat, and I want to take this opportunity to express my sincere gratitude to our dedicated contributors. Your insights and expertise have significantly enhanced the value of our publications, providing diverse perspectives that elevate our collective understanding of the IBC and its practical applications.

As we move forward, I am excited to announce an upcoming residential program in Kerala designed to deepen engagement with the IBC. This initiative will serve as an interactive platform for learning and networking, fostering collaboration among professionals in the field.

I encourage each one of you to actively participate in these initiatives and engage in the ongoing dialogue that strengthens our community. Together, we can work towards a future where effective insolvency resolution promotes sustainable growth, reinforces credit discipline, and drives overall economic progress. Your unwavering support and meaningful contributions are vital to this endeavor.

Thank you for being an integral part of our journey.

Dr. Jai Deo Sharma
Chairperson of IPA -ICMAI

MESSAGE FROM THE DESK OF PRESIDENT

CMA BIBHUTI BHUSAN NAYAK

Dear Esteemed Members and Colleagues,

As I reflect on the past year, it is with great pride and gratitude that I address you in annual publication of the Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA- ICMAI). I am pleased to note that IPA -ICMAI has continued to evolve, demonstrating resilience and adaptability in a rapidly changing landscape. The collective efforts have not only advanced the insolvency profession but have also significantly contributed to the financial stability and growth of our nation.

This year has brought forth numerous challenges, particularly in light of the global economic shifts. However, it has also provided us with unique opportunities to innovate and refine our practices in insolvency and bankruptcy. Through strategic initiatives, IPA ICMAI have strengthened its training programs and enhanced the educational resources, ensuring that its members are well-equipped to meet the demands of a complex regulatory environment.

This year IPA-ICMAI successfully organized a series of seminars and workshops. These events have facilitated meaningful discussions among industry leaders, policymakers, and practitioners, offering valuable insights into best practices and emerging trends. The enthusiastic participation by the members has been truly motivating, reflecting our shared commitment to professional growth and excellence.

I want to express my sincere appreciation for your dedication and commitment to IPA - ICMAI. Your engagement and support are the backbone of our success. Let us continue to uphold our values, share our knowledge, and work collaboratively to advance the Insolvency profession for the benefit of all.

Thank you once again for being an integral part of our journey. Together, we will continue to make a meaningful impact in the field of insolvency and beyond.

With best wishes,

CMA Bibhuti Bhusan Nayak
President, ICMAI

MESSAGE FROM THE DESK OF MANAGING DIRECTOR

MR. G.S. NARASIMHA PRASAD

As we navigate the dynamic landscape of insolvency and bankruptcy, the IPA-ICMAI remains steadfast in its mission to empower Insolvency Professionals (IPs) and enhance the integrity of the profession. In an era marked by rapid changes and increasing complexity in the financial sector, our organization is dedicated to equipping our members with the knowledge, tools, and resources necessary to excel in their roles. By fostering an environment of continuous learning and collaboration, we aim to address the challenges of today while preparing for the opportunities of tomorrow.

The IPA-ICMAI is dedicated to two fundamental areas of focus: ensuring compliance and promoting professional growth. Our primary responsibility lies in regulating Insolvency Professionals (IPs), and we are equally committed to enhancing professional development through a range of innovative programs designed to meet the evolving needs of our members.

In our regulatory capacity, we have established a robust framework of clear protocols aimed at ensuring effective governance. Our commitment is to execute these processes meticulously, prioritizing accuracy and accountability in every aspect. Currently, we are in the process of automating many of our regulatory functions—such as enrollment, monitoring, and compliance—streamlining our operations for greater efficiency. We deeply appreciate the ongoing support and collaboration we receive from the Insolvency and Bankruptcy Board of India (IBBI) as we work towards these improvements.

On the professional development front, our focus is on continuously enhancing and expanding our offerings to cultivate essential skills and competencies among our members and IPs. This is vital for effectively managing Corporate Insolvency Resolution Processes (CIRP) and liquidation within the required timelines. To achieve this, we are actively exploring new and relevant subjects that can provide our members with broader perspectives beyond the immediate scope of the Insolvency and Bankruptcy Code (IBC). It is essential for an IP to swiftly understand the complexities of a corporate debtor's business model and market conditions, as this expertise significantly enhances their appeal to banks and other financial institutions when seeking specialized knowledge in appointing IPs.

This year, we are particularly excited to announce our annual residential program, which will take place in Kerala. This event underscores our commitment to professional development, bringing together delegates from various sectors to engage with a diverse array of stakeholders, including Financial Creditors (FCs), Operational Creditors (OCs), tax authorities, and representatives from industries relevant to CIRP and liquidation processes. This unique opportunity will enable participants to gain insights from multiple perspectives, enriching their understanding of the insolvency landscape.

In addition, we have published a comprehensive compendium of case laws, serving as a valuable resource for our members. This compendium highlights significant legal precedents and insights from the past year, providing a detailed overview of evolving legal standards in our field.

Our annual publication also features a collection of thought-provoking articles authored by our members, alongside summaries of noteworthy case law and profiles of successful resolutions achieved by our peers. We trust that this information will be both enlightening and motivational for our readers.

Finally, our dedicated team at IPA-ICMAI wishes to express our sincere gratitude to the Chairperson, Whole Time Members, Executive Directors, and staff at IBBI, as well as to the President and team of our parent organization, the Institute of Cost Accountants of India (ICMAI), and the members of our Governing Board. Their unwavering support and guidance play an essential role in our ongoing success and commitment to excellence.

GS Narasimha Prasad
Managing Director

OFFICIALS OF IPA-ICMAI

MR. G.S. NARASIMHA PRASAD
MANAGING DIRECTOR

MS. SARIKA AGARWAL
CHIEF FINANCE OFFICER

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MR. AYUSH GOEL
ASSISTANT MANAGER-MONITORING

MS. NEHA SEN
RESEARCH ASSOCIATE

OUR PUBLICATIONS

IBC AU-COURANT

LATEST UPDATES ON INSOLVENCY AND BANKRUPTCY

THE INSOLVENCYPROFESSIONAL
YOUR INSIGHT JOURNAL

IBC DOSSIER
Bulletin on Landmark Judgments

CASEBOOK

PROFESSIONAL DEVELOPMENT INTIATIVES

Insolvency Professional Agency Of Institute Of Cost Accountants Of India

EVENTS CONDUCTED FROM APRIL 2024 TO DECEMBER 2024

S.NO	DATE	EVENT
		April
1	April 7, 2024	Workshop on “Interface of different Laws with IBC, 2016.” (Series - 1)
2	April 12, 2024	Learning Session on Cross Border Insolvency & Group Insolvency
3	April 19, 2024	Workshop on “Improving IBC outcomes” (Key Imperatives for IPs & RVs)
		May
4	May 5, 2024	Workshop on “Judicial Pronouncements under IBC, 2016.”
5	May 10, 2024	Master Class on “Art of Handling a Resolution Plan.”
6	May 13, 2024	64th Batch of Pre-Registration Educational Course (Online Course)
7	May 18, 2024	Workshop on Disciplinary Aspects & Governance under IBC, 2016
8	May 26, 2024	Workshop on "Not Readily Realisable Assets (NRRA)"
9	May 31, 2023	Executive Development Program on “Mastering the Art of Liquidation.”
		June
10	June 2, 2024	The future of insolvency and valuation predictions, prospects, and potential disruptions
11	June 7, 2024	Workshop on "Transaction Audit & Forensic Audit"
12	June 14, 2024	Roundtable Discussion Reducing Compliance by Review Of CIRP Forms Submitted by Insolvency Professionals
13	June 21, 2024	Webinar on Reducing Compliance by Review of CIRP Forms
14	June 22, 2024	Workshop on Avoidance Transactions under IBC, 2016.
15	June 25, 2024	Workshop on Compliance Issues of Insolvency Professionals (Ips)
16	June 28, 2024	Webinar on Discussion Paper on Amendments in CIRP Regulations and Liquidation Progress Report Format
17	June 29, 2024	Workshop on “Interface of different Laws with IBC, 2016.” (Series - 2)
		July
18	July 5, 2024	Seminar On Insolvency and Bankruptcy Code, 2016 (Milestones Achieved and The Way Forward)
19	July 12, 2024	Workshop on "Essentials of Valuation for Insolvency Professionals"
20	July 13, 2024	Webinar on Role of CMAs under IBC, 2016
21	July 18, 2024	"Workshop on "Judicial Pronouncements under IBC. 2016"
22	July 20, 2024	Insol India Seminar: Navigating The Insolvency & Restructuring Landscape: Looking Ahead
23	July 27, 2024	Workshop on "Navigating Moratorium and Interim Finance; Strategies for Insolvency Professionals"
		August
24	August 3, 2024	Learning Session on "Unlocking the Power of Commercial Wisdom; Effective Decision Making by CoC"

25	August 8, 2024	65th Batch of Pre-Registration Educational Course (Online Course)
26	August 11, 2024	Workshop on "Not Readily Realisable Assets (NRRA)"
27	August 13, 2024	Seminar on Navigating Insolvency: ARC's Expertise Asset Resolution
28	August 18, 2024	Workshop on “Compliances to be made by IPs under IBC, 2016."
29	August 20, 2024	DISCUSSION ON FILING OF LIQUIDATION & VOLUNTARY LIQUIDATION FORMS
30	August 24, 2SS024	Workshop on "Role & Responsibilities of Authorized Representatives under IBC 2016"
31	August 30, 2024	Workshop on “Judicial Pronouncements under IBC, 2016.”
32	August 31, 2024	Workshop on Guidelines for Committee of Creditors.
September		
33	September 6, 2024	Executive Development Program on “Successful Implementation of Resolution Plan.”
34	September 13, 2024	Workshop on “Understanding the Waterfall Mechanism (Section 53 of IBC, 2016.).”
35	September 21, 2024	Learning Session on “Avoidance Transactions under IBC, 2016.”
36	September 23, 2024	Webinar on IU's Technology Solutions for IPs
37	September 27, 2024	Seminar on Insolvency Revolution: Preparation for the Unknown
38	September 29, 2024	Workshop on Judicial Pronouncements under IBC, 2016.
October		
39	October 5, 2024	Workshop on Mediation & IBC Framework: Trajectory & Prospects
40	October 10, 2024	Workshop on Forensic Audit & Transaction Audit
41	October 19, 2024	Workshop on Cross Border & Group Insolvency
42	October 26, 2024	Workshop on Judicial Pronouncements under IBC, 2016
November		
43	November 8, 2024	Workshop on Rising Haircuts under IBC, 2016.
44	November 9, 2024	Discussion on recent judgments delivered by Supreme Court and Latest IBBI Circulars under IBC, 2016
45	November 11, 2024	Mediation Cohort: Become A Certified Mediator with Comprehensive Industry Focus
46	November 17, 2024	Workshop on Not Readily Realisable Assets
47	November 21, 2024	Seminar on The Insolvency Revolution: Preparing for the unknown
48	November 23, 2024	Workshop on “Judicial Pronouncements under IBC, 2016"
49	November 28, 2024	66th BATCH OF PRE-REGISTRATION EDUCATIONAL COURSE (Online Course)
50	November 29, 2024	Foundation Day of IPA of Institute of Cost Accountants of India
December		
51	December 1, 2024	Workshop on “Navigating the NCLT & NCLAT Landscape"
52	December 7, 2024	Master Class on “Liquidation: Beyond & Basics”
53	December 14, 2024	Workshop on “Personal Guarantors to Corporate Debtors"
54	December 20, 2024	Workshop on Judicial Pronouncements under IBC, 2016
55	December 28,2024	Workshop on “Unlocking the Power of Commercial Wisdom; Effective Decision-Making by CoC


ARTICLES

PREFERENTIAL, UNDERVALUED, FRAUDULENT AND EXTORTIONATE TRANSACTIONS UNDER INSOLVENCY AND BANKRUPTCY CODE 2016

CS ARVINDER SINGH KINDRA
INSOLVENCY PROFESSIONAL

SYNOPSIS:

As per Insolvency and Bankruptcy Code 2016 **("IBC")** there are four types of transactions i.e. Preferential, Undervalued, Fraudulent and Extortionate are also called as Avoidance and / or Vulnerable transactions. IBC , provides for avoidance of preferential (Sections 43 and 44), undervalued (Section 45 to 48), extortionate (Sections 50 and 51) and fraudulent (Section 49 and 66) transactions and the intention of legislature behind enacting such provisions is that fraudulent transactions are avoided so that such assets would be available either with the IRP or with the liquidator, as the case may be, to put the corporate debtor back on its revival path as a going concern or if that is not possible, to ensure that the creditors of the corporate debtor get a transparent deal. It also ensures that a particular creditor is not placed in a beneficial position vis-à-vised by the other creditors. IBC 2016 also casts duty upon Resolution Professional under Section 25(2) (j) file application for avoidance of transactions in accordance with Chapter III, if any and Section 35 casts duty of the liquidator (l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions. This Article aims to provide insight into PUFE transactions at a glance which can help the reader as a ready reckoner for reference purposes.

INTRODUCTION:

The Insolvency and Bankruptcy Code of India 2016 **("IBC")** and the IBBI (Insolvency Process for Corporate Persons) Regulations of 2016 **("CIRP Regulations"**) have made elaborate provisions for Preferential, Undervalued, Fraudulent and Extortionate **("PUFE transactions").** To identify and inquire into these transactions and file applications for their avoidance, the Resolution Professional / liquidator as the case may be has been assigned a duty under Sections 25(2) (j) and 35(l) of IBC. Further, for setting aside undervalued transactions, an application may also be filed by a creditor under Section 47. In the IBC Eco-System although no separate definitions of PUFE transactions have been provided but the Sections dealing with such transactions are self-contained , which incorporates and includes various terms of immense relevance which shall be explained in this Article.

Notifications & Recommendations of Insolvency Law Committee:

The legislation after recommendation by the Joint Parliament Committee passed by Lok Sabha on 5.5.2016 and by Rajya Sabha on 12.5.2016 and assented by the President on 28.5.2016 and known as the Insolvency and Bankruptcy, Code 2016 (31of 2016 dated 25.5.2016) which has been amended from time to time . Further as per Various Notifications the provisions of various sections have been notified from time to time. **The provisions related to PUFE transactions have been notified vide 2 Notifications (I) Section 26 in respect of Application for avoidance of transactions not to affect proceedings , Section 66 in respect of Fraudulent trading or wrongful trading , Section 67 in respect of Proceedings under section 66 was notified vide Notification S.O. 3594 (E) dated 30.11.2016 enforceable w.e.f. 1-12-2016 and (II) Section 43 to 56 relating to Preferential transactions & order, Avoidance of undervalued transactions, Relevant period & order, Transactions defrauding creditors, Extortionate credit transactions, order were Notified vide S.O.3867 (E) dated 9-12-2016 enforceable w.e.f. 15-12-2016 .**

The Government of India constituted an Insolvency Law Committee **("ILC")** on 16th November 2017 to make recommendations to the Government on issues arising from the implementation

of the IBC as well as on the recommendations received from various stakeholders. The Committee reviews various aspects of IBC in its reports which are considered by the Parliament and recommend for legislative changes and considering the reports and Judgments, the legislations has been amended from time to time to bring the provisions of IBC in line with. ILC in its 5th report of May 2022, deliberated on the issue which was highlighted **in the matter of Venus Recruiters Private Limited vs. Union of India & Ors** and keeping in view the intent of Section 26 of IBC, the ILC suggested that proceedings related to PUFE transactions should be considered independent of the CIRP. Accordingly, the Committee concluded that proceedings in respect of PUFE transactions may continue beyond the timeline.

Further, in line with the suggestion of the ILC, Regulation 38(2) (d) was inserted to the CIRP Regulations vide Notification No. IBBI/2022-23/GN/REG 084, dt. 14.06.2022, w.e.f.14.06.2022. Inserted as (d) provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed.

However, given that the CIRP of a corporate Debtor has to be mandatorily concluded within a period of 330 days (including all extensions from the date of admission into CIRP), coupled with the delay that commonly occurs in disposal of applications in relation to avoidance of PUFE transactions in relation to a corporate debtor often remains unadjudicated by the time the CIRP of such corporate debtor is concluded.

As a result, applications for avoidance of PUFE transactions were considered infructuous upon conclusion of the CIRP. This issue was highlighted in the matter of Venus Recruiters Private Limited vs. Union of India & Ors. The Division Bench of Delhi High Court on January 13, 2023 now titled as IN THE MATTER OF: LPA 37/2021 and C.M. Nos. 2664/2021, 2665/2021 & 2666/2021 Tata Steel BSL Limited Versus Venus Recruiter Private Limited & Ors has finally decided the fate of avoidance/preferential/undervalued applications filed under the Insolvency and Bankruptcy Code, 2016 based on the Venus Recruiters Private Limited & v Union of India & Ors case. **The Division Bench held that avoidance/preferential transactions can survive beyond the conclusion of corporate insolvency resolution process ("CIRP") and that the Resolution Professional ("RP") will not be functus officio for perusing the avoidance applications and can continue to pursue such applications.**

Relevant Provisions / Sections in respect of Duties of Resolution Professional / Liquidator & PUFE transactions under IBC at a glance - Part II Corporate Insolvency Process of Chapter II. Provides the relevant Sections in dealing with such transactions IBC, provides for avoidance of preferential (Sections 43 and 44), undervalued (Section 45 to 48), extortionate (Sections 50 and 51) and fraudulent (Section 49 and 66) transactions.
Quote

Section 25: Duties of resolution professional.

25(2) (j) (j) file application for avoidance of transactions in accordance with Chapter III, if any

Section 26: Application for avoidance of transactions not to affect proceedings.

26. The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process.

Section 35: Powers and duties of liquidator.

35(l) (I) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

Section 43: Preferential transactions and relevant time.

43. (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

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

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

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

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

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

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

Explanation.—For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

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

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency Section 44: Orders in case of preferential transactions.

44. The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, **by an order**:

(a) **require any property transferred** in connection with the giving of the preference to be vested in the corporate debtor;

(b) **require any property to be so vested** if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(c) **release or discharge (in whole or in part) of any security interest** created by the corporate debtor;

(d) **require any person to pay such sums in respect of benefits received by him from the corporate debtor**, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

(e) **direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference**, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(f) **direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order**, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

(g) **direct for providing the extent to which any person whose property is so vested in the corporate debtor,** or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Provided that **an order** under this section **shall not**—

(a) **affect any interest in property which was acquired from a person other than the corporate debtor** or any interest derived from such interest and **was acquired in good faith and for value;**

(b) require a person, who received **a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.**

Explanation I.—For the purpose of this section, **it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference,—**

(i) **had sufficient information of the initiation or commencement of insolvency resolution process** of the corporate debtor;

(ii) **is a related party**, ;

it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.

Explanation II.—A person shall be deemed to have **sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.**

Section 45: Avoidance of undervalued transactions.

45. (1) If the **liquidator or the resolution professional**, as the case may be, on an **examination of the transactions** of the corporate debtor referred to in **sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.**

(2) A transaction shall be considered **undervalued where the corporate debtor—**

a. makes a **gift to a person**; or
b. enters into a transaction with a person **which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,** and such transaction **has not taken place in the ordinary course of business** of the corporate debtor.

Section 46: Relevant period for avoidable transactions.

46. (1) In an **application for avoiding a transaction at undervalue**, the liquidator or the resolution professional, as the case may be, **shall demonstrate that—**

(i) such transaction was **made with any person within the period of one year preceding the insolvency commencement date; or**

(ii) such transaction was made **with a related party within the period of two years preceding the insolvency commencement date.**

(2) The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.

Section 47: Application by creditor in cases of undervalued transactions.

47. (1) Where an **undervalued transaction has taken place** and **the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor**, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.

(2) Where the Adjudicating Authority, after examination of the application made under sub-section (1), **is satisfied that—**

(a) undervalued transactions had occurred; and

(b) liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

it shall pass an order—

(a) **restoring the position as it existed before such transactions** and reversing the effects thereof in the **manner as laid down in section 45 and section 48;**

(b) **requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.**

Section 48: Order in cases of undervalued transactions.

48. The order of the Adjudicating Authority under sub-section (1) of section 45 may provide for the following:—

(a) **require any property transferred as part of the transaction, to be vested** in the corporate debtor;

(b) **release or discharge (in whole or in part) any security interest granted by the corporate debtor**;

(c) **require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be**, as the Adjudicating Authority may direct; or

(d) **require the payment of such consideration for the transaction as may be determined by an independent expert.**

Section 49: Transactions defrauding creditors.

49. Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the **Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—**

(a) **for keeping assets** of the corporate debtor **beyond the reach of any person who is entitled to make a claim against the corporate debtor; or**

(b) **in order to adversely affect the interests of such a person in relation to the claim**,

the Adjudicating Authority shall make an **order—**

(i) **restoring the position as it existed before such transaction as if the transaction had not been entered i**nto; and

(ii) **protecting the interests of persons who are victims of such transactions**:

Provided that an order under this section—

(a**) shall not affect any interest in property** which was **acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and**

(b) **shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.**

Section 50: Extortionate credit transactions.

*__50.__ (1) Where the corporate debtor has been a party to an extortionate credit transaction involving the **receipt of financial or operational debt during the period within two years preceding the insolvency commencement date,** the liquidator or the resolution professional

as the case may be, may **make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.**

(2) The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).

Explanation.—For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

Section 51: Orders of Adjudicating Authority in respect of extortionate credit transactions.

51. Where the Adjudicating Authority after examining the application made under sub-section (1) of section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, **it shall, by an order—**

a) **restore the position** as it existed prior to such transaction;
b) **set aside the whole or part of the debt created on account** of the extortionate credit transaction;
c) **modify the terms** of the transaction;
d) **require any person who is, or was, a party to the transaction to repay any amount** received by such person; or
e) **require any security interest that was created as part of the extortionate credit transaction to be relinquished** in favor of the liquidator or the resolution professional, as the case may be.

Section 66: Fraudulent trading or wrongful trading.

66. (1) If during the corporate insolvency resolution process or a liquidation process, it is **found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose**, the Adjudicating Authority may on the application of the resolution professional **pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.**

(2) On an application made by a resolution professional during the corporate insolvency resolution process, **the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—**

(a) **before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process** in respect of such corporate debtor; and

(b) **such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.**

[(3) Notwithstanding anything contained in this section, **no application shall be filed by a resolution professional under sub- section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A**

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Section 67: Proceedings under section 66.

67. (1) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order, and in particular, the **Adjudicating Authority may—**

(a) **provide for the liability of any person** under the order to be a charge on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor **held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and**

(b) **from time to time, make such further directions** as may be necessary for enforcing any charge imposed under this sAection.

Explanation.—For the purposes of this section, "assignee" includes a person to whom or in whose favor, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

(2) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, in relation to a person who is a creditor the corporate debtor, **it may, by an order, direct that the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the corporate debtor.**

Section 67A: Fraudulent management of corporate debtor during pre-packaged insolvency resolution process.

67A. On and after the pre-packaged insolvency commencement date, where an officer of the corporate debtor manages its affairs with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may, on an application by the resolution professional, pass an order imposing upon any such officer, a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

CIRP Regulations at a glance in reference to PUFE Transactions:
Quote

Regulation 5: Extortionate credit transaction.

5. A transaction shall be considered extortionate under section 50(2) where the terms:

(1) require the corporate debtor to make exorbitant payments in respect of the credit provided; or

(2) are unconscionable under the principles of law relating to contracts.

Regulation 35A: Preferential and other transactions

35A. 1. On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

2. Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date
3. Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirtieth day of the insolvency commencement date.
   a) The resolution professional shall forward a copy of the application to the prospective resolution applicant to enable him to consider the same while submitting the resolution plan within the time initially stipulated.
4. The creditors shall provide to the resolution professional, relevant extract from the audits of the corporate debtor, conducted by the creditors such as stock audit, transaction audit, forensic audit, etc.

Regulation 38: Mandatory contents of the resolution plan.

(2) A resolution plan shall provide:

#(d) **provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:**

Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022.]

#inserted by IBBI (CIRP) (Second Amendment) Regulations, 2022 vide Notification No. IBBI/2022-23/GN/REG084 dated 14th June, 2022, w.e.f. 14.06.2022.

Regulation 39: Approval of resolution plan.

39 (2) The resolution professional **shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him**:-

(a) preferential transactions under section 43;

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.

Summary of PUFE Sections & CIRP Regulations under IBC 2016.

It is important to take a note that landmark Judgment of the Hon'ble Supreme Court of India in the matter of Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. Etc. [Civil Appeal Nos. 8512-8527 of 2019 and other petitions] dated 26th February, 2020 the Hon'ble Supreme Court settled several issues related to Preferential transactions, Look Back Period, Duties and responsibilities of RP, Undervalued and fraudulent transactions.

Section 25 (2) (j) Duties of resolution professional, casts an important duty on Resolution Professional (RP) - file application for avoidance of transactions in accordance with Chapter III, if any. This is to be read with Regulation 35 A which casts a duty on RP and, the RP is required to form an opinion on avoidable transactions on or before the 75th day of the commencement of the corporate insolvency resolution period, to decide on such transactions on or before the 115th day, and to file an application with the adjudicating authority on or before the 135th day of the beginning of the insolvency resolution period.

Section 26 provides that application for avoidance of transaction is not to affect CIRP. Thus, avoidance applications can continue even post completion of CIRP.

Section 35(l) provides Powers and duties of liquidator to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

Section 43 regulates preferential transactions and their relevant time. Under subsection (1) of Section 43, if the liquidator or the resolution professional forms an opinion that the corporate debtor has granted a preference to any person as mentioned in subsection (4), during a relevant time and in the manner specified in subsection (2), they are required to apply to the Adjudicating Authority for the avoidance of preferential transactions. Section 43, which deal with the duties and responsibilities of the resolution professional in examining and reporting on preferential and other transactions observed during the insolvency resolution process and the **issuance of relevant orders under Section 44.**

Section 45 regulates Undervalued transactions and in general parlance, the amount fetched is significantly less than the amount provided by the corporate debtor then this type of transaction is known as an undervalued transaction. And, when a resolution professional or liquidator come across such a transaction, then as the case, must file an application with the tribunal to have the transaction declared null and void and the effect reversed.

Section 46 talks about relevant period for undervalued transactions, any transaction in the ordinary course of business of the corporate debtor would not amount to an undervalued transaction, just as it would not amount to an undervalued transaction in the case of preferential transactions. The undervalued and preferred deals have the same "look-back" time and accordingly, the guidance issued by the Supreme Court in the case of Jaypee Infratech on these aspects would apply in the context of undervalued transactions as well.

Section 47 is about a situation, where an undervalued transaction under section 45 has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this section. Since this section has far reaching effect as the AA may pass an order **requiring the Board to initiate disciplinary proceedings**

against the liquidator or the resolution professional as the case may be. Resolution Professional or the Liquidator as the case may be have to be very much careful in reporting such transactions under Section 45 itself and Section 48 provides about the orders of AA under such transactions.
Section 49 details **about transactions made by a corporate debtor**, defrauding the creditors with the intent of putting the corporate debtor's assets beyond the reach of creditors or otherwise prejudicing the interests of the person making a claim against the corporate debtor or who may make a claim against the corporate debtor in the near future. One of the important feature of this Section is that it differs from section 43 and section 46 in regard to look back period as there is no time limit for contesting the transaction before the Tribunal.

Section 50 read with Regulation 5(2) refers to something that is excessive, extreme, or severe. It is if the corporate debtor receives a credit facility with an excessive rate of interest or unfair credit terms, such as a punitive default clause, or if the debtor was in a vulnerable position at the time of the transaction and Section 51is regarding Orders of the Adjudicating Authority in respect of extortionate credit transactions.

Section 66, details about fraudulent trading or wrongful trading it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose. Transactions under Section 66 does not provide for a look-back period for the purpose of examining and declaring transactions executed by the corporate debtor as fraudulent. This is in contrast to the provisions of Sections 43 and 46 of the IBC which specify a look-back period. An observation to this effect was also recently made by the NCLT, Ahmedabad Bench in **Amit Patel v. Chandra Jain** on 16 February 2022. The Bench noted that there is no prescribed look-back period for transactions which are proposed to be termed as fraudulent under Section 66 of the IBC. Section 67 provides about proceedings under Section 66

Regulation 35 A, spells the timelines on avoidance transactions. The report of the Insolvency Law
Committee and amendment to regulation 35A dated 14.06.2022 & 16.09.2022 makes it clear that an avoidance application can be pending even beyond the submission of the resolution plan. The timelines under this regulation are directory and not mandatory in nature. Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP.

Regulation 38 mandates that the Resolution Plan provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:

Regulation 39(2) of the IBBI Regulations deals with the approval of the resolution plan. It stipulates that the resolution professional is responsible for submitting all resolution plans that comply with the requirements of the IBC 2016 & CIRP Regulations.

Data of avoidance applications and disposal:
As per the quarterly newsletter of the Insolvency and bankruptcy Board of India for the October –December 2023 the Details of avoidance applications and disposal is as under:
Details of avoidance applications and disposal

(Amount in Rs. Crore)

Sl.	Nature of Transactions	Applications Filled		Applications Disposed		
		Number of Transactions	Amount Involved	Number of Transactions	Amoun Involved	Amount Clawed Back
1	**Preferential**	160	15262.77	60	908.86	38.27
2	**Undervalued**	26	1031.96	5	362.42	5.77
3	**Fraudulent**	282	99036.98	49	2338.78	1048.62
4	**Extortionate**	4	75.65	1	0.09	-
5	**Combination**	634	223742.04	140	43735.51	5226.61*
Total		**1106**	339149.40	**255**	**47345.66**	**6319.27***

*In the matter of Jaypee Infra, possession of 758 acres out of total 858 acres of land was given back to the CD. The 858 acres of land was earlier valued at Rs. 5500 crores.

