ANNUAL PUBLICATION 2023-24

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) 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.

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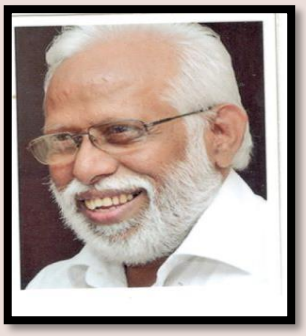
BOARD OF DIRECTORS



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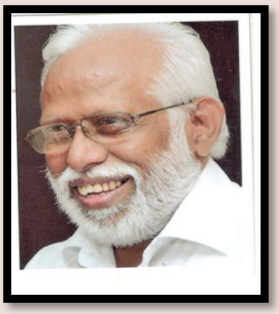
MESSAGE FROM THE CHAIRPERSON'S DESK



DR. JAI DEO SHARMA

Dear Readers and Contributors,

I have great pleasure in extending a warm welcome to each one of you as we embark on another edition of our annual publication. It's truly gratifying to witness the remarkable growth and evolution of our publications, which have become a cornerstone of knowledge and insight in the dynamic landscape of the Insolvency and Bankruptcy Code (IBC), 2016.

As we reflect on the journey we've undertaken since our inception, it's evident that the IBC continues to reshape the landscape of corporate insolvency resolution in India. Seven years on, our dedication to fostering a platform for scholarly discourse and practical insights remains steadfast. The core principles of the IBC focused on timely resolution, asset value maximization, and stakeholder balance thus highlighting its pivotal role in revitalizing distressed corporate entities.

While the IBC has undoubtedly made significant strides for expeditious resolution process and fostering an environment conducive to entrepreneurship and credit availability, the challenges persist. Ensuring adherence to prescribed timelines, transparency, and objectivity in the selection of resolution professionals remain paramount.

The path to resolution traverses through complexities inherent in navigating the intricate web of insolvency proceedings. In light of these challenges, I extend my heartfelt appreciation to our esteemed contributors whose unwavering dedication to the profession has enriched our e-journal with invaluable insights and perspectives.

As we embark on the next phase of our journey, I am filled with confidence that our collective efforts will continue to foster dialogue, inspire innovation, and advance our understanding of the IBC. I invite each one of you to actively participate in this endeavor as we work towards a future where insolvency resolution catalyzes sustainable growth, credit discipline and overall economic development. I sincerely express our gratitude for your unwavering support and valuable contributions.

Dr. Jai Deo Sharma
Chairperson of IPA ICMAI

MESSAGE FROM THE DESK OF PRESIDENT OF ICMAI

CMA ASHWIN G. DALWADI

The impact of the Insolvency and Bankruptcy Code (IBC) since its enactment in 2016 underscores a significant transformation in the Indian economy. Notably, the Gross Non-Performing Assets (GNPA) of Scheduled Commercial Banks (SCBs) have plummeted to their lowest point in a decade, reaching 3.2% by the end of September 2023. The Reserve Bank of India (RBI), in its latest Report on Trends and Progress of Banking in India for 2022-23, highlights that a substantial 43% of SCB recoveries during this period can be attributed to the effective implementation of IBC processes, solidifying its role as the primary avenue for recovery.

Moreover, the influence of IBC is palpable in the shifting sentiments of both lenders and business promoters. A striking manifestation of this is evident in the resolution of outstanding defaults, where an impressive Rs. 9.33 lakh crores involving over 26,000 cases have been eradicated from the books of banks through settlements and withdrawals of insolvency applications prior to admission (IBBI Newsletter, September 2023). This underscores the increasing confidence and efficacy of IBC mechanisms in tackling financial distress and facilitating smoother debt resolution.

The Institute of Cost Accountants of India (ICMAI) has consistently been at the forefront of major economic developments in the country. When the Insolvency and Bankruptcy Code (IBC) was legislated, ICMAI took pride in establishing the Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICMAI) as a non-profit (section 8 company) fully owned subsidiary. It is heartening to observe that IPA-ICMAI has played a significant role in fostering a profession of insolvency and bankruptcy characterized by high competence and ethical standards, while also fulfilling its regulatory responsibilities.

Cost and Management Accountants (CMAs), by virtue of their training, experience, and professional ethos, are exceptionally well-suited to undertake insolvency resolution and liquidation assignments. Indeed, some of the most noteworthy Corporate Insolvency Resolution Process (CIRP) assignments in India's IBC history have been successfully executed by CMAs turned Insolvency Professionals. ICMAI proudly acknowledges their professional achievements.

ICMAI stands firmly behind IPA-ICMAI and fully supports its endeavours to enhance professional development activities. These efforts aim not only to elevate the competence of Insolvency Professionals but also to engage with all stakeholders within the IBC ecosystem, thereby contributing to the overall development of the insolvency profession.

It brings me great joy to learn that IPA-ICMAI is launching its annual digest featuring insightful articles, pertinent case laws, and compelling narratives of successful resolutions achieved by its esteemed members.

\I extend my best wishes to the IPA-ICMAI team for continued success in the upcoming year and beyond, as they strive to attain new heights of professional excellence.

President of ICMAI
CMA Ashwin G. Dalwadi

MESSAGE FROM THE DESK OF MANAGING DIRECTOR

MR. G.S. NARASIMHA PRASAD

IPA-ICMAI has two clearly distinct responsibilities – regulation and Professional Development (PD). Frontline regulation of Insolvency Professionals (IP) is the primary raison d'etre of an IPA, PD is a developmental activity that provides opportunities for initiative and innovation. We take both these responsibilities seriously and in equal measure. The working model and processes are very clearly defined in the regulatory role. It is for us to carry out these processes diligently with total focus on accuracy. We are gradually moving towards automation of most of the regulatory activities comprising enrolment, registration, monitoring, and compliance functions though a good part remains to be done. In this process, I gratefully acknowledge the support and encouragement we receive from Insolvency and Bankruptcy Board of India (IBBI).

Our primary focus in our PD role is to find new ways of improving on our existing programs to facilitate development of skill sets and capacity building among our members and IPs in general to meet the challenge of optimally manage the CIRP/ Liquidation processes given the timelines within the legal framework. We also explore new subjects and domains which are relevant to our members and IP to facilitate them getting broader and different perspectives in areas related, not necessarily directly involved, in the IBC framework. IP in the role of a RP or Liquidator needs to be able to quickly get a grip on the intricacies of the business model, market outlook of the corporate debtor that s/he has taken charge, irrespective of the business segment it belongs to. Moreover, this approach also helps IPs to be better qualified to take on assignments from Banks who look out for domain expertise/ exposure when they select the IRP/IP. We expect to expand in this direction in the days ahead.

The residential program organized by IPA-ICMAI is a step in that direction in that we expect the delegates to get the perspectives of not only FCs but also OC like tax authorities, EPF department, and representatives of business segments to which corporates undergoing CIRP/ Liquidation belong to.

This annual publication is a collection of select articles authored by our members, select case laws from the past year and summaries of the journey to successful resolutions conducted by a few of our members. I hope the reader finds them interesting and useful. I particularly compliment the members whose success stories appear here, and this is far from complete. I look forward to publishing similar success stories of many more of our members in the near future.

Our small and young team at IPAICMAI joins me in conveying our sincere gratitude to the Chairperson, Whole Time Members, Executive Directors and staff at IBBI, President and staff of our parent, the Institute of Cost Accountants of India (ICMAI), and the Chairperson and directors on our Governing Board who have been always helpful, understanding, and supportive.

Managing Director
GS Narasimha Prasad

OFFICIALS OF IPA-ICMAI

MR. G.S. NARASIMHA PRASAD
MANAGING DIRECTOR

MS. SARIKA AGARWAL
CHIEF FINANCE OFFICER

MS. KARISHMA RASTOGI
SECRETARY OF THE COMPANY,
MANAGER & COMPLIANCE OFFICER

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CMA PUSHPENDRA JAISWAL
ASSISTANT MANAGER-INSPECTION

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

EVENT'S CONDUCTED FROM APRIL 2023 TO MARCH 2024

April 2023

S.NO	EVENT	DATE
1.	Two Days Learning Session on CIRP & Liquidation.	April 8th-9th, 2023
2.	Workshop on Judicial Pronouncement under IBC, 2016.	April 15th, 2023
3.	Two Days Online Learning Session on Group Insolvency & Cross Insolvency"	April 22nd-23rd, 2023
4.	Workshop on Compliances to be made by IPs under IBC, 2016.	April 29th, 2023

MAY 2023

S.NO	EVENT	DATE
1.	"IP Conclave" IBC from Stakeholders Perspective.	May 6th, 2023
2.	Workshop on Treatment of Contingent Liabilities under IBC, 2016.	May 12th, 2023
3.	Learning Session on Interface of different Laws with IBC, 2016.	May 19th, 2023
4.	Workshop on Committee of Creditors: An Institution of Public Faith.	May 26th, 2023

JUNE 2023

S.NO	EVENT	DATE
1.	Learning Session on Interim Finance – A Source of Operational Funding under IBC	June 03rd – 04th 2023
2.	Pre-Registration Educational Course	June 07th to 13th 2023
3.	Workshop On Ethics and Management Skills For Insolvency Professionals	June 11th 2023
4.	Learning Session on Analysis of Financial Statements under PUFE Transactions	June 17th –18th 2023

JULY 2023

S.NO	EVENT	DATE
1.	Learning Session on Interim Finance – A Source of Operational Funding under IBC	June 03rd – 04th 2023
2.	Pre-Registration Educational Course	June 07th to 13th 2023
3.	Workshop On Ethics and Management Skills For Insolvency Professionals	June 11th 2023
4.	Learning Session on Analysis of Financial Statements under PUFE Transactions	June 17th –18th 2023
5.	Workshop on Disciplinary Aspects & Governance under IBC, 2016	July 28, 2023

AUGUST 2023

S.NO	EVENT	DATE
1.	Workshop On Not Readily Realisable Assets (NRRA)	August 5, 2023
2.	Learning Session on Analysis of Financial Statements under PUFE Transactions	August 12, 2023
3.	Workshop on Interface of different Laws with IBC, 2016.	August 26, 2023

SEPTEMBER 2023

S.NO	EVENT	DATE
1.	Learning Session on Verification of Claims & Committee of Creditors	September 02nd to 03rd 2023
2.	Workshop on Rising Haircuts under IBC 2016	September 08th 2023
3.	Learning Session on Role of Related Parties under IBC, 2016	September 16th to 17th 2023
4.	62nd Batch of Pre-Registration Educational Course	September 19th to 25th 2023
5.	Workshop on Recent Amendments by IBBI.	September 29th 2023

OCTOBER 2023

S.NO	EVENT	DATE
1.	Learning Session on Compliances to be made by IPs under IBC, 2016	October 7, 2023
2.	Mediation Conclave Leveraging Mediation for catalyzing ADR The Mediation Act, 20	October 10, 2023,
3.	Workshop on Mediation & IBC Framework: Trajectory and Prospects	October 14, 2023
4.	Master Class on Key Aspects of Insolvency Resolution Plan	October20th-22nd,2023
5.	"Insolvency and Bankruptcy Code" Milestone Achieved and Way Forward	October 21,2023
6.	Seminar on Insolvency and Bankruptcy Code	October 21,2023
7.	Executive Development Program on IBC – A Multifaceted Perspective	27October -31 October 2023

NOVEMBER 2023

S.NO	EVENT	DATE
1.	Workshop on Mastering the Information Memorandum	November 3rd, 2023
2.	Seminar on Insolvency & Bankruptcy Code, 2016. Milestones Achieved & Way Forward"	November 4th, 2023,
3.	Workshop on Not Readily Realisable Assets.	November 9th, 2023
4.	Master Class on Personal Guarantors to Corporate Debtors under IBC, 2016	November 17, 2023
5.	Interactive Meet: Challenges/ issues under liquidation including voluntary liquidation and its way forward was organized by IBBI with all the three IPA's	November 23, 2023
6.	"Certificate Course on Insolvency &Bankruptcy Code, 2016: A Refresher Guide"	November 25 to 29 ,2023
7.	Interactive Meet: Challenges/Issues and Way Forward under IP/IPE regulations including CPE, AFA, enrolment was organized by IBBI with all the three IPA's	November 29, 2023

DECEMBER 2023

S.NO	EVENT	DATE
1.	Learning Session on Avoidance Transactions: Unravelling theComplexities	December 1st to 2nd, 2023
2.	Workshop on Resolution Professional & Coc: A Collaboration forSuccess	December 8th, 2023,
3.	Executive Development Program Mastering the Art of Liquidation,	December 15th to 19th, 2023
4.	Workshop on Mediation & IBC Framework: Trajectory &Prospects	December 22nd, 2023

JANUARY 2024

S.NO	EVENT	DATE
1.	Master Class on Managing the affairs of Corporate. Debtor by IRP/RP under IBC, 2016.	January 5th, 2024
2.	Workshop on Disciplinary Aspects & Governance under IBC, 2016.	January 12th, 2024
3.	Preparatory Educational Course for Clearing Limited Insolvency Examination.	January 17th, 2024
4.	Executive Development Program on Financial Forensics Boot Camp.	January 19th, 2024
5.	Interactive Meet on Compliances to be made by IPs under IBC, 2016	January 24th, 2024
6.	Workshop on Judicial Pronouncements under IBC, 2016	January 25th, 2024

FEBRUARY 2024

S.NO	EVENT	DATE
1.	Learning Session on Role of Related Parties under IBC, 2016.	February 2nd to 3rd, 2024
2.	Interactive Meet of Insolvency Professionals and Bankers	February 9th, 2024
3.	Workshop on Transaction Audit & Forensic Audit	February 11th, 2024
4.	Webinar on Recent Amendments under IBC, 2016	February 18th, 2024
5.	63rd Batch Pre -Registration Educational Course	February 19th to 25th, 2024
6.	Certificate Course on Insolvency & Bankruptcy Code, 2016: A Refresher Guide	February 23rd to 27th, 2024

MARCH 2024

S.NO	EVENT	DATE
1.	Preparatory Educational Course for Clearing Limited Insolvency Examination!!!	March 2nd to 6th, 2024
2.	Workshop on "Compliances to be made by IPs under IBC, 2016"	March 3rd, 2024
3.	Workshop on Judicial Pronouncements under IBC, 2016	March 10th, 2024
4.	Residential Program: A Nature’s Retreat	March 14th-16th 2024

Insolvency Professional Agency of Institute of Cost Accountants of India

FRAUDULENT / WRONGFUL TRADING &RELATEDPARTY

Renuka Devi Rangaswamy
Insolvency Professional

SYNOPSIS

It is the paramount duty of the Resolution Professional (RP) during the CIRP / the Liquidator (Lr) during the Liquidation proceedings under the IBC, 2016 (Code) is to identify the perverse transactions which caused the Insolvency or aggravated Insolvency or may put the creditors in deep trouble during the IBC proceedings of the Corporate Debtor (CD). For identifying such transactions, RP / Lr after deeply tunnelling all the details before the Insolvency Commencement Date (ICD), segregates the perverse transactions into 2 broad categories viz., Avoidance Transactions and Fraudulent Transactions. The majority of these "Red" transactions are entered / executed by the CD prior to the CIRP with the Related parties, especially with the group companies. This article deals especially with the liability fixed on the CD and related parties who were involved in the Fraudulent / wrongful trading prior to the CIRP of the CD.

INTRODUCTION:

It is the paramount duty of the Resolution Professional (RP) during the CIRP / the Liquidator (Lr) during the Liquidation proceedings under the IBC, 2016 (Code) is to identify the perverse transactions which caused the Insolvency or aggravated Insolvency or may put the creditors in deep trouble during the IBC proceedings of the Corporate Debtor (CD). For identifying such transactions, RP / Lr after deeply tunnelling all the details before the Insolvency Commencement Date (ICD), segregates the perverse transactions into 2 broad categories viz., Avoidance Transactions and Fraudulent Transactions. The majority of these "Red" transactions are entered / executed by the CD prior to the CIRP with the Related parties, especially with the group companies. This article deals especially with the liability fixed on the CD and related parties who were involved in the Fraudulent / wrongful trading prior to the CIRP of the CD.

The persons covered under the related parties are well defined under Sec-5(24) & 5(24A) of the IBC, 2016, which includes a body corporate which is a holding, subsidiary or an associate company of the CD, or a subsidiary of a holding company to which the CD is a subsidiary, Directors, Promoters, Key Managerial Persons, any person who is associated with the corporate debtor on account of participation in policy making processes of the CD / having more than two directors in common between the CD and such person / interchange of managerial personnel between the CD and such person / provision of essential technical information to, or from, the CD, any person in whom the CD controls more than 20 % of voting rights on account of ownership or a voting agreement, a public company in which a director, partner or manager of the CD is a director and holds along with relatives more than 2% 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 CD and relative of above mentioned class such persons.

Predominantly, all these perverse transactions are indulged by the Directors / Promoters when they are aware that there is no chance of the revival of the Company. By act of transferring assets or interests of the Company to the related parties, the Directors /Promoters in turn fetch the same back by transfer of

assets / benefit accrue from such related parties.

What is a resolvability index?

Insolvency is a situation where an individual or entity is unable to pay their debts. In this situation, the resolvability index, an economic metric, can be used to assess the potential for the debtor to successfully negotiate a restructuring of their debt. The index is based on several factors, including the amount of debt owed, the size of the debtor's assets and liabilities, the debtor's ability to raise capital, and the type of debt owed. Other factors such as the debtor's credit history and the current economic climate may also be taken into account. The higher the index, the higher the likelihood that the debtor will be able to successfully resolve their situation and move forward.

Avoidance of Preferential or Undervalue Transactions u/s 43, 45, 49 of the Code:

Avoidance Transactions involves RP / Lr to form opinion, identify, examine, determine, demonstrate the transactions which are preferential and undervalue transactions. Further, RP / Lr must identify the counter parties involved in these transactions and look back at the period of these transactions from the Insolvency Commencement Date (ICD).

Look back period for the preference or undervalue transactions u/s 43 and 45 of the Code entered between the CD and unrelated parties is one year and if with the related parties is two years. However, undervalued transactions "deliberately or intentionally" entered by CD u/s 49 of the Code with either unrelated or related parties to defraud the Creditors of the CD, there is no look-back period.

On filing of application by the RP / Lr, the Adjudicating Authority (AA) may pass the order to reverse such transactions as if such transactions have not entered or order to compensate the loss to the CD or any other necessary directions to protect the interest of the CD and its Creditors. Further AA before passing order analyses whether these transactions are entered by the CD in the ordinary course of its business or the counter party and the transactions entered with good faith. Such bona fide transactions are protected by the AA and even if these transactions are reversed by AA, interest of the bona fide counter party is protected by its suitable order.

Importantly that the orders passed by the AA u/s 43, 45 and 49 of the Code directs the CD and the counter parties to the transactions to avoid certain transactions. Hence, the AA order is maintainable on the related parties and on the third parties even if they are not at all connected with the CD's operations. It is notable that the AA's order u/s 49 is having flavor of Sec-45 and Sec-66 of the Code and need lot of efforts on the part of the RP / Lr to prove that such transactions entered by the CD intentionally and deliberately to defraud the creditors with all substantial documentary evidence.

Fraudulent Or Wrongful Trading u/s 66 of the Code:

While Section-66 of the Code deals with Fraudulent / wrongful trading of the CD with any parties, there is no look back period for these transactions. Peculiarly, Sec-66(1) of the Code, heavily lays that any persons who were knowingly parties to the carrying on of the business of the CD in such a manner shall be liable to make such contributions to the assets of the CD as it may deem fit. Here any person u/s 66 means, Directors, Promoters, Employees, Advisors, Related parties, Contributories who were knowingly carrying on the fraudulent business is to contribute to the assets of the CD to make out loss to the CD.

It is pertinent to note that Sec 66(2) of the Code direct that a director or partner of the CD who conducts the wrongful trading business of the CD as the case may be, shall be liable to make such contribution

to the assets of the CD as it may deem fit.

The reason behind this is that only the directors conduct the day-to-day operations of the CD and are very well aware of each and every aspect of the conduct of the business. One such wrongful trading example is that without approval from the Board, taking unrelated speculative derivative contracts and making huge losses to the CD. Another instance is selling adulterant products or illegal trading of goods / services. In such cases, all the consequential liabilities which caused the burden on the CD are to be borne by the Directors, who conducted the wrongful trading. However, no liability can be ordered on the third parties or counter parties who are not connected to the conduct of the CD's business.

The Hon'ble High Court of Tripura, in the matter of "1Smt. Sudipa Nath Vs Union of India, MCA, IBBI", analyzed about the Liability for fraudulent conduct of business, u/s- 542 of Companies Act, 1956, Liability for fraudulent conduct of business, u/s- 339(1) of Companies Act, 2013 and fraudulent trading or wrongful trading, u/s- 66(1) of the Code. Further pointed out that in all these Acts and provisions, common mandatory pre-requisite factors are that if any business of the Company/ CD has been carried on an intent to defraud the Creditors of the Company or for any other fraudulent purpose with "Men's rea."

Further in the matter of Smt. Sudipa Nath (Supra), The High Court of Tripura held that it is clear from Sec-66(1) of the Code that NCLT is not having jurisdictions in declaring any transaction as void even if fraudulent but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of CD which is fraudulent or wrongful. And such application u/s 66(1) of the Code shall be filed by the RP / Lr only. Finally Sec 66 (1) also restricts the power of NCLT subject to being satisfy with pre-requisite that any business of the CD has been carried on with intent to defraud creditors or the corporate debtors or for any fraudulent purpose and if satisfied it has powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the CD with mens rea to make them personally liable to make such contributions to the assets of the CD as it may deem fit.

While passing orders in the Smt. Sudipa Nath (Supra) matter, The High Court of Tripura has relied on the following judgements: The Hon'ble Apex Court in the matter of "[2]**Usha Anantha Subramanian vs. Union of India"** held that u/s 337 and 339 of the CA, 2013 that any business of the company whichhas been carried on with the intent to defraud creditors of that company, the penalty may be imposed for such frauds on an officer of the company in which mis-management has taken place, however not on third/ another parties / another Companies.

The Hon'ble Calcutta High Court observed in the matter of "[3]**Prashant Properties Limited Vs. SPS Steels Rolling Mills Ltd"** in the context of Section 66 of IBC, the NCLT cannot avoid past transactions, even if fraudulent, but under Section 66(2) can only direct the Director/partner of the Corporate Debtor, and no other parties to the transaction, to make contribution to assets of the Corporate Debtor.

The Hon'ble High Court of Kerala held in the matter of "4**South India Paper Mills Pvt. Ltd.Vs Sree Rama Vilasam Press &Publications"** dealt in detail about the Fraudulent Preference u/s 531, Liability for Fraudulent conduct of Business u/s 542 and Powers of Court to assess damages againstdelinquent Directors etc., under the CA 1956. The common ingredients of these sections arethat no escape for the fiduciary persons who conducted the businesses of the Company in the fraudulent manner by order passed by the Court to contribute of the losses to the Company.

The Hon'ble Apex court in the matter of "[5]**Mr.Anuj Jain, IRP of Jaypee Infratech Ltd.,Vs Axis Bank Ltd.,"**

held that the Transactionsunder avoidance and fraudulent / wrongful trading are entirely different and specific material facts are necessary to be pleaded forremedies u/s 45/46/47/66 of IBC, 2016 while making motion to the AA by the RP / Lr.Further the Apex court held that theprovisions of Sec- 66 of the Code related to fraudulent trading and wrongful trading entail the liabilities of the persons responsible, therefore.

The Hon'ble NCLAT in the matter of "**6DeepakParasuraman Vs. Sripriya Kumar"** upheld the order passed by NCLT allowing the prayers of the RP filed u/s 43, 46 and 60(5) ofthe Code. While dealing with this matter, NCLATobserved that the Sec-339 of the CA, 2013 andSec-542 of CA, 1956 was aimed atconferring jurisdiction in the course ofwinding up of the company to proceedagainst the persons responsible for fraudulentconduct of the business of the Company and makings such persons personally liable for such fraudulent trading to recouping losses incurred to the Company as a relief. Further held that the Sec-66(1) of the Code which is the pair Materia of Sec-542 of CA, 1956 and Sec-339 of CA, 2013 also directed towards making such persons personally liable for such fraudulent trading to recouping losses incurred and thereby that the NCLT can pass order holding such persons liable to make such contributions to the assets of the CD as it may deem fit.

The Hon'ble Apex court in the matter of "**7Deepak Parasuraman & Anr. Vs. Sripriya Kumar & Anr.,"** upheld the order of the NCLAT in 6Deepak Parasuraman Vs. Sripriya Kumar" (supra) to contribute to the assets of CD who are related parties conducted the fraudulent business and observed that even though the Appellant argues that the transactions have been in the ordinary course of business and no element of fraud was involved therein but, the fatal shortcomings noticed by the NCLT and NCLAT leave nothing doubt that the transactions are hit by the mischief of Sec-66 of the Code.

The Hon'ble Apex court in the matter of "8**Gluckrich Capital Pvt. Ltd., Vs the State of West Bengal & Ors.,"** while dismissing the appeal, upheld the order of the High Court of Tripura passed in the matter of Smt. Sudipa Nath (Supra). Further the Apex Court held that remedy against third party is not available u/s 66 of the IBC and the Civil remedies which may be available in law are independent of the said Section that can be perused by the RP or the Successful Resolution Applicant for recovery of dues payable to the CD. Accordingly, order u/s -66(1) of the IBC can be passed only on to the Directors, Promoters, Advisors, Employees, Related parties, Contributories those who involved in the Fraudulent Trading to contribute to the assets of the CD. However, order u/s 66(2) may be passed on to the Directors / Promoters who indulged in the Wrongful trading to make good such losses incurred by the CD.

Further that the "**9Bankruptcy Law Reforms Committee Report"** – November 2015 dealt with the Treating of recoveries from vulnerable transactions. While detailing the avoidance transactions which may result in reversing transactions by the application of RP / Lr to AA and Fraudulent or Wrongful trading would result in contribution to the CD to make such losses Good by those are responsible for such fraudulent or wrongful conduct of the CD business before CIRP. The report also stressed that there should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the "look back period" should be specified in regulations to be longer.

The Hon'ble NCLAT while upholding the order of NCLT in the matters of " **10Rakesh Kumar Jain, RP of HBN Homes Colonizers Pvt. Ltd., Vs Jagdish Singh Nain**, **RP of HBN Foods Ltd.,& 20 Ors.,"** and in the other appeal arising out of the same NCLT order in the matter of "**11True Blue Fin lease Limited Vs Jagdish Singh Nain , RP of HBN Foods Ltd.,"** dealt in detail about the Sec-14, Sec-66 and Sec-60(5) of the IBC.

In this appeal, NCLAT while referring the Apex Court's judgements in **"M. Pentiah Vs. Veera Mallappa**

Muddala", "CIT Vs. S. Teja Singh", "Corporation of Calcutta Vs. Liberty Cinema", "Raj Krushna Vs. Binod Kanungo", "Sultana Begum Vs. Premchand Jain", "Kailash Chandra Vs. Mukundi Lal", "University of Allahabad Vs. Amritchand Tripathi" "Manohar Joshi Vs. State of Maharashtra and Ors" applied the principles laid down by the Apex court in the above judgments and held it is the duty of the Appellate Tribunal to construe Section 14 (1)(a) and Section 66 of IBC harmoniously to make the enactment effective and workable while there is absolutely no inconsistency or repugnancy between Section 14 (1) (a) and Section 66 of IBC. Further held that the Section 14 of IBC is not a bar to pass appropriate order in the pending proceedings **against the RP or suspended directors and related parties, by the AA, during the CIRP/ Liquidation,** consequently upheld the order of AA directing the Respondent Nos. 2 to 21 **who are related parties viz., different companies,** RP of HBN Homes to contribute to the assets of the other CD, HBN Foods Ltd.

From the above explanation and supporting judgements, it is clear that the order under the Sec-66 of the IBC can be passed by AA only on the Directors, Promoters, Key Managerial Personnels, Group companies, advisors and related parties of these persons who were knowingly involved in such transactions and contribute to the losses of the CD for the benefit of the Creditors. For the brief reference, herewith presented the flowchart on the Sections- 43, 45, 49, 66 of the IBC in detail. Resolve the distressed companies in a time bound manner. This will help the Insolvency Professional and the Resolution Applicant to resolve the company earliest.

REPLACEMENT OF RESOLUTIONAL PROFESSIONAL: (The first person appointed and the last person to be relieved)

Advocate Umesh Singhal
Sigma Legal Group

SYNOPSIS

Creditor in control regime has given supremacy to the Committee of Creditors to take effective decisions in the process of insolvency resolution. Their role extends to facilitate the CIRP process by taking vital decisions which results in maximization of the assets of the Corporate Debtor and its successful resolution. The Resolution Professional, while acting as an administrator of the CIRP process, has to act strictly in accordance with the provision of law and protect the interest of the creditors. If the RP does not conform to the CoC he carries the risk of getting replaced. In this Article we will discuss the powers of CoC and adjudicating authority to replace the Resolution Profession.

INTRODUCTION

The Insolvency & Bankruptcy regime has shifted from "debtor in possession" legacy to a "creditor in control" regime. The reins of CIRP are in the hands of CoC since it is empowered to take all the important decisions by casting their vote. Members of CoC have a pivotal role while exercising their commercial wisdom to resolve and restructure the distressed CD and take such decisions towards its revival in a time bound manner.

As per Section 21(2) of the Insolvency and Bankruptcy Code, 2016 the Committee of Creditors consists of all the Financial Creditors unless there are no Financial Creditors of the CD then the Committee shall comprise of the eighteen largest Operational Creditors in value. The object behind this is that Financial Creditors will take effective commercial and business decisions to recover their money. The Committee of Creditors, being a key decision-making authority in CIRP process is entrusted with wide powers under IBC, 2016.

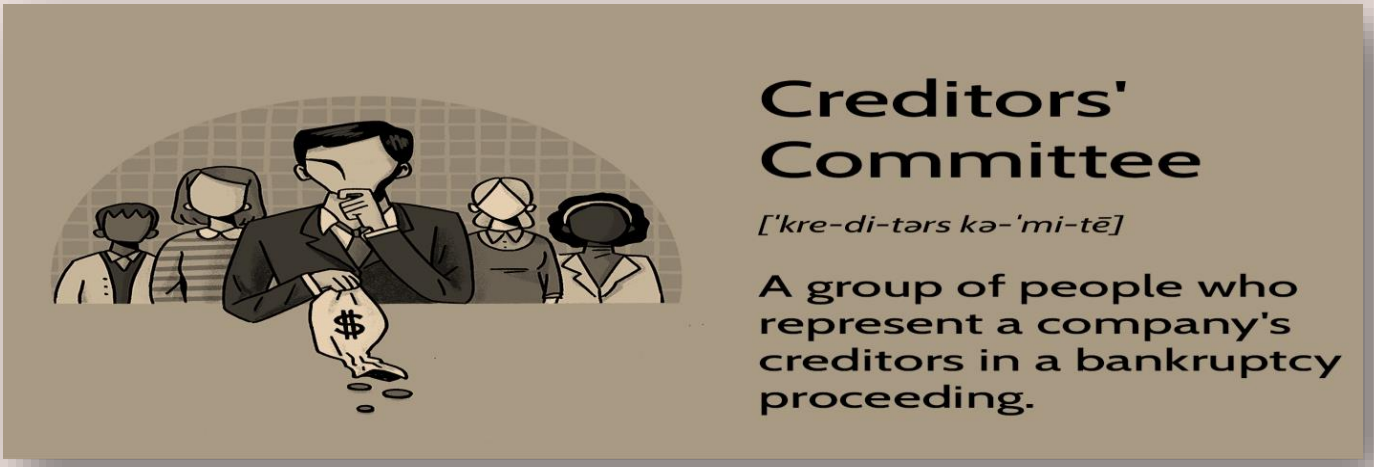
(The Fourth Pillar of IBC)

The CoC helps in enabling the smooth resolution process and maximizing the value of assets of the CD by facilitating the Resolution Professional (RP) in discharging his duties. The duties of the RP are enshrined under Section 25 of IBC, 2016 which consist of taking immediate custody of assets of CD, represent and act on its behalf, raise interim finance, convene, and attend all CoC meetings, prepare Information Memorandum (IM), etc. Section 23(2) further provides that the "RP shall exercise powers and perform duties vested in or conferred on the IRP" under the IBC.

RP TO ACT UNDER THE SUPERVISION OF COC

The role of the RP is to act as a conduit between the debtor and the creditor and help in aligning the interests of the CD with the creditors. RP has to perform various statutory duties and abide by IBC along with underlying rules and regulations. Therefore, the RP cannot act on his own and take decisions on the matters which are under the domain of CoC. Several actions of the RP require approval of the CoC and can only be performed after the prior authorization from CoC. Section 28 of the I&B Code specifies the acts which the Resolution Professional cannot undertake without the prior approval of the committee of creditors such as raise any interim finance in excess, create security interest, changing capital structure or ownership interest or constitutional documents of the CD, debit transaction in excess, carry out any

related party transaction, delegate its authority, dispose shares of shareholders to any third party, change in the management or subsidiary of the CD, transfer any debt (financial or operational debt) or any rights otherwise than in the ordinary course of business, changing any appointment or terms of any personnel as specified by CoC or statutory auditors or internal auditors. These aforesaid acts can only be performed when RP convene a meeting of COC and resolution is passed by the vote of sixty six percent of the voting shares. If any such act is performed without the prior approval of the CoC then such acts shall be void (Section 28(4)). Section 28(5) further provides that where the RP performs any act without the prior approval of the COC then the CoC is empowered to report such actions of the RP to the Board for taking such actions against the RP as are necessary.



REPLACEMENT OF RP BY THE COC

The RP therefore acts under the control and supervision of the CoC while the management of the CD vests with the RP. The CoC has wide powers under the Code to supervise and control the CIRP including the power to replace the RP. According to Section 27 of the IBC, 2016 the CoC has the discretion to replace the RP. If the CoC, at any time during the corporate insolvency process of the CD, forms an opinion that the Resolution Professional is required to be replaced then it may replace the RP with another Resolution Professional by a vote of sixty six percent of the voting share subject to a written consent from the proposed resolution professional. The decision to remove the RP is the collective decision of the members of the CoC and an individual creditor is not vested with this power. The CoC before taking such decision is required to form an opinion however such opinion cannot be formed wherein the CoC records any adverse opinion which will harm the Resolution Professional not only in present assignment but also during the appointment relating to future proceedings. Even if the CoC forms an opinion on the ground of performance of RP and not on the basis of any adverse allegations it will still be against the interest of the Resolution Professional (Pallavi Joshi Bakhru and Ors. Vs. Universal Build Well Private Limited and Ors., (IB) 456 (ND)/2018 & State Bank of India vs. Ram Dev International Ltd., Company Appeal (AT) (Ins.) No. 302 of 2018.

COLLECTIVE DECISION OF THE COC

The An individual person/creditor/stakeholder cannot file an application under Section 60(5) of I&B Code for replacement of the RP when there is an expressed provision namely Section 27 of IBC.

Section 27 of the Code does not speak of 'any person' other than the 'Replacement' of Resolution Professional by the Committee of Creditors".

Veeral Controls Pvt. Ltd. Vs M/s. Regen Powertech Pvt. Ltd, Company Appeal (AT)(I) No. 98/2020
It has been held by the Hon'ble NCLAT in the matter of, that "An individual person/creditor/stakeholder does not have any Locus to prefer an application for Replacement of the RP. CoC is under the fiduciary duty to protect the interest of all the stakeholders of the Corporate Debtor and therefore such decision to replace the RP is taken collectively by the committee and no individual creditor/stakeholder can file the application for the Replacement of RP. If such applications are allowed, then even on the smallest inconvenience faced by the creditors/claimants/stakeholders the Hon'ble NCLT will see a plethora of applications under section 27 of the I&B Code.

Members of COC may have competed interest and their agenda to remove the RP may only be limited to protect their own individual interest and rights other than the revival of the Corporate Debtor which will result in the conflict of interest within the COC. Therefore, it is the COC who is entrusted with this power since such decision also affect the approving of the Resolution Plan as it is the Resolution Professional's duty to examine all the Resolution Plans received by him and certify that the Resolution Plans complies with the requirements of Section 30(2) and is within the letter and spirit of IBC.

<u>POWER OF ADJUDICATING AUTHORITY</u>

Even the powers of the Adjudicating Authority are limited to the extent that it cannot adjudicate upon the decisions taken by the CoC while exercising its commercial wisdom. However, the CoC can face the resistance by the Resolution Professional by way of non-convening of the CoC meetings by the RP for taking the agenda of his/her removal. Similar kind of situation occurred in Veeral Controls case (supra) wherein the applicant namely SREI Equipment Finance Ltd., requested the RP (appellant) to conduct the CoC Meeting under the agenda for replacement of RP. The Hon'ble NCLT directed for his replacement with another RP.

However, the appellant preferred an appeal before the Hon'ble NCLAT and the Tribunal observed the below written:

"It is true that Section 27 empowers CoC for replacement of the RP but if there is a peculiar situation in which the RP, who under Regulation 18 of the IBC CIRP Regulation 2016, himself is sitting tight over the matter for convening Meeting of CoC, the Adjudicating Authority who is also the appointing authority of IRP cannot be allowed to be a mere spectator"

Moreover, the Hon'ble NCLAT in the matter of Srigoal Choudary RP of Shree Ram Urban Infrastructure Limited vs SREI Equipment Finance Limited Company Appeal (AT) (Ins) No. 1443 of 2022, further clarified that under Section 16 of the General Clauses Act 1897, one who appoints can also remove/dismiss the appointee. If under a Central Act or Regulation a power to appoint is conferred on any person then this power shall also include the power to suspend or dismiss any person appointed either by itself or by any other authority. Adjudicating Authority being the appointing authority of Resolution Professional was within the jurisdiction to order for removal of the RP especially in such circumstance where the RP has not taken and/or is not willing to take any steps to convene a meeting of the CoC for the resolution of removal of the RP. The Adjudicating Authority with the intent to implement the provisions of the I&B Code in its letter and true spirit can exercise its inherent jurisdiction to remove the Resolution Professional when the conduct of the RP is resulting in the delaying of the smooth resolution of the Corporate Debtor.

LIMITED POWER OF ADJUDICATING AUTHORITY

The decision to replace the RP comes within the commercial wisdom of the COC since the Resolution Professional whose conduct is against the interest of the stakeholders, and which hampers smooth conclusion of the CIRP cannot be entrusted with the management of the Corporate Debtor and to oversee its insolvency process. The interference by the Adjudicating Authority is only required when there are material irregularities in replacement of RP or when such an action dehorns the statutory provisions and the rules framed thereunder.

"It is not within the jurisdiction of the Adjudicating Authority to interfere with the decision of the COC unless the decision taken by the COC is perverse or without jurisdiction."

Punjab National Bank vs. Kiran Shah, IRP of ORG Informatics Ltd., Company Appeal (AT) (Ins) No. 749 of 2019

"The Adjudicating Authority does not have the jurisdiction to review the justness of majority opinion expressed by the COC. This decision of the COC is not subject to the judicial review. Adjudicating Authority cannot "don the mantle of a supervising authority."

Venus India Asset-Finance Private Limited Vs. Suresh Kumar Jain, RP of MK Overseas Private Limited Company Appeal (AT) (Ins.) No. 1395 of 2022 and I.A. No. 4539 of 2022

The duty of the Adjudicating Authority is restricted to watch over whether the COC has taken the decision to replace the RP by the vote of sixty six percent of voting share and that the proposed RP has given his written consent. The decision taken by the CoC is after deliberating the performance of the RP. The I&B Code specifically demarcates the commercial aspect of insolvency from the judicial aspect and restricts the authorities within their area. The Adjudicating Authority, being a creature of law while adjudicating on this issue cannot substitute the commercial wisdom of the CoC and has to act within the jurisdiction circumcised by the IBC.

REPLACEMENT OF RP VIS-À-VIS PRINCIPAL OF NATURAL JUSTICE

The scheme of Insolvency & Bankruptcy Code, 2016 under Section 27 does not compel the Committee of Creditors to give any reasons for the replacement of the RP **(Sumant Kumar Gupta vs. Committee of Creditors, Company Appeal (AT) (Ins) 1037 of 2020).** Neither it is required by the Adjudicating Authority to look into the reasons or decide whether sufficient cause is provided by the COC. Further Section 27 does not require assessing the performance of the RP.

"The reason behind such a provision is that the relationship between the RP and CoC is that of confidence and trust."
(Bank of India vs Nithin Nutrition's Private Limited, Company (AT) Ins No 497 of 2020).

Section 27 thereby itself ousts the principles of natural justice since it nowhere prescribes any right of being heard to the Resolution Professional (PNB case (Supra)). The scheme of section 27 further does not suggest that the Resolution Professional is to be made party to such a matter and a notice is to be issued before replacing him. The provision further does not provide for the right to be heard before the Adjudicating Authority. The replacement of RP gets concluded when the decision is taken by the COC in its meeting with majority voting. In the matter of Committee of Creditors of LEEL Electricals Ltd. Through State Bank of India vs. Leel Electricals Ltd. Through its Interim Resolution Professional, Arvind Mittal, Company Appeal (AT) (Insolvency) No. 1100 of 2020, the Hon'ble NCLAT further observed that when COC has passed resolution for replacement of RP with requisite majority the IRP/RP cannot claim that his legal rights have been infringed and "it would have been prudent on the part of the RP/IRP to bow to the commercial wisdom of the COC and quit gracefully".