Conclusion:

Avoidance transactions are the transactions undertaken by the corporate debtor prior to the initiation of the Corporate Insolvency Resolution Process ('CIRP') to defraud its creditors or to benefit itself and his related parties. Sections Section 45 to 49 and 66 of the IBC and CIRP regulations regulate how preferential and fraudulent transactions are to be dealt for by the Resolution Professional / Liquidator and the Committee of Creditors during the CIRP. Keeping in view, the nuisance of PUFE transactions and as per the data hereinabove for the quarter October to December 2023 the number of transactions for which applications filed are 1106 and amount involved 339149.40 Crore against which applications disposed are mere 255 and amount involved 47345.66 Crore disposal rate for applications filed and applications disposed and the amount involved in these transactions is alarming, this shows the enormous value that avoidance transactions hold, the recovery of which can substantiate the recoveries by creditors under the IBC. The Resolution Professional or Liquidator must recognize a situation and find solutions to prevent it so that creditors can pursue their claims.

The legislation on the recommendation of the Insolvency Law Committee has amended the IBC 2016 and CIRP regulations from time to time and various judicial pronouncements have also paved the path for disposal of such transactions. In the past there was no provision regarding the restoration of avoidance transactions after the approval of the successful resolution plan. The landmark judgment of Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors provides foremost guidance on the context of avoidance transactions under the IBC. This judgment plays an important role in the remedy / restoration of avoidance transactions filed against the corporate debtor in the future.

References:

1. Insolvency and Bankruptcy Board of India (IBBI)
2. The Insolvency and Bankruptcy Code, 2016 & CIRP Regulations.
3. Reports of Insolvency Law Committee
4. Judicial pronouncements.

ASSET RECONSTRUCTION COMPANIES AS RESOLUTION APPLICANTS UNDER IBC: REVISITING THE JOURNEY SO FAR AND WAY FORWARD.

MOHAMMAD LUTFUL KABIR
INSOLVENCY PROFESSIONAL & SOCIAL AUDITOR

SYNOPSIS

There are tremendous changes in the system for doing business with ease during the last few years. Where financial stakeholders found it difficult to clear backlog of NPA cases, entrepreneurs also got it tough to come out of the business in loss and trauma. Now with the invent of Insolvency & Bankruptcy Code 2016 and changes in Companies Act 2013, it has been made somewhat easy to deal with such cases. Entrepreneurs now get lease of fresh life to exit from previous mistakes done and start new business with more success rate as per their vast experience. Financial institutions also feel better to cope with such cases under new provisions. So, ease of doing business also makes it possible the ease with which companies can shut operations and exit the marketplace in a country and re-enter the market.

INTRODUCTION:

On 11th May 2024, a news item in the financial daily The Economic Times flashed out a heading "RBI looks at ARCs Amid a Flood of Allegations". Under the above heading, the first para of the report says "India's Central Bank leadership is scheduled to meet the top management of asset reconstruction companies (ARC) next week to discuss corporate governance and effective stressed asset resolution amid concern of potential back-door entry by defaulting promoters, people with knowledge of the development told ET.

While the reported allegations and related matters would have got discussed and reviewed with 27 registered ARCs and corrective actions would have got initiated (we shall come to this later in this article) in the Apex Bank's meeting on the 17th May2024, we shall approach the subject here taking in due perspective the following while evaluating the ARCs in the new envisaged role that was permitted by RBI through a notification reference: RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023. It would not be out of context to mention here that although under IBC Law Provision Sec – 29A sub-clause (d) of Explanation II with respect to Provisos to Explanation 1 under Sec 29A(i) does not prohibit participation of ARCs as Resolution Applicant, ARCs could not participate without prior approval of RBI (led to a number of litigation cases in this matter) which only came through the aforesaid notification of 2022-23.

In the next section we shall delve upon the following aspects of ARC functioning to assess and appreciate the expected role that the financial entity is expected to perform with respect to: -

a. As an asset reconstruction company under the SARFAESI Law
b. As Resolution Applicant under IBC within the Code's framework
c. The Legal perspective of ARC as Resolution Applicant
d. Explore and address any conflicting areas between the above two Laws

A) Advent of ARC and its functioning under SARFAESI Law:

It was in the year 2002 that the Government of India brought in the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002 Act (the SARFAESI Act, 2002), consequent to the 1998 Report by the Narasimham Committee II which recommended creation of such entities i.e., ARCs. Hence, Asset Reconstruction Companies started functioning from 2003 while carrying out activities like providing a framework for the banks and other lending institutions to transfer their NPAs to a third party as well as helping them in the resolution of NPAs by bringing in their expertise in managing, resolving and recovering the same. The more popular mode today is to buy the debt from the original lender at deep discount with a nominal down payment and the rest of the considerations through issuance of security receipts. All the modus operandi requires adhering to the detailed compliance guidelines laid down in this regard by various regulatory bodies like RBI, SEBI and last but not the least complying with the law itself. In the following paras we shall deal with the provisions under the Mother Law of ARCs i.e., the SARFAESI Act, 2002 which would help us understand the role and compliance by which the entity is guided under Law.

When we look into the various provisions of the Law, we find that securitization and reconstruction remain the primary areas of business that the ARCs are allowed to conduct as Sec 10(1) of the Act clearly spells out as such ***'Any [asset reconstruction company] registered under section 3 may (a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties; while Sec 10(2) says 'Save as otherwise provided in sub-section (1), no [asset reconstruction company] which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitization or asset reconstruction: Provided that a [asset reconstruction company] which is carrying on, on or before the commencement of this Act, any business other than the business of securitization or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.'*** Hence, we see that Sec 10 provisions clearly limit the role of ARCs within the restrictive areas as spelt out in the Law governing such entities. However, we see a catch in Sec 12 where the RBI is empowered to issue directions to ARCs under the provisions of Section 12 of SARFAESI. Probably based on this Section RBI had issued its circular RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023 in the absence of any other provision under the Law that permits any ARCs to be the Resolution Applicant as is envisaged under IBC or to be in any other business for that matter other than the securitization and reconstruction of assets. On the operational side, provisions like Section 9 of the Act prescribes the measures that can be adopted by an ARC for the purpose of asset reconstruction under the directions and regulation of RBI. Likewise, Section 12(2) empowers RBI to issue directions with respect to the kinds of financial assets that may be acquired by an ARC whereas Section 12(1) empowers RBI to give directions to ARCs concerning income recognition, accounting standards, bad and doubtful debts, capital adequacy, and deployment of funds.

B) As Resolution Applicant under IBC within the Code's framework:

Any discussion or evaluation on IBC must start with the BLRC Report since the Code had its primary foundation based on the recommendations under the BLRC Report. Truly speaking the BLRC Report 2015 does not envisage any significant role of ARCs in the Insolvency Resolution process of an entity. It sees the RBI norms on ARCs as an interfacing element that could influence the Insolvency Resolution process. Also, the IBC Code 2016 did not have any provision for considering ARCs as Resolution Applicant and it was only in the 2018 Amendment that this provision was brought in so that ARC could also be considered as a Resolution Applicant.

Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) is a provision that lays down eligibility criteria for resolution applicants. Objectively speaking, Section 29A got introduced through an amendment in 2018 to strengthen the resolution process and to prevent certain categories of persons from taking over distressed companies. Under the IBC, sub-clause (d) of Explanation Il with respect to the Provisos to Explanation 1, under Section 29A(j), in effect, does not prohibit an Asset Reconstruction Company from submitting a resolution plan and an ARC hence becomes eligible to be a Resolution Applicant for a CD under CIRP.

Although the above provision under IBC after the 2018 amendment gives a blank cheque to the ARCs to bid as Resolution Applicant in a CIRP, it was still not a smooth sailing till some landmark legal cases that came on the way for implementing the same. In the next paras we shall deliberate on a couple of such cases for better understanding of the crux of the issue.

C) The Legal Perspective of ARC As Resolution Applicant:

In the CIRP case of Aircel Ltd and its subsidiaries in CP (1B) No.298/MBII/2018, UV Asset Reconstruction Company Limited ("UVARCL") became the successful Resolution applicant after it got approved by the Adjudicating Authority subsequent to the CoC approval. While UVARCL had applied for RBI nod for acquiring the Aircel shares as part of the resolution plan it had landed up hitting a road block as RBI denied such approval and rather issued a show cause notice to the ARC seeking an explanation to the reported violation of Sec 10 norms failing which action would be taken. UVARCL challenged the show cause notice before the Delhi High Court in UV Asset Reconstruction Company Ltd. Vs. Union of India & Ors. to which a stay order was granted by Delhi High Court. It is here that the Delhi High court emphasized the need to reconcile the apparent disengagement between IBC 2016, SARFAESI Act 2002 and RBI as Regulator to make ARC's inclusion effective and purposeful in the near future. There have been other instances where ARCs have served as the resolution applicants. However due to the stand taken by RBI before the Delhi High Court that the prior approval of the Reserve Bank of India would be required before submitting a Resolution Plan, and since the said approval was not obtained by the ARCs, the Resolution Plan submitted by them is invalid in law.

Similarly in the case of *Superna Dhawan v. Bharti Defense and Infrastructure Ltd*, other apprehensions like the provisions as per RBI Circular sighted above also crept in like that of (i) ARCs having significant influence or control on the insolvent entity only for a period of five years may finally have an adverse impact on the ultimate resolution of the entity_under an insolvency resolution process. (ii) The high likelihood of an ARC investing in a distressed entity only for the purpose of selling it at a higher price and profit margin also do not go down with the ultimate objectives laid out under the Code.

D) Explore and address conflicting areas under the Laws and Regulatory Norms:

The above two cases clearly indicates that there are inconsistent provisions between the two laws as well as in the laid-out norms and guidelines of RBI. There have been efforts to close these gaps or at least narrow it down to a level where the implementation of the intended processes does not suffer or get delayed leading to further decay in the asset value of the already distressed entity. A couple of such initiatives that are taken by authorities are listed as under -

The Reserve Bank of India (RBI) committee led by Executive Director Sudarshan Sen spelt out several recommendations in their report submitted in April 2021 which addressed many such conflicts and incongruencies in the matter of optimizing asset acquisition, securitization and reconstruction measures, enhancing liquidity and trading of security receipts, and improving operational efficiency of ARCs. The Committee also had proposed that ARCs to be permitted to participate in the Insolvency and Bankruptcy Code (IBC) process as a Resolution Applicant,

either through a SR trust or through an Alternative Investment Fund (AIF) sponsored by them. Since then, RBI has taken several steps in line with the recommendations of the Committee and the meeting outcome on the 17th May 2024 point out several such action points to be carried out by the ARCs and RBI.

CONCLUSION

From the points deliberated above it will be clear now that ARCs would continue to remain a very effective player in the distressed asset management of ailing entities and also can become a meaningful value addition in the CIRP process as a successful Resolution Applicant. If one really looks at it ARCs propose a better understanding of the value of distressed assets and consequently offer a higher bid based on their ability and expertise to manage and turn around such assets. On the 17th May 2024 meeting with 27 nos registered ARCs, the RBI Deputy Governor Mr. J Swaminathan emphasized that ***'setting the right tone from the top is crucial in fostering a culture of integrity and ethical conduct. He urged the ARC to adopt a regulation plus approach where there is compliance with both the letter of the regulation and spirit.'***

Reference & Resources: -

a. BLRC Report dt. 4th November 2015
b. UVARCL in Aircel CIR in CP (1B) No.298/MBII/2018
c. Superna Dhawan v. Bharti Defense and Infrastructure Ltd CP(IB)195 of 2019
d. RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023
e. RBI Master Direction for Asset Reconstruction Companies(ARC) effective April, 24 , 2024

A RELATED PARTY UNSECURED CREDITOR CANNOT BE TREATED ON PAR WITH THE SECURED CREDITORS

CS. DR. M. GOVINDARAJAN
PCS & IP

RELATED PARTY TRANSACTIONS

The term 'related-party transaction' refers to a deal or arrangement made between two parties who are joined by a preexisting business relationship or common interest. Companies often seek business deals with parties with whom they are familiar or have a common interest. Although related-party transactions are themselves legal, they may create conflicts of interest or lead to other illegal situations. Public companies must disclose these transactions. Unchecked, the misuse of related-party transactions could result in fraud and financial ruin for all parties involved.

Related parties include parent companies, subsidiaries, associate firms, joint ventures, or a company or entity that is controlled or significantly influenced or managed by a person who is a related party.

Related party transactions in IBC

The concept of related party transactions is also applicable to the Insolvency and Bankruptcy Code, 2016 ('Code' for short). Section 5(24) of the Code defines the expression 'related party' in relation to a corporate debtor as-a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

- a key managerial personnel of the corporate debtor or a relative of key managerial personnel of the corporate debtor;
- a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;
- a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;
- anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
- any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

- any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;
- any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
- any person who is associated with the corporate debtor on account of-

  1. participation in policy making processes of the corporate debtor; or
  2. having more than two directors in common between the corporate debtor and such person; or
  3. interchange of managerial personnel between the corporate debtor and such person; or
  4. provision of essential technical information to, or from, the corporate debtor

Section 21(2) of the Code provides that a related party who is also a financial creditor of the corporate debtor does not have the right to representation, participation, or voting in the Committee of Creditors meetings. Section 29A of the Code prohibits the participation of related parties in the resolution process to ensure that companies or individuals with potential negative impacts on the insolvency resolution process are excluded. The disclosure of related parties is required under Section 29 of the Code to safeguard the interests of creditors. Related parties are not granted voting rights in the resolution process to maintain an objective environment and protect the interests of the Committee of Creditors and other creditors. The eligibility of related parties as resolution applicants is contingent upon clearing all their dues, as seen in the case of Committee of Creditors.

In 'Arcom Medical Devices Private Limited v. B & A Health Care Private Limited'- CP (IB) No. 243/7/HDB/2021, the NCLT, Hyderabad Behcn – I, held that the 2nd Respondent is a related party to the corporate debtor and the 2nd respondent as operational creditor of the corporate debtor, Consequently, it is further ordered that 1st Respondent shall reconstitute the Committee of Creditors by treating the 2nd Respondent as operational creditor to the corporate debtor.

Related party transactions have significant implications for the insolvency resolution process, including conflicts of interest, potential abuse of the framework, and equitable distribution of assets among creditors. Judicial precedents and case studies provide insights into the consequences of related party transactions under the Code, highlighting the need for robust regulation.

ISSUE

The issue to be discussed in this article is as to whether a related party unsecured creditor can be treated on par with the secured creditors with reference to decided case law.

The equity shareholders of the company are treated as related parties of that company. Even if they provide loan to the said companies, they are related parties. Therefore, in the case of resolution plan they may be treated as separate categories of unsecured creditors and they will not be treated on par with the secured creditors of the corporate debtor.

CASE LAW

In 'West Coast Paper Mills Limited v. Bijay Murmuria, RP and others' – Company Appeal (AT) (Ins.) 1272 of 2019 – NCLAT, Principal Bench, New Delhi, decided on 13.05.2024, one ex-employee of Fort Glost Industries Limited filed an application under Section 9 of the Code for initiation of corporate insolvency resolution process against Fort Glost Industries Limited ('Corporate Debtor' for reference) on account of default by the corporate debtor a sum of

Rs.1,13,946/- towards his gratuity. The said application was admitted by the Adjudicating Authority on 09.08.2018. A Committee of Creditor was constituted by the Resolution Professional ('RP' for short) on 04.12.2018.

The RP invited applications from the eligible resolution applicants for submission of resolution plans for the revival of the corporate debtor. Two resolution plans were received one from Gloster Limited and the other from Hooghly Infrastructure Private Limited. The RP, through the Forensic Audit reports ascertained that there were no preferential transactions, undervalued transactions, transactions defrauding creditors, extortionate credit transactions, fraudulent transactions or wrongful trading.

The RP placed the two resolution plans before the Committee of Creditors ('CoC' for short). The CoC analyzed the two resolution plans and selected the plan submitted by Gloster Limited. 73.21% of CoC approved the resolution plan. The RP submitted an application before the Adjudicating Authority for the approval of resolution plan. The Adjudicating Authority approved the same on 27.09.2019. The Adjudicating Authority rejected the claim of West Coast Paper Mills Limited holding that the claim of the said company is to be treated on par with the Financial Creditors and to make the appellant eligible for distribution of claims as per resolution plan.

The Adjudicating Authority held that non allocation of fund by the resolution applicant, in the case in hand to the related party of the Corporate Debtor do not contravene the water fall mechanism as provided in Section 53(1)(h) of the Code, 2016. The Adjudicating Authority did not find any contravention by the resolution applicant.

West Coast Paper Mills Limited filed an appeal before the National Company Law Appellate Tribunal challenging the order of Adjudicating Authority. The appellant submitted the following before the NCLAT-

- A sum of Rs.7.15 crore was paid by them on behalf of the corporate debtor to KDCC Bank Limited due to default by corporate debtor and corporate guarantee bond executed by the appellant.
- The said amount was paid on 25.08.2014 which was transferred into a short term inter-corporate debtor.
- The Corporate debtor every year issued balance confirmation to the appellant.
- The appellant claimed a sum of Rs.89.2 crore during CIRP to RP.
- The appellant claimed that he should be treated as par with the other Financial Creditors and should be eligible for equal pro-rata distribution as per resolution plan.
- No amount has been paid to him.
- The resolution plan is contrary to the provisions of the Code and liable to be quashed.
- The impugned judgment is ex facie illegal and in teeth of the judgment passed by Supreme Court in 'M.K. Rajagopalan v. Dr. Periyasamy Palani Gounder and another' – Civil Appeal Nos. 1682-1683 of 2022, inasmuch as the Supreme Court has categorically rejected the reasoning attributed by the Adjudicating authority in the present case to dismiss the application.
- Despite being a financial creditor, although related party to the Corporate Debtor, was never provided with minutes of any meeting of the CoC.

- The impugned judgment has been premised upon erroneous and wrong reasoning which is in teeth of the observations passed by the Supreme court in M.K. Rajagopalan (supra).
- As a consequence of equating the appellant at par with equity shareholders, the appellant has been illegally and wrongly discriminated in as much as the claims of Central Government and the State Government secured creditors who have exercised their enforcement rights; remaining debts and dues and preference shareholders have been illegally and wrongly given preference over the claim of the Appellant.

Therefore, the appellant contended that the present appeal deserves to be allowed and resolution plan deserves to be set aside and/or remanded back to the CoC for ensuring that the resolution plan is not discriminatory against the Appellant.

The RP, the first respondent in the present appeal, submitted the following before the High Court-

- The prayers sought by the appellant are impermissible under the provisions of the Code.
- The appellant is a related party of Corporate Debtor, and is also an unsecured Financial Creditor.
- The whole class of unsecured financial creditors (consisting of the appellant and another related party viz. Gloster Cables Ltd.) are not being paid anything under the said resolution plan.
- It's a settled position of law that a resolution plan can provide for differential payment to different classes of creditors.
- There is no provision in the Code which mandates that a related party should be paid in parity with unrelated parties.
- No fault can be attributed to a resolution plan merely for not making provisions for related parties.
- The appellant cannot seek payment under the resolution plan in parity with secured financial creditors, who form a different class of creditors and further a resolution plan is not mandated to make provisions for related parties.
- The present appeal is completely misconceived in both fact and law and is liable to dismissed.
- The RP is not empowered to interfere in the commercial wisdom of CoC.
- The role of the RP is limited to ensuring that the resolution plan received by him is compliant with Section 30 (2) of the Code before placing the same before the Committee of Creditors for their consideration.

The respondent No.3, the SRA submitted the following before the High Court-

- The annual report and accounts of the Corporate Debtor for the year 2017-18 shows that the appellant is a promoter entity holding 33% shares in the Corporate Debtor.
- The said annual report of the Corporate Debtor shows that the West Coast at the material time was a related party.
- Clause 32 of the Resolution plan provides that all contracts between the Corporate Debtor and its Related Parties shall stand terminated with immediate effect without any further act, deed or instrument and all Liabilities and obligations of the Corporate Debtor to such Related Parties shall be discharged and be permanently extinguished.

- Thus, under the resolution plan all claims of the related parties against the corporate Debtor stood extinguished.
- Since no payment is proposed to any unsecured financial creditor, there can be no question of discrimination of unsecured financial creditor i.e., all the unsecured financial creditors of the Corporate Debtor have received the same treatment viz. 'Nil payment' and there has been no discrimination what so ever amongst the same class of creditors.
- The appellant has been equated with equity shareholders was made by the appellant and not by SRA or Resolution Applicant.
- The NCLAT heard the submissions of the appellant, RP and SRA. The NCLAT considered the following issues to be considered in this case-
- Whether the appellant has been treated as equity shareholder by the Adjudicating Authority while approving the resolution plan? and
- Whether the appellant has been discriminated vis-à-vis other Financial Creditors?

The NCLAT observed that the Appellant was admitted as Unsecured financial creditor and the same plan were approved by the Adjudicating Authority. Both the CoC and Adjudicating Authority has treated the appellant as unsecured financial creditor. Initially the claim of the appellant and another creditor has been admitted and proposed to pay the full amount as claimed by them. Later on, the RP found that they are related parties to the corporate debtor. The RP informed them that they could not attend the CoC meetings. The SRA has proposed NIL amount to the claimants under this head on account of them being related parties. The Appellant in its submission has also accepted that he is a related party unsecured creditor. The resolution plan has been approved by the CoC and the Adjudicating Authority. The NCLAT was of the view that the appellant has not been treated as equivalent to equity shareholder and such contention of Appellant is devoid of any merit.

The NCLAT observed that it is seen from the records that the Appellant was aware of the fact, that it was being treated as a related party and was accordingly removed from the Committee of Creditors. The Appellant never challenged its treatment as a related party at any stage of the insolvency resolution proceedings, despite have complete knowledge of its status as that of a related party.

In the instant case, among the financial creditors, only secured financial creditors (not related to Corporate Debtor) are being paid Rs. 64.20 crores against their admitted claims of Rs. 619.24 crores. The appellant who is an unsecured financial creditor and related party to Corporate Debtor does not fall in that category as per IBC. there was no provision of the code, which mandates that the related party should be paid in parity with unrelated party. Any prohibition of differential payment to different class of creditors in the resolution plan is ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making provisions for a related party, so long as provision of the IBC and CIRP regulations are met.

The NCLAT found no merit in the present appeal and dismissed the appeal.

Reference:

1. https://www.investopedia.com/terms/r/related-partytransaction.asp.
2. https://www.lawyersclubindia.com.

SUMMARY

It isn't uncommon for companies to do business with people and organizations with whom they already have relationships which is called as related party transactions. These types of transactions are not necessarily illegal. But they can cloud the business environment by leading to conflicts of interest as they show favorable treatment for close associates of the hiring business. The Companies Act, 2013 provides for the disclosures of related party transactions. These transactions are also applicable income tax, Insolvency and Bankruptcy Code, 2016, etc. The aims of the Insolvency and Bankruptcy Code is for the revival of the business of the company which come for insolvency. The resolution plan paves the way for the revival. No related party transaction shall be there in the process of corporate insolvency resolution process etc. This article highlights as to whether the related party unsecured financial creditor is allowed payment in the resolution plan and placed on par with the secured financial creditors.

INSOLVENCY AND BANKRUPTCY CODE, 2016: A BOLLYWOOD DRAMA OF ECONOMIC REFORM

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REGISTERED VALUER

INTRODUCTION

Picture this: The year is 2016, and India's economy is like a classic Bollywood hero—down on its luck, surrounded by creditors demanding their money back, and tangled in a web of outdated laws. Enter the Insolvency and Bankruptcy Code (IBC), 2016, the fearless heroine ready to save the day. The IBC didn't just arrive on the scene quietly; it made a grand entrance with all the fanfare of a blockbuster film. With the IBC, the script was about tochange—dramatically.

"Tera kya hoga, NPAs? (What will happen to you, NPAs?)"

The Pre-IBC Era: A Chaotic Masala Mix

Before the IBC, India's insolvency process was like watching an old masala movie—full of unnecessary twists, endless delays, and subplots that didn't make sense. Businesses in trouble had to navigate a maze of laws, each one adding a fresh layer of confusion. The Companies Act of 1956, SICA 1985, RDDBFI 1993—it was a potboiler of legal drama wherenothing ever got resolved.

Imagine creditors watching their investments vanish while the hero—sorry, debtor—danced around in legal loopholes. The situation was so bad that even foreign investors thought, "Better stay away from this movie."

The Birth of a Game-Changer: IBC, the New Scriptwriter

Into this mess stepped the IBC, ready to rewrite the script. The IBC was like a skilled scriptwriter who knows how to bring together a chaotic plot into a tight, compelling story. Its objectives were clear: streamline all those messy laws into one neat package, make sure resolutions were quick, and give creditors the power they desperately needed.

Key features of the IBC:

1. **Consolidation of Insolvency Laws**: The IBC threw out the old script, bringing all insolvency laws under one umbrella. Finally, creditors and debtors were workingfrom the same playbook.
2. **Time-bound Resolution Process**: The IBC introduced a 180-day deadline to resolve insolvency cases, with an optional 90-day extension. No more dragging the story intoa never-ending sequel.
3. **Creditor-in-Control Model**: Gone were the days of debtor-friendly laws. The IBC handed the reins over to creditors, making them the new stars of the show.
4. **Priority to Secured Creditors**: The IBC flipped the traditional hierarchy, ensuring that secured creditors were paid first, finally giving them their long-overdue close-up.
5. **Insolvency Professionals and Agencies**: The IBC introduced a new cast of characters—Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs)—to manage the process

6. **Adjudicating Authorities:** The National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) became the judges, jury, and executioner in this legal drama.

7. **Cross-border Insolvency**: While the IBC hinted at tackling cross-border insolvency, this part of the story is still waiting for its big break.

The Drama Unfolds: The Insolvency Resolution Process in Action

The IBC was like a high-stakes reality show where companies fought to stay in business.Every step of the process had its own tension, drama, and plot twists.

1. **Initiation of Proceedings**: The drama kicks off when a creditor or debtor files for insolvency. In corporate insolvency cases, a minimum default of ₹1 crore is required.

   Example: The **Essar Steel** case was like the opening episode of a blockbuster show, with financial creditors launching the first attack.

2. **Moratorium Period**: Once the NCLT admits the case, a moratorium is declared. Alllegal battles are paused, giving everyone a moment to catch their breath.

   Example: When **Jet Airways** was grounded, the moratorium gave it a briefrespite from the legal storm.

3. **Appointment of Interim Resolution Professional (IRP)**: The IRP takes over the company, manages operations, and assembles the Committee of Creditors (CoC)—the ultimate decision-makers.

   Example: In the **Bhushan Steel** saga, the IRP's appointment was like the entryof a strong supporting character who takes charge.

4. **Committee of Creditors (CoC)**: The CoC, made up of financial creditors, decides thecompany's fate. Will it be a happy ending or a tragic finale?

   Example: **Electrosteel Steels** found its savior in Vedanta Limited, thanks tothe CoC's green light.

5. **Resolution Plan**: Resolution applicants submit their plans—like contestants presenting their cases to the judges. The CoC's approval is the ticket to the nextround.

   Example: The battle for **Essar Steel** reached its climax when ArcelorMittal'sresolution plan won the CoC's approval.

6. **Adjudication and Implementation**: The NCLT's final approval is like the judge's gavel coming down. The resolution plan is set in motion, and the IRP ensures it's carried out.

   Example: The Bhushan Power & Steel resolution plan, implemented by JSW Steel, was the satisfying conclusion everyone was waiting for.

The Impact: IBC's Blockbuster Success

The IBC didn't just change the rules of the game; it changed the entire playing field. Itsimpact on the economy was like a film that breaks all box office records.

"IBC at the box office: Breaking records and setting new benchmarks!"

1. **Improved Recovery Rates**: Under the IBC, creditors started seeing real returns on their investments, something that seemed impossible before.

   Example: **Binani Cement** was a massive hit when UltraTech Cement's acquisition ensured

nearly 100% recovery for financial creditors.

2. **Reduction in NPAs**: The IBC was the hero that India's banking sector desperatelyneeded, reducing non-performing assets (NPAs) and bringing hope back to the financial system.

   Example: The acquisition of **Amtek Auto** by Liberty House was a big win forthe IBC, as it helped banks clean up their balance sheets.

3. **Enhanced Ease of Doing Business**: The IBC played a starring role in improving India'sranking in the World Bank's Ease of Doing Business Index, especially in the "Resolving Insolvency" category.

   Example: India's jump in rankings post-IBC was like winning a prestigiousaward—proof that the reform was working.

4. **Promotion of Entrepreneurship**: The IBC gave entrepreneurs the confidence to takerisks, knowing that there was a safety net if things went south.

   Example: The swift resolution of **Alok Industries**, where Reliance Industriesand JM Financial stepped in, was a morale booster for other entrepreneurs.

5. **Development of a Robust Insolvency Ecosystem**: The IBC didn't just create a law—itbuilt an entire ecosystem, complete with professionals, agencies, and a specialized judiciary.

   Example: The role of Insolvency Professionals in cases like **Bhushan Steel** highlighted how essential they were in the new system.

The Plot Twists: Challenges and Criticisms

But like any great movie, the IBC's journey wasn't without its challenges. There were plot twists, unexpected setbacks, and a few villains trying to derail the story.

"Just when you thought everything was going smoothly with the IBC..."

1. **Delays in Resolution**: Despite the 180-day deadline, some cases dragged on, turning into unwanted sequels that no one asked for.

   Example: The **Jaypee Infratech** case became infamous for its delays, as creditors and homebuyers waited anxiously for a resolution.

2. **Burden on NCLT**: The NCLT was like the overworked hero, trying to handle too manycases at once, leading to backlogs and frustration.

   Example: The **Videocon Industries** case highlighted how the NCLT wasstretched thin, causing delays that affected the whole process.

3. **Haircuts for Creditors**: In some cases, creditors had to accept significant losses, or "haircuts," on their claims. It was like the hero sacrificing for the greater good, but itdidn't always sit well with everyone.

   Example: In the **DHFL** case, creditors had to take a substantial haircut, leadingto debates over whether the IBC was fulfilling its promise of equitable resolutions.

4. **Challenges in Cross-border Insolvency**: The lack of a comprehensive framework forcross-border insolvency remains a glaring gap, complicating resolutions in an increasingly globalized economy.

   Example: The **Videocon** case, with its assets spread across multiple jurisdictions, underscored the urgent need for a clear and effective cross-border insolvency framework.

5. **Ambiguities in the Code**: The IBC's provisions, though revolutionary, have not beenwithout controversy. Ambiguities have led to varying interpretations and legal battles, creating

uncertainty.

Example: The **Jaypee Infratech** case ignited debate over the status of homebuyers as financial creditors, eventually forcing an amendment to thecode to settle the issue.

6. **Treatment of Operational Creditors**: The perceived unequal treatment of operational creditors under the IBC has sparked criticism, with calls for reform growing louder.

   Example: The **Essar Steel** case brought this issue to the forefront, as operational creditors demanded a more equitable share of the resolutionproceeds, leading to a landmark Supreme Court judgment.

The Sequel: What's Next for the IBC?

As with any great film, the end of one story is just the beginning of another. The IBC's journey is far from over. To keep the momentum going, there are a few key steps that must be taken:

"The IBC: Ready for the sequel, coming soon!"

1. **Strengthening the NCLT**: To ensure timely resolutions, the NCLT needs more judges and additional benches. It's like hiring more editors to speed up post-production.

2. **Enhancing Cross-border Insolvency Framework**: India must urgently adopt a comprehensive cross-border insolvency framework, aligned with global standards, to tackle complex cases involving multiple jurisdictions.

3. **Reducing Delays**: Streamlining procedures and reducing the burden on the NCLT can help minimize delays and ensure swift resolutions.

4. **Balancing Stakeholder Interests**: The IBC must evolve to provide a more equitable treatment of all creditors, including operational creditors, to enhance fairness and effectiveness.

5. **Capacity Building for Insolvency Professionals**: Continuous training and development for Insolvency Professionals will be key in handling increasingly complex cases.

6. **Public Awareness and Education**: Raising awareness about the IBC, especially among small and medium enterprises (SMEs), can lead to better understanding and utilization of the code.

Conclusion: The IBC's Star-Studded Legacy

The Insolvency and Bankruptcy Code, 2016, is more than just a legal reform—it's the blockbuster hit that India's economy desperately needed. It's transformed the insolvency landscape, given creditors a fighting chance, and brought order to a system that was on the brink of collapse.

"When the IBC finally saves the day and everyone gets their money back!"

As India marches forward, the IBC will play a pivotal role in shaping the nation's economic destiny. Like any great film, it has its challenges, but it's also full of promise. The IBC is a powerful testament to the idea that out of chaos, order can be forged—and that in the face of adversity, transformation is not just possible, but inevitable.And so, the credits roll, but the story continues. Stay tuned for the next exciting chapter in the saga of the Insolvency and Bankruptcy Code!

FROM DISTRESS TO SUCCESS: THE IBC'S TRANSFORMATIVE ROLE IN BUSINESS RECOVERY

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SYNOPSIS

This article explores the recent legal and legislative developments in India's Insolvency and Bankruptcy Code (IBC), 2016, highlighting key amendments, judicial interpretations, and the introduction of the Pre-Packaged Insolvency Resolution Process (PPIRP). It analyzes the impact of these changes on stakeholders, particularly operational and financial creditors, while addressing ongoing challenges such as delays, litigation, and the need for clarity regarding personal guarantors. The article emphasizes the importance of continuous reform, technology integration, and stakeholder education to enhance the effectiveness of IBC. Ultimately, it underscores the code's potential as a cornerstone for economic stability and growth in India.

ARTICLE

The Insolvency and Bankruptcy Code (IBC), 2016, has fundamentally transformed India's approach to corporate insolvency and bankruptcy, establishing a structured framework for resolving financial distress. This article provides an indepth analysis of recent legal and legislative developments within the IBC framework, elucidating their implications for stakeholders and the broader insolvency ecosystem. Since its introduction, the IBC has undergone significant refinements aimed at streamlining the insolvency resolution process and enhancing its efficacy. The core objective of the IBC is to foster entrepreneurship, strike a balance between creditor and debtor interests, and facilitate timely resolution of insolvency cases. Recent amendments and judicial interpretations have played a crucial role in shaping the implementation of this legislation, reflecting an ongoing commitment to adapt to the evolving economic landscape. The IBC has seen notable amendments, particularly through the Insolvency and Bankruptcy Code (Amendment) Acts of 2017, 2019, and 2021. These amendments addressed critical issues, such as the eligibility of resolution applicants, the timeliness of resolution processes, and the treatment of operational creditors. The 2021 amendment, for example, clarified eligibility criteria for resolution applicants,effectively disqualifying those with a record of default from participating. This reform aims to prevent opportunistic takeovers, thereby safeguarding the interests of creditors. However, while these measures enhance accountability, they also introduce complexities that may deter potential investors, particularly in a market where entrepreneurial risk-taking is essential for innovation. Despite these advancements, significant challenges remain. The definition of "related parties" continues to be a gray area, often leading to disputes that complicate the resolution process. Such ambiguities can be exploited, allowing certain entities to manipulate outcomes in their favor. Furthermore, while the IBC mandates strict timelines, the reality is that many cases suffer from delays, undermining the legislation's efficacy and frustrating stakeholders. For instance, a substantial proportion of cases still exceed the mandated resolution period of 330 days, with

numerous instances of extensions being granted under various pretexts.

Statistics underscore both the achievements and the challenges faced by the IBC. As of March 2023, around 4,000 corporate insolvency resolution cases had been initiated, with approximately 1,200 resolved successfully, yielding an average recovery rate of 45%. While these numbers indicate progress, the fact that nearly 70% of cases remain unresolved highlights the systemic issues that need addressing. Moreover, the average recovery rates, though improving, still fall short when compared to global standards, raising questions about the effectiveness of the process in maximizing creditor recoveries. A significant recent development is the introduction of the Pre- Packaged Insolvency Resolution Process (PPIRP) through the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021. This mechanism offers a more efficient pathway for resolving insolvencies, particularly for small and medium enterprises (SMEs). By allowing stakeholders to negotiate a resolution plan before formal proceedings commence, the PPIRP aims to minimize contention and preserve the going concern value of distressed businesses. This is particularly vital for SMEs, which often lack the resources for prolonged insolvency battles. Furthermore, the flexibility afforded by PPIRP may encourage more businesses to engage proactively in the resolution process, fostering a culture of preemptive action rather than reactive measures. Recent amendments have also focused on enhancing the treatment of operational creditors, addressing long-standing concerns regarding their marginalization in the resolution process. The IBC now stipulates that operational creditors must receive equitable treatment alongside financial creditors. This change acknowledges the crucial role operational creditors play in the business ecosystem and aims to create a more balanced approach to insolvency resolutions. However, while the intent is commendable, it is crucial to ensure that the rights of financial creditors are not unduly compromised in this pursuit of equity. The potential for operational creditors to secure a greater share of the assets could deter financial institutions from extending credit, leading to tighter lending conditions that may stifle business growth. Judicial interpretations have also been instrumental in clarifying the application of the IBC. Landmark judgments from the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) have set critical precedents. In *Apex Frozen Foods Ltd. v. S.S. S. Industries*, the NCLAT ruled that resolution applicants with outstanding dues should be disqualified, reinforcing the legislative intent to ensure that only credible applicants engage in the resolution process. This ruling also reflects a broader judicial commitment to upholding the integrity of the insolvency process, although it has sparked debates about the potential chilling effect on genuine investors who may be deterred by stringent disqualification criteria. The Supreme Court's ruling in*Innoventive Industries Ltd. v. ICICI Bank* emphasized that initiating corporate insolvency resolution proceedings does not hinge on the determination of the debt amount. This landmark judgment underscores the urgency of the resolution process and reflects a broader commitment to timeliness, which is essential for preserving the value of distressed assets. However, the judiciary's role also highlights the persistent issue of litigation within the IBC framework. Lengthy legal battles can stall the resolution process, leaving creditors and other stakeholders in a state of uncertainty. The need for clearer guidelines and stricter enforcement mechanisms cannot be overstated; ensuring that disputes are resolved swiftly is vital to maintaining the integrity and effectiveness of the IBC. Recent developments also point to an increasing recognition of the need for clarity regarding personal guarantors within the IBC framework. The Supreme Court's ruling in *K. S. Dhingra v. State of

Haryana* clarified that personal guarantors are subject to the IBC's provisions. While this alignment offers creditors an additional avenue for recovery, navigating the complexities involved remains challenging. A more streamlined process for addressing claims against personal guarantors would greatly benefit stakeholders and enhance recovery prospects, particularly in cases where corporate defaults are linked to individual guarantors who may have personal assets available for settlement. The necessity for continuous education and awareness among stakeholders about their rights and responsibilities under the IBC is another critical area requiring attention. Engaging creditors, debtors, and the legal community through targeted educational initiatives can demystify the insolvency process and promote a more informed approach. Public awareness campaigns can also foster understanding of the IBC's provisions, ultimately leading to better compliance and stakeholder participation. The enforcement of IBC provisions also presents challenges. Although the legislative framework is robust, real-world implementation often falls short. Instances of non-compliance and significant delays in resolution processes can undermine the IBC's intended impact. Strengthening the regulatory framework and ensuring rigorous enforcement are vital steps toward enhancing the credibility of the insolvency process. Regulatory bodies such as the Insolvency and Bankruptcy Board of India (IBBI) must continue to adapt their oversight mechanisms to ensure compliance while fostering an environment conducive to healthy business practices. The increasing role of technology in insolvency resolution should not be overlooked. Digital tools and platforms can enhance the efficiency and transparency of the resolution process. For instance, online systems for submitting claims and tracking proceedings can streamline interactions between stakeholders thereby reducing administrative burdens. Additionally, leveraging data analytics can provide insights into financial health and help identify potential insolvency situations early on, allowing for proactive interventions. The adoption of blockchain technology for recording transactions could also provide an immutable record, enhancing trust among stakeholders. The cross-border insolvency framework is another area ripe for development. As globalization continues to reshape the economic landscape, a cohesive approach to cross-border insolvency becomes essential. Establishing a robust framework for handling cross-border cases can facilitate smoother resolutions and protect the interests of creditors across jurisdictions.

This is particularly relevant as Indian businesses increasingly engage in international trade,necessitating frameworks that account for multi- jurisdictional issues. Initiatives like the Model Law on Cross-Border Insolvency, adopted by the United Nations Commission on International Trade Law (UNCITRAL), can serve as a reference point for developing India's own cross-border insolvency framework. Collaboration between the IBC and other regulatory frameworks is crucial for creating a cohesive insolvency regime. Coordinating the IBC with tax laws, labor laws, and other statutory regulations can help minimize conflicts and enhance the overall effectiveness of insolvency proceedings. Addressing overlaps between different regulatory frameworks is essential to facilitate smoother resolutions and streamline the process for all stakeholders involved. For example, aligning labor law provisions with the IBC could help ensure that employee claims are addressed in a manner that maintains workforce morale and business continuity during resolution processes. Regular review and reform of the IBC are imperative in light of the evolving business environment. Continuous engagement with stakeholders and feedback mechanisms can help identify areas for improvement and drive necessary reforms. The dynamic nature of the economy requires that the IBC adapts to changing realities and emerging challenges. A periodic review of the IBC, involving input from

industry experts, practitioners, and affected parties, can provide valuable insights into its practical application and effectiveness. Moreover, enhancing the quality of data related to insolvency cases is critical. Accurate data on recovery rates, resolution timelines, and the performance of various resolution professionals can inform better decision-making for stakeholders. Establishing a comprehensive database would enable regulators to monitor trends and identify best practices, ultimately leading to improved outcomes in insolvency resolutions. The creation of industry benchmarks based on collected data could provide stakeholders with valuable insights into what constitutes a successful resolution process. In summary, while the IBC has made significant strides since its inception, ongoing vigilance and proactive measures are essential to address the challenges and loopholes that persist. Fostering a collaborative environment among stakeholders and investing in capacity building and education will be crucial for the IBC to fulfill its intended purpose of promoting a resilient and sustainable economy. Ultimately, the success of the IBC hinges on its ability to adapt to the changing needs of the economy and the challenges posed by a rapidly evolving business environment. With a focus on stakeholder engagement, regulatory coordination, and the effective use of technology, the IBC can truly realize its vision of facilitating a healthy business environment where enterprises can thrive while also providing a robust mechanism for addressing insolvency challenges. As the IBC continues to evolve, the insights gained from its application in practice will be invaluable in shaping a framework that not only meets the needs of today but also anticipates the challenges of tomorrow. The commitment of all stakeholders will be essential in this journey, ensuring that the IBC not only serves as a mechanism for resolving insolvency but also as a catalyst for economic growth and stability in India

INTERPLAY BETWEEN INSOLVENCY AND BANKRUPTCY CODE (IBC) AND OTHER LEGISLATIONS

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The unshackling of Indian economy in the 90's provided the much-needed impetus to aspirations of Indian Entrepreneurs to fly sky-high, with not all of them getting successful in their well-intended endeavours, putting lot of precious private capital at risk. A well-balanced legal framework fostering the entrepreneurial activity and ensuring impersonal protection of productive assets so created along with protection of the rights of the those who provide the much needed finance was much needed. Legal framework in India responded to these challenges and various laws were enacted to this end. In the long series of those legal enactments, The Insolvency and Bankruptcy Code (IBC), 2016, has become one of the most prominent reforms in the Indian legal and financial framework, aimed at ensuring the timely resolution of insolvency and bankruptcy cases. Prior to its enactment, India's insolvency resolution process spanned across multiple statutes, including the Companies Act, 1956/2013, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, and the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993, among others. The multiplicity of laws and forums birthed a fragmented system, leading to protracted delays and inefficiencies in resolving insolvency matters. The IBC intended to consolidate these laws, thereby providing a cohesive framework for corporate, personal, and partnership insolvencies.

However, as the IBC operates in conjunction with several pre-existing laws, its implementation has seen an intricate interplay with other legislations. These interactions have raised questions about jurisdiction, procedural precedence, and the harmonization of rights and obligations under different legal regimes. This article delves into how the IBC interacts with other key laws in India, examining both conflicts and synergies, and highlighting landmark rulings that have shaped the legal landscape.

IBC and the Companies Act, 2013

The Companies Act, 2013, regulates corporate governance, incorporation, and the winding-up of companies in India. Before the IBC's advent, the winding-up process under the Companies Act was a cumbersome exercise , involving long delays due to multiple judicial interventions, inadequate expertise, and a lack of coordination between regulatory authorities.

1. **Transition to IBC**: The Companies Act, particularly under Section 271, contained provisions for winding up a company. However, these provisions often resulted in extended litigations and delays in settling the claims of creditors. The IBC was introduced to replace the inefficient winding-up provisions, providing a specialized framework for insolvency and liquidation. The IBC's goal is to ensure time-bound insolvency resolution (within 180 days, extendable to 270 days), unlike the lengthy winding-up proceedings under the Companies Act.

2. **Jurisdictional Changes**: After the enactment of the IBC, the jurisdiction of insolvency matters shifted from the High Courts to the National Company Law Tribunal (NCLT). The NCLT, which was initially established under the Companies Act, now serves as the adjudicating authority for corporate insolvency resolution processes under the IBC as well.

3. **Case Law**: In the landmark judgment of **Swiss Ribbons Pvt Ltd v. Union of India** (2019), the

Supreme Court upheld the constitutional validity of the IBC and emphasized that the IBC overrides previous laws, including the Companies Act, where insolvency resolution is concerned. The court also clarified that IBC's provisions for corporate debtors take precedence over the winding-up provisions of the Companies Act.

4. **Challenges under the Companies Act**: The primary challenge under the Companies Act was the multiplicity of laws and authorities, which often conflicted with one another, resulting in inconsistent judgments. The IBC seeks to provide a unified framework for resolving corporate insolvencies in a manner that is quicker, more efficient, and fair to all stakeholders.

IBC and SARFAESI Act, 2002

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act), 2002, is another significant law governing the rights of secured creditors in India. The SARFAESI Act allows secured creditors, primarily banks and financial institutions, to enforce their security interests without the need for court intervention, by taking possession of assets or selling collateral to recover dues.

1. **Rights of Secured Creditors**: The SARFAESI Act empowers secured creditors to take possession of collateral and sell the assets of the borrower in case of default. This law allows banks to bypass the lengthy process of debt recovery through courts, which was a common issue before its enactment.

2. **Conflicts with IBC**: The IBC introduced a significant shift in the priority of claims during the insolvency resolution process. Under the IBC, once a company enters the Corporate Insolvency Resolution Process (CIRP), a moratorium is imposed, and all recovery proceedings, including those under SARFAESI, must be stayed. This leads to a conflict between the rights of secured creditors under SARFAESI and the collective insolvency resolution framework of the IBC, where the interests of all stakeholders, including operational creditors and employees, must be considered.

3. **Judicial Precedents**: In **ICICI Bank Ltd. v. Innoventive Industries Ltd.** (2018), the Supreme Court held that the IBC overrides SARFAESI in cases where a corporate debtor is undergoing insolvency resolution. Once the CIRP is initiated, secured creditors cannot enforce their rights independently under SARFAESI, as the IBC promotes a collective resolution process.

4. **Harmonization**: While the IBC and SARFAESI Act seem to conflict, the courts have clarified that SARFAESI can be invoked by secured creditors only if the debtor has not entered the insolvency process under IBC. Post-IBC initiation, the resolution professional has control over the assets, and the SARFAESI proceedings are stayed to ensure a holistic resolution approach.

The IBC and SARFAESI Act, though distinct in their objectives, now operate in tandem, with the IBC taking precedence once insolvency is triggered. This ensures that secured creditors' rights under SARFAESI are balanced against the broader objective of corporate revival under IBC.

IBC and RDDBFI Act, 1993 (Recovery of Debts Due to Banks and Financial Institutions Act)

The RDDBFI Act, 1993, was enacted to provide an expedited process for recovering debts owed to banks and financial institutions through the establishment of Debt Recovery Tribunals (DRTs) and Debt Recovery Appellate Tribunals (DRATs). Before the enactment of the IBC, the RDDBFI Act served as the primary tool for debt recovery in India.

1. **Objectives of RDDBFI**:

   The RDDBFI Act aimed to improve the efficiency of debt recovery by providing banks and financial institutions with a forum—DRTs—dedicated to resolving disputes related to unpaid debts. This mechanism was created to expedite cases that were previously bogged down by the general civil court system.

2. **Overlaps with IBC**:

   The IBC and RDDBFI Act serve different purposes. The IBC focuses on the resolution or liquidation of a corporate debtor's financial distress, ensuring a holistic treatment of the debtor's assets and liabilities, whereas the RDDBFI Act aims at recovering debts by individual creditors, often ignoring the collective interests of all stakeholders.

3. **IBC Superseding RDDBFI**:

   Once a corporate insolvency resolution process (CIRP) is initiated under the IBC, any proceedings under the RDDBFI Act must be suspended due to the automatic moratorium imposed by the IBC. This has led to instances where creditors who had initiated actions under the RDDBFI Act had to shift to the IBC process to recover dues. The courts have clarified that the IBC, being a later and more specialized statute, supersedes RDDBFI when there is a conflict.

1. **Case Law**:In **Bank of Baroda v. Kotak Mahindra Bank Ltd.** (2019), the Supreme Court emphasized that the IBC overrides the RDDBFI Act when insolvency proceedings are triggered. Debt recovery proceedings before the DRT, once the CIRP is initiated, cannot continue without the leave of the insolvency tribunal.

2. **Harmonization and Practical Impact**:

   While both laws are geared toward creditor recovery, the IBC emphasizes a collective approach, while the RDDBFI Act focuses on individual creditor rights. The priority of IBC over RDDBFI ensures that any recovery process that could harm the interests of the collective pool of creditors is curtailed, promoting a balanced resolution process.

IBC and Arbitration Act, 1996

The Arbitration and Conciliation Act, 1996, provides for the resolution of commercial disputes through arbitration, an alternative dispute resolution mechanism that avoids the formal judicial process. With the rise of arbitration in commercial disputes, the question of how arbitral proceedings and awards fit within the framework of IBC has been a key area of legal development.

1. **Impact of Moratorium on Arbitration**:

   One of the most significant issues arises when a company undergoing insolvency is also involved in arbitration proceedings. Section 14 of the IBC imposes a moratorium that stays all legal proceedings, including arbitration, as soon as the insolvency resolution process begins. This effectively halts any ongoing arbitration against the corporate debtor.

2. **Stay on Arbitration Once Insolvency Commences**:

   The moratorium under the IBC prevents any further adjudication of claims through arbitration once insolvency proceedings begin. However, arbitration proceedings initiated by the

corporate debtor are generally allowed to continue. This balance is critical in ensuring that while creditors cannot pursue their individual claims, the debtor company can continue to assert its rights and recover dues that could improve the prospects of resolution.

3. **Treatment of Arbitral Awards**:

If an arbitral award is passed before the initiation of the CIRP, it is treated as a debt that must be filed with the resolution professional as part of the insolvency claims. Post-CIRP, arbitral awards are subject to the resolution plan's approval and the waterfall mechanism for debt distribution in the event of liquidation.

4. **Judicial Precedents**:

In **Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt Ltd.** (2017), the Supreme Court held that arbitration proceedings involving a corporate debtor should be suspended once a moratorium under Section 14 of the IBC is imposed. The court reiterated that any claims, whether adjudicated or pending adjudication, must be routed through the insolvency process.

The interplay between IBC and the Arbitration Act demonstrates the IBC's broad reach in resolving insolvency matters by staying external proceedings that may interfere with the unified resolution process.

IBC and Labour Laws

The interplay between the IBC and labor laws is particularly sensitive, as it affects the rights and livelihoods of workers employed by companies undergoing insolvency. Labor laws in India provide protections for wages, severance pay, and working conditions, and the IBC must reconcile these protections with the need to resolve insolvency efficiently.

1. **Impact on Employment Contracts**:

When a company enters insolvency, one of the first concerns is the fate of the employees. The IBC ensures that employee dues are treated as part of the claims filed with the resolution professional. Under the IBC's waterfall mechanism, workmen's dues and wages are given a priority in the distribution of assets during liquidation.

2. **Employee Dues Under IBC**:

The IBC specifies that wages and unpaid dues of employees, for a period up to 24 months preceding the insolvency commencement date, must be prioritized. These dues rank high in the hierarchy of payments, following only insolvency resolution costs and secured creditors. However, beyond the 24-month period, employee dues rank lower in priority.

3. **Judicial Precedents**:

In **J.K. Jute Mills Company Ltd. v. Surendra Trading Co.**, the Supreme Court acknowledged the importance of ensuring that employee dues are adequately protected under the IBC's resolution and liquidation processes. The court highlighted that while financial creditors have significant control during insolvency resolution, the interests of employees and workmen cannot be ignored.

4. **Challenges**:

The primary challenge in balancing IBC and labor laws lies in ensuring that workers' rights are

respected while allowing for an efficient insolvency process. Workers often face delays in the payment of dues during insolvency, and in some cases, liquidation may leave employees with limited or no compensation if asset value is insufficient.

The IBC's treatment of employee claims seeks to balance workers' interests with the financial realities of the debtor company, but continuous judicial oversight is necessary to ensure fair outcomes.

IBC and Tax Laws

The interaction between IBC and tax laws presents a unique challenge, as tax authorities often hold claims against corporate debtors, whether in the form of unpaid taxes, penalties, or interest. The treatment of these claims during the insolvency resolution process is an area of ongoing legal development.

1. **Tax Authorities as Operational Creditors**:

   Under the IBC, tax authorities are treated as operational creditors, meaning their claims are typically subordinated to those of financial creditors. This has led to situations where the government's tax dues are either significantly reduced or written off altogether in the resolution plan.

2. **Moratorium on Tax Proceedings**:

   Similar to other legal proceedings, tax recovery actions are stayed once the moratorium under Section 14 of the IBC is invoked. This means that tax authorities cannot pursue recovery actions, enforce penalties, or initiate prosecution during the insolvency resolution process.

3. **Treatment of Tax Dues in Liquidation**:

   In the event of liquidation, tax dues rank lower in priority than secured creditors and workmen's dues under the waterfall mechanism in Section 53 of the IBC. This often leads to tax authorities recovering only a fraction of their dues, particularly in cases where the company's assets are insufficient to cover all claims.

4. **Judicial Precedents**:

   In **Principal Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.**, the Supreme Court upheld that tax dues are subject to the resolution process under IBC and must be dealt with according to the priority specified in the Code. The court ruled that IBC's provisions override conflicting provisions in tax laws when insolvency is involved.

   The IBC's approach to tax dues has been a source of contention, as it often requires tax authorities to compromise their claims for the broader goal of corporate revival or liquidation.

IBC and Cross-Border Insolvency

As India's economy becomes more integrated with the global market, cross-border insolvency has emerged as a critical issue. While the IBC does not yet have a comprehensive framework for cross-border insolvency, it contains provisions (Sections 234 and 235) that allow the Indian government to enter into bilateral agreements with foreign countries for mutual recognition of insolvency proceedings.

1. **Need for a Cross-Border Insolvency Framework**:

The absence of a comprehensive framework for cross-border insolvency has led to legal uncertainty for multinational corporations with operations in India. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which provides a uniform legal framework, has been recommended for adoption in India, but it has not yet been implemented.

2. **Judicial Developments**:

In **Jet Airways (India) Ltd. v. State Bank of India**, the NCLT made significant strides in cross-border insolvency by recognizing parallel insolvency proceedings in the Netherlands and coordinating with Dutch insolvency administrators. This case highlighted the need for formal rules on cross-border insolvency to ensure cooperation between jurisdictions.

3. **Future Prospects**:

The government is expected to introduce legislation to implement the UNCITRAL Model Law in the near future, which would provide certainty for companies and creditors involved in cross-border insolvencies. This would align India's insolvency framework with international standards, facilitating better coordination with foreign jurisdictions.

The Insolvency and Bankruptcy Code, 2016, represents a paradigm shift in India's approach to resolving financial distress, creating a cohesive framework for insolvency and liquidation. Its interplay with other legislation, including the Companies Act, SARFAESI Act, RDDBFI Act, Arbitration Act, labor laws, tax laws, and the emerging domain of cross-border insolvency, highlights the complex legal ecosystem in which it operates.

While the IBC has been successful in streamlining insolvency proceedings and prioritizing the resolution of distressed companies, its integration with other laws requires ongoing judicial interpretation and legislative refinement. Courts have played a pivotal role in harmonizing the conflicts between IBC and other legal regimes, ensuring that the Code remains the primary tool for insolvency resolution while respecting the rights and obligations created under other statutes.

Looking ahead, the challenge will be to further refine the IBC, particularly in the areas of cross-border insolvency, labor law harmonization, and tax law integration. As the Indian economy continues to grow and evolve, the IBC must adapt to ensure that it remains an effective mechanism for resolving financial distress, while balancing the interests of all stakeholders.

ANALYSIS OF THE HON'BLE APEX COURT JUDGMENT IN V.S. PALANIVEL VS. P. SRIRAM, LIQUIDATOR: IMPLICATIONS FOR INSOLVENCY PROFESSIONALS

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INTRODUCTION

The Hon'ble Supreme Court of India ("**Apex Court**"), in the landmark judgment **V.S. Palanivel vs. P. Sriram, Liquidator & Ors. (CIVIL APPEAL NOS. 9059-9061 OF 2022)**[1], addressed crucial legal questions arising from liquidation proceedings under the IBC[2]. The judgment was delivered by Hon'ble Justice Hima Kohli, the said judgment explored important issues related to the auction sale process, time extensions for the payment of sale consideration, the impact of the COVID-19 pandemic on statutory timelines, the liquidator's compliance with regulations, and the role of stakeholders in liquidation.

This article provides an extensive analysis of the judgment, explaining its significance for insolvency professionals and stakeholders involved in corporate insolvency proceedings. By dissecting the judgment into its essential parts, this article will cover the background of the case, the legal questions raised, the rationale behind the Hon'ble Apex Court's decision, and the implications or take aways for the practice of insolvency professionals.

1. Background and Facts of the Case

The appellant, V.S. Palanivel, was a shareholder and former managing director of Sri Lakshmi Hotels Private Limited ("***corporate debtor***"). The corporate debtor had defaulted on loans from its financial creditor, leading to liquidation proceedings under the IBC. After no resolution plan could be approved by the Committee of Creditors ("**CoC"**), the Hon'ble National Company Law Tribunal ("***NCLT"***), Chennai Bench, had ordered the liquidation of the corporate debtor in 2019.

P. Sriram, CS, was appointed as liquidator in this case, who initiated the auction of the corporate debtor's immovable property to recover dues. In the first auction, no bids were received, prompting the liquidator to lower the reserve price and schedule a second auction. **KMC Speciality Hospitals (India) Ltd ("KMC or auction purchaser")** emerged as the successful bidder in the second auction. However, complications arose when the auction purchaser delayed the payment of the balance sale consideration beyond the 90-day period prescribed by the IBC regulations[3].