CONCLUSION

The relationship between the COC and RP is based on trust and confidence. The Resolution Professional acts as an administrator of the insolvency resolution process and performs his functions under the guidance and supervision of COC. The functioning of the COC depends on the conduct of the RP. There should not be any scope of friction between the COC and RP. The RP must act with transparency and accountability to COC and the moment it loses the trust of the COC the COC will exercise its discretion to replace the RP. **Such a decision of the COC will prevail, and the RP does not even have the right to be heard and represent his case unless there is material irregularity.** This on the face of it looks like a violation of the principles of natural justice. However, the reason behind such a decision is that the Resolution Professional on his appointment undertakes the management of the Corporate Debtor and is entrusted with certain powers to ensure that the CD is kept as a going concern and place before the COC the resolution plan which confirm with section 30 of the IBC. The RP has a key role in the revival of the CD and therefore cannot afford to lose the trust of COC. Section 27 empowers the COC to keep the CIRP under its control.

STATUS OF OPERATIONAL CREDITOR OTHER THAN EMPLOYEE/WORKMEN VERSUS FINANCIAL CREDITOR UNDER INSOLVANCY AND BAKRUPTCY CODE

Mr. Yudhishter Sharma,
Advocate & Insolvency Professional

SYNOPSIS

Yudhishter Sharma is an Advocate, Mediator, Arbitrator, Insolvency Professional and a qualified Independent Director, has the qualification as MBA(Finance), with project on profitability of banking, CAIIB, LL. B with specialization in Labour Laws, MA (Economics), PG Diploma in Cyber and Tax Laws and B. Com (Hons).

Empaneled Mediator with Delhi High Court, ICADR, NCDRC and MCA. Arbitrator with Delhi High Court, ICA(FICCI), ICADR and AICADR (ASSOCHEM).

Whenever any company comes under (Corporate Insolvency Resolution Process) CIRP, there are basically two types of creditors, Financial and Operational Creditor.

First, we will look into the words used subsequently.

The basic word is claim, which is defined u/s 3(6) that it is a right to payment and remedy for breach of contract under any law for the time being in force. In the same way financial debt is defined u/s 5(8) that a debt along with interest, if any, which is disbursed against the consideration for the time value of money.

As for as operational creditor is concerned, we are discussing about only the goods/ service providers, it is defined u/s 5(20) means a person to whom an operational debt is owed, and operational debt is defined u/s 5(21) that a claim in respect of the provision of goods or services.

The goods or service providers are mainly by MSME, registered as per section 7 of "The Micro, Small and Medium Enterprises Development Act 2006 and the limitation provided u/s 11(aa) is a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process and are not eligible to file CIRP.

Now we can discuss the edge of financial creditors over operational creditor.

1. That no notice is required to be issued by the financial creditors, however it is mandatory for operational creditor to issue notice u/s 8.

2. That there should not be any existing dispute pending before a lawful authority in case of operational creditor, but no such condition is applicable on financial Creditor.

3. That application of CIRP is u/s 7 filed by the financial creditor and u/s 9 by the operational creditor.

4. That Financial Creditors can only member of committee of creditor (CoC) as per section 21.

5. That in terms of section 24(3) (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt, the notice of meeting of CoC can be given, but without any voting right.

6. That means operational creditors are on weak footing to protect their interest in relation to financial creditors.

7. That as per section 30(2)(b)(i) the resolution professional shall examine each resolution plan received by him to confirm that each resolution plan to provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53. Here *explanation*-1 *says* it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Normally when the operational creditor supplies the goods/ service through it invoices because he is weaker in the bargaining position to get an agreement and rarely there is any written agreement.

That the section 4(1) of the Sale of Goods Act, 1930 states that – 'A contract of sale of goods is a contract whereby the seller either transfers or agrees to transfer the property in goods to the buyer for a decided price. ' And under Rule 4A of the Service Tax Rules, 1994, it is compulsory for a service tax assesses to issue a bill or invoice within 14 days from the date on which the taxable service was completed or the date on which the payment was received for the service, whichever comes first. That now under the GST regime, an "invoice" or "tax invoice" means the tax invoice referred to in section 31 of the CGST Act, 2017. This section mandates issuance of invoice or a bill of supply for every supply of goods or services or both. It is necessary for a person supplying goods or services or both to issue an invoice and also as per section 9 of the contract act as far as the proposal or acceptance of any promise is made in words, the promise is said to be expressed. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

In view of the above in the absence of any written contract the issuance of invoice is also a contract.

That it is witnessing innumerable challenges and disputes, there are still some areas which lacks clarity. "Interest" is one such zone. There has been some discussion on this issue before Tribunals. The big question is whether "interest" is chargeable on "operational debt" to maintain insolvency application. Is it possible to club "interest" with principal debt to crossover the threshold limit of INR 1 crore. Distinction in treatment of "interest" under "financial debt" versus "operational debt" Prior to IBC, financial debt and operational debt were not considered differently for the purpose of initiating winding-up proceedings against a company for its inability to pay debt under the Companies Act.

However, as we saw the definition with the introduction of IBC as for as operational creditor is concerned, we are discussing about only the goods/ service providers, it is defined u/s 5(20) means a person to whom an operational debt is owed and operational debt is defined u/s 5(21) that a claim in respect of the provision of goods or services., and both these debts, IBC provides for different procedures with corresponding rules and regulations. financial debt is defined u/s 5(8) that a debt along with interest, if any, which is disbursed against the consideration for the time value of money.

Accordingly, distinction between the two debts is in relation to the component of "interest." The term

“financial debt” is defined to include “interest” (if any), while there is no mention of “interest” in the definition of “operational debt.” The distinction in the treatment of “financial” and “operational” debt and creditor has been sufficiently deliberated and upheld by the Supreme Court in the celebrated case of Swiss Ribbons (P) Ltd. v. Union of India, the distinction related to the component of “interest” is not explicitly dealt with yet. The Supreme Court held in Pioneer Urban Land and Infrastructure Ltd. v. Union of India wherein important distinction is that in an operational debt, there is no consideration for the time value of money—the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Evidently, there is no concept of “time value of money” for a debt to qualify as an “operational debt,” unlike a “financial debt.” When payment of the said consideration is delayed beyond a due date, and the “interest” is levied. Such interest, however, is in the form of “penalty” and not a return on investment.

The position of law as it exists today on these issues. Interest is chargeable on “operational debt.” In the case of D.F. Deutsche Forfeit AG v. Uttam Galva Steel Ltd., observed that there is also some time value of money for an “operational debt” as goods or services are supplied against money as consideration. It observed that it is not expected that delay in payments of consideration beyond time is left unchanged. It is a known fact that the money today will worth less from what it was worth yesterday, and hence, any delay beyond the credit period should entitle the creditor to claim “interest.” NCLT, Mumbai noted that: On commercial side, the [operational] creditor claiming interest is quite normal and justifying business always runs keeping in mind the time value of money. Subsequently, even NCLT Mumbai revisited this question in Vitson Steel Corp (P) Ltd. v. Capacite Infraprojects Ltd.,[9] and united with the latter approach by holding that interest cannot be claimed as an “industry practice” on an operational debt. It held: The object of the Code is not advanced by surprising the corporate debtor with a claim for interest firstly by claiming that it was as per industry practice and thereafter making a pitch that it was as per (MSME Act) Micro, Small and Medium Enterprises Development Act, 2006, when the operational creditor was confronted with a question posed by this Bench as to how the claim for interest was sustainable when neither the purchase order nor the invoices carried a provision therefor. the same is rejected.

The NCLAT decision does clarifies the position of law on this issue that “interest” is chargeable on an “operational debt” provided there is an agreement to that effect. Whether “interest” would qualify as “operational debt” to file insolvency application under Section 9 of IBC. While it is a good development that the interest on operational debt is being recognised and considered.

As for as claim is concerned, they will be treated u/s 53(1)(f) of IBC means lowest step of claims for outsiders, however the financial creditor u/s 53(1)(b), so it is imperative the CIRP company is revived on their cost, because they have to face maximum possible haircuts, which resulted in a huge loss and difficult to survive and resulted into either close down or invoke PPIRP (Pre-Packaged Insolvency Resolution Process).

From the above facts it is clear that for survival of one CIRP Company push n numbers of MSME for closure or invocation of PPIRP and thus it is a vicious circle to have more and more litigation, which resulted into increasing the Burdon of litigation on Tribunal, those are already overburdened with the cases as per their daily cause list.

In my view the Insolvency and Bankruptcy Code (IBC) is made for saving the banks and financial institutions and not the economy of the country as whole.

We are tabulating the issues discussed above for easy and comparative understanding.

S. No	Heading	Bank/ Financial Institutions	Operational Creditors other than employees/ workmen
1.	Applicable Law	Section 7 of IBC	Section 9 of IBC
2.	Notice	Not required	It is mandatory to send u/s 8 of IBC
3.	Existing dispute	Can be pending with any agency	There should not be any existing dispute.
4.	Status	Maximum Banks	Maximum MSMEs
5	CoC	Member	It can be if share of credit is 10% or more
6	Voting Rights	Yes, in proportion to their share of credit.	No.
7	Right to Protect	It has right to protect its interest	It has no such facility.
8	Claim	Can be submitted on the basis of agreement of loan	It can be summited on the basis of agreement to provide services/supply of goods.
9	Support	It is supported by a/c statement	Supported by invoices and delivery of goods/ services
10	Interest	They are automatically eligible to claim	If there is any clause of interest in the agreement, then can be claimed. If there is no agreement and rate of interest is shown in the invoice than it is a matter of litigation.
11	Practical aspect	The agreement is normally available.	The agreement is not available in all the cases; however, invoices are available in all the matters.
12	Acceptance of Interest	In all the matters	It is not routine but chances of acceptance and after a litigation.

13	Acceptance of claim	It is very easy.	It is very difficult.
14	Providing services during the moratorium	There is no compulsion to provide any additional loan.	The operational creditors have to continue to provide services in spite of claims submitted for long overdue.
15	Disbursement of claim	u/s 53(1)(b)(ii) of IBC for secured creditors if they acted as per section 52 of IBC and u/s 53(1)(d) for all other creditors	Us/ 53(1)(f)
16	Haircuts	Minimum Possible	Maximum
17	Recovery	Recovery is higher and huge profits	Recovery is very meager or no recovery, which resulted in huge losses.
18	Result	Survived	Either close down due to losses or can try to survive through PPIRP (Pre-Packaged Insolvency Resolution Process)
19	Effect	IBC is for survival of banks.	IBC is not for survival of economy of the country

SEBI REGULATIONS ON LISTED COMPANIES UNDERGOING CIRP UNDER IBC,2016

Mr. R. Sugumaran
Insolvency Professional

ABSTRACT OF THE ARTICLE:

The Government of India has enacted the Insolvency and Bankruptcy code in the year 2016, to facilitate restructuring and to provide resolutions under the process of insolvency and bankruptcy of Companies registered under the Companies Act, partnership, and individuals which/who are in financial distress. For the Listed Companies whose governance is monitored by SEBI through LODR Regulations, anyscheme of arrangement for restructuring was required to be preapproved by Stock Exchanges, before filing it before any Tribunal or Court. After the enactment of IBC, 2016, once the scheme under the Resolution Plan is approved by NCLT, the Corporate Debtor need not undergo the process specified by SEBI Regulations. Now, SEBI Regulations are amended to eliminate duplication of compliance in order to complete the Resolution Process within the specified timelines, under the IBC, 2016.

SEBI REGULATIONS ON LISTED COMPANIES UNDERGOING CIRP UNDER IBC, 2016

Preamble:

The enactment of Insolvency and Bankruptcy Code, 2016, facilitated early resolution for the stressed companies, by way of restructuring, reorganization, and delisting by way of adoption of Resolution Plan. The code also empowers to find resolution for the partnership firms and individuals which/who are under financial stress. To meet the point of resolution with ease within the stipulated time and to avoid duplication of process, SEBI has amended LODR Regulations which regulate the governance of Listed Companies. The amendments in SEBI(LODR) Regulations with respect to the Listed Companies under Corporate Insolvency Resolution Process (CIRP) are discussed hereunder:

SCOPE OF IBC:

The code enables early resolution with a time bound process for the Companies, Partnership Firms, and Individuals with the ultimate goal of reaching of maximization of wealth, professional management and meeting the requirements of all stakeholders in a balanced manner. In case such a resolution cannot be reached, the Code provides for Liquidation in the case of Companies and Bankruptcy for Partnership Firms and Individuals to pay off the creditors and the other stakeholders. Finally, when all the assets are sold off and all the stakeholders are settled, the code provides for dissolution of the Companies and Partnership Firms and Bankruptcy for individuals.

WHAT IS CIRP:

Corporate Insolvency Resolution Process is the process initiated by the Adjudicating Authority i.e., National Company Law Tribunal (NCLT), by admitting the petition u/s 7 or 9 or 10 of the IBC, 2016. Financial Creditors of the Companies, when there is default in the loan commitments, initiates Insolvency Petition u/s 7 of the IBC, 2016, against the companies under the said code. Similarly, the insolvency process is initiated by Operational Creditors u/s 9 and by the Companies themselves for voluntary liquidation u/s 10 of the said code.

Under this process, the management of the Company is vested with the Insolvency Professional who is appointed by NCLT at the time of admission. The authority of Board of Directors will stand suspended on the admission of the Company under CIRP. There will be moratorium during the CIRP period against any other legal proceedings.

ROLE OF RESOLUTION PROFESSIONAL:

On the admission of CIRP by NCLT, an Insolvency Professional/Insolvency Professional entity is appointed as Interim Resolution Professional (IRP). He/ She or an Insolvency Professional Entity will take over the management of the Corporate Debtor from the Board of Directors. The employees of the Corporate Debtor will report to the IRP and the suspended directors are required to cooperate with the IRP in managing the affairs of the Corporate Debtor. The IRP will invite claims from all the creditors and collate the same. He will convene the First Committee of Creditors (COC), after constituting it based on the claims received from the creditors. He/ she/ Insolvency Professional Entity will seek Resolution Plans from the Prospective Resolution Applicants. On the approval of the Resolution Plan by the Committee of Creditors (COC), the same will be filed with NCLT for its approval.

ROLE OF COMMITTEE OF CREDITORS:

The COC constituted by IRP, will take on record the claims collated by IRP. It will appoint Resolution Professional (RP) in the place of IRP and will supervise the work of RP in finalizing the appropriate Resolution Plan, after inviting such Resolution Plans from the Prospective Resolution Applicants by the RP and getting approval of such Resolution Plan by NCLT. COC plays the role of Board of Directors. COC will approve the CIRP expenditures, and each member of the COC will contribute towards the CIRP expenditures, proportionately based on their claims.

IBC Vs SEBI(LODR):

While IBC, 2016 provides for resolutions for the stressed companies, by way of reorganization, restructuring and delisting, the SEBI(LODR) Regulations provides for disclosures and compliances for better governance of Corporates which are listed.

On admission of the Listed Companies under CIRP by NCLT, IRP appointed by NCLT is required to comply with the provisions of the applicable laws, when managing the Corporate Debtor. Accordingly, he/ she / insolvency professional entity, will follow the SEBI(LODR) Regulations in the case of listed companies undergoing CIRP in its governance. When. NCLT approves the resolution plan under the IBC, 2016, involving restructuring, reorganization, and delisting in the case of listed companies, such plan needs to be disclosed to SEBI. Now, amendments were made in SEBI(LODR) Regulations for prompt disclosures of the events happening under IBC, 2016, while excluding such events from the normal process specified in SEBI Regulations.

Supreme Court in the case of Innovative Industries Limited vs ICICI Bank Limited, held that IBC, 2016 super cedes any other Law and once moratorium is declared u/s 14 of the IBC, 2016, SEBI has no power against the Corporate Debtor.

In Shobha Limited vs Pan card clubs Limited, NCLT, Mumbai declared that Investor Protection is dealt by SEBI, whereas IBC, 2016 deals with the interest of the creditors. Hence investors cannot proceed against the Corporate Debtor when it is under CIRP.

CLARIFICATION FROM MCA ON IBC Vs COMPANIES ACT:

The Ministry of Corporate Affairs has clarified that when NCLT approves a resolution involving restructuring,reorganization and delisting, the requirement under the Company law, to get the approval by the shareholders of the Corporate Debtor is not required. In normal course, when there is restructuring of companies through the process of merger, demerger, amalgamation, delisting, acquisition etc., the approval of the shareholders of the Company is required under the Companies Act. Vide its Circular dated 25.10.2027, MCA clarified that the process of shareholders' approval under the Companies Act, 2013 is no longer required for the Resolution Plan which is approved by NCLT.

AMENDMENT IN SEBI(LODR):

With the changing environment on the enactment of IBC,2016, the responsibility of governance of the listed companies is changed. The management is vested with IRP/RP/ Insolvency Resolution Entity, on the admission of the Companies under CIRP. Further, any reorganization of the Company under the Resolution Plan as approved by NCLT is required to be completed within the stipulated time. In the normal course of time, it will involve various approvals by regulatory authority. Hence, SEBI issued a discussion paper on 28 March 2018 to amend the SEBI Regulations to meet with the changing environment.

SEBI, based on the discussion paper to facilitate support to IBC, 2016 and to eliminate duplication of governance process, amended the following regulations on 31 May 2018:

1. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
2. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
3. SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.

The Resolution Plan as approved by NCLT, may result in change in the shareholding pattern, very frequently exceeding the 75% ceiling on the shareholding of promoters, change in the nature of promoters' shareholding and delisting of shares, the implications of which are discussed below:

1. ACQUISITION BEYOND 75%:

When NCLT approves a Resolution Plan involving restructuring, reorganization and/or delisting of a Listed Company, it may result in holding shares beyond the threshold of 75%. Under SEBI(LODR) Regulations, a promoter of the said company cannot hold more than the threshold limit of 75%. But when it is approved by NCLT, it does not require any approval from SEBI, however, requires disclosure. This is as per the amendment made in the Take Over Regulations on 31.05.2028 which complemented the earlier amendment in August 2017. SEBI by its amendment, has exempted such acquisition of shares beyond 75% as per the Resolution Plan as approved by NCLT under section 31 of IBC, 2016. SEBI has mandated that the Corporate Debtor maintain public shareholding at least at 5% level, in order to get admission into Stock Exchange after the completion of CIRP.

2. CLARITY ON PROMOTERS' SHAREHOLDING:

If reclassification of the existing promoter is made as per the Resolution Plan as approved by NCLT, Regulation 31A of the SEBI(LODR) Regulations would not apply, subject to the conditions that the control of the Corporate Debtor will not be with the present promoter and the rationale of such reclassification isdisclosed to SEBI within one day of the approval of such Resolution Plan. The latest amendment in SEBI(LODR) Regulations, 2015, enables the classification of erstwhile promoters' shareholding as part of public shareholding, however, during the normal course, such reclassification does not entitle the promoters from diluting their holdings.

3. CLARITY ON DELISTING:

SEBI Delisting Regulations, requires the following Process:

- making a public announcement.
- making an offer to public shareholders.
- opening an escrow account for depositing the consideration payable; and
- determining the offer price through a book building process.

Resolution Plan under Section 31 of IBC, 2016, vide Amendment dated 31.05.2018, SEBI has made the Delisting Regulations not applicable with a condition that there should be a mechanism of delisting and a specific provision for exit option for the existing public shareholders in the Resolution Plan.

The exit option for the public shareholders, if any in Resolution Plan under the IBC, 2016, should provide for price which should be not less than the liquidation value as per Regulation 35 after the payment of creditors u/s 53 of the IBC,2016.

Whenever the promoters get an exit opportunity in a Resolution Plan at a price and similar option should also be made available to the public shareholders as well under the said Resolution Plan.

Regulation 30(2A) provides that application for listing of the delisted equity shares of the Corporate Debtor, which has undergone CIRP under the IBC, 2016, whereas, under SEBI Delisting Regulations stipulate 5 years cooling period for shares delisted under Chapter III or IV- and 10-years cooling period for the shares delisted under Chapter V for listing again of the delisted equity shares made under SEBI Regulations.

SUMMARY OF OTHER CHANGES TO THE LODR REGULATIONS:

SEBI has amended a number of other provisions in LODR Regulations to facilitate successful Resolution under the IBC, 2016. They are:

a) The LODR Regulations on the composition and roles of Board of Directors and Committees are not applicable to the Corporate Debtor who undergoes CIRP. Under the IBC, 2016, these roles are performed by the IRP/RP under the supervision of the Committee of Creditors.

b) The matters relating to (i) material related party transaction, (ii) material subsidiary and (iii) transfer/lease of more than 20% in material subsidiary will be disclosed to SEBI by the IRP/RP under the IBC, 2016 and shareholders' approval for such events under the Companies Act, is not required for the Listed Companies undergoing CIRP.

c) The Scheme of Arrangement of the Corporate Debtor under CIRP under the Resolution Plan as approved by NCLT requires disclosure by RP to SEBI and does not require any pre- approval from the Stock Exchange.

d) Section 29A controls the involvement of the promoters in a Resolution Plan and any Resolution Plan approved by NCLT, reclassifying the promoter shareholders as public shareholders requires only disclosure to SEBI by RP and the provisions of SEBI(LODR) Regulations and the Companies Act do not apply on such reclassification by NCLT under IBC, 2016.