The appellant filed appeals challenging the auction process and the liquidator's conduct. His principal contentions revolved around the liquidator's violation of Insolvency and Bankruptcy Board of India (IBBI) regulations[4], failure to constitute a Stakeholders' Consultation Committee (***SCC***)[5], undervaluation of the property, and the extension of time granted to the auction purchaser for payment of the sale consideration. The Hon'ble NCLT as well as NCLAT[6] upheld the liquidator's actions, leading to the appeals before the Hon'ble Supreme Court.

2) Key Legal Issues in the Case

Several pertinent legal issues were brought before the Hon'ble Supreme Court, all of which hold significant implications for the insolvency framework under the IBC:

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[1] 2024 INSC 659,
[2] Insolvency and Bankruptcy Code, 2016
[3] IBC Regulation 33 of the IBBI (Liquidation Process) Regulations, 2016 read with Schedule I
[4] Regulation 33 of the IBBI (Liquidation Process) Regulations, 2016
[5] As required in regulation 31A of IBBI (Liquidation Process) Regulations, 2016
[6] National Company Law Appellate Tribunal

Time Extension for Payment of Sale Consideration

The principal issue was whether the auction purchaser, KMC, herein, was entitled to an extension for the payment of the balance sale consideration due to the disruption caused by the COVID-19 pandemic. Under regulation 33 of the IBBI (Liquidation Process) Regulations, 2016 ("***IBBI liquidation regulation"***), read with Rule 12 of Schedule I of the said regulations, the auction purchaser is required to deposit the balance sale consideration within 90 days. In this case, KMC failed to make the payment within the prescribed period due to the COVID-19 pandemic and sought an extension.

In this case, the auction purchaser failed to meet the deadline, citing the unprecedented disruptions caused by the COVID-19 lockdown as the primary reason for the delay. The liquidator granted an extension based on the pandemic's extraordinary circumstances, which was also supported by Hon'ble NCLT and NCLAT. The appellant contended that this violated the IBC's strict timelines and sought the cancellation of the auction.

Applicability of the COVID-19 Lockdown to Liquidation Proceedings

The Hon'ble Apex Court in this case addressed the issue whether the relief provided by the Court's **suo motu**[7] orders on the extension of limitation periods during the pandemic could apply to liquidation processes under the IBC. The Hon'ble Apex Court in **Suo Motu Writ Petition (C) No.3 of 2020 in 'Cognizance for Extension of Limitation, In Re', reported as (2020) 19 SCC 10** issued during the COVID-19 situation, extended statutory limitations due to the COVID-19 pandemic to safeguard litigants' rights.

The core issue involved or question before the Hon'ble Apex Court was whether this extension could be invoked in cases of liquidation proceedings like the present, where an auction purchaser delayed payment of the balance sale consideration.

a) Compliance with IBBI Regulations on Auction Process

Another crucial issue was whether the liquidator followed the procedural requirements outlined in the IBC and IBBI liquidation regulations during the auction process. Specifically, it was the bone of contention and argument by the Appellant that the liquidator violated **Regulation 31A**[8] by failing to consult a Stakeholders' Consultation Committee (***SCC***) when deciding on matters such as the auction reserve price.

b) Reserve Price Reduction and Allegations of Undervaluation

The appellant also raised the issue of the liquidator reducing the reserve price by 25% for the second auction after the first auction failed to attract bidders. This reduction, in the appellant's view, resulted in the undervaluation of the corporate debtor's property, leading to a lower realization for the creditors and shareholders.

The Hon'ble Apex Court also determined the issue whether the liquidator's actions complied with the IBC and whether such a reduction was permissible under the law.

3) Legal Analysis of the Supreme Court Judgment

The Hon'ble Apex Court, in its detailed judgment, addressed each of the issues raised and provided critical clarifications for insolvency professionals and other stakeholders involved in the liquidation process.

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[7] Suo Motu Writ Petition (Civil) No. 3 of 2020

[8] IBBI (Liquidation Process) Regulations, 2016

Extension of Time for Payment of Sale Consideration

The Hon'ble Apex Court upheld the NCLAT's decision to grant an extension to the auction purchaser, recognizing the unprecedented impact of the COVID-19 pandemic. It ruled that the pandemic's extraordinary circumstances justified the delay in depositing the balance sale consideration. The Court relied on its earlier Suo Motu orders extending limitation periods due to the nationwide lockdown and cited Regulation 47A of the liquidation process regulation, which allows for the exclusion of the lockdown period from any prescribed timeline under the IBC.

The Court also upheld that the liquidator, under such extraordinary circumstances, had the discretion to accommodate delays in payment, provided the extension was reasonable and did not cause harm to the interests of the creditors or other stakeholders.

Key Take Away for Insolvency Professionals:

This decision reinforces the idea that insolvency professionals should exercise reasonable discretion when faced with external disruptions, such as the pandemic. It also emphasizes the importance of considering broader national or global circumstances while balancing the interests of creditors and stakeholders.

Application of the Suo Motu Orders to Liquidation Proceedings

The Hon'ble Apex Court held that the Suo Motu orders passed by the Hon'ble Apex Court extending limitation **periods applied to liquidation proceedings under the IBC**. The Hon'ble Apex Court clarified that its orders were intended to benefit all litigants and parties affected by the pandemic, including those involved in insolvency processes. The auction purchaser, being an essential party to the liquidation process, was entitled to relief under these orders.

The Hon'ble Apex Court further emphasized that the COVID-19 lockdown disrupted business activities nationwide, **which justified a lenient approach toward statutory deadlines**. The liquidator's decision to seek an extension was deemed consistent with the Hon'ble Apex Court's orders and the provisions of the IBC.

Key Take Away for Insolvency Professionals:

Insolvency professionals must recognize the applicability of general relief orders, such as those passed during the pandemic or under specifical circumstances, to IBC proceedings. They should remain vigilant about external factors affecting statutory deadlines and ensure compliance with Apex Court and IBBI directives.

a) Liquidator's Compliance with IBBI Regulations

The appellant's contention that the liquidator violated regulation 31A of the liquidation process regulations by failing to consult the SCC was dismissed. The Hon'ble Apex Court clarified that **while the liquidator is required to consult the SCC, the advice of the SCC is not binding**. The liquidator retains the discretion to make decisions in the best interest of the liquidation process, provided reasons for deviating from the SCC's advice are recorded.

In this case, the liquidator had acted in accordance with the IBC and had validly reduced the reserve price for the second auction after the first auction failed. The liquidator's actions were found to be within the ambit of the IBBI regulations.

Key Take Away for Insolvency Professionals:

Insolvency professionals must ensure that they consult with stakeholders as required under the IBC, but they are not bound by their advice. It is crucial to document decisions meticulously

and provide valid reasons for any deviations from stakeholder recommendations.

Reserve Price Reduction and Valuation Concerns

The Hon'ble Apex Court rejected the appellant's argument that the reduction in the reserve price amounted to undervaluation on the finding that the IBBI regulations, specifically Rule 4A of Schedule I to regulations[9], allow the liquidator to reduce the reserve price by up to 25% if an auction fails to attract bidders. The liquidator had adhered to this provision and reduced the reserve price accordingly for the second auction.

Furthermore, the Hon'ble Apex Court also recognized that the liquidation value of assets, as determined by registered valuers, can fluctuate based on market conditions. The Hon'ble Court also noted that the liquidator had acted prudently by reducing the reserve price to facilitate the sale, which was in the best interest of the creditors and stakeholders.

Key Take Aways for Insolvency Professionals:

Liquidators should follow the IBBI regulations concerning reserve price reductions but must ensure that the reduction is reasonable and justifiable based on market conditions. Valuation is a critical aspect of the auction process, and liquidators must carefully document the rationale behind reserve price adjustments.

4) Implications of the Judgment for Insolvency Professionals

This judgment provides essential guidance for insolvency professionals managing the liquidation process under the IBC. Several key takeaways from the judgment can inform the conduct of insolvency professionals and ensure that liquidation proceedings are conducted in compliance with the IBC and the IBBI regulations.

a) Finality of the Auction Sale

The Hon'ble Apex Court also emphasized the finality of the auction sale. Since the auction was concluded, and the sale deed had been executed in favor of the auction purchaser, there was no merit in the appellant's prayer for setting aside the sale. The Hon'ble Apex Court underscored the importance of ensuring the certainty and finality of liquidation sales to maintain the credibility of the process under the IBC.

The judgment reinforces the principle that once an auction sale is completed and the sale deed is executed, it is final and binding. Insolvency professionals should ensure the completion of all sale-related formalities to avoid protracted litigation.

b) Flexibility in Auction Timelines

The Hon'ble Apex Court decision to uphold the extension of time for the auction purchaser underscores the importance of flexibility in managing auction timelines, particularly during unforeseen circumstances like the pandemic. Insolvency professionals must be proactive in assessing the impact of external events on the liquidation process and should seek appropriate relief from adjudicating authorities when necessary. Though the judgment is specific to certain facts and circumstances, but auction timelines flexibility may not be always available to liquidator as an escape for its delayed action otherwise.

c) Time Value of Money and Compensation for the Same is must

The Hon'ble Apex Court, while upholding the auction process and granting an extension in accordance with its order in the Suo Moto Writ Petition, noted that the auction purchaser, KMC, had managed to withhold/retain the balance payment of auction money and differential

[9] IBBI (Liquidation Process) Regulations, 2016

of Rs. 10 crore for approximately six months. Consequently, the Hon'ble Apex Court directed that an additional amount of Rs. 5 crore, with interest, be deposited with the liquidator to enhance asset value and maximize the benefits of liquidation.

Balancing Stakeholder Interests with Practical Realities

While the liquidator is required to consult stakeholders through the SCC, this judgment reaffirms the liquidator's discretion in making final decisions. Insolvency professionals should always aim to strike a balance between adhering to stakeholder recommendations and ensuring that the liquidation process remains efficient and expedient.

Importance of Documenting Decisions

The judgment highlights the need for insolvency professionals to maintain meticulous records of all decisions, especially when they deviate from stakeholder advice or when unforeseen circumstances require adjustments to the auction process. Proper documentation is essential to defend the liquidator's actions in potential legal challenges.

Compliance with Valuation Regulations

Liquidators must strictly comply with the IBBI regulations regarding the valuation of assets and reserve price reductions. Valuation is a contentious issue, and insolvency professionals must work closely with registered valuers to ensure that the auction prices reflect the true market value of the assets while being mindful of the liquidation timelines.

Navigating Complexities of the Pandemic

The Hon'ble Court's reliance on Regulation 47A and its Suo Motu orders on limitation underscores the unique challenges posed by the pandemic. Insolvency professionals should remain informed about evolving legal interpretations of such situations and apply them judiciously to protect the interests of all stakeholders.

5. Conclusion and Way Forward

The Hon'ble Apex Supreme Court's ruling in **V.S. Palanivel vs. P. Sriram, Liquidator** is a landmark judgment that provides significant clarity on the powers and responsibilities of liquidators under the IBC. It also offers critical insights into how insolvency professionals should navigate external disruptions, such as the COVID-19 pandemic, and comply with the legal framework governing liquidation.

For insolvency professionals, this judgment serves as a valuable precedent on the flexibility of auction timelines, the importance of stakeholder consultation, and the need to comply with valuation regulations. By adhering to the principles outlined in this judgment, insolvency professionals can ensure that liquidation proceedings are conducted efficiently, transparently, and in the best interest of the stakeholders.

This judgment also reiterates the importance of understanding and applying the provisions of the IBC in a dynamic and flexible manner, especially during times of unforeseen challenges. Insolvency professionals must continue to stay updated on evolving legal interpretations and best practices to ensure the smooth conduct of liquidation proceedings in the future.

ASSET UNDER IBC: AN ANALYSIS

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The realization and valuation of assets are crucial in the insolvency resolution process. The term "a**sset**" is not specifically defined under IBC 2016 or any of the seven Acts specified under section 3(37) of the code. **In general** terms, an asset refers **to any kind of property**. According to the income tax act, assets include **property or rights of any kind.** The term "property" is defined under section 3(27) of the IBC, which is an inclusive definition. Therefore, it can be concluded that **property or rights of any kind could be considered as assets** for IBC proceedings. This interpretation aligns with the Hon'ble Supreme Court Judgment in the case of Victory Iron Works Ltd vs. Jithendra Lohia & Anr.

1. Framework

The Insolvency and Bankruptcy code 2016, which is divided into **5 parts**, contains provisions for the following:

Part I Preliminaries
Part II Insolvency Resolution and Liquidation for Corporate Persons
Part III Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms
Part IV Regulation of Insolvency Professionals
part V Miscellaneous Provisions

2. Definitions- Coverage

Words and Phrases used in IBC are defined in the following sections:

Section 3: Applicable throughout the Code, unless the context otherwise requires

Section 5: Applicable for **Part II only**

Section 79: Applicable for **Part III only**

Thus, section 3 in general applies to the entire Code, whereas, Sections 5 & 79 have only limited applications to the respective parts of the Code.

3. Assets

The term Asset is not specifically defined anywhere in IBC

Except that

i) **Section 79(14)** provides for exclusion of certain assets from **insolvency and bankruptcy proceedings** of Individual and partnership firms under Part III of the Code subject to certain conditions under the expression **"excluded Assets"**

"**Excluded assets"** for the purposes of this part includes—

(a) Unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation.

Conditions for Exclusion:

- The assets should not be encumbered
- Exclusion is only to the extent necessary for the personal use or employment, business or vocation (vocation means a way of living as believes to be suitable for One)

(b) Unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family.

Conditions for Exclusion:

- The assets should not be encumbered
- Exclusion is only to the extent necessary for the debtor and for his immediate family domestic needs (immediate family means his spouse, dependent children and dependent parent)

(c) Any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

Conditions for Exclusion:

- The assets should not be encumbered Exclusion is only to the extent of Rs 1 lakh
- Exclusion is only if the assets cannot be parted with in accordance with religious usage of him or immediate family

(d) Any unencumbered life insurance policy or pension plan (irrespective of value) of the debtor or his immediate family;

Condition for Exclusion:

(e) An unencumbered single dwelling /residential unit owned by the debtor of such value as prescribed;

Conditions for Exclusion:

- The dwelling unit should not be encumbered
- Exclusion is only to the extent of Rs 25 lakhs in urban area and Rs 10 lakhs in Rural area (rural area as per section 2(o) of National Rural Employment Guarantee Act 2005)

ii) **Section 18** of the IBC, which provides for the duties of resolution professional, inter alia, gives an explanation that the term "Assets" shall not include the following.

- Assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- Assets of any Indian or foreign subsidiary of the corporate debtor; and
- Such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

4. Now, **Section 3(37**) of the Code states that words and expressions used but not defined in this Code, but defined in the

- Indian Contract Act, 1872,
- Indian Partnership Act, 1932,
- Securities Contract (Regulation) Act, 1956,
- Securities Exchange Board of India Act, 1992,
- Recovery of Dets Due to Banks and Financial Institutions Act, 1993,
- Limited Liability Partnership Act, 2008 and
- Companies Act, 2013

shall have the **meanings respectively assigned to them in those Acts**.

Since the term assets is not defined in IBC, taking refuge in section 3(37), to find out a definition for the term **asset,** it could be seen that:

- Indian contract act 1872 - Not defined the term “assets”
- Indian Partnership Act 1932 -Not defined the term “assets”
- Securities Contract (Regulation) Act, 1956 - Not defined the term “assets”
- Securities Exchange Board of India Act, 1992- Not defined the term “assets”
- Recovery of Dets Due to Banks and - Not defined the term “assets”
- -Financial Institutions Act, 1993
- Limited Liability Partnership Act 2008 - Not defined the term “assets”
- Companies Act, 2013 - Not defined the term “assets”

Thus, neither IBC nor the seven acts specified under section 3(37) of IBC has defined the term Asset.

5. However, section 102(2) of the Income tax act 1961 defined the term asset to include “property or rights of any kind.

Though it applies to chapter X-A of the Income Tax Act, the definition alludes to the fact that any property or right of any kind could be considered as an asset.

6. In common parlance also asset denotes property of any kind.

7. Based on the discussion above, since there is no specific definition of the term "asset" under IBC or in any of the seven acts specified in section 3(37) of the IBC, we can consider the definition given in the Income Tax Act, 1961, which includes "property or rights of any kind." In common language, "asset" typically denotes any kind of property. Therefore, it can be concluded that property or rights of any kind could be considered as assets for the purpose of IBC proceedings.

8. In the context of the Insolvency and Bankruptcy Code (IBC), it's important to note that Section 3(27) defines the term "property" to include money, goods, actionable claims, land, and every type of property located in India or outside India. It

9. also encompasses all forms of interest, whether present, future, vested, or contingent, that are related to the property.

10. Since this is an inclusive definition and not an exhaustive one, property or rights of any kind could be termed as an asset for the purpose of IBC proceedings.

11. The above analysis aligns with the judgment in the case of Victory Iron Works Ltd versus Jithendra Lohia & Anr. The Honorable Supreme Court affirmed the decision of NCLT and NCLAT, stating that a bundle of rights and interests that the Corporate Debtor has in the immovable

property constitute an "Asset" to be included in the information memorandum by the resolution professional and to take custody and control of the same.

In the same case, the Honorable Supreme Court held that assets owned by a third party but in possession of the Corporate Debtor under a contractual agreement are excluded from the definition of assets only in section 18 of the IBC, and not in section 25. This is due to the fact that, the explanation under Section 18 starts with a caveat, "for the purposes of this Section." This clarification aligns with the principle that shareholders do not own the company's assets. "It can be inferred that the lack of a specific definition of the term "asset" under the IBC may not be a failure of the legislation, but rather a deliberate choice not to define the term. This allows for flexibility in interpreting what can be considered an asset under the law."

Reference:

1. Bare Acts-IBC

2. Judgment dated 14thMarch, 2023 of Hon'ble Supreme Court in the matter of Victory Iron Works Ltd. Vs. Jitendra Lohia & Anr.

RESHAPING INSOLVENCY SOLUTIONS: ANALYZING THE NEED FOR INFORMAL CORPORATE RESCUE STRATEGIES IN INDIA

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INTRODUCTION

The term "corporate rescue" refers to a significant intervention that is required to prevent a company from failing in the end, to revive businesses that are about to collapse economically, and to save economically viable units to increase production capacity, create jobs, and to continue rewarding capital and investment. Rescue operations include going above and beyond the typical management reactions to business difficulties, and they may be carried out via both official and informal legal channels[10]. The assumption that severe corrective action is performed during a company crisis is fundamental to the rescue concept. All these perspectives essentially agree with the idea that informal rescue techniques should be used in rescue operations instead of being limited to official processes[11].

Globally, modern banking and business practices have used a number of tactics throughout the years to deal with financially challenged businesses and the loans and obligations they hold. Many factors, such as the size of the business, the level of difficulty, the vulnerability of certain creditors, and its prospective viability, among others, affect the final decision and its actions. The particular insolvency regime concerned is a significant factor that influences how simple it is to execute one alternative over another[12]. Thus, a creditor-oriented system makes it easier for the lenders to take charge of the legal process and take measures to recover their debts, which might ultimately lead to the winding up of the bankrupt company. Conversely, a government that helps debtors usually succeeds in regaining the company[13].

The current economic downturn has led to many loan defaults and business difficulties. Considering that the current situation is the consequence of a systematic breakdown rather than isolated incidents, closing businesses does not seem to be the appropriate course of action. What is often sought is saving businesses and giving them new life—as long as they remain viable[14]. There are two types of rescue mechanisms: official and informal. A court-led or supervised procedure would be part of the official rescue process, which eventually results in the firm being saved by actions like debt restructuring and management changes[15]. India is one of the youngest countries to enter the informal debt restructuring market. Before

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[10] Kastrinou, A. (2016) Comparative Analysis of the Informal Pre-Insolvency Procedures of the UK and France. Int. Insolv. Rev., 25: 99–118. doi: 10.1002/iir.1247.

[11] James H.M. Sprayregen & Tarun Warriar, The IBC and Interim Finance: Potential Developments Based on DIP Lending Experience, Legal Era (Dec. 12, 2017), https://www.legaleraonline.com/articles/ the-ibc-and-interim-finance-potential-developments-based-on-dip-lending-experience.

[12] Julian Chung & Gary Kaplan, An Overview of Debtor in Possession Financing, in Lending & Secured Finance Laws and Regulations 2021 120 (Thomas Mellor ed., 2021).

[13] Chen, T. W., Azmi, R., & Rahman, R. A. (2021). Theories of corporate insolvency: A philosophical analysis of the corporate rescue mechanisms under the Companies Act 2016. UUM Journal of Legal Studies, 12(2), 167-202. https://doi.org/10.32890/uumjls2021.12.2.8.

[14] Vijaykumar V. Iyer et al., Performance Analysis of M/s Binani Cement Limited, Indian Inst. of Insolvency & Prof. of ICAI (Jan. 2020), https://www.iiipicai.in/images/PDF/CASE-STUDY-BINANI-CEMENT.pdf.

[15] LawTeacher. November 2013. Informal Corporate Rescue Mechanism. [online]. Available from: https://www.lawteacher.net/free-law-essays/finance-law/informal-corporate-rescue-mechanism.php?vref=1 [Accessed on 15 August 2024].

2001, there was no organized structure in place to accelerate non-formal debt restructurings and other business rescue procedures. The Board of Industrial and Financial Reconstruction (BIFR) was given permission to oversee the reorganization process by the Sick Industrial Companies Act, 1985, which established the legal framework for the recovery of financially troubled Indian enterprises[16]. Nonetheless, the BIFR's contribution to the procedure was and is still very inadequate. As a result, the Reserve Bank of India (RBI)'s Corporate Debt Restructuring (CDR) mechanism was used to institutionalize informal rescue via debt restructuring in 2001[17]. This platform, which was mostly based on the London principles, has seen a lot of usage recently. The Reserve Bank of India has released a number of circulars about the CDR process. Regarding corporate rescue processes, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act of 2002 was another positive move. The Act facilitated the establishment of Asset Reconstruction Companies (ARC) in India, primarily focused on managing non-performing debts that were obtained from secured creditors[18].

INFORMAL CORPORATE RESCUE MECHANISMS

Informal corporate rescue process focuses on business reorganization outside official statutory bankruptcy proceedings. Such methods provide indebted firms with a flexible chance to fix their problems outside the inflexible, complex, and sometimes time-consuming statutory bankruptcy processes. Informal corporate rescue processes are via informal 'workouts', 'pre-packs' and 'debt for equity swaps', cherry-picking and purchase and assumption[19].

An informal workout refers to a voluntary out-of-court restructuring process in which a financially troubled firm and its creditors arrange to modify their debts. Essentially, the creditors reach a consensus on a "coordinated approach" by attempting to collaborate in order to come up with a group solution that serves their shared interests. There are noticeable differences in how exercises are implemented in various jurisdictions, but they nonetheless share several key traits[20].

Pre-Packs

This essentially entails a pre-insolvency phase of discussion with a potential buyer of an insolvent company's operations. The assets that the buyer needs will be decided upon, and the selling price of the company will always be determined with reference to an impartial appraisal. When a subsequent administration is made, the buyer receives ownership of the company together with all agreed-upon assets, goodwill, contracts, staff, and similar items. Pre-packs may include the selling of the company to a third party or a "phoenix" sale in which the former directors take control the newly formed company[21].

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[16] Sachin Gupta & Varsha Banerjee, India: Restructuring & Insolvency Laws & Regulations, Int'l Comp. Legal Guides (May 05, 2020), https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/india.

[17] Pandya, Param, Corporate Insolvency and Corporate Recue in India - An Economic Analysis (May 1, 2015). Available at SSRN: https://ssrn.com/abstract=2970582 or http://dx.doi.org/10.2139/ssrn.2970582.

[18] Shikha N. Takeover through Scheme of Arrangement: A Changing Trend in the UK. Vikalpa. 2013;38(1):87-103.doi:10.1177/0256090920130107.

[19] Finch, V. (2009). Corporate Insolvency Law: Perspective and Principles (2nd ed.). UK: Sweet and Maxwell.

[20] Sui-Jim Ho & Surya Kiran Banerjee, Indian Bankruptcy Code—How Does it Compare?, 8 Emerging Markets Restructuring J. 51, (2018)

[21] Maksym Iavorskyi et al., Resolving Insolvency - New Funding and Business Survival, Doing Bus. (2016), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Chapters/DB16-CS-RI.pdf.

Debt For Equity Swap

A debt for equity exchange might be implemented as an informal company rescue strategy. This is the situation in which a creditor consents to swap a loan for an equity stake in the business in the anticipation of a higher return down the road. It is a technique that may allow an acceptable agreement to be struck with creditors. This strategy, however, may be limited since it may be costly and time-consuming to negotiate because the approval of most [22]creditors and the company's shareholders is often needed[23].

Purchase and Assumption

This is the process by which an investor or other corporation buys the assets of a failing business and takes on its obligations, often for an auction price. The assumed company is dissolved by a judicial sale of its assets and liabilities to the buying company or investor through a judicial accent rather than through regular winding up procedures. The transaction is completed by means of a properly signed Deed of Purchase and Assumption by the parties, resolutions endorsing the deal, or, in the event of a government company or a company bought or taken over by a regulatory body, a government white paper. There are many options for the ease of purchase and assumption in connection with bank reorganization: buy and assumption for the whole bank, purchase and assumption for a portion of the bank, purchase and assumption for loss sharing, and bridge bank[24].

Cherry Picking

Similar to Purchase and Assumption, but with one key difference: the investing company or buying company is not assuming full liability for the failing business; instead, it is permitted to examine the failing business's assets, operations, and books in order to identify any aspects that it could integrate into its own operations and save costs[25].

NEED FOR INFORMAL CORPORATE RESCUE MECHANISMS IN INDIA

To modernize India's debt settlement system, the Insolvency and Bankruptcy Code (IBC), 2016, a historic piece of legislation, was put into effect. The old insolvency rules were superseded, and a unified framework for handling stressed assets was established. Resolution of distressed assets has undergone major changes because of the IBC, which has had a major influence on the business sector[26].

The financial system's overall health is directly impacted by the prompt settlement of stressed assets. Without a deadline, the process of resolving stressed assets would often take years, piling up non-performing assets (NPAs) on the balance sheets of banks and other financial organizations. Consequently, this would impact the credit flow and cause the rate of economic growth to decelerate. The financial system has been less affected by stressed assets because of

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[22] Manaswita Nakwaal, Maximisation of Value of Assets under the Insolvency & Bankruptcy Code, 2016, Indian Rev. Advance Legal Res. (Oct. 01, 2020), https://www.iralr.in/post/maximisation-of-value-of-assets-under-the-insolvency-bankruptcycode-2016.

[23] Vishwanath Nair, As Banks Deny Working Capital to Insolvency Cases, Resolution Professionals Turn to Funds, Bloomberg Quint (Aug. 28, 2017), https://www.bloombergquint.com/business/2017/08/28/as-banks-deny-working-capital-to-insolvencycases-resolution-professionals-turn-to-funds.

[24] Nwafor, Anthony. (2017). The goal(s) of corporate rescue in company law: A comparative analysis. Corporate Board: role, duties and composition. 13. 20-31. 10.22495/cbv13i2art2.

[25] Megha Mittal, Interim Financing Becomes Effective and Attractive, in IBC: Ushering in a New Era 150 (Megha Mittal ed., 2019).

[26] Avinash Kumar Khard, Rescue Financing: Helping Hand for Entities in Distress, Indian Bus. L. J. (Feb. 03, 2019), https://law.asia/rescue-financing-helping-hand-entitiesdistress/.

the IBC's time-bound approach, which has drastically shortened the time required for their resolution[27].

Additionally, the Insolvency and Bankruptcy Code (IBC) stipulates a moratorium period that stops creditors from pursuing recovery actions against an insolvent corporation throughout the insolvency process. By conducting the resolution process more systematically and effectively, this helps to preserve the value of the company's assets. This is beneficial to the financial system because it fosters investor and creditor confidence, both of which are necessary for the financial markets to run smoothly[28].

Bringing India into line with its international equivalents, such as the United Kingdom, the United States, Canada, and Singapore, is a major step forward with the introduction of a pre-packaged insolvency system[29]. Particularly, the implementation of a PPIRP presents good possibilities for the MSME sector, emphasizing their rehabilitation during economic problems such as those presented by the COVID-19 epidemic. But there are still issues that need to be resolved, such voluntary haircuts and judicial intervention that impedes the 120-day deadline[30]. Pre-packs that are implemented should gradually, focus on properly managing enterprises first and then expanding to smaller organizations with simpler debt arrangements to maximize their effectiveness[31]. Transparency issues, particularly with operational creditors' participation, might be minimized by requiring their presence in negotiating procedures and establishing a window for complaints. Additionally, imposing a minimum compensation for operational creditors equivalent to liquidation rights under Section 53 of the Code might assure justice[32]. Given the current backlog of CIRP applications, the effectiveness of PPIRPs depends on supplementary actions to improve the ability of adjudicating authorities to manage applications[33]. Although pre-packs provide a productive alternative for resolving financially troubled enterprises, changes to the Code and strong regulatory structures are essential. It is, therefore, vital to modify the pre-pack processes to fit the Indian environment, recognizing its supplemental function alongside the current bankruptcy resolution structure rather than a total replacement[34].

CONCLUSION

If a company's financial crisis is identified early on, it may be remedied swiftly via an informal rescue that benefits both creditors and debtors, rehabilitating it without the need for the official

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[27] van Zwieten, Kristin, Corporate Rescue in India: The Influence of the Courts (July 1, 2014). Journal of Corporate Law Studies, Vol. 1, 2015, Forthcoming, Oxford Legal Studies Research Paper 37/2014, Available at SSRN: https://ssrn.com/abstract=2466329.