DISCLOSURES UNDER AMENDED LODR:

Based on the amendment to SEBI(LODR) Regulations, the following additional requirements of disclosures are to be made by the Listed Company to SEBI:

1. Filing of Application u/s 10 of the IBC, 2016, by the Listed Company for CIRP.
2. Filing of Application u/s 7 and 9 by the Creditors for CIRP.
3. Defaulted amounts as per the applications u/s 7,9 and 10 to NCLT.
4. Receipt of Demand Notice u/s 8(1) of IBC, 2016, demanding the defaulted amount from the Operational Creditor.

On admission of CIRP of the Listed Company by NCLT, the following disclosures are required under the amended provisions of Regulation 30 of SEBI(LODR) Regulations:

- Public Announcement as ordered by NCLT on admission under CIRP.
- Invitation of claims by the IRP.

- CoC's confirmation of the appointment of IRP.
- Notice of the COC's Meetings.
- Notice of Information Memorandum as prepared by RP.
- Number of Bids received by RP.
- Notice of Filing of Resolution Plan with NCLT.
- Event of the approval of the Resolution Plan by NCLT.
- Other Material information like delisting etc without disclosing any commercial secret.

AMENDMENT IN ICDR REGULATIONS W.R.T IBC:

Any Resolution Plan approved by NCLT involving any preferential issue of equity shares or convertible preference shares/debentures is not required to comply with the conditions set in Chapter VII of the ICDR Regulations except lock in provisions, pursuant to the amendment dated 14.08.2017 in ICDR Regulations.

WHAT FURTHER IS EXPECTED FROM SEBI:

SEBI Discussion Paper provided temporary trading suspension of the shares of the Listed Company under CIRP to avoid insider trading and market manipulation. The shareholders of the Listed Company may tend to sell their holdings in the market, having come to know about the CIRP. This will unnecessarily erode the market capitalization of the Corporate Debtor, which may result in lower valuation of its assets. But this discussion is incomplete, and the amendment is yet to be made as this requires further study.

Similarly, restoring the 25% public shareholding within an extended time frame requires consideration of SEBI. Keeping the public shareholding below the threshold limit of 25% for a long period will not help in the maximisation of wealth to all the stakeholders. As per the Securities contract (Regulation) Rules, when the threshold limit falls below 10% due to CIRP, the time prescribed to bring back a minimum of 10% is 18 months and to 25% within 3 years from the date of such fall. High concentration of shareholders within the promoters may help in the manipulation of the market price of the shares.

REFERENCES:

1.Insolvency and Bankruptcy Code, 2016.
2.SEBI Regulations.
3.SEBI Circular no. CFD/DIL3/CIR/2017/21
4.IBBI Regulations and Notifications.
5.Discussion Paper of SEBI on CIRP of Listed Companies-March 2018.
6.MCA Notifications on IBC,2016.

AGENCIES TO ENFORCE CRIMINAL LAW (INCLUSIVE):

- The Directorate of Enforcement (ED) for PMLA & FEMA; Central Bureau of Investigation (CBI); Criminal Investigation Department (CID).
- Serious Fraud Investigation Office (SFIO), Ministry of Corporate Affairs.
- The Central Economic Intelligence Bureau (CEIB) for various economic offences and COFEPOSA
- The Central Bureau of Narcotics (CBN) for drug related offences
- The Directorate General of Anti-Evasion (DGA) for central excise related crimes
- The Directorate General of Revenue Intelligence (for customs, excise, and service tax related offences)
- The SEBI for protection of interest of investors and securities related offenses

RESOLUTION PLAN AND COMMERCIAL WISDOM OF CoC

CMA Satyanarayana Veera Venkata Chebrolu
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The Committee of Creditors is considered as an expert body in determining the feasibility and viability of the Resolution Plan. The commercial wisdom of CoC cannot be questioned except on limited grounds. The power of commercial wisdom of CoC however is limited. This article is intended to review some of the judicial pronouncements on commercial wisdom of CoC and its limitations.

The Committee of Creditors (CoC) has a very crucial role under the IBC. Even the Supreme Court has reiterated repeatedly that the commercial wisdom of the CoC is of utmost importance under the Code and should not be interfered with

The decision as to whether to accept the resolution plan to put back Corporate Debtor on its feet or to proceed for liquidation will be taken by Committee of Creditors (CoC) using commercial wisdom. When Committee of Creditors approves a resolution plan it is presumed to be viable and feasible

Almost all the orders on approval of Resolution plans refer the judgement relating to K. Sashidhar vs. Indian Overseas Bank, Civil appeal No.10673/2018 dated 05.02.2019 of the Hon'ble Apex court where in it is stated in para No. 62 that "the legislature has not envisaged challenge to the "commercial/ business decision of the financial creditors taken collectively or for that matter their individual opinion, as the case may be, on this count" Thus the role of the NCLT is 'no more and no less'.

Similarly in the matter of Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors., Civil Appeal No. 8766-67 of 2019, judgement dated 15.11.2019 the Hon'ble Apex Court clearly laid down that the Adjudicating Authority would not have power to modify the Resolution Plan which the CoC in their commercial wisdom have approved. In para 42 Hon'ble Court observed as under:

"It is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar(supra)

In the case of Committee of Creditors of Edu comp Solutions Ltd. v. Ebix Singapore pte. Ltd, NCLAT held that once the resolution plan is approved by the CoC, the applicant cannot take a "topsy turvy" stance, and hence, is not allowed to withdraw the approved resolution plan.

The Adjudicating Authority, as per section 31 of IBC, 2016, before approving the Resolution Plan is required to examine whether the Resolution Plan approved by the CoC under Section 30 (4) of the Code meets the requirements as referred to under Section 30 (2) of the Code which are as under:

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

(b) provides for the payment of debts of operational creditors and provides for the payment of debts of financial creditors, who do not vote in favour of the Resolution Plan which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. provides for the management of the affairs of the corporate debtor after approval of the ResolutionPlan.

(c) The implementation and supervision of the Resolution Plan.

(d) does not contravene any of the provisions of the law for the time being in force.

(e) conforms to such other requirements as may be specified by the Board.

Adjudicating authority can reject the resolution plan when the resolution plan does not conform to the above requirements under section 31(2).

Recently in the matter of Gajanand Corporation Private Limited, NCLT Ahmedabad vide order dated 02.11.2023 held that the Resolution Plan does not address the cash flows and value of the Assets enumerated and the Operational Debt claims received from Statutory Authorities. The valuation report (only a summary is submitted) of the assets is not satisfactory. The Resolution Plan presupposes approval and ignores the claim that has been received from the Income Tax Department of dues to be paid. It also proposes to pay only Rs 1000 to employees in 90 days after the approval of the Plan. Hence the Resolution Plan is rejected as it does not satisfy the provisions of Section 31(2) of IBC 2016 and Regulations 36 of the Act of the Code.

Further section 30(4) of IBC, 2016 states that the committee of creditors may approve a resolution plan after considering the aspect of feasibility and viability which is completely within the domain of the CoC.

Of late many failures due to impossibility and unviability are being observed in the implementation of resolution plans. Hence CoC should undertake this exercise in all the seriousness. Further without studying the feasibility and viability of the resolution plan it should not be stated in the minutes that CoC has considered feasibility and viability of the resolution plan while approving.

Success of the plan can be determined from verification of the assumptions with which projected financials are arrived taking into account the current trend. Further the plan should be workable and there should be a reasonable prospect of implementation. Other factors that can be studied include whether working capital requirement is taken care of in the resolution plan, financial background, marketing strategy, operational synergies, experience of the resolution applicant etc.

In fact, the proviso to Section 31 sub-section (1) mandates the NCLT to ensure that the resolution plan has provisions for effective implementation before authorizing it.

With regard to the viability and feasibility of a resolution plan in K. Sashidhar vs. Indian Overseas Bank, Civil appeal No.10673/2018 dated 05.02.2019 it is held as follows:

“There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision.”

The importance of ‘viability’ of the plan weighed by NCLAT in Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP & Ors. In this case, on the realistic and actual basis of technical production of the capacity of the corporate Debtor the Resolution Applicant brought to the notice of the Adjudicating Authority that the plan was unviable or unfeasible or unimplementable.
Resolution Applicant stated that report furnished by the Resolution Professional in the ‘Virtual Data Room’ (VDR) showed the realistic capacity to be 2.10 lac MTPA. Consequently, the plan assumed 1.10 lac MTPA production in the first year and increases thereafter. Admittedly the production capacity of Metalyst is only approximately 45,000 MTPA.

NCLAT held that the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench rightly observed in this case that the 'Insolvency and Bankruptcy Code' do not confer any power and jurisdiction on the Adjudicating Authority to compel specific performance of a plan by an unwilling resolution applicant.
Further it is observed that in the absence of fact that there was any procedural infirmity and having not proceeded in the manner as was required the plan approved was violative of Section 30(2)(e) of the 'I&B Code', having contravened the provisions of the 'I&B Code'.

For the said reasons NCLAT stated that the plan approved by the 'Committee of Creditors' under sub-section (4) of Section 30 of the 'I&B Code' was rejected by the Adjudicating Authority i.e NCLT, Mumbai in terms of Section 31(2) and hence no interference is called for.

Likewise, the NCLAT permitted withdrawal after the CoC approval in Tarini Steel Company Pvt. Ltd. v. Trinity Auto Components Ltd and in Digjam Ltd. Where NCLT, Ahmedabad has permitted modifications tothe resolution plan post CoC's approval, at the resolution applicant's request on account of the COVID-19 virus.

In the case of Tarini steel, the resolution plan was approved by AA (NCLT, Mumbai bench) on 22.01.2018 with modifications. In view of the same, Resolution applicant has preferred appeal before NCLAT. RA submitted that the Adjudicating Authority has no jurisdiction to modify the 'resolution plan' once approved by the Committee of Creditors. NCLAT, while not expressing any opinion, gives liberty to the appellant to withdraw the resolution plan, if it is not satisfied with the amendment made therein and stated that in such case the Adjudicating Authority will allow the same.

In the case of Digjam Ltd NCLT, Ahmedabad has permitted on 27.05.2020 modifications in the resolution plan post CoC's approval, at the resolution applicant's request on account of the COVID-19 crisis in the payment to financial creditors/ operational creditors and/or other stakeholders due to pandemic of Covid-19 virus.

CONCLUSION:

Thus, the power of commercial wisdom of committee of creditors is not unlimited. The success of the implementation of resolution plan depends on the feasibility and viability which CoC has to ensurebefore approving the plan. Further Resolution Professional should provide in the information memorandum the most updated information about the entity as accurately as is reasonably possible.

Personal Guarantors to Corporate Debtors

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INTRODUCTION

On 9th November 2023, a 3 Judge Bench of Honorable Supreme Court led by Chief Justice D Y Chandrachud along with Hon'ble' Justices J.B. Pardiwala and Manoj Misra delivered a much-awaited judgment centering round the questions of Natural Justice, Adjudicating Authority and Constitutional Validity of the process of insolvency resolution and bankruptcy of Personal Guarantors to Corporate Debtors. The detailed judgment made all attempts to address every concern of the 384 petitioners and could conclusively draw a curtain on the 5 year-long journeys into the question of law and constitutional validity of Pat III of the code as regards its applicability in the matter of Personal Guarantors. Through this article an attempt has been made to present (i) a brief overview & backdrop thru' which the cases have accumulated over the years without a resolve; (ii) the PG provisions in IBC and its procedural aspects and treatment; (iii) the litigation process & legal challenges; (iv) the road ahead and future course of action to make the journey smoother and self-reliant to yield the intended benefits envisaged by the code.

(i) Overview & Backdrop PIRP (Personal Insolvency Resolution Process)

- The provisions relating to Insolvency Resolution and Bankruptcy relating to Personal Guarantors to CDs came into force on December 1, 2019. As per the information received from the applicants, IPs, and data collected from various benches of the Hon'ble NCLT and Debt Recovery Tribunal (DRT), 2289 applications have since been filed as of September 30, 2023, for initiation of personal insolvency resolution process (PIRP) of PGs to CDs. Out of them, 284 applications have been filed by the debtors and 2005 applications by the creditors under sections 94 and 95 of the Code, respectively. Among them 50 have been filed before different benches of DRT and 2239 have been filed before different benches of the Hon'ble NCLT (**Source: IBBI Journal Volume 28, July-Sep 2023 Issue**).
- Of the 2289 applications, 88 applications have been withdrawn/ rejected/ dismissed before the appointment of the RP and RPs have been appointed in 991 cases. After the appointment of the RP, 62 cases have been withdrawn/rejected/dismissed and 282 cases have been admitted. (**Source: IBBI Journal Volume, 28 July-Sep 2023 Issue**).
- Out of the 282 admitted PIRPs, 90 have been closed. Of these, 7 have been withdrawn; 62 have been closed on non-submission or rejection of the repayment plan; and 21 have yielded approval of the repayment plan. The creditors have realised Rs.91.27 Crores, which is 5.22% of their admitted claim. During the quarter July-Sep 2023, seven PIRPs have yielded approval of repayment plan with the realizable amount contributing to 24.52% of the claim amount. (**Source: IBBI Journal Volume 28 July-Sep 2023 Issue**).

Bankruptcy Process

- On the other hand, if the resolution process fails or repayment plan is not implemented, the debtor or the creditor may make an application for initiation of the bankruptcy process.

  As per the information received from the applicants, IPs and data collected from various benches of NCLT and DRT, 19 bankruptcy applications have since been filed as of September 2023.

All the 19 applications are initiated by the creditors under Section 123 of the Code. Among them, one application has been filed before DRT, Chennai, and balance 18 applications have been filed before different benches of the NCLT. (**Source: IBBI Journal Volume 28, July-Sep 2023 Issue**)

Key Takeaway – When one looks at the detailed analysis of year wise data of filing of PG applications (please see Table 17 in **IBBI Journal Volume 28, July-Sep 2023 Issue** on IBBI website**)** one sees a noticeable reduction in number of applications filed since the year 2022-23 and the trend continues. This reduction in a way indicates the diminishing reliance of the lenders/creditors on the mechanism of pursuing recoveries of PG cases thru' the IBC framework and the long drawn legal challenges to various provisions of the IBC PG enactments remaining unresolved for the last many years of its promulgation. The SC decision could not have come at a better time probably to draw a curtain on these long pending issues and uncertainties once for all.

(ii) PG provisions in IBC and its procedural aspects and treatment

- By way of the Amendment in 2018, sub-sections (e), (f) and (g) were inserted in Section 2 of the Code. Section 2 provides the classification of entities upon whom the Code would apply. Section 2(e) of the Code provides that the code shall apply to Personal Guarantors and to Corporate Debtors, thereby excluding such personal guarantors from the ambit of individuals, which are provided under Section 2(g) of the Code. Section 2 of the Code is reproduced hereinbelow -
- "Section 2. Application: The provisions of this Code shall apply to--

  (a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law; (b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; (c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; (e) personal guarantors to corporate debtors; (f) partnership firms and proprietorship firms; and (g) individuals, other than persons referred to in clause (e)]"

Armed with the above amendment in place, the Central Government as a first step in implementing Part III of the Code, notified the following [vide its notification dated 15.11.2019 ("Impugned Notification")]. The impugned notification read as:

"In exercise of the powers conferred by sub-section (3) of section I of the Insolvency and Bankruptcy Code. 2016 (31 of 2016), the Central Government hereby appoints the 1st day of December 2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors, shall come into force:

(1) clause (e) of section 2; **(2)** section 78 (except with regard to the fresh start process) and section 79; **(3)** sections 94 to 187 (both inclusive); **(4)** clause (g) to clause (i) of sub-section (2) of section 239; **(5)** clause (m) to clause (zc) of sub-section (2) of section 239; **(6)** clause (zn) to clause (zs) of sub-section (2) of section 240; and **(7)** Section 249."

Furthermore, the Government has notified the commencement of provisions relating to insolvency and bankruptcy processes for Personal Guarantors of Corporate Debtors, with effect from 01.12.2019. It has notified:

- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 ("**IIRP Rules**"); and
- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019 ("**Bankruptcy Rules**").

(iii) The litigation process and the legal challenge

The legal challenges that were encountered in the process of implementing the enactments can be categorised broadly under three heads namely: -

(a) Challenges as regards the legality of the Notification dated 15.11.2019 challenged before Hon'ble Supreme Court of India [**Lalit Kumar Jain vs. Union of India & Ors.** [2021 SCC Online SC 396
(b) Challenges as regards deciding on the Adjudicating Authority for Personal Guarantors to Corporate Debtors [**State Bank of India vs. Mahendra Kumar Jajodia** [2022 SCC online NCLAT 58]
(c) Challenges as regards the Constitutional validity of the provisions before the Hon'ble Supreme Court of India in **SLP(C) No. 16463 of 2021** titled as **Surendra B. Jiwrajka vs. Omkara Assets Reconstruction Pvt. Ltd.**

In this section we shall summarily deal with the above cases to cover the entire journey that finally concluded this year to give a finality to this long pending topic to pave way for execution of the pending personal guaranteed cases for admission as well as enabling the filing of the cases in the corporate insolvency pipelines.

(a) In **Lalit Kumar Jain vs. Union of India & Ors.** [2021 SCC online SC 396 the challenges as regards the legality of the notification centred round the following question:

- That the central government could not have selectively brought the Code into force and applied the provisions to only one sub-category of individuals i.e., PGs to CDs.
- The central government ought to have brought Section 243 into effect.
- Liability of PG post approval of Resolution Plan
- The extent of liability of Personal Guarantors to Corporate Debtor.

The Apex Court judgment brought out a few very important points like '**legislative intent to treat PGs differently**' and '**to enable Hon'ble NCLT to have holistic approach about the nature of assets available**' and again '**The Liability of the Guarantor is co-extensive with the Corporate Debtor**' while '**Personal Guarantors' liability doesn't get discharged upon approval of Resolution Plan'** made the issues raised as regards the legality of the notification clearly dealt with and the same was put to rest.

(b) Challenges as regards deciding on the Adjudicating Authority for Personal Guarantors to Corporate Debtors [**State Bank of India vs. Mahendra Kumar Jajodia** [2022 SCC online NCLAT 58]

- Correct Adjudicating Authority for Personal Guarantors
- Whether the pendency of CIRP against Corporate Debtor is a mandatory pre-requisite for initiating insolvency resolution process for Personal Guarantor?

The initial journey into litigation for PG cases as regards the right Adjudicating Authority for Personal Guarantor in fact dates back to 2018 in the case of **"State Bank of India Vs V. Ramakrishnan & Anr."** [(2018) 17 SCC 394] before the Hon'ble Supreme Court and in 2021 in the matter of **"Rohit Nath Vs. KEB Hana Bank Ltd.**" [2021 SCC online Mad 2734] before the Madras High Court. However conflicting views had emerged in the above cases and finally the challenge was put on rest after the Apex Court upheld the decision of NCLAT in the Mahendra Kumar Jajodia case which in clear terms explained the interplay and logic of operation of Sec 60(1) and Sec 60(2) to ensure consistency and uniformity in the proceedings.

The judgment emphasised that "The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in sub-section (1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate Person is located."

(c) Challenges as regards the Constitutional validity of the provisions before the Hon'ble Supreme Court of India in **SLP(C) No. 16463 of 2021** titled as **Surendra B. Jiwrajka vs. Omkara Assets Reconstruction Pvt. Ltd.**:

The Hon'ble Supreme Court disposed off 384 petitions in one go that challenged PG legislature mainly on the grounds of the reported adjudicative role of RP in Individual Insolvency, the right of representation for the PG, the application of the principle of natural justice and the constitutional validity. A few takeaways from the judgment are listed below: -

- "The function of Resolution Professional under Sec. 99 is purely facilitative, and Resolution Professional does not possess an adjudicatory function in terms of the provisions of Sec. 99. "
- That apart, sub-section (4) also goes on to specify that the information or explanation may be sought in connection with the application. In other words, the nature of the information or the explanation which is sought must have a nexus with the application. We are of the view that the right to file such representation is sufficient compliance of '**audi alterum partem'** requirements. **(p75)**
- The nature of the resolution professional's role, the powers, and its nexus with the legitimate aim of the legislation also lead us to the conclusion that the impugned provisions are compliant with Article 14 of the Constitution. **(p81).**

The above judgment hence conclusively ended the long chain of litigations spanning the last few years since the promulgation of legislative rules on PG Insolvency Resolution Process and Bankruptcy for its finality for implementation.

(iv) <u>The road ahead and future course of action</u>

When we look at all these developments over the years, we find it encouraging in the end that the IBC Code is founded on a strong fundamental footing to meet the challenges of time to pursue its basic objectives that were laid out in the BLRC Report. It is not once that the code has faced such challenges on the legality but in the past many such challenges were overcome on such strength.

The Apex Court judgment is expected to pave ways for further bolstering the IBC mechanism in uncharted territories which earlier could not be accessed due to the legal challenges. A few direct takeaways are as under: -

- With this judgement, the banks can now pursue personal guarantors in respect of corporates with major haircuts and proceed full throttle to file applications for PIRP for those defaulting guarantors/promoters/directors.
- With the strength of the judgment, banks can now also reach out to many cases where money has left shores and money has been deployed in other ventures. In the absence of any established cross border insolvency doctrine, the time now has come to set out innovative legal ways to work more closely with the legal and governmental agencies to book such defaulters.
- In the judgment SC has clarified that all personal guarantees issued prior to November 2019 will also be subject to these insolvency provisions of the IBC and creditors will be able to move against the personal guarantors to seek their recoveries. In essence, banks can now go after personal guarantors for their past guarantees as well.
- It was felt equally important that the Government also work on strengthening the DRT and SARFAESI framework so that insolvency does not remain the only effective tool available for creditors to recover money. To enable smooth circulation of industrial credit, it becomes essential that all three mechanisms i.e., IBC, SARFAESI & DRT work in tandem.
- The judgment if one sees is not only beneficial to the creditors for recovering their dues but also there are good takeaways for the defaulting PGs as well. Now an onus is put on the guarantors to exercise caution and prudence while extending such guarantees.

CONCLUSION

At the end we must appreciate that a corporate insolvency framework without an effective remedy against promoters remains a weaker bait and prone to turn ineffective during trying times of loan defaults. While IBC regime has earned a lot of points for our country to improve our ranking in EOB (Ease of Doing Business) Index globally, such weak spot would have remained a sore area in future to probably pull us down a few points in the event of non-effectiveness on this front. It is expected that this judgment will go a long way in building Investors' confidence in global map and earn many valuable points for the Nation in the process.

A STUDY OF INTRICATE RELATIONSHIP BETWEEN CLIMATE CHANGE AND INSOLVENCY

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ICMAI Registered Valuers Organization

THE PERSPECTIVE

Climate Change is the defining issue of our time, and we are at a defining moment. From shifting weather patterns that threaten food production, to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale. Climate change is currently a global challenge that threatens the future viability of our planet. Climate change can bring catastrophes for humans and ecosystems: extreme weather, melting glaciers, rising sea levels, altered ecosystems, etc. The rate of climate change and extreme weather has accelerated in recent years. Despite the growing concern and awareness, it is difficult to predict climate change accurately with the available technological tools. However, scientific evidence suggests that the risks of climate change will continue to increase.

CLIMATE CHANGE

Climate change is a broad term used to refer to changes in the Earth's climates, at local, regional, or global scales, and can also refer to the effects of these changes. Climate change refers to periodic modification of Earth's climate brought about as a result of changes in the atmosphere as well as interactions between the atmosphere and various other geologic, chemical, biological, and geographic factors within the Earth system. Climate change refers to long-term shifts in temperatures and weather patterns. Such shifts can be natural, due to changes in the sun's activity or large volcanic eruptions. In recent decades, the term 'climate change' is most often used to describe changes in the Earth's climate driven primarily by human activity since the pre-Industrial period, particularly the burning of fossil fuels and removal of forests, resulting in a relatively rapid increase in carbon dioxide concentration in the Earth's atmosphere.

Climate refers to the long-term regional or global average of temperature, humidity and rainfall patterns over seasons, years, or decades. While the weather can change in just a few hours, climate changes over.

longer timeframes. Climate change is the significant variation of average weather conditions becoming, for example, warmer, wetter, or drier—over several decades or longer. It is the longer-term trend that differentiates climate change from natural weather variability.

There are some basic well-established scientific links:

- The concentration of GHGs in the earth's atmosphere is directly linked to the average global temperature on Earth.
- The concentration has been rising steadily, and mean global temperatures along with it, since the time of the Industrial Revolution.
- The most abundant GHG, accounting for about two-thirds of GHGs, carbon dioxide (CO_2), is largely the product of burning fossil fuels.

Widespread improvements in the quality of life of many of the world's populations have gone hand-in-hand with increased demands on natural resources. The planet is struggling to keep up. Increases in the average global temperature, and the frequency of extreme weather events are transforming ecosystems around the world and threatening entire species of plants and animals. Forests are drying up because there is less rainfall and thus more fires, and the glaciers of both the North and South Poles are shrinking. The consequences of climate change affect all of us, but to react and adapt to these challenges, we must first understand them.

CLIMATE CHANGE RISKS

Climate change is already a reality. The natural environment has been significantly degraded over the past few decades, which has become an important concern for modern society. Specifically, changes in the natural environment have significantly impacted national economic policies as well as corporate strategies. As scientists continue to reinforce the severity of climate change, the potential disruption and financial implications have come to the forefront. Economic and financial risks arising from climate change are typically divided into two types:

Physical risks refer to the potential damage and losses from the increasing severity and frequency of climate-related events. These can be acute (as in the case of a destructive tropical cyclone) or chronic (such as rising sea levels and temperatures).

Transition risks result from the actions taken to reduce greenhouse gas emissions, mitigate climate change and adjust to a lower emissions economy. This encompasses changes in government policies, technology, and investor and consumer preferences, which have the potential to result in substantial and, in some cases, unexpected changes to the functioning of the economy and financial system. Transition risks can arise domestically or internationally, transmitted through trade flows or financial markets.

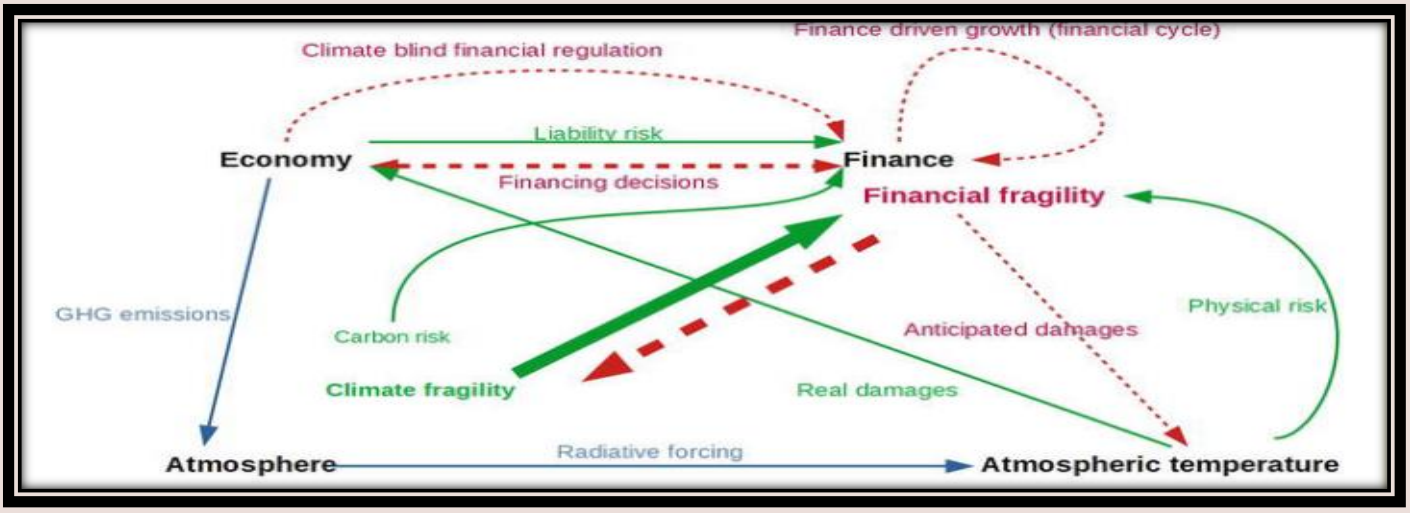
Potential effects of climate risk drivers — Table 1

Risk	Potential effects of climate risk drivers (physical and transition risks)
Credit risk	Credit risk increases if climate risk drivers reduce borrowers' ability to repay and service debt (income effect) or banks' ability to fully recover the value of a loan in the event of default (wealth effect).
Market risk	Reduction in financial asset values, including the potential to trigger large, sudden and negative price adjustments where climate risk is not yet incorporated into prices. Climate risk could also lead to a breakdown in correlations between assets or a change in market liquidity for particular assets, undermining risk management assumptions.
Liquidity risk	Banks' access to stable sources of funding could be reduced as market conditions change. Climate risk drivers may cause banks' counterparties to draw down deposits and credit lines.
Operational risk	Increasing legal and regulatory compliance risk associated with climate-sensitive investments and businesses.
Reputational risk	Increasing reputational risk to banks based on changing market or consumer sentiment.

Physical risks from increased variability and extremity of climatic conditions will reduce the value of certain assets and income streams. Policy and technological changes that address climate change will moderate these physical risks; however, they may increase the transition risks associated with the move to a lower emissions global economy. Sudden or unexpected changes in regulations, technology or consumer preferences, or uncertainty about prospective policy settings, could quickly lower the value of assets or businesses in emissions-intensive industries, some of which may become economically unviable or 'stranded.'

RELATIONSHIP BETWEEN PHYSICAL AND TRANSITION RISKS

Physical risk and transition risks are correlated because the more transition policies enter into force, the fewer physical risks are likely to materialize. On the other hand, the harder the economy is hit by physical risks, the stronger the demand will be for effective transition measures.



Risks can also materialize through the economy at large, especially if the shift to a low-carbon economy proves abrupt (as a consequence of prior inaction), poorly designed, or difficult to coordinate globally (with consequent disruptions to international trade). Financial stability concerns arise when asset prices adjust rapidly to reflect unexpected realizations of transition or physical risks.

SUPPLY CHAIN DISRUPTION

All businesses, to varying degrees, depend upon wider supply chains. If it's not directly, as with a company relying on particular raw materials, it may be indirectly via the fact that every business is connected to others via people, entities, information, and resources. For many businesses, climate change disruption upon supply chains is a high-risk area.

CREDIT RISKS IMPLICATIONS OF CLIMATE CHANGE

Credit risk is the risk of a financial loss resulting from a borrower's failure to repay part of or all the interests and the principal of a loan. Climate-related risks affect all three dimensions of credit risk—a borrower's capacity to generate enough income to service and repay its debt as well as the capital and collateral that back the loan.

Climate and financial fragilities reinforce each other. They are intertwined into positive feedback loops so that climate systemic risks also incur financial systemic risks. Financial fragility to external risks may increase climate fragility through negative externality effects. Conversely, climate fragility incurs new risks that may reinforce financial fragility.

CLIMATE CHANGE AND INSOLVENCY

The realization of a climate systemic risk translates into potential financial turmoil and this in turn can increase probability of insolvency. The deterioration of the natural environment has engendered numerous challenges because firms in diverse array of industries rely on the natural environment for business-critical resources. The impact of environmental degradation and climate change poses significant financial risks and a threat to corporate survival. Consequently, it is no longer regarded as a secondary issue: firms have begun to see it as a core socio-economic concern.

Many businesses may be able to withstand the challenges ahead, but it may very well be that their trading counterparties (whether suppliers, customers, or other stakeholders) will not. Whilst these times can represent an opportunity for some, such as potential acquirers (whether of businesses, assets, or distressed debt), in most cases, the climate represents a threat to businesses.

Climate change can also affect businesses in a number of other ways. Changing weather conditions may lead to resource scarcity and cause dramatic price increases for essentials like water, food, and energy. Efforts to avert climate change could also have a damaging effect on companies. More stringent environmental levies like a carbon tax would make it very difficult for some of the most polluting businesses to operate profitably. Other policies, meanwhile, could wreak havoc on certain industries. The government's decision to ban the sale of new petrol and diesel cars from 2030 could have disastrous consequences for petrol stations and other companies in the fuel supply chain. A single large-scale natural disaster can cause the sudden failure of an otherwise solvent company. Climate change, which

has fuelled increases in the severity and frequency of natural disasters, has become a “new and significant” source of potential business failures. Many of these perils appear to be accelerating in line with scientists’ warnings regarding the consequences of climate change.

Hotter years have been routinely linked with reduced economic output in developing countries. New research shows that one reason is that people are less productive at work and more likely to be absent on hot days. The aggregate effects are large enough to significantly reduce the output of the manufacturing sector. Rising temperatures can hurt economic output in various sectors by reducing the productivity of human labor. Climate change will have an impact on both industrial raw material supplies and processes. Climate change can have notable impacts to those industrial sectors whose raw materials are heavily dependent on weather and other changes in the natural environment. Climate change can produce new challenges to the construction industry when changing weather conditions demand the implementation of new types of construction materials and plans. Sea-level rise and more acidic oceans will threaten coastal tourism infrastructure and natural attractions. Rising temperatures will shorten winter sport seasons and threaten the viability of some ski resorts. Climate change will lead to changes in biodiversity, affecting eco-tourism. Industrial plants handling flammable substances, in the chemical industry for example, can be faced with a higher risk of fire as the climate becomes warmer.

EFFECTS OF CLIMATE CHANGE ON AGRICULTURE

- Less predictable growing seasons
- In a warming world, farming crops are more unpredictable—and livestock, which are sensitive to extreme weather, become harder to raise. Climate change shifts precipitation patterns, causing unpredictable floods and longer-lasting droughts.
- More frequent and severe hurricanes can devastate an entire season’s worth of crops.
- Meanwhile, the dynamics of pests, pathogens, and invasive species—all of which are costly for farmers to manage—are also expected to become harder to predict.
- Climate change is expected to increase the frequency of heavy precipitation which can harm crops by eroding soil and depleting soil nutrients.

CLIMATE RISK AND FIRM’S EARNINGS

Climate effects on firm earnings and performance are getting an increasing attention from researchers. Ginglinger and Moreau (2019) find that greater climate risk leads to lower leverage in the post-2015 period, i.e., after the Paris Agreement and show that the reduction in leverage related to climate risk is shared between a demand effect (the firm’s optimal leverage decreases) and a supply effect (lenders increase the spreads when lending to firms with the greatest risk). Addoum et al. (2019) find that extreme temperatures significantly impact earnings in over 40 percent of industries in the U.S. and demonstrate bi-directional effects that harm some industries and bring benefits to others. On the global scale, Pankratz et al. (2019) find that an increasing exposure to extremely high temperatures has negative impact on firms' revenues and operating income. Focusing on a panel of 55 countries, Huang, Kerstein, and Wang (2018) find that climate risk at the country level is associated with lower corporate earnings and higher earnings volatility.

It is a two-way street.

Climate impacts finance. Climate change affects companies' fundamentals and thus markets overall. It brings new risks and opportunities for companies, with obvious financial implications. Globally, different sectors face different degrees of risk in the green transition. Those that contribute most to CO2 emissions (such as transportation and food) will be harder hit than others. Changing policies, such as new regulations and restrictions on the use of certain resources, will impose transitional costs on these sectors.

INTERNATIONAL CASE STUDIES

When PG&E filed for Chapter 11 protection in January, The Wall Street Journal dubbed it the "first climate change bankruptcy." The Californian power utility was facing $30 billion in potential liabilities following a series of devastating wildfires linked to its equipment—wildfires made more likely by a prolonged period of hot, dry weather that had reduced the surrounding forests to tinder and which scientists have since attributed to climate change. PG&E may well be the largest corporate casualty of climate change, but it is not the first. Climate change is increasing the frequency and severity of extreme weather around the world, and other businesses have fallen victim to these trends.
If the first climate change bankruptcy is indicative of a new reality, it is not that utilities are going to go bankrupt overnight. Rather, climate disasters will increasingly add financial stress to utility-sector stakeholders, as costs accumulate from both acute events and damaging extreme weather impacts. Adapting the regulatory bargain for a climate-exposed future will require lawmakers, regulators, and shareholders to develop new approaches and new incentive structures to ensure an accountable, robust utility sector. Moreover, while climate change is already presenting real financial challenges to utilities, it will not be the only sector to face large climate-driven costs. Other corporate actors can look to the utility experience to better understand how policy makers, investors, and companies will respond to the growing financial threat from climate change.

The announcement that Peabody, the world's largest private sector coal miner, has filed for bankruptcy has sent shockwaves through the fossil fuel industry and it acts as a warning to oil and gas companies – and their investors – about how quickly things can change. What's happened in coal is an example of the dangers. Peabody is the 50th coal company to file for bankruptcy since 2012 and a startling example of the industry's failure to anticipate how future markets might be limited by tighter environmental regulations.

This astonishing and rapid fall has been triggered by a number of events, including the continuing fall in the cost of renewable energy technologies and the rise of the shale gas industry in the US. Not only did this hit the demand for coal in the US, but it also contributed to a fall in oil and gas prices globally that reduced coal demand in other markets such as Europe. The Chapter 11 filing highlighted the risks of fossil fuel assets becoming stranded because of tightening environmental regulations and the availability of cost-competitive renewable energy alternatives.

CONCLUSION

Climate change is rapidly proceeding, and climate-related risks are being exacerbated. While the mechanisms of physical climate change and the possible impacts are scientifically well understood, the specific estimates of these impacts are associated with uncertainty. Climate change will affect all sectors of the economy, and it is relevant to investors and financial institutions, posing an unprecedented challenge to the governance of global socioeconomic and financial systems. Climate-related risks touch

on the interests of a broad range of stakeholders across the private and public sectors, impact all the key dimensions of credit risk, and are the main channels through which climate change can affect financial stability and thus lead to higher probability of Insolvency. The adverse effects of climate change are pervasive and systemic, affecting all asset classes, industries, and economies, and in turn, the financial system. Given the overall landscape many businesses will continue to trade in circumstances in which it is highly questionable as to what the future holds for them and whether they remain viable.

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INTRICACY OF PF CLAIM AND ITS EFFECT ON RESOLUTION PLAN

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INTRODUCTION

Refusal of Hon'ble Supreme Court to interfere in NCLAT order dated 21.10.2022 pronounced in the matter of **Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia, Resolution Professional of Jet Airways**, will have far-reaching implications on approval of resolution plan(s) and recovery of financial creditors through resolution plan or liquidation proceedings. Partial reversal of its own order by NCLAT, earlier pronounced in the above referred matter, in the case of **Regional Provident Fund Commissioner Vs Manish Kumar Bhagat, RP of Perfect Boring Pvt Ltd**, confirms that issues relating to treatment of provident fund dues during corporate insolvency resolution process / liquidation process are far from fully settled and may have more further examination in future.

In Jet Airways case, NCLAT held that EPF dues do not fall under the scope of the term 'assets' even during the CIRP and, therefore, the IRP / RP cannot alienate or transfer such assets. The NCLAT observed *"...the said funds i.e.,* provident fund, pension fund and gratuity fund maintained by the corporate debtor, have to be utilized fully for payment of provident fund, pension fund and gratuity of the workmen and employees and thus, these assets cannot be included in the information memorandum as the assets of the corporate debtor, while inviting the resolution plan and claims have to be settled against the assets of the corporate debtor. It was further held that EPF dues have to be paid in full calculated till the Insolvency Commencement Date ("ICD"), along with any damages and interest as levied, as per the provisions of the EPF Act, since they do not form part of the assets of the Corporate Debtor by virtue of Section 18 and Section 36 of the Code. It was further clarified that EPF dues have to paid irrespective of whether or not the Corporate Debtor has maintained a separate fund for provident fund contributions. In the aforesaid case, NCLAT examined and upheld following two issues relating to employee provident fund:

a) Whether the workers and employees are entitled to receive the payment of provident fund, gratuity, and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the Code?

NCLAT held that workers and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(b)(iii).

b)Whether verified & admitted claim of Regional Provident Fund Commissioner for the amount related to Section 14B of Employees' Provident Funds & Miscellaneous Provisions Act 1952 (PF Act 1952), can be treated as secured debt and the Appellant was entitled to receive the amount as secured creditors? Relying on its earlier judgement in the case of "Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors., NCLAT held that Section 11 of Provident Funds & Miscellaneous Provisions Act 1952 provides for priority of payment of full claim over other debts and, therefore. any partial payment of Provident fund dues would lead to breach of provision of Section 30(2)(e) of the Code.

Earlier, NCLAT in the case of ***Tourism Finance Corporation of India Ltd. vs Rainbow Papers Ltd.*** held that since no provisions of the Code and the EPF Act are in conflict, the application of Section 238 of the Code does not arise in respect PF claim filed pursuant to section 7Q and 14B of PF Act. Section 17B of the EPF Act creates an obligation on the transferee to pay the contribution and other sums due from the employer whenever an establishment is transferred. Therefore, by operation of Section 17B of the EPF Act, the successful resolution applicant was made liable to pay the provident fund dues arising pursuant to section 7Q and 14B of PF Act which the corporate debtor owes to its employees.