[28] Ajanta (P.) Ltd., In re [2017] 77 taxmann.com 232 (Gujarat); also, Aditya Birla Money Mart Ltd., In re [2016] 76 taxmann.com 270 (Gujarat)]. Also see Cello Pens (P.) Ltd., In re [2017] 83 taxmann.com 399 (NCLT - Ahd.)

[29] Buljevich, E.C. (2005). Cross Border Debt Restructuring: Innovative Approaches for Creditors, Corporates and Sovereigns. (Euromoney Institutional Investor PLC, 2005) Chapter 1 at 1.

[30] Don Weinland, Global Investors Sidestep Indian Bankruptcy with Rescue Finance, Fin. Times (Jan. 02, 2019), https://www.ft.com/content/6059445a-0d82-11e9-ac dc-4d9976f1533b.

[31] Dr. Neeti Shikha & Urvashi Shahi,Restructuring in COVID-19: Reinventing the old wheel, The Daily Guardian (11th July,2020) https://thedailyguardian.com/restructuring-in-covid-reinventing-the-old-wheel/

[32] Ashwin Bishnoi, The Indian Insolvency & Bankruptcy Code 2016: No More a "Wait and Watch" Space for Private Equity, 22 EMPEA Legal & Reg. Bull. 7 (2017).

[33] Dinesh Unnikrishnan, Explained: Why Pre-Packaged Insolvency Resolution is Great for MSME Borrowers, Money Control (Apr. 05, 2021), https://www.moneycontrol.com/news/business/explained-why-pre-packaged-insolvency-resolution-is-great-for-msmeborrowers-6729901.html.

[34] Neeti Shikha,The Changing Trend of Schemes of Arrangement and Approaches towards Its Efficacy,Indian J. Int'l Econ. L., 2011.

bankruptcy procedure. What matters is that the firm should have a workable business plan and a turnaround specialist, sometimes known as the "company doctor," who can provide guidance on the best course of action to pursue in order to save the company sooner and boost its chances of success. Informal rescue methods often entail voluntary agreements between the debtor and some or all of its creditors. These discussions are often facilitated by the banking and business sectors and usually urge for the troubled enterprises to undergo some kind of reorganization. Informal rescue provides a variety of potential rewards since it is quicker and cheaper than official rescue and gives a lot of anonymity, therefore maintaining the goodwill and status of the organization. Informal rescue negotiations provide more flexibility since the terms and circumstances of the rescue may be altered throughout the negotiation process. This is not the case with the official rescue procedure. Informal rescue has shortcomings in addition to its many positive aspects. The first flaw is the need for unanimity, which is necessary if the rescue is to be successful (such as in the event of a workout or settlement with the lenders). The consent of all parties whose privileges are at risk is usually necessary. The absence of a formal moratorium is the second flaw. Consequently, creditors who object to the method are free to stop the unofficial rescues by starting official bankruptcy processes, such as liquidation. But implementation in the Indian environment might be highly problematic for both regulatory (IBBI) and adjudicating authorities (NCLT) as the market and the business trends are quite volatile in nature. An unofficial rescue is consequently a delicate mechanism that depends on everyone's participation because of this danger. It is evident, however, that a prompt completion of an informal rescue always has tangible benefits for both creditors and debtors.

RECOVERY OF INCOME TAX DUES IN A CASE WHERE CIRP IS APPROVED UNDER IBC

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CHIEF COMMISSIONER OF INCOME TAX

1. Recovery mechanism under Income Tax Act:

a. 1.An Income Tax assessee will become statutorily obliged for payment of amount of any tax, interest, penalty or fee in terms with the notice issued under section 156 of the Income Tax Act, 1961(Act).

b. The Income Tax statute contains provisions for recovery of the tax dues, which includes even creating a charge on all the assets of a defaulter. Chapter XVII of the Income Tax Act provides for various manners for collection and recovery of tax. Section 220 to 232 of the Act provides mechanism for collection of tax due from the assessees. The Assessing Officer is responsible for collection/recovery of tax in accordance with the procedure laid down in section 220 of the Act.

c. Where the assessee is in default in making the payment of tax,the proceedings for recovery are carried out by the Tax Recovery Officer(TRO), once the recovery certificate is drawn by the Assessing Officer.T.R.O. can recover the arrears of taxes by any or all of the following 4 modes in accordance with the rules laid down in the Second Schedule to the Income-tax Act-

- Attachment and sale of the defaulter's movable property (Schedule II, Part II).
- Attachment and sale of the defaulter's immovable property (Schedule II, Part III).
- Appointment of a Receiver for the management of the defaulter's movable and immovable property (Schedule II, Part IV)
- Arrest of the defaulter and his detention in a Civil Prison (Schedule II, Part V).

1.1. The immovable property will include property transferred by the defaulter after 1.6.1973, if such transfer has been made without adequate consideration.

1.2. Besides the above, the normal procedure and Powers for recovery of tax available to the assessing officer are also available to the T.R.O.

Provisional attachment of properties:

Further, with a view to protect the interest of revenue, during the pendency of any proceeding for the assessment or reassessment, the Assessing Officer is empowered to make a provisional attachment of any property of the assessee (even though there is no demand outstanding against the assessee). In order to invoke this provision, the Assessing Officer should be of the opinion that it is necessary to do so. The order of the provisional attachment will be made under Section 281B. It is to be made only after obtaining the approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director.

Primacy of income tax dues granted by Income Tax Act:

Priority of recovery of outstanding Income Tax dues over all other debts, by virtue of creation of first charge over the assets of the defaulter, was the stand enjoyed by Income Tax Department.

2. Change of position post introduction of IBC-2016:

1. A question now arises whether the recovery income tax dues stand any chance post introduction of Insolvency and Bankruptcy Code, 2016 (IBC) w.e.f. 28-05-2016, which is the nation's first comprehensive law to address the insolvency of corporate persons and individuals.

Objective of IBC

IBC was intended to tackle the bad loan problems that were affecting the banking system. It provides for a time bound process to resolve insolvency. When a default in repayment occurs, insolvency professional gains control over debtor's assets and must take decisions to resolve insolvency under the guidance of Committee of Creditors consisting of financial creditors. If debt resolution does not happen, the company goes for liquidation.

Important provisions in IBC:

Now let us examine the provisions contained in IBC w.r.t. treatment of Income tax dues (for that matter any amounts due to Central or State Government) while approving the Resolution Process. But understanding the following key terms as defined in the IBC is important before going further on the issue:
Section 3(10): "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, an unsecured creditor and a decree holder.

Section 3(11): "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operation debt.

Section 3(12): "default" means non- payment of debt when whole or any part

or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

Section 5(7) "financial creditor" means a person to whom financial debt is owned (including a person to whom debt has been legally assigned).

Section 5(8) "financial debt" means a debt along with interest disbursed against consideration for time value of money and includes specified borrowings.

Section 5(13) of IBC defines "insolvency resolution process costs" as costs of interim finance, fees of RP, costs incurred by RP in running day-to-day business, and costs incurred to facilitate

resolution process.

Section 5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21) “Operational debt” -- claim in respect of goods or services, including employment, or debt in respect of payment of dues under any law and payable to Central Government/State Government/Local Authority

Section 5(26) “resolution plan” – means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.
Explanation – For removal of doubts, it is hereby clarified that a resolution plans my include provisions for the restructuring of the corporate debtor, including by way of merger/amalgamation and demerger.

Section 31 – if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors (COC) under sub-section (4) of

Section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan, which has a binding nature.

3.1 Approval of the Committee of Creditors (CoC) thus becomes key, based on which the Adjudicating Authority passes an order approving the resolution plan. Hence, it can safely be concluded that the Corporate Insolvency Resolution Process (CIRP) is a financial creditor driven process.

4.Waterfall mechanism: The proceeds are distributed in a specific sequence (popularly known as the waterfall mechanism), starting with secured creditors, followed by preferential creditors, and then unsecured creditors. The Supreme Court has consistently held the waterfall mechanism and the priority of claims, as prescribed under section 53 of the IBC, which cannot be over-rided by other laws.

Section 53: Proceeds from the sale of liquidation assets shall be distributed as provided in this section, as under:

- **a.** the first priority is given to Corporate Insolvency Resolution Process (“CIRP”) Costs, which are paid in full.

- **b.** next priority is given to debts owed to secured creditors (in the event such secured creditor has relinquished security) along with workmen for 24 months preceding the commencement of the liquidation which are paid paripassu amongst them.

- **c.** third in line are the wages and any unpaid dues owed to the employees (other than workmen) upto 12 months preceding the commencement of the liquidation and debts.

- **d.** Thereafter come the dues of unsecured creditors, which are low at priority, followed by dues of Central Government & State Government upto

2 years preceding Liquidation Commencement date

e. least priority is given to any remaining debts or dues; preference shareholders followed by equity shareholders

4. <u>Whether the resolution plan will be binding on the tax authorities?</u>

Yes. As per Section 31 of the IBC, the approved resolution plan shall be binding on the corporate debtor and its employees, members, creditors, including Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed], guarantors and other stake holders involved in the resolution plan.

1. Further, IBC has an overriding effect over provisions of Income Tax, by virtue of non obstante clause contained in Section 238 of the Code. Thus, where there is a conflict between the provisions of the Code and those of the Income Tax Act, the Code will prevail over the Act.
2. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect of a claim, which is not part of the resolution plan.

5. <u>Imposition of moratorium:</u>

As per section 14 of the Code, which reads as under, the Adjudicating Authority shall declare moratorium prohibiting any action against the corporate debtor.

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

- the institutionJ2 of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

- the recovery of any property by an owner or lessor where such property is occupied by or in the possession ofJ3 the corporate debtor.

6. <u>This overriding nature of IBC over any other law necessitated amendments to the below mentioned Income Tax provisions:</u>

1. Change in overriding nature of Income Tax provisions in the case of company in liquidation:

As per Section 178(6) of the Income Tax Act, as amended w.e.f. 01.11.2016, the Code (IBC) shall have the overriding effect.

2. **Modification in demand notice:** A new section 156A was inserted in the Income Tax Act w.e.f. 01-04-2022 to reduce Income tax demands, which gets modified by virtue of an approved resolution plan, from the outstanding demand register.

3. **Profits and gains of business or profession under section 28(iv):** (Taxability of loanswaived in restructuring plan – monetary benefits were not covered prior to amendment)

   The following words were inserted
   w.e.f. 01-04-2023 in the amended provisions of section 28(iv) of Income Tax Act, 1961 w.r.t. benefit or perquisite arisen from business or profession.
   "In cash or in kind or partly in cash or in kind"

7. **Judicial pronouncements:**
   The declaration of moratorium and overriding nature of the IBC resulted in following pronouncements decisions/orders by Apex Court, various High Courts/Tribunals making the Income Tax provisions inoperative in the case of a corporate debtor in whose case resolution plan is approved.

1. **Pr.CIT v. Monnet IspatAnd Energy Ltd. 107 taxmann.com 481 (SC) [2019]**
   Moratorium under section 14 of the IBC will also apply to appeals being made by the Income Tax Departments against the orders of Income Tax Appellate Tribunal, in respect of tax liability of a debtor under CIRP.

   The Hon'ble Supreme Court upheld the ruling of Hon'ble High Court of Delhi in this judgement.

2. **Kitply Industries Ltd. V. Asst. Commissioner of Income Tax-- 102 taxmann.com 116 (NCLT-Guwhati)**
   [2019]
   Proceeding before the Income Tax Department, which has resulted in freezing bank accounts is a proceeding of quasi-judicial nature and continuation of such a proceeding during the period of moratorium period is illegal, in view of the prohibitions under section 14(1)(a) of the Code.

3. **PCIT v. Monnet Ispat& Energy Ltd., [SLP (C) No. 6487 of 2018, dated 10-08-2018] (SC)**
   The overriding nature and supremacy of the provisions of the IBC over any other enactment in case of conflicting provisions, was upheld in this case by the Apex Court.

4. **Alchemist Asset Reconstruction Co. Ltd. V. Hotel Gaudavn (P) Ltd. 88 taxmann.com 202[2017] / 145 SCL 428 [2018] (SC)**
   It was held in this case that even arbitration proceedings cannot be initiated after imposition of the moratorium u/s. 14(1)(a).

5. **Leo Edibles and Fats Ltd. Vs. Tax Recovery Officer (Central), Hyderabad [WP No.8560 of 2018, dated 26-07-2018) –**
   The Hon'ble Telangana High Court held that the Income Tax Department cannot claim any

priority over other creditors only because of its order of attachment prior to the initiation of liquidation proceedings under the IBC.

6. **Murli Industries Limited vs. Asst. CIT 441 ITR 8 [2022] (Bom)**
   The IT Department is not entitled to issue notice against the corporate debtor for unpaid tax claims after the approval of the resolution plan by the Adjudicating Authority.

7. **In Sirpur Paper Mills Ltd. Vs. Union of India [WP No.25827 of 2019, dated 18-01-2022],**
   The Hon'ble Telangana High Court held that IBC law overrides Income Tax law and quashed the assessment notices issued by the Income Tax Department during the pendency of IBC resolution proceedings.

8. **Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs [Civil Appeal No.7667 of 2021] (SC) –**
   The decision of Hon'ble Supreme Court in this case established the supremacy of the IBC over the Customs Act, even though the Customs Act grants customs officials a statutory first charge over a corporate debtor's assets.

9. **There are no specific provisions under the IT Act** dealing particularly with tax implications in the case of corporate structuring pursuant to IBC provisions. Consequently, the waiver of loans under resolution plan approved under IBC by NCLT will lead to potential tax implication as the following sections may not be applicable to the case of a corporate debtor, in whose case the resolution plan is approved.

   a) Cessation of liability under section 41(1):
   (Taxability of Loans Waived or written off)
   b) Carry forward and set off of losses under section 79:
   (Inspite of change in shareholding pattern in the case of corporate debtor in whose case resolution plan is approved by IBC, losses can be carried forward and set off against future profits)
   c) TDS under section 194R
   (Taxability of benefit or perquisite in respect of business or profession)
   d) Capital gains under section 47(vi)
   (in the case of amalgamation/merger, as depreciation shifts to the amalgamated company)
   e) Penalty u/s.271E
   (applicability of section 269T for non- payment of loan by accounting payee cheque or electronic clearing system/mode)
   f) Deeming provisions of Section 50CA and 56(2)(x)
   (Valuation of equity shares in the case of IBC company much lower than fair market value – violation of Rule 11UA)
   g) Issuance of notice u/s.148
   (to assess or reassess the income which has escaped assessment for any assessment year

Other losses to Revenue on account of debt resolution under IBC: Apart from making the above provisions of Income Tax Statute non-applicable to the case of a Corporate Debtor in whose case resolution plan is approved under IBC, it is pertinent to note that there are some

other pecuniary losses to Revenue, which are discussed hereunder:

i. Recovery of unpaid TDS: Any person is statutorily obliged to deduct tax on payments made to various categories of persons under different heads of expenditure, under the relevant TDS provisions of Income Tax Act. However, often the amounts deducted towards TDS/TCS are not remitted into Central Government account within the prescribed due dates and such monies are used for business purposes by the deductor companies/entities (especially which are in not financially sound position).In the case of a corporate debtor covered under IBC resolution plan, apart from non-availability of credit to the deductees (due to TDS mismatch for non-remittance), recovery of such unpaid TDS becomes impossible due to waterfall mechanism.

ii. Loss of revenue on account of corporate debts, which could not be recovered in full as per the resolution plan approved under IBC and written off by the creditors will ultimately result in lower tax payments.

iii. Loss of revenue on account of tax losses available for set off,in the hands of a corporate debtor, against future incomes of a resolution applicant if the same benefit is extended to a resolution applicant taking over the CD under CIRP.

Government dues is a secured creditor or unsecured creditor :Now, let us examine some of the recent judgements delivered by Hon'ble Supreme Court with respect to treatment of 'government dues' as secured creditor or otherwise.

10. Honourable Supreme Court in State Tax Officer vs. Rainbow Papers Limited in civil appeal no. 1661 of 2020 decided on 06th September, 2022 held that – "because of the provisions of Gujarat Vat Act, the tax dues to the Government of Gujarat are secured creditors covered by the definition of secured creditors given in section 3(30) of the IBC, as security interest is created by operation of law as per the definition of security interest given in section 3(31) of the IBC".

1. Thus, the Hon'ble Supreme Court interpreted the definition of 'secured creditor' to hold that any government or governmental authority shall be a secured creditor as the charge created by a statutory law can be considered as a 'security interest'.
2. The expressions 'security interest' and 'secured creditors' have to be read in accordance with the definitions assigned under section 3(31) and section 3(30), respectively. Therefore, in order to be a secured creditor, one has to have a 'security interest'. The definition of 'security interest' reads as to mean a right, title, etc., created by a 'transaction' which secures payment or performance of an obligation. 'Transaction', as defined in section 3(33) of IBC, includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.
3. Now the question to be answered is - whether, the concept of 'security interest' can be stretched to include forced or non-consensual acts like attachment of property by Income tax authorities, which will create a statutory charge in favour of the tax authority, such that the status of a 'secured creditor' can be imparted to the tax authority.

The decision of the Honourable Supreme Court in this case (Rainbow Papers Private Ltd.,) was subject to review petition which was decided by the Honourable Court on 31.10.2023

wherein the Honourable Court has refused to Review its earlier order dated 06.09.2022.

11. The above decision in Rainbow Papers limited was, however, dissented with by another bench of the Honourable Supreme Court in PaschimanchalVidyutVitaran Limited vs. Raman Ispat Private Limited in civil appeal No. 7976 of 2019 vide order dated 17.07.2023. The Hon'ble Supreme Court observed that –

i. Rainbow Papers (supra) did not notice the 'waterfall mechanism' under Section 53 – the provision had not been adverted to or extracted in the judgment. Furthermore, Rainbow Papers (supra) was in the context of a resolution process and not during liquidation.

ii. The judgment in the case of Rainbow Papers (supra) has not taken note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than dues payable to Central or State Government.

iii. The dues payable or requiring to be credited to the Treasury, such as tax, tariffs, etc. which broadly fall within the ambit of Article 265 of the Constitution are 'government dues' and therefore covered by Section 53(1)(e) of the IBC

iv. The Gujarat Value Added Tax Act, 2003 no doubt creates a charge in respect of amounts due and payable or arrears. It would be possible to hold [in the absence of a specific enumeration of government dues as in the present case, in Section 53(1)(e)] that the State is to be treated as a 'secured creditor'. However, the separate and distinct treatment of amounts payable to secured creditor on the one hand, and dues payable to the government on the other clearly signifies Parliament's intention to treat the latter differently - and in the present case, having lower priority.

v. The Rainbow Papers judgment has to be confined to the facts of that case alone.

It is possible to hold the State as a secured creditor but only if there is no separate enumeration of "state dues" as in section 53(1)(e) of the IBC.

12. The above view that the State Dues do not rank paripassu with Secured Creditors is fortified by the decision of three member bench of the Supreme Court in Ghanashyam Mishra and Sons Pvt. Ltd.,v. Edelweiss Asset Reconstruction Co. Ltd.[SC] [2021] 126 taxmann.com 132/166 SCL 237 (SC).

1. The Honourable Court held that the Government cannot recover tax dues that are not forming part of the resolution plan under IBC and that the resolution plan is binding on all stakeholders, including the Government.

2. The Honourable Court after considering the Statement of Objects and Reasons for the amendment to the code in 2019, the Finance Minister's speech in Parliament at the time of introduction of the bill for amendment went on to hold at paragraph 87of the order that the amendment of 2019 to section 31 is retrospective. It was held to be clarificatory because even otherwise the words "other stake holders" in the pre amended section 31 covers both Central and State Governments or any other local authority.

3. The Honourable Court has concluded that once the Resolution Process is approved by the Adjudicating Authority as per law, then no further claims can be made against the successful bidder. It was held that the state dues whether service tax, vat, income-tax or any other dues

to the Governments (State or Central) or any local authority will stand extinguished if the same are not included in the Approved Resolution Plan. It may be noted that in this case also dues to the Government are treated on a footing different from the dues to other secured/financial creditors.secured creditor but only if there is no separate enumeration of "state dues" as in section 53(1)(e) of the IBC.

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4. The Hon'ble Apex Court observed that – "Harmonious construction of subsection (10) of Section 3 of the I&B Code read with subsections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'.

   The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under subsection (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under subsection (10) of Section 3 of the I&B Code.

   As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in subsection (1) of Section 31 of the I&B Code."

10 Amendments made to IBC-2016 : The chronological order of the amendments made to IBC-2016 till date are as under:

14. In December 2019, provisions for insolvency resolution and liquidation for individual insolvency were brought into force concerning personal guarantors ("PG") to corporate persons.

In addition, a separate customised framework was also notified under the Code for the financial service providers in November 2019.

15. Further, in April 2021, a separate framework for pre-packaged insolvency resolution for micro small and medium enterprises ("MSMEs") was introduced.

16. In November-December, 2021, the Ministry of Corporate Affairs invited public comments on issues related to the corporate insolvency resolution and liquidation frameworks, and the introduction of a cross-border insolvency framework. Since receipt of public comments in response to such invitation, further changes are being considered to bolster the frameworks under the Code.

17. In this process, the Ministry of Corporate Affairs released a notice seeking comments on the proposed amendments, in File No. 30/38/2021-Insolvency Date: 18.01.2023, to strengthen the functioning of the IBC, in relation to the admission of corporate insolvency resolution process ("CIRP") applications, streamlining the insolvency resolution process, recasting the liquidation process, and the role of service providers under the Code.

4.1 One of the proposed amendment as per para 14.1 of the said notice suggests that-

-"all debts owed to Central Government and the State Government, irrespective of whether they are secured creditors pursuant to a security interest created by a mere operation of statute, shall be treated equally with other unsecured creditors."

Further, it is also to be clarified that- "only where the security interest is created pursuant to a transaction of the Central Government or a State Government with CD, the Government in question will continue to be treated as a secured creditor in the order of priority.

4.2 In addition to the above proposed amendment, attention of the reader of this article is drawn towards para 17.1 of the said discussion paper, which reads as under:

"it is being considered that the Code may be amended to clarify that post approval of the resolution plan, no proceedings may be commenced or be continued by any government or authority regarding the claims arising before the commencement of the CIRP, unless otherwise provided for in the resolution plan, and such claims shall stand extinguished."

11. Clearance certificate from IT Department before creating charge :

1. As per the provisions of section 281 of the Income Tax Act, which reads as under certain transfers of assets or charges created over assets by an Income Tax assesse during the pendency of any proceeding or after completion of such proceeding "shall be treated as void". Section 281. (1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in

respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise.ss

1.1 However, it is provided that such charge or transfer shall not be void if it is made –

1. for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee ; or
2. with the previous permission of the Assessing Officer.

1.2 Further, the provisions of section 281B are applicable to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

1.3 In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock- in-trade of the business of the assessee.

2. Thus, it is evident from the above provision that previous permission of the Assessing Officer, before transferring any asset or creating charge on any asset is, mandatory. In other words, a clearance certificate is required to be obtained by the assesse and produced before the lending banks/other financial institutions.

3. The litigation with respect to supremacy or first charge of the Income Tax dues could be avoided if the above procedure is followed scrupulously either by the assesses or by the lending institutions. In very few cases the certificates were obtained prior to 2016.

4. However, due to overriding nature of IBC, the above provision is no longer applicable to the case of a Corporate Debtor in whose case resolution process has been initiated.

12. It transpires from the above discussion that –

i. the recovery of government dues (crown debts) in the case of a Corporate Debtor have lost primacy (claim for a priority in the resolution plan) as they cannot be treated on par with security creditors, as was held in catena of judicial pronouncements;

ii. deviation from waterfall mechanism is not allowed as adjudicated by various courts;

iii. the sums due to Central or State Government which go to the consolidated fund of India or State shall be ranked only after the dues payable to creditors listed earlier in section 53(1)(e) of IBC;

iv. recovery of Income Tax dues even in cases where properties were already attached by the Tax Recovery Officer prior to initiation of CRIP also is ruled out as the same is not treated as a security interest;

v. the overriding nature of IBC prohibits initiation of proceedings under Income Tax Act after the approval of resolution plan by the Adjudicating Authority;

vi. the only way to reduce the Income Tax dues from the books is to write-off the uncollected demands in the case of a Corporate Debtor, if recovery of the same was not a part of the

approved resolution plan.

vii. neither Income tax assesses nor the lending institutions are not obtaining clearance certificates before creating charge over assets/release of sanctioned loan amounts.

1. It is pertinent to mention that as per the latest data given by the Central Government in the budget for fiscal year 2024-25, the unrealised taxes (both direct and indirect) of the Union reported at 21.3 trillion rupees is very close to the Government's full year's share of revenue under all heads reported at 23.24 trillion rupees as per the revised estimates for 2023-24. The dues to various State Governments would also be of significant amount.

1.1. The attention of the readers is also drawn to the fact that such figure is steadily increasing year after year due to apparent impediments in recovery of tax dues by Central and State governments.

In view of the above, the authors are of the view that the amendments as proposed in the discussion paper released by Government of India will put an end to the litigation relating to the contentious issues like-

1. priority for recovery of Income Tax dues over other items in the resolution process under IBC;
2. treatment of the government dues as secured creditors where security interest was already created by way of attachment of assets; andssssssss
3. requirement of clearance certificate from Income Tax Department under section 281B.

SUCCESS STORIES

MR. ASHOK KUMAR GULLA
INSOLVENCY PROFESSIONAL

Fedders Electric and Engineering Ltd

Fedders Electric and Engineering Limited (FEEL)
Successful Resolution Under Corporate Insolvency resolution Process

- **Background of the Company**: Fedders Electric and Engg Limited (FEEL or the Corporate Debtor or CD) was incorporated on 16.01.1957 having registered office at 6 & 6/1, UPSIDC Industrial Area, Sikandarabad, Bulandshrar, UP-203205Flat and corporate office at C-4, Phase II, GutamBuddh Nagar, Noida- 201305 (UP). FEEL was engaged in the (i) manufacture and fabrication and erection of steel structure and supply of pre-fabricated structure (ii) transmission and distribution of Power Projects as ERP contractor (iii) Design, commission, manufacture and installation of HVAC system for railways and defence (iv) Overhead electric lines for railways and (v) Installation of Wind mill Power. The Company had factories at Pant Nagar (UP), Sikandarabad (UP), Kalam(HP), Bharuch (Gujarat) and Gautam Budh Nagar (Noida). FEEL was facing liquidity problems at the commencement of Corporate Insolvency resolution Process (CIRP) and most of the projects in Power Transmission and Distribution were delayed and other verticals were also facing problems orders were not executed as per the contract. The CD had recorded net revenue of Rs 1239.06 crs, net Loss of Rs 496.00 crs and EBITDA of (-) Rs 449.61 crs during year ended March 2018 and net revenue of Rs 127.79 crs, net loss of Rs 120.89 crs and EBITDA of (-) Rs 63.94 crs during yeae ended March 2019.

- **Commencement of CIRP and Public Advertisement in Form A**: The application no CP No: (IB) -75 (AL)/2019 was filed by State Bank of India, Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) with Hon'ble NCLT, Allahabad and same was admitted into Corporate Insolvency resolution Process (CIRP) vide order dated 14th August 2019 and appointed Mr. Ashok Kumar Gulla as Interim Resolution Professional (IRP). The IRP released public advertisement inviting claims from Financial Creditors, Operational Creditors and other creditors in Financial Express (English) All India Edition dated 17.08.2018 and Jansatta (Hindi) All India Edition dated 17.08.2018. Based on the Claims received and collated by the IRP, the report for constitution of CoC was filed with NCLT on 06.09.2019. The IRP was confirmed as Resolution Professional during the First meeting of Committee of Creditors (CoC) held on 12.09.2018. FEEL was dealing with SBI, PNB, Axis Bank, CBI, Karnataka Bank, ICICI Bank, Standard Chartered Bank and Toyoto Financial Services and claims were received from these Financial Creditors (FCs) and admitted to the extent of Rs 992.00 crs.

- **Continuation of CD as a Going Concern**: The Resolution Professional along with the team from IPE i.e. RBSA Restructuring Advisors LLP (which is IPE registered with IBBI) ensured that

the corporate debtor continues as a going concern and execute the orders received from various SEBs so as to reduce penalties and maximize the value for stakeholders. The RP along with Team and support from the staff of the CD started deliberations with suppliers, sub-contracts, Semi Govt Authorities, customers, employees and management of the CD for ensuring that the activities keeps on going and ongoing projects are completed. The CD had a total of around 150 staff posted at various sites and at administrative office and other places.

- **Appointment of Professionals**: The RP had conveyed the meetings of CoC from time to time to deliberate on the activity levels, cash flow monitoring, appointment of professionals, follow up of account recoverable and deliberations on the Resolution Plans from Prospective Resolution Applicants. During the first meeting of CoC held on 12.09.2019, the fees of the BDO Valuers and GAA Advisors LLP for conduct of fair and Liquidation value of the corporate debtor as on the commencement of CIRP was approved. Further, HAS Associates been appointed as Legal Counsel and their fees was approved by CoC during the first meeting held on 12.09.2019.

- **Avoidance Application**: Grant Thorton India LLP was appointed as Transaction Auditor for Verification of Preferential, undervalued, extortionate and fraudulent transactions under Section 43,45,50 and 66 of the Code and their fees was approved by the CoC during the second meeting held on 10.10.2019. The Auditor submitted the Report and same was discussed during the 8th Meeting of CoC held on 04.03.2020 and finally Resolution Professional filed avoidance application with Adjudicating Authority on 18.03.2020.