NCLAT followed its judgement given *in* Jet Airways case, subsequently in the *case of* **Assam Tea Employees Provident Fund Organization Vs, Mr. Madhur Agarwal, Resolution Professional of Hail Tea Limited.** In this case**,** NCLAT also relied on Hon'ble Supreme judgement given in the case of **"Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others**, wherein Apex observed that. *The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7A, 7Q, 14B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages."*

NCLAT observed that the above judgment lays down that any amount due from employer appearing in sub-section (2) of Section 11 also covers the amount determined under Section 14B and there cannot be any quarrel to the preposition as laid down by the Hon'ble Supreme Court in the above case. The priority for payment of debt under Section 11 of the PF Act has to be looked into in view of the mechanism which is specifically provided under Section 53(1) of the Code. It further stated that they had already dealt the provision of Section 36(4)(a)(iii) of the Code and held that provident fund dues are not subject to distribution under Section 53(1) of the Code.

In the case of **State Bank of India v. Moser Baer Karamchari Union** the question of whether provident fund, pension fund, and gratuity fund dues could be included in section 53 of the IBC was considered. The Adjudicating Authority allowed the application on the grounds that these dues could not be part of Section 53 of the IBC. NCLAT upheld the decision of the Adjudicating Authority, which held that provident fund, pension fund, and gratuity fund do not come within the meaning of liquidation estate. This means that these funds are not part of the assets available for distribution to the creditors of the company in liquidation.

However, NCALT in the case of **Regional Provident Fund Commissioner, Vatwa Vs Shri Manish Kumar Bhagat, Resolution Professional of M/s. Perfect Boring Pvt. Ltd. (**Judgement pronounced on 11.10.2023) partially reversed its earlier orders by examining afresh nature of section 17 B and discretionary power vested with the concerned authority for waiver of penalty under section 32 B of Provident Fund Scheme. NCLAT observed that *Central Board is empowered to waive the damages under Section 14B of the Act. The Para 32B of the Scheme provides that Board for Industrial and Financial Reconstruction for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed. After enforcement of IBC, the provisions of Board for Industrial and Financial Reconstruction and Sick Industrial Companies (Special Provisions) Act, 1985 were repealed and*

earlier statutory regime for rehabilitation is now substituted by Insolvency Regime as contained in IBC. Thus, when Insolvency Resolution Process has been initiated against a Corporate Debtor and Resolution plan has been approved under IBC, power of Central Board to reduce or waive the damages can be exercised with regard to the damages imposed under Section 14B. The power of recommendation as contemplated in paragraph 32B of the scheme can very well be exercised by the NCLT.

Accordingly, NCLAT asked Successful Resolution Applicant to pray to the Central Board to waive 100 percent damages imposed under Section 14B of the PF Act 1952 and no direction was issued for payment of damages of imposed under Section 14B. Successful resolution applicant was directed to pay remaining amount as determined to be payable under section 7A & 7Q of EPF Act 1952.

From above judicial pronouncements, it is amply clear that a Resolution Plan will have to provide for payment of entire outstanding EPF dues, calculated as on ICD. Claim for such outstanding EPF amount can be filed either by workers/ employees or by Provident fund organisation. Such provisioning in the Resolution Plan is essential to make it compliant with Section 30(2)(e) of the IBC which stipulates that the Resolution Plan must not contravene any of the provisions of the law for the time being in force. Further, in liquidation, *a*ll sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund be excluded from liquidation estate as well as from the purview of the waterfall mechanism, as enshrined under Section 53 of the IBC, which enumerates the order of priority in which the payment during liquidation is to be made.

While it is laudable to accord priority to the payment of workers / employees dues, a cause espoused by the Apex Court, but in none of the above referred judgements, the Apex Court / NCLAT examined rationale and purpose of section 7Q and 14 B of PF 1952 and how amount collected pursuant to said sections are utilised by PF organisation.

SECTION 7Q AND 14 B OF PF ACT 1952

7 Q: *Interest payable by the employer. —The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]*

14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund , Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of 5 any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985,subject to such terms and conditions as may be specified in

the Scheme.

Section 14 B is a deterrent provision to prevent default in payment of EPF dues and any recovery pursuant to said provision is never paid to employees of concerned organisation. Further, since the section prescribes stiff penalty, the section itself empowers Central Board to reduce / waive penalty levied in the case of sick unit. Corporate debtor undergoing CIRP, or liquidation process is certainly a distressed unit and therefore, deserves waiver of penalty levied u/s 14 B. Similarly, pursuant to section 7 Q, PF department normally charges interest @ 12% while it pays interest between 7-8 percent to employees on outstanding PF balances. In view of this, payment of full amount of claim including for interest and damages charged pursuant to section 7Q and 14 B may be considered as enrichment of PF organisation at the cost of other creditors.

Further, section 36(4)(a)(iii) of the Code excludes all sums due to any worker or employee from the provident fund, pension fund and the gratuity fund from liquidation estate. Sub section (3) of section 36, prescribe list of assets which shall form part of liquidation estate. Generally, organisation deposit contribution (both employer and employees) with Employees' Provident Fund Organisation ("EPFO") and only handful of organisations are having their Provident Fund Trust. In financial statements, there are generally no assets named as provident fund, even if contribution amount is deposited with its own trusts. On retirement / retrenchment / otherwise, EPFO or PF trust, as the case may be, directly settles PF claims, without routing funds through the concerned organisation. Similarly, in liabilities side of the financial statement, only contribution amount, which are yet to deposited, are shown. In view of the above, in Author's view, no adjustment is needed in the liquidation estate, created pursuant to section 36(3) of the Code, even if there are outstanding PF dues unless Regulatory authorities allows deduction of outstanding PF amount reflected as liability in the books of corporate debtor / Admitted amount of PF department or employees claim towards PF from assets value representing immovable properties, plant & machinery, investment and monetary assets.

In author's views, even considering NCLAT and Apex Court judgements that there is no conflict between section 11 of EPF Act 1952 and provisions of the Code, priority can be given and amount can be excluded from liquidation estate *under Section 36(4)(b)(iii) of the Code,* only to the extent of contribution (both employer and employee) and accrued interest to the extent payable to workmen / employee only and not for any additional interest, penalty and damages as claimed EPFO.

Further, Invariably, EPFO files claim during CIRP / liquidation based on ex-parte order issued by its own officers on the basis of salary & wages amount disclosed in audited financial statements. Seldom only, claims are substantiated with employee wise claim detail or based on PF returns filed by the concerned organisation. As per Regulation 12 of CIRP Regulation, it is responsibility of creditor to submit claim with proof. IRP / RP may call for such other evidence or clarification as he deems fit from creditor to substantiate the whole or part of its claim. In Author's view, filing of any claim by EPFO on estimate / best judgement basis, cannot be termed as substantiated.

In all cases, referred in earlier paragraphs, workers and EPFO had filed their claims with the RP before approval of resolution plan and the dispute was only over the amount allocated towards their claims under the Resolution Plan. The law is still unclear on what were to unfold if EPF claims are lodged based on assessments/ inspections carried out at belated stages where the Resolution Plan is already approved.

Despite multiple legal pronouncements, there are still many unresolved issues, and therefore, Payment of EPF dues during CIRP or liquidation is far from fully settled. Further, payment of full amount of EPF dues including interest under section 7Q of PF 1952, and gratuity dues during CIRP / Liquidation may affect recovery of financial creditors who drives CIRP / liquidation process. Financial creditors enjoy priority under section 53 of Code also. Therefore, according to priority in payment of entire EPF and gratuity dues, irrespective of category or number of dues may disincentivise financial creditors to support resolution. Appellate courts normally examine legal issues which are espoused in appeal and does not look into nitty gritty of entire issue. Hence, there is a need for examination of entire PF claim issue afresh to resolve unsettled issues and to balance out interest of all stakeholders.

GOVERNMENT DUES CONONDRUM

"RAINBOW PAPERS" EFFECT – A CASE STUDY

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SYNOPSIS

The State Tax Officer(1) Vs Rainbow Papers Ltd ***(Civil Appeal No. 1661 of 2020) (SC)*** *("**Rainbow Papers**") case created a huge whirlpool in the near about steady waters of I&B Code and its ripples continue to remain in the ecosystem and grossly impact the decision making process of the insolvency professionals during CIRP and Liquidation proceedings, at adjudication forums like NCLT, NCLAT and Supreme Court in the form of protracted litigations and among the uncertain and undecided lenders and corporate debtors at large.*

The lenders are the most effected fraternity in this respect as they are unsure and uncertain about the settlement of amounts due to central government and state governments as per provisions of section 53(1) of the IB Code. This measure, alone, effects their realizations from corporate debtors to a great extent.

In this process, the legal forums like NCLT, NCALT and Supreme court and the regulator IBBI, have done an exemplary work of providing valuable guidance and direction to the IBC fraternity at large for creating a holistic understanding of the issues involved by providing indications of the way forward. However, the whirlpool created by the ***Rainbow Papers*** *case still refuses to abate.*

Therefore, in this Article, the author has made a humble attempt to analyze and bring out the issues, ***which were not brought to the attention of the Hon'ble Supreme Court bench****, which delivered the* ***Rainbow Papers*** *judgement in September 2022.*

In this Article, the author has endeavored to provide a persuasive methodology about dealing with such issues by the stakeholders. The intensive search for appropriate answers to various questions, which were generated in the ecosystem after the ***Rainbow Papers*** *case,* ***is still continuing****. The author may be reached by email on* ***– rajeevip2020@gmail.com***

This judgment ***is exceptional*** *because, although the SC concluded that the resolution applicant was not allowed to submit a resolution plan****, yet, on peculiar facts of the case, the implementation of resolution plan was allowed to continue in the overall interests of the corporate debtor.***

Since its inception, the provisions contained in the I&B Code have generated extraordinary interest in the insolvency professionals (IP) and legal fraternity for determination of the most appropriate interpretation of such provisions framed by IBBI. On several occasions, the matters related to such legal interpretations travelled right up to the Supreme Court, where the final word was delivered. However, some issues continued to retain interests of all stakeholders, due to the far-reaching effect on determination of amount payable to creditors under resolution and liquidation process. Yes, we are talking about the Rainbow Papers case, wherein the status and payment of amount due to central government and state governments under the corporate insolvency resolution process (CIRP), was deliberated upon at length.

Certain issues are usually peculiar to laws which relate to financial matters. One such issue, which is particularly peculiar and contentious in the I&B Code, is the settlement of dues of the Crown, i.e., amounts due to the central government and state governments, for which claims are submitted by concerned government departments with the RP or the liquidator, as the case may be. The founding fathers of I&B Code were conscious of the challenge faced by them with respect to the claims of government dues and they had a difficult task of finding appropriate answers for addressing this issue under the I&B Code. At that point in time, it was also widely known that all laws framed earlier than I&B Code (like SICA, etc.), with the solemn objective of settlement of claims of creditors, had hit a major roadblock, including but not limited to, settlement of dues of the Crown.

In order to address this issue, the first Banking Law Reforms Committee (BLRC), which was assigned the onerous task of making recommendations for setting up a framework for resolution of stressed assets, was faced with a serious challenge of finding a solution to this issue within the I&B Code framework. The BLRC studied the framework of resolution process, which was followed with respect to dues of the Crown, under the resolution laws framed by other countries and also considered the past experience of the ecosystem while dealing with this issue.

The question before the BLRC was – Can the dues of the Crown be considered higher in priority to the dues of other creditors, especially Financial Creditors, who had provided funds for setting up the business and/or for supporting the business operations of an entity?

On page 14 of the First BLRC recommendations made in November 2015, under the heading 'Liquidation' the Committee observed as follows **–**

"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer."

It was perhaps a result of such recommendations made by BLRC, that the amounts due to central government and state governments were placed at a priority, which was lower to the debts of unsecured financial creditors and of all kinds of secured creditors, in the waterfall mechanism provided in section 53(1) of the I&B Code.

Therefore, when the I&B Code was introduced in the Parliament, the Preamble of the Code stated as follows: —

"An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and

to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

The issue relating to the payment of debts of government dues came up for consideration before the Hon'ble Supreme court on various occasions and on due consideration of facts and the law involved, the Hon'ble Supreme Court held that dues of government fell under the category of Operational Creditors and they were to be considered to be lower in priority than the secured creditors under the waterfall mechanism provided under section 53(1) of the I&B Code.

However, when the matter of Rainbow Papers, relating to dues of State Government under Gujarat Value Added Tax (GVAT), came up for hearing before the Hon'ble Supreme Court, on due consideration of facts of the case and on detailed consideration of the provisions of the Gujarat VAT Act and the I&B Code, the Hon'ble Supreme Court was pleased to hold that the dues of the state government under GVAT were to be treated at par with the dues of other secured creditors and such dues should be given the same treatment under the provisions of I&B Code as was available to other secured creditors. The conclusions of Hon'ble Supreme Court in the Rainbow Papers case are mentioned below (extract of relevant paras reproduced here)–

A) "48. A resolution plan which does not meet the requirements of Sub- Section (2) of Section 30 of the IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor."

B) "54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues."

C) "56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date."

D) "57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."

Subsequently, a review petition was filed against the Rainbow Papers judgement, before the Hon'ble Supreme Court with a plea that various provisions of I&B Code had not been brought to the notice of the Court and certain judgements pronounced by other benches of the Court itself had not been considered. This review petition was rejected by the Hon'ble Supreme Court. It was held that there was no error or infirmity in the judgement pronounced in the case of Rainbow Papers and the reasons, for which the review of Rainbow Papers judgement was being sought, were either insufficient or were not relevant.

It will be useful to list out the following facts relating to Rainbow Papers case-

1. Certain amounts were due to the GVAT department (GVAT) by the corporate debtor (CD) and a recovery notice was issued by GVAT in July 2016; The property of the CD was attached by GVAT in October 2018.

2. The CIRP of CD commenced in September 2017 with the appointment of IRP and the Committee of Creditors (CoC) was constituted in October 2017. Till such time, although the recovery notice had been served by GVAT on the CD, the attachment of property of CD had not been made till such time.

3. The GVAT did not submit its claim with the RP within the time allowed under I&B Code. Such claim was submitted with RP belatedly i.e., while the process of consideration of the resolution plan by the Committee of Creditors (CoC) was underway.

4. A resolution plan was approved by NCLT for resolution of the CD. The GVAT wrote a letter to the RP for confirming the status of the amount claimed. The RP informed GVAT that their entire claim had been waived off under the resolution plan.

5. The GVAT filed an application before NCLT against the successful resolution applicant and RP for not considering their claim, which was rejected by NCLT. On appeal before NCLAT, the prayer of the GVAT was, once again, rejected.

6. Thereafter, GVAT filed a special leave petition before the Hon'ble Supreme Court with a prayer that the claims of the state government could not be waived under a resolution plan and such claims should be treated at par with the claims of other secured creditors under section 53 of the I&B Code.

7. On due consideration of facts and law, the Hon'ble Supreme Court allowed the appeal of GVAT and held that claim of state government could not be waived off under a resolution plan and such claims should be treated at par with other secured creditors for settlement of dues under the resolution plan.

Certain legal provisions referred to in the Rainbow Papers case are as follows –
Section 48 of the GVAT Act is reproduced below: -

"48. Tax to be first charge on property. —

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."

Section 3(30) and 3(31) of the I&B Code are reproduced below-
"3(30) "secured creditor" means a creditor in favour of whom security interest is created.

3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or

provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

Section 53 of the I&B Code, which provides for the mode and manner for distribution of the proceeds of sale of the assets of a Corporate Debtor in liquidation, is reproduced below: -

"53. Distribution of assets.—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely—

(a) the insolvency resolution process costs and the liquidation costs paid in full.
(b) the following debts which shall rank equally between and among the following—
- workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
- debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52.

(c) wages and any unpaid dues owed to employees other than workers for the period of twelve months preceding the liquidation commencement date.
(d) financial debts owed to unsecured creditors.
(e) the following dues shall rank equally between and among the following:
- any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date.
- debts owed to a secured creditor for any amount unpaid following the enforcement of security interest.

(f) any remaining debts and dues.
(g) preference shareholders, if any; and
(h) equity shareholders or partners, as the case may be.
(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation. —For the purpose of this section—
- it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- the term "workmen's dues" shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 (18 of 2013)."

Certain facts and point of law, which were not brought to the attention of the Hon'ble Supreme Court, in Rainbow Papers Case –

A. SEPARATE PROVISION INCLUDED IN SECTION 53(1) FOR GOVERNMENT DUES:

(1) Section 53(1) of the I&B Code includes a separate provision with regard to the treatment to be given to the amounts due to central government and state governments during a corporate resolution or liquidation process. Section 53(1) of I&B code reads as follows (relevant extract reproduced below)-

"53. Distribution of assets. — 1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds

(e) the following dues shall rank equally between and among the following: —
(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date.

2) The important question to consider here is that when a specific and separate provision was made by the legislature in section 53(1)(e)(i) of the I&B Code, then whether the amount due to central government and state government could be included with or considered to be covered by the provisions of some other clause of section 53(1) of the IB Code ?

3) Sub-clause (i) of clause (e) of section 53(1) of I&B Code, clearly provides for settlement of the amount due to central government and state governments in a decreasing order of priority. The I&B Code does not create any exceptions or special conditions under which payment of such dues may be considered in a different manner or in some other order of priority.

4) Therefore, the question that, whether the provisions of section 53(1)(b)(ii) of I&B Code (applicable to secured creditors), were applicable to dues of central and state government, when such an implication was, neither expressly nor impliedly, contemplated by provisions contained in section 53(1) of the IB Code, was not raised before the Court.

RATIONALE FOR A SEPARATE PROVISION UNDER I&B CODE FOR GOVERNMENT DUES:

5) The reason for including a separate and a special provision for treatment of all government dues under I&B Code can be found in the observations of the First BLRC Report, which was issued in November 2015. The relevant extract has already been reproduced hereinabove.

6) The most important words to mark in the BLRC recommendations are –
"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets)"

7) Three important points emerge from such consideration:

- First, that the rights of central and state government were recognized as separate rights.
- Second, that the rights of central and state government were to be provided priority lower than unsecured financial creditors; and
- Third, and most significant one, that the rights of central government and state government were to be provided priority lower to all kinds of secured creditors also.

8) It is important to appreciate this interesting dimension of section 53(1) of I&B Code. The reference to "priority lower to all kinds of secured creditors" in this recommendation clearly brings out two important principles related to rights of central government and state governments:

- Firstly, it was the understanding of BLRC that the rights of the central government and state governments were never to be treated at par or equal or equivalent to secured creditors under the waterfall mechanism provided in section 53(1) of I&B Code; AND/OR

- Secondly, even if the rights of the central government and state governments were to be treated as secured creditors under I&B Code, it was the understanding of BLRC that they were still to be ranked lower in priority below the amounts payable to unsecured financial creditors and to all kinds of secured creditors also.

9) It is interesting to note that if one considers either of these two principles, then the amounts due to central government and state governments would always be placed at a priority, which was lower to all unsecured financial creditors and all kinds of secured creditors, as per provisions of section 53(1) of the I&B Code. The determination of such government dues, as secured or unsecured, would not make any difference in the treatment to be given to such dues under the waterfall mechanism.

10) This rationale for introducing a separate provision relating to dues of government under section 53(1)(e)(i) of I&B Code was not brought to the attention of the Court.

OVERRIDING EFFECT OF NON-OBSTANTE CLAUSE CONTAINED IN SECTION 53(1) OF I&B CODE VS. NON-OBSTANTE CLAUSE CONTAINED IN SECTION 48 OF GVAT:

11) The non-obstante clause contained in the opening part of section 53(1) of IB Code that "53. Distribution of assets. — (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force,".

12) The non-obstante clause contained in Gujarat VAT, 2003 act provides that "Notwithstanding anything to the contrary contained in any law for the time being in force" ….

13) Therefore, a decision is required to be made as to which non-obstante clause will have an overriding effect over the other. The GVAT is a state legislation, which provides for collection of taxes in the state of Gujarat on sales of goods and services, while the I&B Code is a special Central legislation, which was enacted by the Parliament for a specific purpose i.e., resolution of distressed assets. In its wisdom, the Parliament had chosen to provide a non-obstante clause in the widest possible terms in section 53(1) of I&B code and included the words "Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force".

14) Thus, from the perusal of the aforesaid non-obstante clauses, it can be seen that the non-obstante clause included in section 53(1) of IB Code is of a much wider import and it overrides all laws enacted by any State Legislature for the time being in force. As a result, the provisions contained in GVAT Act, 2003 could not be said to have an overriding effect over the provisions of section 53(1) of the I&B Code.

15) This aspect of the overriding effect of provision relating to dues of state government under I&B Code was not brought to the attention of the Court.

OVERRIDING EFFECT OF SECTION 238 OF I&B CODE VS. NON-OBSTANTE CLAUSE CONTAINED IN SECTION 48 OF GVAT:

16) Section 238 of the I&B Code provides as follows –
"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

17) The provision of section 238 of the I&B Code operate on a global basis. This means that the provisions of I&B Code will be applicable and will override the provisions of all other laws for the time being in force, inspite of any inconsistency which may exist in such other laws.

18) Here, it is important to point out that while provisions of section 238 of the IB Code apply globally, the provisions of section 53(1) apply specifically with respect to distribution of funds or settlement of dues of creditors due to the inclusion of a more specific non-obstante clause included in that section. Therefore, there is a double protection or safeguard in I&B code, on account of overriding effect over other laws, due to the non-obstante clauses contained in section 53(1) as well as in section 238 of IB Code, which are applicable to the settlement of dues of creditors. It could be reasonably concluded that no other law, whether enacted by Central or any State Government, could be said to override or supersede the I&B Code in any manner, except for exceptions, if any, provided under the I&B Code itself.

19) Further, the argument taken by the GVAT in the Rainbow Paper case that there is nothing "contrary or inconsistent" between the provisions of section 48 of the GVAT and the provisions of section 53(1) of the I&B Code does not seem to be relevant here as there is no question of inconsistency between the non-obstante clauses mentioned in section 53(1) and section 238 of the IB Code and section 48 of the GVAT.

20) It has simply to be determined whether the provisions of section 48 of GVAT have an overriding effect over provisions of section 53(1) and section 238 of the I&B Code. If this question is answered in the negative, then there could be no question on the inconsistency between the two provisions because the provisions contained in both sections are absolutely clear and unambiguous.

21) In this connection, the ratio laid down by Hon'ble Supreme Court in the case of M/s Innoventive Industries Ltd Vs ICICI Bank (Civil Appeal No. 8337-8338 of 2017 – Judgment dated 31st August 2017) (Specific Reference – Para 50 to Para 60 of the said judgement) with regard to inconsistency or repugnancy between the laws framed by the Centre and State is squarely applicable to this matter.
It was held by the Court that the repugnancy may exist between the two Acts on account of similar provisions contained in both the Acts.

In para 50(ix) of this judgment, the Court held that "The repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void." In such circumstances, the State Act is supposed to make way for the Central Act to apply. In other words, the provisions contained in the Central Act will prevail and the provisions contained in the State Act shall not be applicable in such circumstances.

22) This overriding effect of section 238 of I&B code and the ratio of judgment pronounced by Hon'ble Supreme Court in the case of M/s Innoventive Industries Ltd Vs ICICI Bank supra was not brought to the attention of the Court.

CREATION OF SECURITY INTEREST:

23) The words "security interest" have been defined under the I&B code to mean any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge,……..etc. The definition of security interest, therefore, includes all rights, titles and interests created as a result of some "transaction" which takes place between the debtor and the creditor.

24) In civil law, the word "transaction" is usually used to refer to an agreement or a contract, which is reduced to writing, reached between two or more parties whereby they make reciprocal concessions to prevent or end a dispute that might end up in litigation.

25) In commercial law, the word "transaction" has been defined as an occasion when someone buys or sells something or when money is exchanged or the the activity of buying and selling something is undertaken.

26) So, now the question is, can a provision made under a state law for collection of taxes by the government (for e.g., tax on provision of goods and services like VAT or GST, on any miscellaneous receipts, etc) can be said to be giving rise to a "transaction"?

27) As per powers given to the States and Union Territory (UT) in India by the Constitution of India, the States and UT can make their own laws with regard to collection of certain taxes within their States and UT like sale of goods and services, other local taxes, etc. This power of collection of taxes is granted by the Constitution of India as a measure for raising revenue for the State and UT so that the State and UT can meet their expenditure for the development of the State and UT for the welfare of people. Therefore, the collection of taxes by the State government or UT, under the powers conferred by the Constitution of India, cannot be classified as a "transaction" between the State (as a collector of taxes) and the Taxpayer (as the entities paying such taxes to the State).

28) As per definitions contained in GVAT Act also, the word "tax" is defined as -
'"tax" means a tax leviable and payable under this Act on sales or purchase of goods and includes lumpsum tax leviable or payable under section 14, 14A, 14B, 14C and 14D'. This definition also provides guidance that tax is proposed to be collected under GVAT Act on sales of goods and services.

Therefore, such collection of taxes, which is defined in the GVAT Act, and which is collected according to the powers given by the Constitution of India to the States for collection of taxes, does not fall under the

definition of "transaction."

29) Once we arrive at such an inescapable conclusion, the natural corollary to the main theorem is that if the collection of taxes by state government could not be termed as a "transaction", then a "security interest" could not have been created under the I&B Code against the corporate debtor, as a result of non-payment of any taxes to the state government, as the activity of collection of taxes does not give rise to a "transaction".

30) The fact that, the activity of collection of tax by GVAT from the CD, was not a transaction between the GVAT and CD, was not brought to the attention of the Court in this case.

CREATION OF FIRST CHARGE UNDER GVAT:

31) Another contention, which was raised in Rainbow Papers matter, which needs to be addressed, was creation of a charge in favour of GVAT. It was submitted that a charge created as per provisions of section 48 of GVAT was a "charge created under law or by operation of law" on the assets of the corporate debtor and creation of such a charge under law was to be duly recognized and given the treatment as a secured creditor under the provisions of the I&B Code.

32) So, now the relevant question is, does a "charge created under GVAT Act" stand on the same footing as a charge created as a result of a "transaction" as provided in definition of "security interest"?

33) The answer to this query again rests in the provisions contained in section 3(31) of the I&B code. The words used in section 3(31) of I&B Code are "security interest" which means any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a "transaction" which secures payment or performance of an obligation and includes mortgage, charge,…….etc.".

34) This definition only includes right, title or interest created in favour of or provided for a secured creditor by a "transaction". Such right, title or interest is expected to be "created in favour of or provided for" by some act of a "transaction" or something that can be termed as a "transaction." We have seen in the earlier discussion hereinabove that the collection of taxes by the state government cannot be termed as a "transaction" between the state government and the taxpayer.

35) Therefore, when the basic premise i.e. "transaction" was missing from the main contention, then it would not be appropriate to agree that such a right, title or interest was created in favour of or provided for in favour of GVAT as a result of a default by CD in payment of taxes.

36) The attention of the Court was not drawn for its consideration that no charge could have been created in favour of the GVAT on the assets of the CD in such a manner.

IS A CHARGE CREATED BY LAW EXCLUDED FROM SECURITY INTEREST?

37) Now, does the conclusion, that no charge gets created, otherwise than through a transaction between the two parties, means that a "charge created by law" is excluded from the definition of "security interest" as per section 3(31) of IB Code? For this purpose, we need to understand the concept of creation of a charge by operation of law.

38) Under the Companies Act, a charge is created on the property of the company, in favour of some other entity, on the basis of contracts or agreements entered into between the company and such other entity, by registering such charge with the ROC under the provisions of the Companies Act. On being satisfactorily so registered, all such charges are said to be created under law on the assets of the company.

39) It should be understood that non-registration of charge with ROC does not mean or imply that the contract is not enforceable, or the other entity cannot take legal recourse against the company for recovery of their dues. Yet, the registration of charge with ROC provides a legal status to such a charge, which is said to be registered or created under a law, and such a legal status of charge is recognized as enforceable under such law.

40) Similarly, under the banking laws, a charge is said to be a right which is created by any person, including a company, referred to as "the borrower", on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as "the lender", which has agreed to extend financial assistance. This is a case of creation of charge as a result of a transaction of borrowing and lending between the borrower and the lender.

41)A charge created by other revenue laws prevailing in States and UT also provide, in some cases, that the payments to be made for taxes, duty or other sums under such laws shall be a charge on the properties owned by the person or entity and they shall be recoverable in the manner provided in such laws. This is another example of creation of charge by operation of law.

42) However, for the reasons mentioned hereinabove, all such charges, which are created only by the force of law for recovery of amounts payable to governments as taxes, duties, or such other sums, could not be said to be arising out of any "transaction" between the government and the taxpayer.

43) Therefore, there appears to be sufficient force in the contention that the definition of the words "security interest" provided in section 3(31) of the I&B Code includes only those rights, titles and interests, which are created in favour of or provided for a secured creditor, as a result of a "transaction" between the debtor and the creditor and all other charges, which are created in any other manner, are excluded from such definition.

44) As a result, a charge created by the provisions of section 48 of GVAT Act, as a First Charge on the properties of the corporate debtor, could not be said to be a charge created as a result of a "transaction" between the State government and the corporate debtor and such a charge could not be said to be treated as creating a security interest in favour of the GVAT.

45) This aspect of the matter was not brought to the attention of the Court that in the absence of security interest being created in favour of GVAT, there was no occasion to treat the GVAT as a secured creditor under the provisions of I&B code.

CONCLUSION:

The observations given in this Article hereinabove show that in the absence of adequate presentation of these issues before the Hon'ble Supreme Court, the decision of the Court in Rainbow Papers case seldom reflects on all these issues. Therefore, a student of law and all stakeholders under I&B code, face a stiff challenge of searching for answers to all these issues elsewhere.

Author's Views:
The issues emanating from the Rainbow Papers judgment pronounced by Hon'ble Supreme court have consumed umpteen numbers of hours of IPs, legal professionals, and other stakeholders, in understanding and assessing the impact of this judgment on the insolvency and liquidation proceedings under I&B code. As the matter is related to distribution of proceeds under I&B Code, all stakeholders are continuously debating on the nuances of this judgment with a solemn objective of finding a solution. The central and state government departments have also stepped on their vigil and are eager to claim their share of pie from the delinquent CD under the CIRP and Liquidation process.

After the Rainbow Papers case, a coordinate bench of Hon'ble Supreme court delivered another remarkable judgment in the case of Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd, wherein it was held that the judgment pronounced in the case of Rainbow Papers did not take into consideration, the various provisions contained in the I&B code and the judgments pronounced by Hon'ble Supreme court in other similar cases. On due consideration of facts and the law involved, it was held that the dues of the state government could not be considered as a "secured creditor" under the provisions of I&B Code.

The judgment passed in the case of petition filed, for review of judgment pronounced in the case of Rainbow Papers, by a bench of Hon'ble Supreme Court observed that since there was a difference of opinion on the same issue between the two coordinate benches, before pronouncing any judgment in the case of Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd, the coordinate bench should have referred the matter to a larger bench for final determination on this question.

Therefore, it would serve the interests of all stakeholders of insolvency and liquidation process if the Hon'ble Supreme Court could take a Suo-moto cognizance of this issue and constitute a larger bench for deciding this matter at the earliest because the difference of opinion has arisen at the highest temple of judiciary and they alone can provide final guidance on this issue.

In conclusion, there is lot of hope that, moving forward, the stakeholders involved in insolvency and liquidation proceedings will not be required to face challenges in addressing the issues relating to settlement of amounts due to central government and state governments under the provisions of the I&B Code.
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3. Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd (Civil Appeal 7976 of 2019) (SC) – Dated 17th July 2023

EVALUATION MATRIX CONUNDRUM

CA IP Avishek Gupta
Founding Partner – Optimus Resolution

The term Evaluation Matrix ('EM') has been defined under Regulation 2 (ha) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to mean such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.

Use of Evaluation Matrix ('EM') makes the CIRP more objective and transparent thereby minimizing potential prejudices and subjective decisions. It allows a systematic comparison of resolution plans and accelerates decision-makers in selecting the most appropriate resolution plan for revival of the distressed company within the framework of the IBC.

Keeping up with the spirit of Insolvency and Bankruptcy Code 2016 ('IBC') of revival of an ailing entity, under EM, various parameters are assigned scores to evaluate the Resolution Plans received during CIRP. Besides the amount offered to stakeholders which is a primary quantitative criterion and generally carries the maximum weightage, other qualitative criteria such as experience of the resolution applicant in the industry to which the company under CIRP belongs, their financial strength etc is also given weightage for assessing the overall score of the resolution plans.

EM is a tool for comparing various resolution plans received during CIRP and assists Committee of Creditors ('CoC') in judging and approving resolution plans. However, it is interesting to note that nowhere the Code mandates that the resolution applicant awarded the highest score under EM will be necessarily selected by the CoC as Successful Resolution Applicant.

The Resolution Professional must along with the CoC members take due care and effort to draft an EM that best indicates the most suitable resolution applicant who can maintain and enhance the operational continuity of the company under CIRP. The choice of words must be made judiciously and the decision to keep the clauses narrow or open for wider interpretation needs to be considered and decided in consultation with the CoC. The Resolution Professional must also state the basis on which scores will be awarded to the EM with respect to each parameter.

The CoC members on their part need to consider the EM draft as suggested by Resolution Professional carefully and make necessary modification there to before the document is included as part of the process and circulated to the potential resolution applicants. There should be clarity in the scoring mechanism, least it creates confusion and litigation in the future.

As each company has many unique attributes, it may not be a good idea to replicate the EM used for some other CIRP assignment in the past. In fact, the key terms used in EM must be defined/ elaborated upon as precisely as possible within the document.

A brief structured approach in creating the EM is hereunder:

Selection of Criteria
(some revival may need huge financial investment while others may need more sector expertise, etc.)

Assign Weightage
(based on criteria's relative importance)

Define criteria and scoring scale.
(To ensure clear, precise, and uniform understanding. Scores are generally numerative with range)

Resolution applicants should give requisite emphasis to the EM and carefully peruse the words/clauses used therein so that they are able to draft the Resolution Plan and well articulate it to try maximizing their score under the EM which may provide them an edge over other resolution applicants.

The Resolution Professional is required to allocate scores under the EM to the Resolution Plans received from Resolution Applicants and place the same before CoC for its considerations. It is the duty of CoC members to discuss and understand the scores awarded by Resolution Professional and exercise their commercial wisdom in finalization of the scores under EM making required changes, if any.

For example, if there is score attributed to experience of the Resolution Applicant in the same sector / industry to which the CD belongs, there may be confusion at a later stage if the experience of directors/promoters/ group company of the Resolution Applicant is to be considered for awarding score under the evaluation matrix.

In this case, the Resolution Professional and the CoC must at the time of finalizing the EM make it clear whether the experience of directors / promoters of Resolution applicant or the experience of the group company of the Resolution Applicant will be considered.

In brief, the function and responsibility with regard to EM can be summarised in table below:

Responsibility /Function	**Resolution Professional**	**CoC**
Preparation and finalization of EM	Proposes the initial draft of EM to CoC for approval	Approves the EM prepared by Resolution Professional after incorporating modifications if any
Scoring on EM	Proposes the scores to resolution plans under EM subject to final approval of CoC	Reviews and finalizes the scores ascribed by Resolution Professional after incorporating modifications if any

<u>Some of the key parameters for evaluation commonly used in EM are</u>:

A. Quantitative Aspects / Parameters:
   - Upfront payment to stakeholders
   - Deferred payment to stakeholders – NPV of cash recovery
   - Non-cash benefits to stakeholders

- Fresh equity / Quasi equity infusion for achieving operations of the Corporate Debtor within 12 months from effective date.

B. Qualitative Aspects / Parameters
   - Experience in same/ similar sector.
   - Ability to turnaround distressed companies and experience operating stressed companies.
   - Standing of the Resolution Applicant and Group Company and assessment of credibility and adherence to financial discipline

More often than not, the decision-making body within a bank / financial institution considers the scores attributed to resolution plans on EM before selection of a resolution plan and voting on it.
It has been generally observed that EM gains more importance specially in cases where there are more than two/three resolution applicants as well as a greater number of CoC members as it is more likely that the score of EM serves as a benchmark to form a decision to approve a particular Resolution Plan.
Following two judgements from Hon'ble NCLAT makes it apparent that the law gives precedence to commercial wisdom of CoC in formulation of the EM and assigning scores to resolution plans under the matrix:

1. Case: PNC Infratech Ltd. Vs. Deepak Maini before the Hon'ble NCLAT Outcome: Unsuccessful Resolution Applicant cannot challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations. It was also held that the Tribunal cannot go into the technical issues with regard to evaluation and score matrix which is in the exclusive domain of the CoC.

2. Case: IMR Metallurgical Resources AG Vs. Ferro Alloys Corporation Limited before the Hon'ble NCLAT Outcome: It is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, which involves evaluation of the Resolution Plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable. The powers of the Adjudicating Authority under Section 31 of the Code are limited to the matters covered under Section 30(2) of the Code when the Resolution Plan does not conform to the stated condition. Therefore, the Appellant cannot question the commercial wisdom of the CoC in rejecting the Resolution Plan, with the requisite majority and in approving the Resolution Plan

The EM plays a crucial role in determining the fate of distressed companies. It is an instrument designed to ensure that resolution plans are assessed based on predefined criteria, with the final goal of maximization of value of assets and protecting the interests of all stakeholders. While the matrix has brought transparency and objectivity to the insolvency resolution process, it is not without its challenges, including subjectivity and complexity. As the IBC continues to evolve, addressing these challenges and refining the EM will be essential to further advance the effectiveness of the insolvency resolution framework.

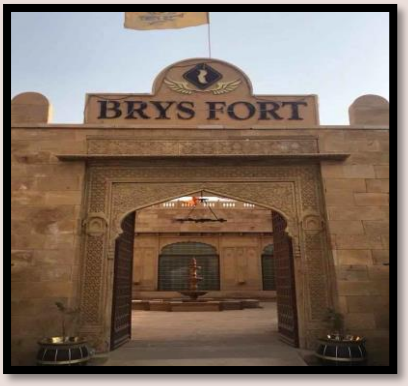
SUCCESS STORIES

CMA SANDEEP GOEL
INSOLVENCY PROFESSIONAL

Brys Hotels Pvt Ltd

SUCCESS STORY: CORPORATE INSOLVENCY RESOLUTION PROCESS OF BRYS HOTELS PVT LTD

In the bustling city of New Delhi, amidst the anticipation and legal proceedings, a pivotal moment unfolded on March 18, 2019, marking the commencement of the RP's journey as the Interim Resolution Professional (IRP) for Brys Hotels Pvt Ltd in the Corporate Insolvency Resolution Process (CIRP). Nestled between Jaisalmer's golden sands and the bustling streets of the National Capital Region (NCR), Brys Hotels Pvt Ltd boasted an impressive portfolio, including a luxurious five-star resort. However, beneath the opulence lay turmoil, with the absence of the company's promoters who were behind bars, leaving chaos and uncertainty in their wake. Taking control of the company amidst this chaos, the RP embarked on a daunting odyssey, navigating legal intricacies to reclaim control of the company's assets. Armed with determination, the RP set out to chart a course towards redemption, facing challenges with resilience and perseverance. Thus began a saga, a testament to the indomitable spirit of those navigating the treacherous waters of corporate insolvency.



It all began when the Bank of Baroda, as the sole secured financial creditor, filed a Section 7 application, revealing a hidden dispute between the hotel's operating agency and its former management. Speculation swirled about a bitter feud, leading to the filing of an FIR against the hotel's promoters, who had been incarcerated since January 2019. Despite the chaos, the hotel continued to operate under the Brys Fort of CD brand, with its management agency keeping its doors open amid uncertainty. Interestingly, all earnings were being redirected to the operating agency, despite the hotel's distinct identity over the past three years. In this maze of legal battles and conflicting interests, the hotel's fate hung precariously. Amidst the turmoil, one question remained: would the truth behind its troubled past be unveiled, or would it remain shrouded in secrecy?

RP initially faced resistance from another agency to take charge of the NCR under construction hotel property, where the suspended director had signed an agreement to sell and offered possession. However, the real challenge lay in taking custody and control of the prime asset of the Corporate Debtor (CD), the Brys Fort hotel in Jaisalmer, as mandated by the Insolvency and Bankruptcy Code (IBC) under section 18. Despite no physical office for the CD and its promoters incarcerated, RP persevered. With no CD employees for guidance, RP navigated through the CD's history, uncovering an Agreement to Sell orchestrated by the suspended Board of Directors, transferring possession to the hotel's operating agency.

For the past three years, this agency had assumed control, managing the hotel under the guise of ownership, staunchly resisting relinquishing CD's assets to the IRP/RP, claiming what they perceived as rightfully theirs. As RP, empowered with the IRP's authority, grappled with this intricate tapestry of legal entanglements and conflicting interests, the fate of CD hung precariously in the balance. Would the IRP succeed in reclaiming control, or would the CD remain ensnared in the clutches of those who sought to possess it? The unfolding saga of financial intrigue holds the answer.

With determination in RP's heart, RP took decisive action by submitting an application under section 60(5) at the National Company Law Tribunal (NCLT) seeking possession of the Hotel Property of the Corporate Debtor at Jaisalmer, with the onus of proving it as an asset of the CD on the Resolution Professional. This marked the beginning of a challenging journey through CIRP.

An essential step in the CIRP was the issuance of a Public Announcement, summoning all stakeholders to assert their claims. Among them, the Bank of Baroda stood as the sole Secured Financial Creditor, while the operating agency entrusted with managing the hotel in question emerged as a significant player among the unsecured Financial Creditors.

However, navigating the CIRP posed a unique challenge as one of the members of the Committee of Creditors (CoC) was the very entity against whom RP waged a legal battle at the NCLT. His objective was clear: to gain possession of the assets belonging to CD, a task made all the more complicated by the presence of this opposing CoC member. As RP embarked on this arduous journey, the echoes of legal disputes reverberated through each step, testing his resolve and ingenuity. Yet, with each hurdle overcome, he moved closer to unraveling the mysteries that shrouded CD's fate and securing justice in the turbulent world of corporate insolvency.