- **Eligibility criteria for invitation of EoI**: Further, eligibility criteria for inviting Expression of Interest (EoI) from Prospective Resolution Applicants (PRAs) as per Section 25 (2) (h) of the Code were discussed and approved during the third meeting of CoC held on 21.10.2019. The Request for Resolution Plan (RFRP) and Evaluation Matrix (EM) keeping in view the Regulation 37, 38 and 39 of IBBI (Insolvency resolution Process for Corporate persons) regulations, 2016 and Sec 25 (2) (h) and Section 29A of the Code were placed by the Resolution Professional and discussed and approved by the CoC during the third meeting held on 21.10.2019.

- **Release of Form G**: Accordingly, Public advertisement in Form G was released in Financial Express (English) All India Edition and Jansatta (Hindi) All India Edition on 27.10.2019 for inviting EoI from Prospective Resolution Applicants (PRAs) for submission of the resolution Plan. In response to this Public Advertisement, the RP received in all six EoIs from PRAs till the last date for submission of EoI i.e. 25.11.2019. It was decided during the 4th meeting of CoC dated 26.11.2019 to re-issue Form G for extension of time till 10.12.2019 to get more EoIs. In response to re-issue of Form G on 28.11.2019, in all total 16 EoIs were received till the last date for submission of the EoI i.e. 10.12.2019.

- **Receipt of EoIs**: In response to the Public Advertisement in Form G, finally 11 PRAs were in the Final List and it was decided in the 7th meeting of CoC held on 12.02.2020 to again re-issue Form G as there were further enquiries so as to get as many Resolution Plans to maximize value. As

first attempt to consider Resolution Plans did not yield any positive result, hence Form G was re-issued on 26.12.2020 and in response to this total 12 EoIs were received.

- **Deliberations on the Resolution Plan by CoC**: The Resolution Plan submitted by Eight PRAs , two for the company as a whole and six for the slump sale for the particular factory was discussed during the 9th , 10th, 11th , 12th and 14th meetings held on 18.03.2020, 05.06.2020, 01.07.2020, 22.07.2020 and 25.08.202, the RP, Legal Counsel, CoC Members with some of the representatives of Resolution Applicant were called during these meetings. These discussions were primarily for the improvement of the Financial offer including Time Period within which entire payment will be made apart from modifications in the terms and conditions that need change so that these Plans are in compliance with Section 30 (2) (e) of the Code. The Resolution Plan submitted by PRAs were revised keeping in view these discussions held during CoC meetings and SW Steel Ltd (PRAs) was further discussed with the RP and his Legal Counsel along with members of CoC and representatives of PRA further during 9th, 10th, 11th and 12th Meeting of CoC held on 20.07.2018, 26.07.2018, 03.08.2018 and 06.08.2018 wherein based on the further negotiations, the said resolution Plan was modified/ revised several times and it was agreed that the Revised Resolution Plan will be approved by the CoC during the next meeting.

- **Approval of the Resolution Plan by CoC on 18.06.2021**: The 14th Meeting of CoC was held on 25.08.2020 wherein the resolution Plan submitted by Markab Capital WLL was put up for approval but no decision was taken for considerable time. In the meantime, the resolution Applicant withdrew the Plan citing various uncertainties in getting approval and subsequent implementation of the Plan. The members thereafter sought further extension of time to re-issue Form G again and get more PRAs to submit Plan. Accordingly, Form G was re-issued on 26.12.2020 and in response to this advertisement, Twelve EoIs were received, and these were discussed during 19th , 20th , 21st , 22nd , 23rd and 24th meeting of CoC held on12.01.2021, 09.02.2021, 16.02.2021, 23.02.2021, 09.03.2021 and 19.03.2021. After detailed deliberations, the Final Revised resolution Plan submitted by IM +Capital Limited (Successful Resolution Applicant) was put up for approval during the 25th and 26th Meeting of CoC held on 30.03.2021and 06.04.2021. As members requested for more time , the Resolution Plan(s) was finally put up for e- voting from 16.06.2021 and 18.06.2021 and approved with 74.61% voting share by members of CoC. The Successful Resolution Applicant provided Performance Security to the extent of 10% of the total Financial offer as required as per Request for Resolution Plan (RFRP) document.

- **Approval of the Resolution Plan by NCLT Delhi on 06.10.2021**: The RP filed application No 198/2021 on 28.06.2021 seeking approval of the Resolution Plan submitted by IM + Capitals limited. The reliefs sought were (i) approval of the Resolution plan (ii) Capital reduction as proposed in the Plan (iii) Existing BOD to vacate the office (iv) approve key reliefs and concessions as proposed in the Plan. The said Resolution Plan was approved by the

Adjudicating Authority vide order dated 06.10.2021. It was stated in the said order that Monitoring Committee will be constituted for supervision and implementation of the Plan.

- **Disposal of other Applications**: Number of applications were pending on the date of pronouncement of the order dated 06.10.2021 approving the Resolution Plan. These applications were subsequently dealt with by the Adjudicating Authority and in some cases, the Successful resolution Applicant was directed to deal with the pending application pertain to dispute on the ownership of the properties. Further, the Adjudicating Authority allowed dealing the Avoidance Application by members of CoC.

- **Implementation of the Resolution Plan**: The resolution Applicant (IM + Capital Limited) started implementation of the Resolution Plan. The Monitoring Committee was constituted with members from Successful Resolution Applicant, CoC and Ex- Resolution Professional. All the creditors and statutory authorities were intimated about implementation of the Resolution Plan. The Resolution Applicant made entire payment before 26.02.2022 and all these payments to Financial creditors, Operational Creditors and payment of pending Insolvency resolution Process Cost (IRPC) was made on or before this date. The Financial Creditors issued No dues Certificate and arranged for satisfaction of charges against the assets of the corporate debtor and released the title documents of the properties mortagaged to them and handed it to IM +Capital Limited. The successful Resolution Applicant (IM + Capital Limited) took control of the corporate debtor fully on 26.02.2022 by induction of own staff / KMPs and retaining some staff of the CD. Even after role of the Monitoring Committee was over, certain letters and claims from PF authorities were received and this matter is still pending with Adjudicating Authorit

MRS.PRATIBHA KHANDELWAL
INSOLVENCY PROFESSIONAL

Mount Shivalik Industries Limited

Successful Resolution of Mount Shivalik Industries Limited

BASIC DETAILS OF THE CORPORATE DEBTOR

Mount Shivalik industries Limited ("MSIL") "The Corporate Debtor" was incorporated on 19/01/1993 for manufacturing of Beer. MSIL, a listed entity, had its Brewery unit at Behror, Alwar, Rajasthan with installed capacity of 3 lakhs HI per annum. The key well-known brands owned by "MSIL "were Thunderbolt, PB 6K, Thunder 10 K ad Golden Peacock. Few years later, it also diversified into hospitality division with heritage restaurants at royal Tourist Destinations of Jaipur and Jodhpur. One of restaurant situated at Amer Fort, Jaipur in agreement with Rajasthan Tourism Development Corporation amongst other tourist catered to high notch international tourists of "Palace on Wheels".

Suddenly, in and around 2012, the business operations took a hit due to sudden change in taxation policies of the Government and Liquor ban in few of the states like Bihar. As a result, the Corporate Debtor was declared as a Sick company by BIFR in 2015 due to erosion of its net worth by accumulated losses.

Due to the above mentioned setbacks, the Corporate Debtor could not maintain financial discipline and the sole Banker, Oriental Bank of Commerce filed an application under Section 7 of IBC 2016 to initiate CIRP in respect of MSIL and the application was admitted by Hon'ble NCLT, New Delhi Bench on 12/06/2018 and appointed **Pratibha Khandelwal** as Interim Resolution Professional (subsequently confirmed as Resolution Professional). Later on with the establishment of NCLT, Jaipur Bench the matter was transferred to Jaipur.

Total amount of admitted claims was Rs. 98.00 crore (approx.)

HARDSHIPS IN THE PROCESS

At the time of this CIRP in 2018, IBC,2016 was in its infancy and the law was evolving. The process was new not only for all the stakeholders but also for all the agencies involved such as Insolvency Professionals, Adjudicating Authority, Local courts, High Courts, Government departments, Financial Institutions, Sectoral Regulators and the other Regulators like SEBI, Stock Exchanges (BSE/NSE), Depository Participants.

"With great power comes great responsibility" the famous saying seem to be doomed. All around the Resolution professional, there was a hostile environment. On papers it looked that RP is entrusted with great power and position but the powers were clinched. It was exactly like

"inheritance of loss".

Corporate debtor was handed over to RP with no usable productive assets and loads of responsibilities. There were no funds even for essential services like Security, Insurance, electricity and water. The employees were suddenly put into the lurch, with little hope of the revival of Brewery.

The Corporate debtor had a Restaurant division that was in operation and it was to be managed as a going concern. The news of initiation of CIRP spread like a wild-fire amongst all the vendors. And before RP took reins, they were misled and misguided by outside forces. The vendors ranging from Sabji-wala to Accounting services, Web site managers, Tour operators, Transporters, Security agencies, Grocers, Decorators, Cooking Gas agency, employees threatened to disassociate themselves from the CD till the time their outstanding dues were cleared. The existing support system of the CD was on the verge of collapse and at the same time no one new was inclined to sail in the so called **"sinking boat".**

It was hard to make them understand that pre CIRP period dues cannot be paid now and claim has to be submitted for the same. With continuous communication and dialogue with all of them, slowly the process was streamlined by the RP.

Form G was published three times and owing to the strategic location of the Brewery, few of well- known Companies in the Liquor sector including multi nationals submitted their Resolution plans. But for the one or the other reason, no Resolution plan could see the light of the day.

Suddenly the savior in the name of **"Kals Distilleries Private Limited"** made a sort of "**wild card entry"**, of course, with the due approval of Hon'ble NCLT and presented its Resolution Plan which was duly approved by COC.

But that was not the end of the road blocks. The road to success was blocked when the approval of Resolution plan remained stucked with NCLT due to pending appeals and later on disappointing addition was caused due to massive disruptions by COVID.

HANDLING DIFFICULT SITUATIONS: HARD TIMES PULL OUT THE BEST IN YOU.

During the process, there were times, when everyone feared that the Corporate Debtor will be forced into Liquidation. With my endeavor to resolve the CD, we all made untiring efforts and used all the available tools in our kit like Extension, Exclusion and publishing Form G three times.

To achieve success in the Insolvency profession, which is 24*7 job, one needs to take challenges thrown by all the stakeholders and Regulators.

"RP is a punching bag" the realization came too early in the process. But I soon determined myself to be a "**comforting bag"** for all the stakeholders. My expertise in Management skills and more importantly, being a compassionate listener to all aggrieved parties be it a COC members, Operational creditors, Promoters, Government authority, Vendors, employees etc was indeed, a tremendous advantage and'asset' that helped others to build a relationship of trust and confidence in me.

Further, I appreciate the cumulative and coordinated efforts put up my team. No resolution would have been achieved without the support of the legal team of Advocate Abhishek Anand

and Consultant Mr. Ashok Gupta.

DETAILS OF RESOLUTION PLAN

Finally, after the humongous exercise, **Kals Distilleries Private Limited** was voted as the successful Resolution Applicant ("SRA") by the Committee of Creditors. "SRA" is engaged in the business of trading, distribution and manufacturing of Indian Manufactured Foreign Liquor and Beer in South India. The Resolution plan has taken into account interest of all stakeholders including Secured Financial Creditors, unsecured Financial Creditors, statutory dues, Operational Creditors and employees. The Resolution Plan provided for continuity of current employees and generation of fresh employment opportunities, quality goods for the customers, economic utilization of assets lying unproductive for years and revenue generation for the exchequer. Interest of all the stakeholders has been taken into account and no one was worse off on approval of Resolution plan than in the event of liquidation.

Settlement amount was Rs 42.00 cr (approx.)

The term of the Implementation of Plan was 12 months with a grace of 3 months.
Besides resolution of the corporate debtor, the greatest achievement of this plan was **"No hair cut"** for the Secured Financial Creditor. Oriental Bank of Commerce (now PNB) got 100 % of its outstanding dues of approx. Rs 18.28 crores, Unsecured Financial Creditors got 93% of its dues.

Few months after the initiation of CIRP in August 2018, one of the Unsecured Financial Creditor challenged the decision of RP for categorization of one creditor as unsecured Financial creditor. However, Hon'ble NCLT, Jaipur Bench was pleased to allow the decision of RP to certain extent and on the basis of that judgement, certain other Operational Creditors were included in the category of Unsecured Financial Creditor. The respondent, however, preferred an appeal with Hon'ble NCLAT in 2019 and the order of Hon'ble NCLT was reversed. Subsequent to that order by Hon'ble NCLAT, the Resolution Plan was approved by Hon'ble NCLT. The matter of classification as Unsecured Financial Creditor did not end there and an appeal was filed against the order of Hon'ble NCLAT with Hon'ble Supreme Court, the orders of which reserved on 26th September 2023 and the issue of treatment of Security Deposit as Financial or Operational Creditor ultimately reached finality on April 2024 by the Apex Court for the good of all.

This endless litigation, dragged the shut and open case for almost six years. But "**All is well that ends well"** now it's implementation is on the verge of the completion and we are in the process of filing Closure Report with Hon'ble NCLT, Jaipur Bench.

Success comes when you depend on your backbone, not on your wishbone

CMA ASHOK KUMAR GUPTA
INSOLVENCY PROFESSIONAL

REVIVING HANUNG TOYS & TEXTILES LTD. (HTTL)

SUCCESS STORY: REVIVING HANUNG TOYS & TEXTILES LTD. (HTTL)

Success Story: Reviving Hanung Toys & Textiles Ltd. (HTTL)
I am grateful to Hon'ble Adjudicating Authority, National Company Law Tribunal, Insolvency & Bankruptcy Board of India, IPA of ICAI, for giving an opportunity to act as Insolvency Professional to achieve Resolution Plan and revive Companies.

I am thankful to members of committee of Creditors of Hanung Toys & Textiles Ltd (**HTTL**) for their cooperation and guidance during CIRP process, special mention to Shri Arun Kumar (AGM-PNB), Shri Meghraj Deshmukh (VP-Legal) of Edelweiss, Ms. Anshu Jain (DGM-ICICI), Shri M K Gupta (Chief Manager- CBI), Shri Karthikeyan (AGM-ESIM) and other officials of Canara Bank, BOM, KBL, Union and UCO bank.

Background:
Hanung Toys & Textiles Ltd. ('**HTTL'** or '**Corporate Debtor'** or '**Company'**) was established on October 9, 1990, and became a leading player in the manufacturing of stuffed toys and home furnishing products. Over the years, HTTL expanded its operations globally, exporting products to various overseas markets. It became a listed entity in 2006-2007. However, despite its strong initial performance, the company faced significant financial difficulties due to operational inefficiencies, exacerbated by significant hedging loss, slow-moving inventory, rejection of some orders, adverse marketing conditions, financial cost, mounting debt obligations, faced severe liquidity issues, which eventually led to HTTL becoming a Non-Performing Asset (NPA) by 2013-14, with outstanding debts of over ₹2,000 crores spread across 21 public and private sector banks.

Despite attempts to restructure, including the Corporate Debt Restructuring (CDR) in 2014-2015, the company's financial health continued to deteriorate. By 2015-2016, due to the promoter's failure to implement the CDR plan, the banks initiated recovery measures under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (**SARFAESI)** Act, which included the disposal of company assets.

Action for SARFESI, declared 'Sick unit' or winding up under Companies Act or Insolvency Resolution Process under Insolvency & Bankruptcy code (2015-2018)

Upon failure of CDR, one side the Board for Industrial and Financial Reconstruction (BIFR) was approached by the management of the company to declare HTTL as a "sick company or unit" under provision of the Sick Industrial Companies (Special Provisions) Act (SICA) in 2016 and other side a creditor filed application before Delhi High Court for recovery and winding up of Company under Companies Act, 2013 and third side secured creditors commenced disposal of assets under SARFAESI, which further complicates the situation.

Meanwhile, the introduction of the Insolvency and Bankruptcy Code (IBC) allowed for the possibility of a corporate resolution process of HTTL. Therefore, Punjab National Bank (PNB) filed application u/s 7 of IBC in 2018 before Adjudicating Authority, National Company Law Tribunal (**NCLT**).

In a pivotal moment for **HTTL**, the **BIFR** initially refrained from declaring the company "sick" under SICA . The reason: HTTL's assets were under the control of banks, as per the **SARFAESI Act**. The banks had been actively disposing of HTTL's assets and those of its guarantors, to recover outstanding dues.

Despite these challenging circumstances, the legal journey took a significant turn. In **July 2018**, the **Hon'ble Delhi High Court (HC)** ordered the winding-up process of HTTL under the Companies Act, 2013. The court appointed an official liquidator, signalling the beginning of a new chapter for the company, despite the seemingly insurmountable financial difficulties.

Delisting and Initial Legal Challenges
HTTL's financial troubles escalated, and by 2017, the company was delisted from both the National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) due to its inability to meet regulatory and financial obligations.

Application for CIRP for HTTL
Despite the liquidation proceedings in Delhi High Court, the Insolvency & Bankruptcy Code (**'IBC' or 'Code'**) superseded the liquidation process in terms of section 238 of said Code. On 28th March 2019, NCLT admitted HTTL into the Corporate Insolvency Resolution Process **(CIRP)**, following an application by PNB.

Insolvency Professional Arvinder Singh was appointed as the Interim Resolution Professional (**IRP**). The IRP issued a public announcement and invited claims from creditors and began the process of collated claims of creditors, prepared list of creditors and then constituted Committee of Creditors of HTTL.

Interim stay given by Hon'ble NCLAT, the Appellate Tribunal
However, a series of legal challenges, including an appeal by the suspended board of directors and an interim stay given by the Hon'ble Appellate Tribunal, National Company Law Appellate Tribunal (**NCLAT**) on 30.04.2019 as the company was under control of HC though Official Liquidator **(OL**), delayed progress in CIRP.

Application to High Court for Transfer of Matter to NCLT
The Central Government issued a notification in December 2016 that transferred petitions relating to winding up under the Companies Act to the NCLT. This was done to address the failure of the SICA to revive distressed companies

The amended proviso to Section 434 of the Companies Act, 2013 Act stated that even in winding up petitions where notice has been served and which are pending in the high courts, any person could apply for transfer of such petitions to the NCLT under the Code. When such an application is made, the Court should transfer the proceedings.

Therefore, Punjab National Bank (PNB) filed an application before the Delhi High Court (HC) seeking to transfer the matter to the NCLT under the IBC. Interesting the OL opposed the application, and the CD was remained under control of Liquidator. It is noted that
The Supreme Court has on multiple occasions clarified (and in fact encouraged) the transfer of winding up proceedings initiated under the *Companies Act* to the National Company Law Tribunal (NCLT) under the *Insolvency and Bankruptcy Code* (Code). In matter of *Forech India Ltd v. Edelweiss Assets Reconstruction Co. Ltd*, the Court highlighted that In the said judgment, the Court held as follows:

"The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on working of the Code, the Government realized those parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red.

In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code."

High Court's Division Bench, Delhi allowed to Transfer case to NCLT on 30.09.2019 Upon appeal of PNB, the matter refer to Division Bench of Delhi High Court.
It is noted that three petitions pertain to transfer of case regarding M/s Hanung Toys & Textiles Ltd, M/s Shakti Bhog Food Ltd, and M/s MVL Ltd were heard by Hon'ble Division bench of High Court, Delhi.

Some of the significant points/ observations of judgement highlighter here :

That *CIRP proceeding was stayed by the NCLAT on 30.04.2019, the upper court under IBC.*
The objective of the provisions in Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC) is to give powers to the financial creditors to determine the manner of recovery of monies from corporate debtors. It is stated that intention of the legislature was to enact a Code where creditors themselves would have vested powers to determine the manner of recovery of monies from debtor company. It is the objective of IBC to revive that company at the first instance through Corporate Insolvency Resolution Process. Winding up procedure would be directed only in the event of failure of Corporate Insolvency Resolution Process.

Reliance is placed on the judgment of the Supreme Court in the case of Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors., 2019 4 SCC 17.

It is also pleaded that the judgment of the Supreme Court makes it clear that under proviso to section 434(c) of the Companies Act, this Court has to mandatorily transfer pending winding up petitions to NCLT. Reliance is placed on the judgment of the Supreme court in the case of Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd., 2019 SCC On Line 87. Reliance is also placed on the judgment of the Supreme Court in the case of Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd.,(2019) 4 SCC 227.

It is reiterated that this court has to transfer the matter where such an application is filed for transfer even if an order for winding up of the respondent company has been passed. It is stated that this would follow in view of the judgment of the learned Single Judge of the Bombay High Court in Jotun India Private Limited & Ors. v. PSL Limited., (2018) 2 Comp LJ 222 (Bom). It is reiterated that since the objective of the IBC is to provide the financial creditors with powers to determine the manner of recovery of monies, if this case is not transferred, the court would be preventing such creditors from exercising their rights.

Official Liquidator opposed to transfer and mentioned that t*he power to transfer such matters under proviso to section 434(1)(c) of the Companies Act, 2013 is purely discretionary. Reliance is also placed on the judgment of the Supreme Court in the case of Jaipur Metals & Electricals Employees Organisation v. Jaipur Metals & Electricals Ltd.(supra) to contend that the Supreme Court did not transfer the winding up petitions from the High Court.*

The fact of the matter is that despite pendency of the winding up petition for more than four years, no money has been able to be recovered by any of the creditors. At this juncture it is

necessary for this Court to clarify that it is not expressing any view on the plea of the Appellant regarding the conduct of Respondent No. 1 since that is not the subject matter of the present appeal. That will have to be pursued separately by the Appellant in accordance with law.

The OL who is appointed as the PL may hand over the assets, books of accounts and all other material of the respondent company in its possession to the IRP subject to the IRP paying to the OL the expenses incurred by the OL since its appointment as a Provisional Liquidator on 12.3.2018.

In the circumstances, this Court concurs with the Company Court that it was in the best interest of all the creditors that the matter should be transferred to NCLT. Consequently, the Court finds no reason to interfere with the impugned order of the Company Court."

Delay in handover of assets and records by IRP despite High Court order

Despite the Division Bench of the High Court ordering the transfer, the IRP was unable to initiate any action due to the existing of stay order issued by the Hon'ble NCLAT on 30.04.2019.

Removal of stay on CIRP by NCLAT

On November 25, 2019, the NCLAT removed the stay on the Corporate Insolvency Resolution Process (CIRP), and dismissed the appeal.

Appointment of Resolution Professional (RP)

Following the removal of the stay on CIRP by the NCLAT on 25.11.2019, the IRP initiated the process. In the first week of December, the IRP convened the second meeting of the Committee of Creditors (**CoC**), during which the CoC appointed Insolvency Professional Ashok Kumar Gupta as the Resolution Professional **(RP)**. The NCLT formally confirmed this appointment through its order dated 16th December, 2019.

Further Stay on CIRP of HTTL by the Hon'ble Supreme Court

Although the Resolution Professional (RP) was appointed on 16th December 2019, the order was officially received on 18th December 2019. On the same day, the Hon'ble Supreme Court ('**Supreme Court' or 'SC'**) granted an interim stay on the CIRP through a Special Leave Petition (SLP) and Civil Appeal (CLP) filed by the ex-management. This stay effectively halted the CIRP process.

Subsequently, on **January 8, 2020**, the **NCLT** declared the matter **"sine die"**, effectively putting the proceedings on hold. This decision meant that the Resolution Professional **(RP)** was unable to take possession of HTTL's assets or initiate any action under the CIRP while the matter was pending before the Supreme Court.

In the face of this uncertainty, PNB, as the lead member of a consortium banks, once again intervened in the matter. Recognizing the urgency of resolving the situation, PNB took the initiative to present the case before the Supreme Court.

Impact of Stay on CIRP and Fate of Liquidation Process

Due to the ambiguity surrounding the stay, the Official Liquidator (OL), who had control over the company and certain of its assets, neither initiated any action for the disposal of assets nor took further steps in the proceedings. Furthermore, no information was provided, and no meetings were held with the financial creditors or mortgagees of the assets. With no active management of the assets, other than by the security agency deployed by the OL or the banks in their control, the value

SARFAESI Action continue

Despite the stay on CIRP imposed by the Hon'ble Supreme Court and the 'sine die' order issued by the Hon'ble NCLT, some private banks continued to dispose of assets under the SARFAESI Act."

Dismissal of Legal Challenges and Revival of CIRP

The SLP and CLP were dismissed by the Supreme Court on May 18, 2022, and July 21, 2022, respectively. RP could not take any action till July 2022 as CIRP was stayed in both SLP as well as CLP. RP took legal view and called a meeting of Financial Creditors to decide further course of action. Following this, the RP filed an application before the NCLT for the revival of the CIRP process. On September 9, 2022, the NCLT was pleased to order the revival of CIRP and allowed exclusion of the entire litigation period from the CIRP timeline. But for revival of Corporate Debtor, OL should transfer its control to RP.

Permission of Hon'ble High Court for Direction for Liquidation Expenses and Asset Handover

Subsequently, the RP approached the OL, who filed an application before the HC for seeking directions for the payment of OL expenses amounting to ₹2.80 crores and transfer of Company to NCLT. Regarding the payment of these expenses, the RP referred to the provisions of the IBC, noting that repayment of the OL expenses would be subject to the provisions of the IBC and approval of CoC. The Hon'ble Court approved the OL expenses and directed the RP to treat them as either CIRP or liquidation expenses, to be paid on a priority basis, thereby eliminating the need for approval from the CoC. The High Court also directed the OL to transfer the company and its assets to the RP, setting a timeline for the handover."

Challenges in Asset Handover

Handover, Inspection and Asset Condition

1. **NEPZ, Noida (UP)**

In mid-November 2022, the Resolution Professional (RP), accompanied by members of the Committee of Creditors (CoC), conducted an inspection of the sealed units at NEPZ Noida. The inspection uncovered several issues across the units, notably Unit No. 108, which primarily functioned as an office but was found cluttered with furniture and discarded items and was in control of OL. Upon closer examination of Unit 108, the RP identified a temporary wall on the ground floor at entry of downstair, which was subsequently removed. In the basement, a few machines, a cutting table, and various items in poor condition were found, alongside a hole in the back of the building. Vehicles were also parked at the gate, but they were in poor condition. It was also noted that the Official Liquidator (OL) had only sealed the premises and had not prepared an inventory of the assets.

Unit 109, which was connected to Unit 108, but had been blocked by a temporary wall. It contained raw materials but lacked any machinery. Similarly, Units 110 and 125 were found with dumped fabrics and empty fixtures. Units 108 and 109 were under the control of the OL and Units 110 and 125 were under the control of Banks.

During the inspection, an unreported entry from Unit 110 to Unit 111 was discovered, which had previously been unknown to the present bankers and official of OL. This led to the revelation that Unit 111 also belonged to HTLL. The RP subsequently took possession of Unit 111 situated on plot measuring 1000 sq. meter, which contained old furniture, machinery, and deteriorating raw materials.

Further investigation revealed that each plot in the Noida Economic Process Zone (**NEPZ**), measuring 1,000 square meters, had been allocated to HTTL under an operating lease. The land is owned by NEPZ, the Government of India, while the built-up factory premises belong to the lessees (HTTL). The operating lease is nearing expiry, and the buildings are very old and unsuitable for new setups. Additionally, it was noted that custom duties were applicable on the debonding of goods from the factory. Upon request, NEPZ filed its claim, which helped the RP gain a better understanding of the lease terms, the status of all units, and the outstanding dues related to each unit.

2. Handover of Bhagwanpur Factory (Roorkee, Haridwar, Uttarakhand)

The Official Liquidator (OL) official handed over the Bhagwanpur factory premises in Roorkee, which spans 25 acres with a built-up area of approximately 7 lakh square feet, to the RP on an "as-is-where-is" basis in the presence of a few members of CoC and new security agency. The inspection revealed that the premises was built up solid but machinery, fixtures, internal part of building in a dilapidated condition, with little to no usable assets. The factory was found to contain a few pieces of furniture and fixtures, but essential items such as cables, wires, fans, air conditioning units, lights are missing or might be removed or stolen. Many heavy machines were discovered to have been stripped of their copper wiring and key components. The main office building, comprising a basement and three floors, was devoid of machinery, wiring, or office equipment, with only a none operating lift without card and board, few finishing tables and old stitching machines remaining.

The OL official reiterated that, as per the prescribed process, the premises had been sealed, and a security agency had been appointed to safeguard the property. However, the OL did not provide an inventory of the machinery, except for a valuation report conducted by a civil engineer, which covered the land, building, and plant & machinery.

It evident that a burglary had occurred, although determining the exact time and responsibility for the theft remained a challenge. In response, the RP sent a video of the premises highlighting the condition of the plant and machinery, to the OL office for further investigation and necessary actions against the security agency and also shown to CoC. As of yet, no communication or response has been received from the OL office.

Challenge for insurance claim

Since 2016-17 to 2022, the assets of the company were under the control of both the bank and the Official Liquidator (OL) and Ex-management (under '*superdagi*') from time to time. However, the absence of crucial documentation, such as the fixed assets register, unit-wise register, invoices of Plant & Machines, installation records, and machine brochures, created significant challenges in establishing a clear record of the assets for claim. Additionally, the OL's office did not maintain any inventory of the assets, nor did the valuation report prepared by the external valuer, appointed by the OL, provide specific details about the machines or their condition. Given the lack of proper records and supporting documentation, it would be extremely difficult to substantiate claims of burglary or theft under the insurance policy. Without a comprehensive and detailed inventory, along with clear evidence of the missing assets, proving such losses becomes problematic, complicating any potential insurance claims or legal actions related to the theft.

Challenges Due to Bank Mergers and change of Bank Branch

During the period from 2016 to 2019, some creditor banks assigned their loans to other banks, Asset Reconstruction Companies (ARCs), or Non-Banking Financial Companies (NBFCs). Additionally, due to the mergers of major banks (e.g., OBC with PNB, Andhra Bank with Union Bank, Vijaya Bank with Canara Bank), it became increasingly difficult to trace historical data for investigation.

Actual CIPR commenced in January 2023

Due to the persistent efforts of PNB and its legal counsel, the CIRP of HTTL, which had commenced in April 2019, experienced significant delays. These delays were primarily caused by ongoing legal challenges, including an interim stay from the Supreme Court, as well as complications in the asset handover process. By November 2022, after successfully overcoming these hurdles, the RP was able to regain control of the assets, continuing with the CIRP process. However, the RP took control and possession of Unit No. 111 at NEPZ, measuring 1,000 square meters in January 2023 only following thorough due diligence and the necessary precautions.

Despite these challenges, the RP was finally able to take control of the assets "as-is-where-is"

and proceed with the resolution process.

This was made possible due to the tireless and determined efforts of PNB and its legal counsel, who navigated the complexities of the legal system across the NCLT, High Court, and Supreme Court. Their remarkable contributions were instrumental in the initiation of the CIRP for HTTL and ensuring that the insolvency process continued in a manner that protected the interests of creditors and managed the assets under difficult circumstances. The RP's diligent work in managing the operational, financial, and legal aspects was critical in advancing the process, despite the evolving and often challenging situation

Efforts to Restore Utilities

Deployment of Security Agencies

The RP deployed a new security agency at NEPZ and Bhagwanpur. The security personnel appointed by the OL vacated the premises and handed over charge to the new security agency on an 'as and when' basis. A video recording of the handover was made for documentation purposes and a copy was provided to the office of the OL. Although the RP requested to retain the old security agency for a while longer, they withdrew their services

Restoration of Electricity

The Resolution Professional (RP) faced significant challenges in restoring utilities at the Bhagwanpur site, particularly the lack of electricity. After several attempts, temporary electricity connections for emergency and security areas were secured on a prepaid basis. The RP also worked closely with various government authorities in Delhi, Noida, NEPZ, and Uttarakhand to address the legal, financial, and logistical issues arising from the prolonged delay in the CIRP process.

Upon assessing the cost of restoring electricity at NEPZ, the CoC concluded that electricity was not essential for areas where goods were simply stored and had little to no significant value. Additionally, since the area was under the control of Customs and NEPZ, and security personnel had already been deployed, it was deemed unnecessary to restore utilities in those areas and increase cost of CIRP."

Challenge at the ROC and Income Tax

Several issues were encountered while interacting with the Ministry of Corporate Affairs (MCA) and the Registrar of Companies (ROC) portal regarding the Corporate Debtor's (CD) status and compliance:

1. **Master Data Showing Corporate Debtor as 'Active' Despite Control by Official Liquidator**

   Despite the company being under the control of the OL from July 2018 onwards, the MCA master data still showed the Corporate Debtor as "active." This was misleading, as the company was technically in liquidation and should have reflected this status. The incorrect status caused confusion in the process of filing documents and updating the company's records.

2. **Sine Die Order and Liquidation**

   On 8th January, 2020, the Hon'ble NCLT, declared the case declared case as ' sine die " after knowing stay on CIRP proceeding by Hon'ble SC. Causing the company was continued under the control of the OL. The 'sine die' order temporarily suspended the proceedings, which affected the ability to carry out any compliance activities, including filing the form that would initiate the necessary changes in the company's status. Furthermore, taking any action may lead to contempt of the court order issued by the Hon'ble Supreme Court.

3. **Filing of INC-28 Post CIRP Revival Order in October 2022**

In October 2022, after the revival of the CIRP and the High Court's order for the transfer of the company to NCLT, the INC-28 form was filed to update the company's status in the MCA records. However, despite the court order and the revival of the CIRP, the ROC did not update the status of the Corporate Debtor to reflect that it was "**under CIRP**." The failure to update this status created further complications, as it did not align with the legal and procedural realities of the company and IBC.

4. **Challenges in Activating the PAN for the RP under CIRP**

The RP team faced significant challenges accessing the Income Tax e-filing portal to review HTTL's tax details and pending assessments. Despite multiple visits to the Income Tax Offices (ITO) in Delhi, Ghaziabad, and follow-ups through calls, emails, and letters to offices in Pune and Bangalore, no progress was made. The PAN had been deactivated by the Official Liquidator (OL) as per the process.

Efforts with the Official Liquidator's Office and Chartered Accountant

After several setbacks, the RP initiated meetings with the OL's office and its Chartered Accountant (CA), who sent numerous emails to the ITO, but the issue remained unresolved. The ITO was unresponsive, and the helpdesk could only provide general guidelines, which were not helpful for a CIRP case or company in liquidation.

Though the Pune IT Department issued a fresh PAN based on the CIRP order, the system failed to recognize the RP, preventing login setup.

Escalation to ITO Ghaziabad and Bangalore

The Chief Commissioner of Income Tax (Delhi) (CPIO-Delhi) escalated the matter to the ITO in Ghaziabad, leading to a call from the ITO in Bangalore. The RP was advised to add the company as a "representative assessee" under their personal PAN account. However, the portal only allowed the RP to be added as a "liquidator," which was not accurate. Despite submitting the CIRP and revival orders, the IT Department rejected the request, stating that the CIRP order listed the IRP (Interim Resolution Professional), not the RP. A subsequent submission with the RP's appointment order was also rejected, citing the company's liquidation status in their records.

Persistent Follow-Up and Personal Visits

The RP continued with follow-ups, personal visits, and meetings with Deptt., sending additional clarification letters to Ghaziabad and Bangalore. Finally, the RP succeeded in adding the company's PAN to their portfolio as a representative assessee. However, due to restrictions on mobile number and email usage, the RP had to purchase a new mobile number to complete the process.

5. **Exemption Application for none compliance**

It was noted that several compliance requirements were not met during the winding-up process, as certain filings were not required under the Companies Act. The lack of updates to the company's status in the ROC records complicated the RP's ability to manage corporate obligations during the CIRP process. In response, the RP filed an application for exemption. The NCLT advised that the exemption would be granted to the SRA, leading to the withdrawal of the application.

Information Memorandum (IM) Challenges

The Resolution Professional (RP) shared all available documents and information under the Information Memorandum **(IM)**, providing a comprehensive overview of the actual position of the company's assets and determined liabilities, and past financial position as available at RoC/ public domain. However, several challenges were faced during this process, as outlined below:

1. **Assets Disclosed on 'As and Where is Basis'**

Given the lack of a fixed assets register and confirmed asset matching details from OL office, the RP clarified in the IM that all assets were being disclosed on an "as and where is" basis. This approach was taken to avoid any potential complexities or discrepancies that could arise from incomplete or inaccurate asset records. The absence of a detailed asset register posed a significant hurdle, as the RP could not provide exact asset details or confirm their current status. Whereas OL had control on some assets, on the other side the banks were in control of some assets as well as disposing off the assets under SARFAESI.

2. **Limited Information from Banks and Former Auditors**

While the banks and the company's auditors did share some information; it was insufficient for fully addressing the requirements of the IM. The limited data provided did not offer a clear picture of the company's assets or liabilities. Moreover, these sources of information did not help resolve the gaps in the fixed assets register, further complicating the preparation of a complete and accurate IM.

3. **Books and Records**

The RP shared latest available Annual Return, audited Balance Sheet, quarterly report at available at Public domain till 31.03.2018, list of machines (as prepared), photo graphs, copy of land title documents, other details as obtained from valuation conducted by OL, List of Creditors….and documents shared by NEPZ placed in IM. The Assets and inventory were offered ' as where is basis." And requested all PRA to visit both sites.

Transaction Review Audit (TRA) and Books of Account

The Company operated multiple factory premises and offices. Under the SARFAESI Act, the bank took possession of and disposed of several properties. Meanwhile, investigating agencies seized the books and records from the NEPZ units and found minimal records at the Bhagwanpur factory in 2018 where the Official Liquidator (OL) had control over the company from July 2018 until November 2022. During this period, the company's PAN was deactivated, complicating the preparation of its books and records.

Prior to the initiation of CIRP, the banks closed the operating accounts after adjusting any credit balances against outstanding dues. A technical agency was engaged to convert desktop images into data, which yielded some information but was insufficient for preparing comprehensive books and records. This data was subsequently handed over to the Transaction Review Auditor (TRA) for reviewing transactions from July 2016 to 2018. Additionally, the bank had conducted a forensic audit for the period up to 2016-17. However, the TRA did not identify any significant avoidance transactions in its limited review and had to wait for a considerable amount of time to receive many of the required details. The TRA later concluded its report, which was then circulated by the RP to the financial creditors.

Maximizing Asset Value through Resolution Plans
Despite these setbacks, the RP initiated the process of inviting Expression of Interest (EOI) and Resolution Plans. A total of 10 prospective resolution applicants (PRAs) showed interest in the distressed assets, but only 5 submitted formal resolution plans. One PRA, initially interested in acquiring the NEPZ units, expanded their bid to include the Bhagwanpur factory after a site visit.

Valuation
The average fair value and liquidation value of Corporate Debtor is Rs. 83.45 crores and Rs. 59.87 crores.

Challenge Round
The RP initiated a challenge round to maximize the bid value, which was a critical move to improve the offers. Initially, the bids were around ₹45 crores, but after focused negotiations and strategic encouragement, the final bid increased significantly by 70%, reaching ₹78 crores.
This surprising improvement in the bid came from Cyfuture India Pvt. Ltd., who initially showed interest in only the NEPZ units. Their final bid, placing a value on all HTTL assets, made them the highest bidder and the Qualified Resolution Applicant (QRA).

Role of Committee of Creditors (CoC)
The Committee of Creditors (CoC) played a crucial role in the successful resolution of Hanung Toys & Textiles Ltd. (HTTL) under the Corporate Insolvency Resolution Process (CIRP). One of the most significant challenges faced was the substantial haircut suffered by 16 Financial Creditors, a reflection of the high level of debt involved. In addition, three banks merged post-CIRP, while three other banks had already assigned their loans to one Financial Creditor before the commencement of the CIRP. Despite these complexities, the CoC worked cohesively to navigate the challenges and ensure that the resolution process moved forward.

The lead bank, PNB, along with the legal teams and official of UCO Bank Advocate Rajesh Ratan, made remarkable and persistent efforts from the filing of the application in 2018 until the Hon'ble Supreme Court's removal of the stay on the CIRP in July 2022. This decision paved the way for the CIRP to proceed without further hindrances. It is important to highlight that representatives from various branches, zonal/RO offices, and the head offices of the banks actively participated in CoC meetings, demonstrating their commitment to the process. Some of the banks including lead bank even visited the HTTL site to better understand the situation on the ground.

Throughout the CIRP, the CoC was proactive in discussing issues that arose, taking appropriate decisions, and ensuring the process continued smoothly and in a timely manner. Given the large debt involved, all decisions required approvals from higher authorities, particularly because most of the major financial creditors were public institutions. The role of the lead bank, PNB, was critical in maintaining optimism throughout the entire process and steering the CoC toward a resolution.

NCLT approved Resolution Plan on 28.02.2024
The Resolution Plan, offering a 1.5% recovery for secured financial creditors against claims of over Rs. 4953 crores, was approved by CoC with over 88% voting in favor and whereas one bank which could not participate in voting due to change of branch, had sent its voting sheet in favour of plan. The Plan was submitted for final approval of the Adjudicating Authority.

The NCLT, upon reviewing the plan, raised concerns about the low recovery rate given the scale of HTTL's debt. NCLT also summoned both members of CoC (Dissent and Ascent) and heard them. The RP presented a detailed history of the case, highlighting the significant losses incurred by banks due to the earlier liquidation of assets under SARFAESI that was done earlier and the impact of foreign exchange hedging losses. After several hearing, the NCLT

approved the resolution plan on February 28, 2024, considering and giving weightage to commercial wisdom of CoC, marking the successful conclusion of the CIRP process.

POST-APPROVAL CHALLENGES AND IMPLEMENTATION OF RESOLUTION PLAN

IP become member of Monitoring committee(MC). During implementation phase MC and SRA have been facing several issues and resolving by and by, what possible.

Resolution and Activation of PAN, Post-Approval

Despite following all prescribed procedures, the Resolution Professional (RP) encountered significant challenges in activating the company's PAN and access for login on the Income Tax e-filing portal. Initially, the RP was unable to obtain the credentials and set up password required for access. Later, the department provided options to register both the RP and the acquirer, but the process was further complicated when the department requested a revival order for the company from liquidation. The RP uploaded the order approving the Resolution Plan, but could not add himself as the RP, as he had been discharged from his role.

Given these obstacles, the process was revisited, and the RP, with the guidance of the Successful Resolution Applicant (SRA), directed the team to follow a new set of procedures. While the process was time-consuming and involved multiple rounds of communication and rejections, it ultimately led to the activation of the PAN in June 2024—almost a year after the initial attempt. Through persistent efforts, numerous meetings, and continuous follow-ups, the PAN was finally activated, allowing the SRA to proceed with necessary tax compliance. This experience highlighted the challenges faced by the RP under the CIRP framework when dealing with complex government procedures.

The RP expresses contentmen knowing that these efforts have paved the way for new RPs to add themselves as assessors in future cases. However, one issue remains unresolved: the same mobile number and email ID can be used for a limited number of PAN registrations, which could pose a problem if the limit is exceeded on the e-filing portal.

Challenges at ROC/MCA

The challenges continued at the Registrar of Companies (ROC) and the Ministry of Corporate Affairs (MCA). The erstwhile RP had submitted Form INC-28 for the approval of the Resolution Plan, but the status had not been updated. Additionally, while the DIR-12 form was filed to appoint a new director, the ROC rejected the application due to past non-compliances. It was also unusual that, despite the appointment of the OL in 2018, the status of the company was still shown as 'active' instead of 'under winding up,' which sent a misleading message to stakeholders. Furthermore, SEBI did not respond to the intimation of the commencement of CIRP on its portal, as the company had been delistedThe SRA and its consultants made several visits to the ROC office in Delhi in an attempt to resolve the issue, but were unsuccessful. Faced with these obstacles, the matter was escalated to the MCA. After numerous efforts and sustained communication, the ROC finally added the name of one director to the company for the purpose of completing necessary compliances. Despite the long delays, these efforts ensured that the company could continue moving forward with the required regulatory formalities.

Challenge in opening account and draw down fund by Successful Resolution Applicant (SRA)

Despite the approval of the resolution plan, there were additional hurdles. The SRA (Cyfuture India Pvt. Ltd.) faced difficulties in securing the necessary financing on account of :

I. MCA Data Not Reflecting New Director

The MCA data did not show the new director’s name, as the DIR-12 filing was pending approval by the ROC due to unresolved past compliances. This prevented the bank from verifying the management and they relied on HTTL's board resolution.

II. Income Tax Portal Not Updated

The company's profile on the Income Tax e-portal could not be updated due to the non-approval of the new director.

III. Difficulty in Opening New Bank Account for Fund Distribution

The SRA faced difficulties opening a new bank account for fund distribution. The Monitoring Committee (MC) allowed the use of HTTL's CIRP account, operated by the RP, for this purpose. Later, the RP (a member of the MC) issued a No Objection to enable the SRA to open a new company account.

IV. Non-Compliance Under the Companies Act During OL's Control

Several compliance requirements were missed during the winding-up process, complicating the RP's and SRA's ability to manage obligations. The RP applied for exemption, which was advised by the NCLT but later withdrawn. The Monitoring Committee suggested that the SRA make efforts independently and approach NCLT if needed.

V. Issue of No Dues Certificate and Charge Satisfaction

Some banks merged or closed loan accounts, but their charges remained in the ROC records due to the non-submission of charge satisfaction forms. As a result, funding banks and financial institutions were unable to establish a clean charge on the company's assets. The absence of a full board, NOCs from existing banks, and the unresolved charges complicated fund disbursement and the opening of new bank accounts. Whereas Bank officials must comply with banking and RBI regulations to safeguard their interests.

Post-Approval Support and Role of Financial Creditors in Monitoring Committee

Following the approval of the Resolution Plan, the formation of the Monitoring Committee **(MC)** marked a critical step toward the successful implementation of the plan. The Successful Resolution Applicant (SRA) faced several operational, financial, and regulatory challenges during the post-approval phase, and the support of the erstwhile Committee of Creditors (CoC), particularly the Financial Creditors **(FC)**, became even more vital in ensuring smooth execution.

The Financial Creditors recognized the complexities and hurdles faced by the SRA and proactively enhanced their support to the Monitoring Committee. Their active involvement helped resolve issues that emerged during the post-approval phase, particularly around arrangement of finance by SRA and handover of title documents in time.

The Monitoring Committee, as an oversight body, was tasked with ensuring that the terms of the Resolution Plan were followed and that the SRA had the necessary support to implement the plan successfully. Given the significant debt involved and the need for regulatory approvals, the Financial Creditors, particularly PNB and other major creditors, worked closely with the Monitoring Committee to address the challenges faced by the SRA. Their ongoing engagement, coupled with their commercial wisdom, was essential in navigating these issues and facilitating a smoother implementation of the plan.

The former CoC's (FC) enhanced support to the Monitoring Committee included regular monitoring of financial performance, ensuring adherence to the timelines of the Resolution Plan, and helping address any delays or regulatory hurdles that the SRA encountered. Their commitment to ensuring the success of the resolution process reflected the collective responsibility of the Financial Creditors in managing distressed assets under the Corporate Insolvency Resolution Process (CIRP).

Joint efforts accomplished financial task in 4.5 months

With persistent efforts from the SRA, the RP, MC and FC, the financial closure was eventually achieved, and the entire settlement amount of ₹78 crores was deposited and paid to creditors within just 4.5 months well ahead of the anticipated 8-month timeline. The SRA also received "No Dues" certificates from dissenting creditors.

Ultimately, the collaborative efforts between the Monitoring Committee, the SRA, and the Financial Creditors ensured that the implementation of the Resolution Plan proceeded effectively, leading to the successful revival of HTTL. The continuous support from the Financial Creditors after the approval of the plan underscored the pivotal role they played in securing the resolution.

Post Challenge remain

Permission of NEPZ and Customs

After settling the prior CIRP dues in a proportionate ratio and paying the full CIRP amount to NEPZ, the SRA initiated the process for handling the premises and disposing of scrap. However, NEPZ has not granted permission.

On November 12, 2024, the Supreme Court of India delivered a landmark decision in *Noida Special Economic Zone Authority (NSEZA) v. Manish Agarwal & Ors.*, upholding the approval of a resolution plan under the Insolvency and Bankruptcy Code (IBC) and dismissing appeals from NSEZA. The judgment reinforced IBC's precedence over other statutes, including the Special Economic Zone Act (SEZ Act), clarifying that NSEZA dues are operational dues and must be settled under the resolution plan.

While NEPZ may accept a haircut on the CIRP dues, it insists on transfer charges based on a specified rate per square meter, due to the 51% change in shareholders. According to NEPZ's lease agreement terms, this presents a challenge, as the company was acquired through court proceedings, not in the 'ordinary course of business'. This may require a separate court order or payment of transfer charges by the SRA.

The SRA has assessed that value could be derived from the scrap machinery and old inventory, though these were considered negligible during negotiations. The IBC framework is expected to address emerging issues, especially in cases involving government authorities, EPF-related penalties, and PMLA matters.

Impact on Company Revival: The transfer charges requested by NEPZ are less than 0.75% of the Resolution Amount. The SRA can potentially offset these charges with value derived from scrap machinery and inventory. However, the carry-forward losses, not considered in the resolution plan, are subject to the Principal CIT's approval.

Other Government/Statutory Authorities: While other authorities have accepted their full and final dues under the plan, the SRA's bank is requesting a "No Dues" certificate from them. This may take longer to secure due to ongoing follow-ups and the need for legal approval.

Challenges in Carrying Forward Losses

Once the SRA gains access to the e-portal, there might be an opportunity to carry forward the company's losses. However, several challenges would arise in doing so, as outlined below:

(a) **Unfiled Loss Returns since AY 2018-19 and NIL carry forward losses in AY 2019-20**

The SRA informed that the last Income Tax Return (ITR) was filed for the Assessment Year (AY) 2017-18, in which the company claimed carry-forward losses of a substantial amount, including unabsorbed depreciation of ₹190 crores. However, the Official Liquidator (OL), acting as the representative assessee, reported a NIL carry-forward loss in AY 2019-20. Furthermore, no ITR was filed for subsequent years. This discrepancy could potentially complicate the approval process with the Principal Commissioner of Income Tax (Principal CIT)

(b) **Asset Disposal under SARFAESI or winding up process**

The banks, under the SARFAESI Act, had disposed of several assets, including Plant &

Machinery and miscellaneous assets at HTTL's various premises. This complicates the situation because, without proper documentation or information on these disposals from the OL, it will be challenging to claim unabsorbed depreciation or losses that could otherwise be carried forward. Further there was no information shared by OL if any assets disposed by it.

However, the carry-forward losses, which were not factored into the resolution plan, are subject to approval from the Principal Commissioner of Income Tax (Principal CIT).
So above issue will not impact on revival of Company and neither were conditional nor potential threat.

HTTL's Journey Through Insolvency: A Story of Resilience and Transformation
The journey of Hanung Toys & Textiles Ltd. through the Insolvency and Bankruptcy Code is a remarkable testament to resilience, collaboration, and strategic determination. Over a span of four years, HTTL navigated the complex challenges of insolvency, transforming from the brink of liquidation under the Companies Act to becoming a functioning going concern within just 20 months under the IBC framework (excluding the idle period). This process highlights not only the intricacies of the IBC but also the critical role played by various stakeholders—the Committee of Creditors, the Resolution Professional, the Successful Resolution Applicant and the Monitoring Committee—in turning around a distressed company.

By mid-2024, HTTL successfully made the transition from a potential liquidation scenario to an operational business. With the unwavering support of the CoC, SRA, and Monitoring Committee, the Resolution Plan was implemented, enabling the company to resume its operations. The collective efforts of the RP and their team, alongside the tireless commitment from financial creditors, legal advisors, and other stakeholders, ensured the revival of HTTL. This not only prevented its closure but also opening new jobs and safeguarded significant value for creditors.
While the company has made substantial progress, challenges remain. The road ahead is still fraught with hurdles, but there is hope that the SRA, with continued legal guidance, will be able to resolve these issues in accordance with the legal framework, ensuring a full and sustainable recovery for HTTL.

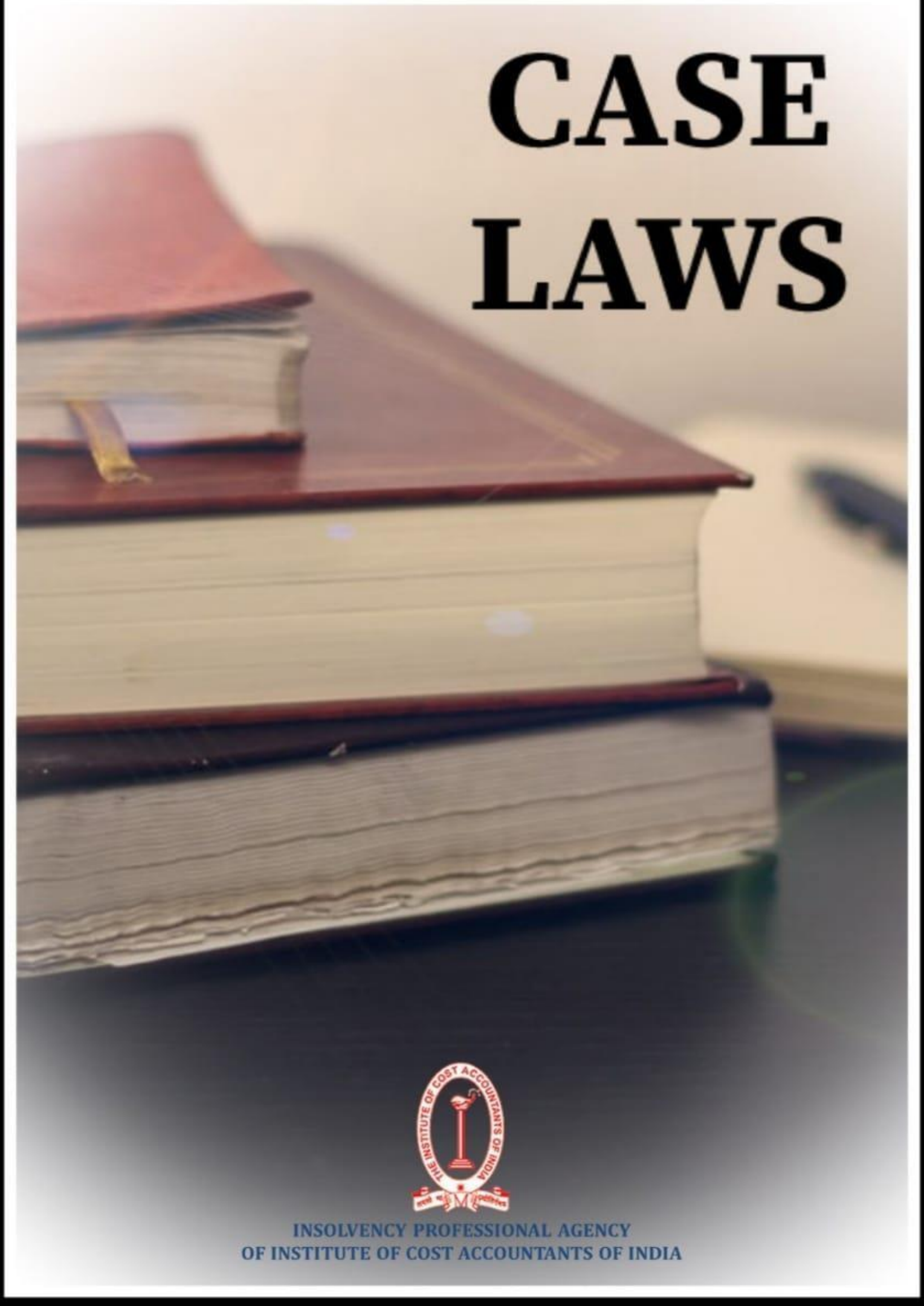
Outcome and Synergies:
HTTL's revival through the IBC process marked a significant turnaround. The company, which had been teetering on the edge of liquidation under the Companies Act, was successfully revived, with the assets being repurposed for new business expansion under the SRA.

The SRA, Cyfuture India Pvt. Ltd., found significant synergies in HTTL's assets, particularly in the Bhagwanpur factory, which they plan to repurpose for expanding their own operations. This not only generates economic value of un-utilised assets and also creates jobs and a viable business model for the continued use of the company's assets, ensuring that HTTL's legacy continues in a new form.

Key Takeaways:

1. **Strategic Decision-Making**: Despite numerous legal and operational challenges, the RP and CoC made strategic decisions that maximized the value of the distressed assets, ensuring the best possible outcome for stakeholders.
2. **Asset Recovery and Transparency**: The RP's persistent efforts to recover and assess HTTL's assets, even in the face of significant obstacles, ensured that creditors received the maximum possible value from the distressed assets.
3. **Improvement in Bid Value / Maximized Value**: The challenge round played a crucial role in enhancing the bid value, underscoring the importance of flexibility and effective negotiation in distressed asset sales.
4. **Timely Resolution**: Despite the prolonged process, creditors received full payment within 4.5 months, a notable achievement given the initial timeline of 8 months, demonstrating the effectiveness of the resolution efforts.
5. **Commercial Wisdom of the CoC**: The Committee of Creditors (CoC) displayed exceptional commercial wisdom, which was instrumental in the successful resolution of HTTL. By carefully evaluating available options, the CoC facilitated the resolution process, proving the pivotal role it plays under the Indian Bankruptcy Code (IBC). Their decision-making, diligence, and collaborative approach were key to achieving a positive outcome, reinforcing the CoC's critical role in supporting the resolution of distressed companies.
6. **Revival and Synergies**: The successful resolution under the IBC created an opportunity for HTTL's assets to be integrated into a new business. This not only unlocked synergies but also ensured long-term value for both creditors and the new management.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
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SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Kesoram Industries Ltd. v. Pratim Bayal [2024] 159 taxmann.com 27 (NCLAT- New Delhi)

Where appellant claimed its financial debt on basis of inter-corporate loans given from time to time to corporate debtor, however, there was no disbursement for time value of money and there was no financial record of corporate debtor reflecting any such transaction with regard to alleged inter-company loan, essential ingredients to prove a financial debt were missing and, thus, NCLT did not commit any error in rejecting appellant's claim as a financial creditor.

Application filed under section 9 against the corporate debtor was admitted and a Resolution Professional (RP) was appointed. In pursuance of public announcement, the appellant filed its claim as a financial creditor on basis of inter-corporate loans given from time to time to the corporate debtor. RP sent an e-mail requested the appellant to provide relevant documents to prove its claim. Thereafter, RP again communicated to the appellant but no such records had been furnished, nor any financial records of the corporate debtor reflected any such transaction with regard to alleged inter-company loan and, therefore, in absence of any material, he was unable to verify and admit claim of the appellant. The appellant filed an application before NCLT seeking to set aside RP's decision and to restore claim of the appellant as financial creditor. NCLT by impugned order rejected said application and upheld RP's decision. It was noted that the appellant categorically stated that the corporate debtor was a business division of its company, such statement in itself was testimony to fact that there could not have been a loan agreement or disbursement to the corporate debtor. It was further noted that balance sheet of the corporate debtor as well as the appellant was under same Chairman, and balance sheet even if it was taken at its face value did not in any manner prove that there was any financial debt.

Held that financial debt ought to have been reflected under heading of borrowings and there was no reflection of claim which was filed in Form C under heading borrowings. When there was no disbursement for time value of money, essential ingredients to prove a financial debt were missing, thus, NCLT did not commit any error in rejecting application filed by the appellant and instant appeal was to be dismissed.

Case Review: SRF Ltd. v. Birla Tyres Ltd. [2024] 159 taxmann.com 26 (NCLT - Kol.) (SB) affirmed.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

Greater Noida Industrial Development Authority v. Prabhjit Singh Soni [2024] 159 taxmann.com 301 (SC)

Even in absence of a specific power in IBC empowering NCLT to recall its order, NCLT can recall its order under its inherent powers to secure ends of justice and/or to prevent abuse of process of Court notwithstanding that an appeal lay before NCLAT against order of approval of resolution plan passed by NCLT.

CIRP petition filed against the corporate debtor was admitted and claims were invited through a public announcement. The appellant submitted its claim as a financial creditor, however, RP treated the appellant as an operational creditor and requested the appellant to submit its claim as an operational creditor of the corporate debtor. In meantime, CoC approved a resolution plan and same was further approved by NCLT. The appellant filed an application before NCLT on ground that no opportunity of hearing was given to the appellant by CoC and entire process right up to approval of plan by NCLT was ex parte. NCLT rejected said application. The appellant filed appeal before NCLAT on ground that RP misrepresented that the appellant had submitted no claim while a claim was submitted by the appellant and, therefore, there was a gross mistake on part of NCLT in approving plan, which did not fulfil conditions laid down in section 30(2). However, NCLAT upheld NCLT's order. It was noted that neither NCLT nor NCLAT rejected assertion of the appellant that the appellant had submitted its claim with proof before RP.

Held that a Court or a Tribunal, in absence of any provision to contrary, has inherent power to recall an order to secure ends of justice and/or to prevent abuse of process of Court. Even in absence of a specific power in IBC empowering NCLT to recall its order, NCLT can recall its order under its inherent powers to secure ends of justice and/or to prevent abuse of process of Court notwithstanding that an appeal lay before NCLAT against order of approval of resolution plan passed by NCLT. Neither NCLT nor NCLAT while deciding application/appeal of the appellant took note of fact that, the appellant had not been served notice of meeting of CoC. Since appellant had submitted its claim and was a secured creditor by operation of law, resolution plan projecting that the appellant had not submitted its claim did not meet all parameters laid down under section 30. Therefore, order passed by NCLAT and NCLT was to be set aside and resolution plan was to be sent back to CoC for re-submission.

Case Review : Greater Noida Industrial Development Authority v. Prabhjit Singh Soni [2024] 158 taxmann.com 711 (NCLAT - New Delhi), reversed.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Ashok Singh v. Babu Lal Sharma [2024] 159 taxmann.com 529 (NCLAT- New Delhi)

Where corporate debtor filed instant appeal on ground that despite a pre-existing dispute over outstanding amount and quality of work rendered by operational creditor NCLT admitted CIRP petition, since there was no dispute regarding running bill and invoices issued by operational creditor had been verified and confirmed by technical person, NCLT had rightly admitted application for initiation of CIRP under section 9.

The corporate debtor entered into a sub-contractor agreement with respondent No. 2-operational creditor, in which the operational creditor undertook to complete construction project. Thereafter, operational creditor raised various invoices against corporate debtor. However corporate debtor failed to pay any amount even after work had been done and also after running bills had been signed and verified by technical persons of corporate debtor. Consequently, operational creditor filed a petition under section 9 against corporate debtor. NCLT vide impugned order admitted said petition. Appellant, suspended director of

corporate debtor filed instant appeal on ground that despite pre-existing dispute with respect to outstanding amount and quality of work rendered by operational creditor, NCLT admitted CIRP petition and, thus, same was to be set aside. It was noted that apart from Rs. 11 lakhs, which was paid as mobilisation advance, no other payments had been made, even though running bills had been sent over a period of time. It was further noted that no dispute had been raised with respect to running bill and no reply was issued to demand notice. Whether corporate debtor had not replied to all communications and very belatedly raised issue that work had not been done as per sub-contractor agreement. Held, yes. Whether invoices raised by operational creditor were verified and confirmed by technical person. Held, yes. Whether since corporate debtor defaulted in making full payments against services rendered by operational creditor which was more than Rs. 1 lakh, NCLT had rightly admitted application for initiation of CIRP under section 9.

Case Review *:* RG Colonizers (P.) Ltd. v. Macro Infra Contractors (P.) Ltd. [2024] 159 taxmann.com 528 (NCLT - Jaipur), affirmed.

SECTION 25 - CORPORATE INSOLVENCY RESOLUTION PROCESS – RESOLUTION PROFESSIONAL - DUTIES OF

Umesh Kumar v. Narendra Kumar Sharma, Insolvency Resolution Professional of Indirapuram Habitat Centre (P.) Ltd. [2024] 159 taxmann.com 707 (NCLAT- New Delhi)

Where appellant filed claim before RP for consultancy services rendered to corporate debtor, since appellant failed to provide any document to RP to substantiate its claim, impugned order passed by NCLT rejecting claim of appellant was justified.

The appellant-operational creditor claimed that he was hired as a media management consultant on a monthly retainer ship of Rs. 10 lakhs per month for which purpose appellant had entered into a Consultancy Agreement with the Corporate debtor. After the corporate debtor was admitted into insolvency, Resolution Professional (RP) invited claims, in which the appellant filed its claims vide e-mail dated 28-3-2020.. However, same was rejected by the RP. The appellant filed an application before NCLT seeking direction to RP to admit its claim. NCLT vide impugned order rejected said application on ground that the appellant failed to show any document to substantiate plea of rendering services by the appellant to the corporate debtor and, thus, there was no infirmity in conclusion drawn by RP that he could not find any media service rendered by the appellant during period for which consultancy fees were claimed. Aggrieved by NCLT's order, the appellant filed instant appeal. It was noted that e-mail sent to RP enclosing GST invoice for consultancy till month of August 2019 and in said tax invoice service Description" column of invoice, only words "Management Consultancy" had been stated without giving any further details. It was further noted that RP had made it clear that due to want of documents in support of their claims, RP was unable to verify claims of the appellant whenever, the appellant failed to comply to persistent request of RP for documents.

Held that there was no incidence of wilful negligence, or deliberate stone-walling of claims on part of the RP in dealing with appellant's claim. Since RP had been consistently pointing

out that he was not in a position to verify claims due to want of documents substantiating claims, impugned order passed by NCLT rejecting application of the appellant seeking acceptance of their claims which had been rejected by RP, did not suffer from any infirmities.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES – APPEALS AND APPELLATE AUTHORITY

Sansar Investment & Finance Company (P.) Ltd. v. Atlantic Spinning & Weaving Mills Ltd. [2024] 165 taxmann.com 90 (NCLAT - Chennai)

Where during pendency of an appeal against order of NCLT rejecting application of appellant against rejection of it claim by RP order of liquidation had already been passed by NCLT and appellant decided to challenge order appointing liquidator under section 42, instant appeals challenging NCLT's order had been rendered infructuous and was to be dismissed with liberty to prefer appeal under section 42.

The appellant-company had given financial assistance to the corporate debtor. The appellant-company filed an application before NCLT challenging Resolution Professional's decision to reject its claim due to lack of substantial evidence and discrepancies in documents. However, NCLT dismissed said application. The appellant-company filed instant appeals against impugned orders passed by NCLT. However, during pendency of appeals, order of liquidation had already been passed by NCLT. The appellant submitted that it would prefer an appeal under section 42 by challenging order appointing liquidator.

Held that in view of facts, instant appeals had been rendered infructuous and was to be dismissed with liberty to prefer appeal under section 42

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES – APPEALS AND APPELLATE AUTHORITY

Sanjay Kumar Aggarwal v. Stakeholders Consultation Committee of Punjab Basmati Rice Ltd. [2024] 165 taxmann.com 94 (SC)

Where in liquidation proceedings of corporate debtor NCLT granted an exclusion of period but liquidation process was not completed within six months, liquidator was not eligible for higher percentage of fees as per regulation 4 of IBBI (Liquidation Process) Regulations, 2016.

A liquidation order was passed against the corporate debtor. Later, the appellant-liquidator filed an application before NCLT for purpose of calculation of his fees. NCLT by order dated 1-11-2021 granted an exclusion of period from 15-03-2020 to 02-10-2021 due to Covid-19 lockdown. Thereafter, an application was filed by Ex-Management of the corporate debtor before NCLT, wherein a stay on e-auction of properties was granted by NCLT on 09-11-2021. The respondent-stakeholders consultation committee (SCC) filed an application before NCLT on ground that there was no valid restriction available to the Liquidator to not to act during period from 3-10-2021 to 8-11-2021 and there was no hindrance to liquidation process during this period and, therefore, NCLT erred in granting exclusion of period consumed in adjudication of subject, instead of period consumed while auction was under stay. NCLT vide impugned order rejected said application and held that total time consumed in liquidation proceedings

was 174 days and, thus, Liquidator was eligible for higher percentage of fees, as liquidation process was completed within six months, as per regulation 4 of IBBI (Liquidation Process) Regulations, 2016. Respondent filed appeal before NCLAT. NCLAT vide impugned order held that there was no valid restriction available to Liquidator to not to act during period from 03-10-2021 to 08-11-2021 and, thus, same was to be added to liquidation period of 174 days and period consumed in liquidation process was to be determined as 211 days. NCLAT further held that liquidation process was not completed within six months and, therefore, liquidator was not eligible for higher percentage of fees as per regulation 4 of IBBI (Liquidation Process) Regulations, 2016. Liquidator challenged NCLAT's order before Supreme Court.

Held that there was no need to interfere with NCLAT's order, as said order gave no reflection on capabilities of liquidator and, therefore, instant appeal was to be dismissed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

C. Sivasami v. A.R. Ramasubramania Raja [2024] 165 taxmann.com 206 (NCLAT - Chennai)

Where appellant-SRA of corporate debtor was required to deposit a certain amount under resolution plan, but failed to deposit entire amount within stipulated time, considering stand taken by Liquidator that no other resolution plan was received and, to meet objective of CIRP proceedings, appellant was granted one last opportunity to deposit required amount with aim of ensuring corporate debtor's revival.

CIRP was initiated against the corporate debtor and resolution plan submitted by appellant-SRA was approved by NCLT, subject to condition that he would deposit a sum of Rs. 10.11 crores. The appellant had deposited a certain sum but he could not deposit balance amount within stipulated time period. Consequently, NCLT ordered liquidation of the corporate debtor and appointed a respondent as Liquidator. The appellant alleged that when an application for liquidation of the corporate debtor was under consideration, he was able to identify a potential investor and mobilize funds and, thus, he filed an application before NCLT to deposit balance amount as per approved resolution plan and to stay liquidation proceedings. However, said application was rejected by NCLT vide impugned order. It was noted that even after one year from date of liquidation, Liquidator had not been able to find a buyer for the corporate debtor. It was further noted that respondent had unanimously expressed that he would not object if appeal itself was allowed and the appellant was permitted to deposit balance sum within a fixed timeline.

NCLAT can extend its powers under section 60(5) to meet out ends of justice in order to avoid liquidation of corporate debtor. Owing to resolution plan submitted by the appellant and approved by NCLT, the corporate debtor was expected to revive back in and to reach status of being a going concern, considering that no other resolution plan had been received by the Liquidator. In view of facts and provisions to section 60 sub-section (5), the appellant was provided with last opportunity to deposit amount into bank account of liquidator and to meet objective of CIRP.

SECTION 3(12) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEFAULT

Rita Malhotra v. Orris Infrastructure (P.) Ltd. - [2024] 164 taxmann.com 232 (NCLAT-New Delhi)

Where appellants had applied for office space with corporate debtor under assured return scheme, appellants held status of allottee and having filed section 7 application they were mandatorily required to comply with threshold limit under second proviso to section 7(1).

Respondent-corporate debtor floated a scheme to develop/construct a commercial building/complex. Appellants under assured investment return plan, applied for office space under an assured return scheme and entered into an agreement with the corporate debtor which guaranteed monthly assured return on investment. The corporate debtor breached agreement and failed to make payment towards return on investment and petition under section 7 was filed by the appellants against the corporate debtor. However, a settlement was reached between parties and petition was withdrawn in view of cheques issued for payment till June 2019 but the corporate debtor defaulted again, leading the appellants to revive CIRP petition. NCLT vide impugned order rejected said application on ground that an application should be filed jointly by not less than one hundred allottees or not less than 10 per cent of total number of allottees creditor of same class and instant application was filed by only 2 allotees out of 504 allottees and, therefore, appellants did not satisfy threshold for filing application under section 7. Appellants challenged NCLT's order on ground that they were claiming an amount which had become due and payable on account of Monthly Assured Return (MAR) Plan and, therefore, threshold provided under second proviso to section 7(1) was not applicable.

Held that on a plain reading of provisions contained in section 2 of RERA Act, a commercial space/unit allottee is covered under purview of 'allottee' under RERA and by virtue of Explanation (ii) to section 5(8)(f) same interpretation is to be adopted for an 'allottee' under IBC. NCLT had correctly held that even a commercial space or unit allotted to Assured Returns Class of Creditors was also covered in ambit of an allottee. Appellants could not be said to go out of definition of 'allottee' merely because they were part of MAR plan or that they should be treated in a different category wherein they were not required to comply with second proviso to section 7(1). Appellants continued to hold status of 'allottees' and having filed section 7 application, they were mandatorily required to comply with second proviso to section 7(1). Since parameters of section 7 application had not been complied with, section 7 application was non-maintainable and, thus, appeal was to be dismissed.

Case Review : Ms. Rita Malhotra v. Orris Infrastructure (P.) Ltd. [2023] 154 taxmann.com 471 (NCLT - New Delhi), affirmed.

SECTION 32A - CORPORATE INSOLVENCY RESOLUTION PROCESS – LIABILITY FOR PRIOR OFFENCES, ETC

Vasan Healthcare (P.) Ltd. v. India Infoline Finance Ltd. [2024] 165 taxmann.com 237 (Madras)

After insertion of section 32A of IBC by way of amendment with effect from 28-12-2019, corporate debtor cannot be prosecuted for prior liability after approval of resolution plan; but this

protection under section 32A of IBC is restricted only to corporate debtor and not its directors who were in-charge of affairs of company when offence was committed.

For purchase of medical equipments, petitioner-company borrowed loan from respondent finance company-IIFL. To discharge liability, Managing Director/Authorised Signatory of the petitioner company issued cheques. Cheques, on presentation for collection, returned stating reason 'Funds insufficient' Therefore, complaint under section 138 of NI Act was filed against the accused company and its directors. The petitioner vide instant petition under section 482 of Cr.PC seeking to quash criminal complaint on ground that insolvency resolution process had been initiated against the petitioner company and the petitioner company had been taken over by successful resolution applicant and claims of creditors were settled under approved resolution plan on condition that all civil and criminal litigations, investigations, claims, dispute, pending, present or future would stand extinguished. It was noted that after insertion of section 32A of IBC by way of amendment with effect from 28-12-2019, the corporate debtor cannot be prosecuted for prior liability after approval of resolution plan. However, protection under section 32A is restricted only to the corporate debtor and not its directors who were in charge of affairs of company when offence was committed or signatory of cheque.

Held that since instant petitions only the petitioner, corporate debtor was seeking quashing of criminal complaint, instant petition under section 482 of Cr. PC was to be allowed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Bhanwar Lal Jajodia v. State Bank of India [2024] 165 taxmann.com 393 (Calcutta)

Where a wilful default can only take place in respect of guarantors when guarantee was taken on or after 9-9-2014, however, petitioner's guarantee was signed on 28-3-2014, clause 2.6 under RBI Master Circular dated 1-7-2015 was inapplicable to them and, therefore, decision by Wilful Defaulter Identification Committee, declaring petitioner guarantor as wilful defaulter, which was upheld by Review Committee was legally incorrect and was to be set aside.

The petitioner stood as a guarantor for a loan taken by a borrower-company from respondent-SBI bank. Later, the petitioner and borrower company were declared a wilful defaulter by SBI's Wilful Defaulter Identification Committee. Despite filing a representation, the Review Committee upheld said decision. Later, the borrower-company entered into insolvency proceedings, and resolution plan was approved and its remaining debt was assigned to a NBFC i.e., 'DTIPL'. The petitioner filed an instant writ petition on ground that as per Clause 2.6 of Master Circular dated 1-7-2015, Wilful Defaulter proceedings could not have been initiated against the petitioner, as said Clause specifically states that such proceedings against personal guarantors could be initiated only in respect of guarantees which were given on and after 9-9-2014. It was noted that the bank, in its written notes, had categorically admitted that deed of guarantee was executed on 28-3-2014. It was further noted that treatment as a wilful default could only take place in respect of guarantors when guarantee was taken on or after 9-9-2014, but the petitioner executed deed of guarantee on 28-3-2014 and, thus, clause 2.6 under RBI Master Circular dated 1-7-2015 did not apply to the petitioner at all and as such, declaration of petitioner as a wilful defaulter in capacity of a personal guarantor was bad in law.

Held that impugned order passed by Review Committee, which confirmed decision of Wilful Defaulter Identification Committee that the petitioner was a wilful defaulter under RBI Master Circular, dated 1-7-2015 was to be set aside.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Saratvam Creators v. Sudhir Construction Infrapase (P.) Ltd. [2024] 167 taxmann.com 236 (NCLAT- New Delhi)

Where appellant's claim against guarantor i.e., corporate debtor was deemed inadmissible because appellant had not disbursed any amount to corporate debtor thus, admission of appellant's claim by RP was unsustainable and NCLT had not committed any error in ousting appellant from CoC.

The appellant had entered into a loan agreement with the corporate debtor's Special Purpose Vehicle (SPV) and the corporate debtor, in which SPV was borrower and the appellant was lender. The corporate debtor stood as a guarantor and executed a deed of guarantee-cum-indemnity. Later, CIRP was initiated against the corporate debtor and, the appellant filed its claim as an unsecured financial creditor before Resolution Professional (RP) claiming an amount of Rs. 195 crores. RP admitted appellant's claim. NCLT by impugned order held that the appellant referred to themselves in documents executed with the corporate debtor as contractors, they could not be treated as financial creditors but operational creditors and thus, directed RP to reconstitute Committee of Creditors (CoC) after excluding the appellant. It was noted that disbursement as claimed by the appellant was not to the corporate debtor, but to SPV and, claim was filed by the appellant on basis of Loan Agreement and Deed of Guarantee-cum-Indemnity. It was further noted that there was no statement indicating that amount of Rs.195 crores had been disbursed, rather than calculation of interest, which was part of Form-C, clearly indicated that amount disbursed was only Rs.19.43 crores.

Held that when actual disbursement claimed by the appellant was only Rs.19.43 crores, on which interest was also claimed, it was not clear on what basis RP admitted claim of Rs.195.28 crores and, therefore, admission of claim of Rs.195.28 crores on face of it was unsustainable and was a callous act on part of RP. Since the appellant had not disbursed the amount of Rs. 195 crores to principal borrower, claim of Rs. 195 crores could not be admitted against guarantors, i.e., the corporate debtor, thus, admission of claim of Rs. 195 crores were unsustainable and NCLT had not committed any error in ousting the appellant from CoC.

Case Review: Bank of Maharashtra v. Ram Ratan Kanoongo [2024] 167 taxmann.com 195 (NCLT - Mum.), affirmed.

SECTION 94 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS – APPLICATION BY DEBTOR

Gursev Singh, Personal Guarantor v. IDBI Bank [2024] 167 taxmann.com 204 (NCLAT-New Delhi)

Where personal guarantor was permitted to withdraw restoration, application filed against a dismissal order under section 94(1) due to non-compliance, with liberty to refile as per law, however, NCLT did not indicate whether refiled application would be maintainable or not and, thus, there was no error in order of NCLT rejecting subsequent application filed by appellant being not maintainable.

CIRP against the corporate debtor was commenced. Later, the appellant-personal guarantor of the corporate debtor filed an application under section 94 before NCLT, which was dismissed by NCLT for non-compliance. Subsequently, the appellant filed an application for recall and

restoration of application. NCLT permitted the appellant to withdraw restoration application with liberty to refile. Accordingly, the appellant filed a fresh application under section 94. NCLT by impugned order held that subsequent application filed by the appellant was not maintainable. It was noted that no liberty to file fresh petition had been granted when order dismissing application for non-compliance was passed. It was further noted that liberty to refile was granted at appellant's request to withdraw petition with liberty to refile under section 94 but, NCLT had not expressed any opinion as to whether application which was to be refiled by appellant under section 94(1) would be maintainable or not.

Held that at time of withdrawal of restoration application only liberty was granted to refile as per law and liberty by withdrawing restoration application could not be treated to be liberty to file fresh application under section 94(1) wiping out earlier order dismissing application for non-compliance, therefore, there was no error in impugned order of NCLT rejecting application.

***Case Review*:** Gursev Singh, In re [2024] 167 taxmann.com 203 (NCLT - Chd.) and Gagan Deep Kaur, In re [2024] 167 taxmann.com 202 (NCLT - Chd.) affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Noida Power Company Ltd. v. Gaurav Katiyar RP of Earthcon Universal Infractech (P.) Ltd. [2024] 167 taxmann.com 145 (NCLAT- New Delhi)

During a moratorium period, supply of essential goods or services to a corporate debtor can be interrupted if payments for those supplies are not made; where corporate debtor did not pay for electricity during moratorium, impugned order passed by NCLT directing appellant not to disconnect electricity connection of corporate debtor was to be set aside.

Corporate Insolvency Resolution Process (CIRP) commenced against the corporate debtor and respondent was acting as Resolution Professional (RP) during moratorium. Later, the appellant-NPCL issued a disconnect notice due to unpaid post-CIRP electricity dues. RP filed an application before NCLT seeking directions to the appellant not to disconnect electricity and to provide options for making payment on an instalment basis. Since there was no response from RP, a notice was sent again by the appellant to respondent for disconnection of electricity. The respondent filed an application seeking a permanent stay on an electricity disconnection notice from the appellant, leading NCLT to issue an interim order preventing disconnection. The appellant later sought to vacate said order. In response, NCLT vide impugned order instructed RP to collect electricity dues from residents and ensure payment to the appellant within a month and, further directed the appellant not to disconnect electricity connection of the corporate debtor. Aggrieved by NCLT's order, the appellant filed instant appeal.

Supply of essential goods or services to the corporate debtor shall not be terminated or suspended or interrupted during a moratorium period. Explanation to section 14(1) and section 14(2A) was clearly introduced by way of an amendment to fill critical gaps in Corporate Insolvency framework and that a substantive provision was introduced into IBC framework which clearly provided that supply of goods or services, critical to protect and preserve value of the corporate debtor, could always be terminated or suspended or interrupted during period of moratorium when dues arising from such supply during moratorium period was not paid, therefore, benefit of electricity supply which is enjoyed by any corporate debtor given by government or authority, should be continued subject to condition that there is no default of payment of current dues. In view of facts, NCLT had failed to appreciate amendments which

were brought in section 14 by Act 1 of 2020, thus, the impugned order passed by NCLT was clearly in conflict with legislative scheme.

Case Review: **Nisus Finance & Investment Managers LLP v. Earthcon Universal Infratech (P.) Ltd. [2024] 167 taxmann.com 144 (NCLT -New Delhi), reversed.**

SECTION 220 - INSPECTION AND INVESTIGATION OF INSOLVENCY PROFESSIONALS AGENCIES AND INFORMATION UTILITIES - DISCIPLINARY COMMITTEE - APPOINTMENT OF

Sandeep Kumar Bhatt v. Insolvency and Bankruptcy Board of India [2024] 167 taxmann.com 136 (Delhi)

Where petitioner, IP, had failed to protect assets of corporate debtors and there was a substantial delay in submission of forms by petitioner with Board, order of Disciplinary Committee of IBBI suspending registration of petitioner for a period of two years was justified.

The corporate debtor was undergoing CIRP and petitioner-IP was appointed as RP. Later, liquidation process was initiated against the corporate debtor, thus, the petitioner was discharged from case. Later, liquidator was appointed, who filed an application for dissolution of assets of the corporate debtor. NCLT raised serious doubts upon entire CIRP/liquidation proceedings and called upon the petitioner and liquidator to explain efforts made for realisation of value of assets. The petitioner filed his reply to queries raised by NCLT. Thereafter, a notice of investigation was issued to the petitioner by IBBI. Investigating Authority (IA) observed that the petitioner had failed to preserve and protect assets of the corporate debtor and also failed to submit CIRP forms within time prescribed under circular issued by IBBI. A Show Cause Notice (SCN) was issued to the petitioner by IBBI. The petitioner replied to (SCN). After due consideration of investigation report and reply to (SCN), disciplinary committee of IBBI passed an order suspending registration of the petitioner for a period of two years. The petitioner filed instant writ petition challenging order passed by IBBI.

Held that since the petitioner had failed to protect assets of the corporate debtor and there was a substantial delay in submission of forms by the petitioner with Board, order of Disciplinary Committee was justified. Since procedure had been followed by Board before passing order suspending petitioner, there was no reason to interfere with order passed by IBBI.

SECTION 60 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY -

Gateway Investment Management Services Ltd. v. Reserve Bank of India [2024] 167 taxmann.com 40 (Delhi)

Where in CIRP of corporate debtor, petitioner-resolution applicant claimed that though it was highest bidder yet its bid had not been accepted by CoC in an arbitrary manner, and thus, petitioner filed instant writ seeking direction in nature of Mandamus upon CoC to initiate process of fresh voting on its Resolution Plan, in view of fact that resolution plan decided by CoC would be put up for consideration before Adjudicating Authority, which forum alone would finally decide whether or not CoC had performed its fiduciary duty as per legislative mandate of IBC, instant writ was to be dismissed.

In CIRP of the corporate debtor, the petitioner claimed that it was highest bidder, both in terms of monetary value and net present value and yet its bid had not been accepted by CoC throwing all commercial norms & financial prudence to wind. Thus, the petitioner filed instant writ seeking direction in nature of Mandamus upon CoC to act in a fair, transparent and reasonable manner while exercising decision making power in approving a resolution plan and to initiate process of fresh voting on resolution plan of the petitioner to abide by principle of equality and fairness while considering resolution plan of the petitioner.

Held that the Adjudicating Authority maintains a supervisory role over entire CIRP proceedings and is empowered under section 60 to take action on any issue relating to insolvency proceedings. Thus, resolution plan decided by CoC shall be put up for consideration before the Adjudicating Authority, which forum alone shall finally decide whether CoC has performed its fiduciary duty as per legislative mandate of IBC. In view of guidelines for functioning of CoC framed by IBBI dated 6-8-2024 coupled with relevant provisions of IBC, Writ Court was not enjoined upon to exercise its power of judicial review and thereby usurp upon powers of NCLT to inquire into commercial wisdom of CoC whereby Resolution Plan of the petitioner was rejected. In view of foregoing, instant writ petition was to be dismissed with liberty to the petitioner to take appropriate recourse before NCLT, which forum alone would decide objections of the petitioner, if any preferred, on its own merits in accordance with law.

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SCHEDULE OF THE PROGRAM

4TH JANUARY 2025 : CHECK IN AT THE RESORT/HOTEL

1200- 1400 Hours	Inaugural Session
1400- 1500 Hours	Lunch
1500 –1700 Hours	Tech- 1, IBC 2030 and Beyond
1700- 1900 Hours	Leisure Time

5TH JANUARY 2025

0700-0800 Hours	Yoga Session
0800-1000 Hours	Breakfast
1000-1130 Hours	Tech 2: RP's Role under IBC
1130-1300 Hours	Tech 3: Insolvency Mechanism for MSME(s)
1300-1400 Hours	Lunch
1400-1530 Hours	Tech 4: Intersection of IBC, Valuation & ESG
1530-1700 Hours	Tech 5: IBC: Time Management
1700-1900 Hours	Time to explore places around us
1900-2000 Hours	Session – Spiritual and Motivational

6TH JANUARY 2025

Backwater Cruise including visit to Kumarakom

1900-2000	Pool Side Chat : Role of Mediation under IBC, 2016

7TH JANUARY 2025

0700-0800 Hours	Yoga Session
0800-1000 Hours	Breakfast
1000-1130 Hours	Tech 6: Analysis of Insolvency Best Practices
1130-1300 Hours	Tech 7: Role of Committee of Creditors
1300-1400 Hours	Lunch
1400- 1530 Hours	Tech 8: Impact of Global Economics in IBC Eco-system
1530-1700 Hours	Tech 9: Use of Technology under IBC Processes.
1800-0000 Hours	Valedictory Session & Gala Dinner

8TH JANUARY 2025

CHECKOUT AND DEPARTURE

Via Fort Cochin and Jew Town (Optional)

GUEST & SPEAKERS

MR. NIPUN SINGHVI
ADVOCATE

DR. SHRADUL SHROFF
ADVOCATE

MR. SUMANT BATRA
INSOLVENCY LAWYER

MR. ASHISH MAKHIJA
ADVOCATE &
INSOLVENCY PROFESSIONAL

MR. ANIL GOEL
INSOLVENCY PROFESSIONAL

MS. POOJA BAHRY
INSOLVENCY PROFESSIONAL

MS. SHWETA BHARTI
MANAGING PARTNER
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- Assisted a client in challenging the Insolvency Resolution Professional of a real estate developer in a matter worth INR 1388 crores approximately.
- Assisted a leading construction company in an appeal under Section 61 of the IBC worth INR 1200 crores.
- Assisted many leading real estate developers in the initiation of the insolvency process under Section 9 IBC.
- Advised and assisted in enforcing and implementing security mechanisms made available to lenders under the legal, regulatory, and policy framework, namely the Recovery of Debts due to the Banks and Financial Institutions Act of 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002, and the Insolvency and Bankruptcy Code of 2016.
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