In the intricate dance of corporate resolution, PwC stepped onto the stage as the guiding force, tasked with unlocking the dormant potential within the CD. The mission was clear: to seek out a Resolution Applicant capable of breathing new life into the entity, maximizing its value.

As the world grappled with the aftermath of the COVID-19 pandemic, the hospitality industry found itself in the throes of a severe recession. In the midst of this turmoil, the resolution process for CD encountered yet another obstacle. One of the Resolution Applicants, burdened by the economic downturn, reluctantly withdrew their bid. Undeterred, Resolution Professional forged ahead, initiating fresh negotiations with the remaining contenders. However, just as progress seemed imminent, a curve ball was thrown into the mix. The highest bidder abruptly withdrew from consideration, citing an unexpected hurdle: the inability to conduct a site visit of the hotel property. The operating agency, who had maintained control of the premises since the RP assumed charge, had locked the doors tight, denying access to prospective buyers.

After a lot of effort, the CIRP period was extended, and section 60(5) application seeking possession of the Hotel Brys Fort at Jaisalmer was pursued. In July 2020, Bank of Baroda took a proactive step by establishing a specialized cell to handle cases under the National Company Law Tribunal (NCLT). As part of this initiative, all pending NCLT cases in Delhi and nearby areas were transferred to the Stressed Assets Management Branch in Delhi (SAMDEL)

Brys Hotel Pvt Ltd, where the Corporate Insolvency Resolution Process (CIRP) commenced on March 18, 2019, was one such case involved Due to prolonged legal battles, the CIRP continued, necessitating

extensions. Bank of Baroda, represented by SAMDEL, emerged as the sole secured financial creditor in this case. SAMDEL deployed qualified and experienced officers to navigate complex issues such as unit possession and litigations, offering invaluable support to Resolution Professional. This altered landscape empowered RP to exert extra effort in resolving the case.

The CIRP took a long time, and a lot of frustration was around and CoC was worried about the mounting CIRP cost with no Resolution. The CoC was not at all willing to contribute towards the approved CIRP expenses. It was a real challenge for the RP to run the CIRP without having CIRP expenses over 15 months, and CoC was not in a position to accept the fresh terms of success fee being charged by the process advisor and in the absence of the same RP was not having support of PwC as a Process advisor. However, the RP continued without CIRP expenses and handled frustration at all levels due to prolonged litigation and increased time of CIRP to nearly three years.

Now comes the intervention of Head office of the Bank of Baroda by providing all legal support through senior advocates to Resolution Professional and proactive role of the new team officials at SAMDEL RP took the challenge and took the onus on self to market the project and was successful in creating interest through marketing teaser and personalized approach to showcase the potential in the deal, Bank of Baroda officials join hand in hands with the Resolution Professional and supported at all level in marketing the deal and solving the complex legal issues involved in this matter.

Bank of Baroda's top management played a pivotal role in this success story. Their active participation and strategic guidance facilitated various initiatives, including legal assistance in NCLT and NCLAT and Supreme Court matters, suggesting the incorporation of the hybrid Swiss Challenge process in Request for Resolution Plans (RFRP), marketing the account to high-value individuals through teaser circulation, and engaging new professionals. RP, with the support of Bank of Baroda was successful in getting 14 EOI and pursued each Resolution Applicant to submit the Plan and received three plans. A fresh round of negotiation took place; several strategic meetings were held, and as quoted by Bank of Baroda "*RP created competition among Resolution applicants after creating their interest in the deal. After creating competition and showing the worth in the deal, which was shadowed behind the mismanagement of the suspended board and long litigation? This was evidenced by the transformation observed during the bid processes. Initially, only two resolution plans were submitted in the first bid, with minimal value and conditions. However, in the subsequent bid process, around four resolution applications were received, all devoid of restrictive conditions.*"

This was with the support of Bank of Baroda a hybrid Swiss Challenge process, was initiated RP requested the Bank of Baroda SAM Branch Head Mr. Ajoy Kumar Sharma to ask their head office to join the said CoC, and thankful to Mr. D.K. Namdev - General Manager who joined the CoC meeting, and negotiations took place by the CoC under his able guidance. Several rounds of negotiation took place on the predefined process designed and circulated by the RP with the consultation of legal and approval of CoC. RP conducted a Physical CoC for the negotiation of the Resolution Plan offering which throughout the day where Resolution Professional was successful in getting a many fold increase in the negotiated price of the Resolution Plan with the payment terms of 90 days on approval of Resolution Plan. The amount negotiated by the CoC was over the fair value of the Corporate Debtor and this has become

possible as per Bank officials says "**RP *Sandeep Goel's commendable efforts not only brought resolution to every stakeholder but also resulted in recoveries far surpassing the fair value for SFCs, FCs, and other creditors, making it the rarest of the rare within the domain of the Insolvency and Bankruptcy Code (IBC). Bank of Baroda acknowledges RP Sandeep Goel's contributions liquidation value, and SFC has over 83% approx. of the Recovery of the Claim amount."***

The Plan was approved by the CoC in October 2022, and RP filed the application for approval of Resolution Plan under section 30(6) of IBC 2016. The order was reserved on the Plan application in December 2022, and the order was pronounced on 09.03.2023.

RP with the inherent powers during CIRP demitted the office and took over as the Chairman of the Monitoring Committee, now the challenge was to implement the Resolution Plan. There was some reported dispute at MCA by the operating Agency against the suspended board of the CD, and RoC was not ready to remove the said line on change of equity to new Resolution Applicant despite having the NCLT order. A lot of persuasion has been done by the Chairman monitoring committee and submitted several representations; however, time was running fast, and no fruitful result came despite personal meetings by Resolution applicant, appointed Professionals, and several written requests by the erstwhile Resolution Professional and Chairman Monitoring Committee. The time of the 90-day period was getting over, and this was again a big challenge for Resolution Applicant to make payment while he was having sanction of loan amount and could not draw down the same in the absence of the change of Directors at RoC.

Again, a lot of pressure was mounted on all that is the sole SFC, i.e., Bank of Baroda and Resolution Applicant. It was Erstwhile RP and Chairman monitoring committee who had to play a tactful role so as to create a win-win for all, and at the end with a series of meetings and persuasion, Successful Resolution Applicant who was running a chain of 5 star hotel in India arranged the funds from internal sources to maintain his goodwill and paid the entire amount on time resulting in over 83% recovery of claim amount to SFC.

However, the Role of Chairman monitoring committee was not yet over, SRA wanted to continue the monitoring committee to get the balance sheet filed at RoC which RoC was not accepting despite repeated submission and change the directors of the CD. This has become really challenging for Resolution Applicant that despite making full payment he was not having ownership transferred on paper at RoC. Ultimately through a writ petition filed by SRA at the High court, a direction to RoC was granted to change the director of the new Resolution applicant, and it was done, and Monitoring Professional supported the SRA on all count and Resolution Plan is successfully implemented.

SRA Comment

I, Harimohan Dangayach, Managing Director Serveall Land Developers Private Limited and Sh. Anil Khandelwal, was one of the Successful Resolution Applicants within the consortium comprising for Brys Hotels Private Limited. Initially, we submitted a resolution plan with a lower price to the Resolution Professional, Mr. Sandeep Goel, during the Corporate Insolvency Resolution Process (CIRP) of Brys Hotels Private Limited. However, during the Swiss challenge, it was Resolution Professional who along with CoC members kept us busy increasing the price and we significantly increased our bid amount and felt at one point of time that we have taken an expensive deal. The real challenge came when even after NCLT approval we could not get our name Change as director of CD and recorded at RoC, this has

resulted that we could not avail the sanctioned loan. It was the monitoring Professional again who smartly managed to get the Resolution Amount paid to CoC members without getting our name as director updated at RoC record. However, we acknowledge the efforts of CMA Sandeep Goel as Resolution Professional and as a Monitoring Professional who supported us all through despite various challenges and created a win- win for all.

Today, we are renovating both the hotel property of the corporate debtor and hope that upon the completion of the hotel's renovation, our investment will transform it into one of the finest hotels globally. It's akin to finding gold in a river of sand.

Comments of the sole Secured Financial Creditor Bank of Baroda:

CMA Sandeep Goel's commendable efforts as Resolution Professional not only brought resolution to every stakeholder but also resulted in recoveries far surpassing the fair value of the Corporate Debtor which has given a good recovery to SFCs, FCs, and other creditors, making it the rarest of the rare within the domain of the Insolvency and Bankruptcy Code (IBC).

Bank of Baroda acknowledges CMA Sandeep Goel's untiring efforts and contributions in finding the best resolutions and working as a team with CoC members, even when faced with challenges such as having a CoC member involved in a legal battle. It was indeed a challenge for Resolution Professional to manage both ends while dealing with the same person as a CoC member and seeking to regain unauthorized possession from them. Mr. Sandeep Goel's role as Chairman of the Monitoring Committee of Brys Hotels Pvt Ltd was also commendable. The bank eagerly anticipates his continued zeal and dedication in handling future IBC cases.

In conclusion, the story of Brys Hotels Pvt Ltd's journey through the Corporate Insolvency Resolution Process (CIRP) is a testament to the resilience, perseverance, and collaboration that underpins successful resolution endeavors. From the tumultuous beginnings marked by legal battles and uncertainty to the triumphant resolution that exceeded expectations, each twist and turn illuminated the transformative power of determination and strategic guidance.

Through the unwavering support of BoB and the dedication of the resolution team, led by the IRP/Monitoring Professional, obstacles were overcome, and challenges were met head-on. The result was not just a successful resolution plan, but a recovery that far surpassed initial expectations, benefiting all stakeholders involved.

As the dust settles and the journey concludes, the lessons learned from Brys Hotels Pvt Ltd's experience serve as a guiding light for future resolution endeavors. They underscore the importance of collaboration, strategic planning, and unwavering commitment in navigating the complexities of corporate insolvency.

Ultimately, Brys Hotels Pvt Ltd's story is not just one of financial redemption but of resilience in the face of adversity, demonstrating that with determination and collaboration; even the most challenging situations can be transformed into opportunities for growth and success.

MR. JITENDRA R. PALANDE
INSOLVENCY PROFESSIONAL

Khandoba Prasanna Sakhar Karkhana Limited

SNAPSHOT OF CIRP

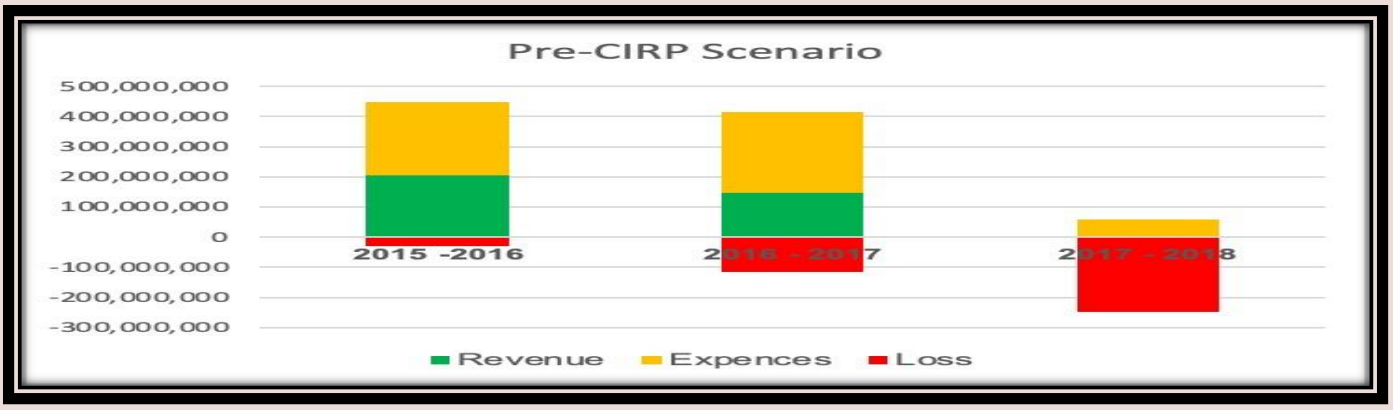
Khandoba Prasanna Sakhar Karkhana Limited (Corporate Debtor/Company), a molasses-based ethanol manufacturing company, faced Corporate Insolvency Resolution Process (CIRP) in 2018, initiated by Karad Urban Co-op Bank Ltd (KUCB). This bank was the first one in the co-op banking industry to initiate CIRP against any company. Jitendra Palande was appointed as the Resolution Professional (RP). The RP and team successfully conducted the process, resulting in a resolution plan approved by the Adjudicating Authority. The total plan amount was 2.5 times the market value and more than 3 times the liquidation value of the Corporate Debtor.

CORPORATE DEBTOR PROFILE

Khandoba Prasanna Sakhar Karkhana Limited; a company registered under The Companies Act, 1956 is under the jurisdiction of the Registrar of Companies (ROC), Pune. The installed capacity was 75 KLPD. Manufacturer of Ethanol, Sugar, Rectified Spirit, Rectified Spirit BP, Special Denatured Spirit, and Industrial Chemicals.

PRE-CIRP SITUATION AND CAUSES OF STRESS

The Corporate Debtor faced significant challenges due to the volatile ethanol and molasses market. The factory was closed due to inadequate infrastructure, breaching Maharashtra Pollution Control Board (MPCB) standards. The company borrowed funds, executed contracts, and raised substantial funding. Bank guarantees for ethanol supply were invoked due to non-performance.



SETTING UP PRIORITIES BY THE RP

The RP set up priorities to manage CIRP successfully by preserving asset value, managing corporate debtor affairs, managing diverse stakeholders, creating a positive image, advising successful resolution applicants, deploying innovative ideas, and ensuring a smooth handover of the Corporate Debtor.

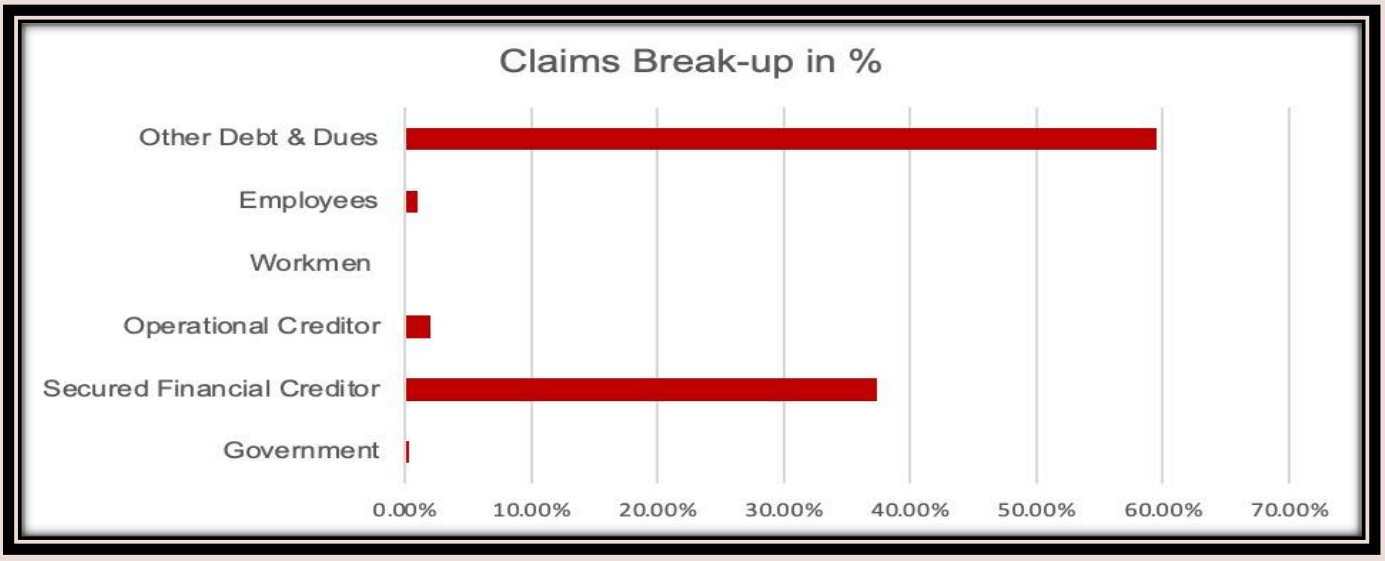
CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

INITIAL 2 MONTHS

Promoters faced disagreements with banks, after KUCB section 7 petition was admitted and the promoters' section 10 petition dismissed. The IRP resigned on health grounds, prompting KUCB and the IRP to request the RP to take over. Without much assessment, the RP intervened to manage the CIRP and rescue the IRP and the bank.

CLAIMS ADMITTED

The IRP admitted initial claims, but many creditors were unaware of the claim submission process, so the RP Team provided explanations and assistance in filing their claims. The percentage break-up of claims by creditor group is given below.



REGULATORY AUTHORITIES

The RP informed the authorities about the commencement of CIRP and requested them to file claims as

per the provisions of the Code. Some authorities responded with clarification about the IBC, but most of them claimed that their laws superseded IBC.

SENSITIVE SCENARIO AT MANUFACTURING FACILITY

Employees and Creditors viewed RP as their enemy No. 1 due to fear of job loss and uncertainty. The RP was seen as a ***"persona non grata"*** who planned to destroy the Corporate Debtor's future. The employees demonstrated hardcore loyalty towards Promoter. The villagers were also instigated by the promoter. The initiation of CIRP made the situation worse because their dues prior to the CIRP commencement date were included in claims. The situation flared up leading to total non-co-operation. The RP spent time to educate them about the IBC, its objectives, its benefits and how the CIRP was the beginning of the revival phase in the best interest of stakeholders. The RP convinced the COC to pay the employee salaries on time during CIRP which created a sense of confidence in them, and the situation remained under control.

NEXT 5 MONTHS

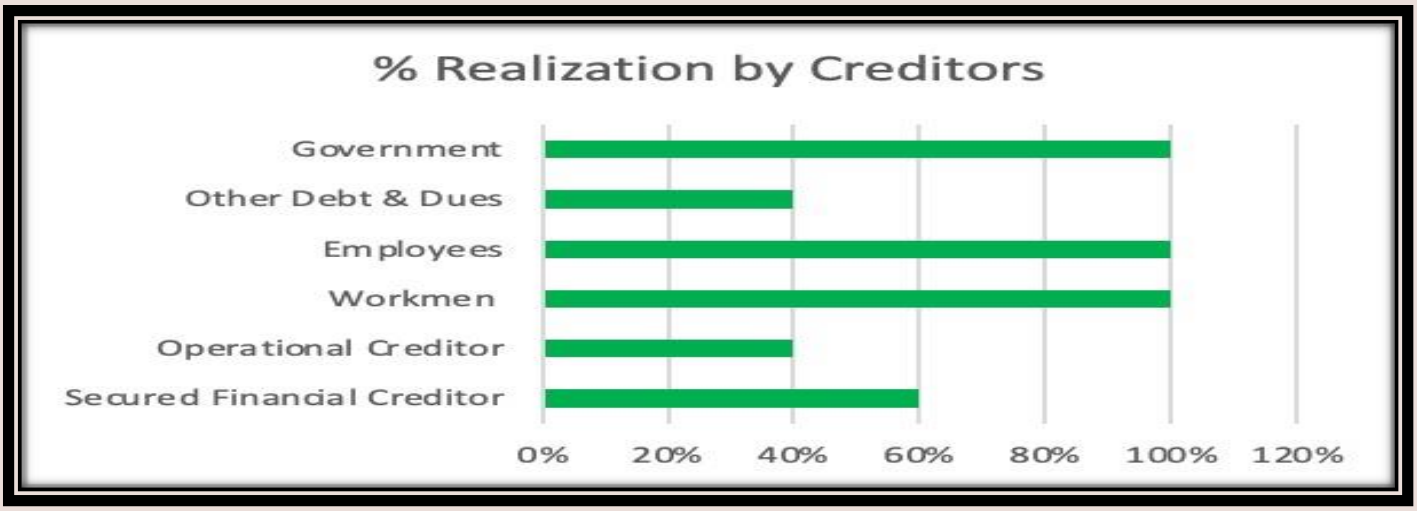
The promoter initially participated in the CIRP but filed a writ petition in the Bombay High Court, accusing the Adjudicating Authority and bank of conspiring against him. This raised concerns among the legal community and insolvency professionals. The promoter did not challenge the NCLT order in the National Company Law Appellate Tribunal (NCLAT), participated in the CIRP proceedings and a couple of months later filed the writ when he perceived that proceedings did not suit his expectations. The Bombay High Court found that the promoter adopted tactics of "taking chances" and dismissed the petition with costs. It vacated the stay after 5 months with comments.
"...we find that the Petition deserves to be thrown out on the ground of conduct of the Petitioner..."

BOOKS OF ACCOUNTS AND FINANCIAL STATEMENTS

The promoter provided accounting data and financial statements very late, revealing erroneous entries and outdated Corporate Debtor accounts. The RP's team reconciled accounts with auditors, finalizing financial statements.

RESOLUTION OF THE CORPORATE DEBTOR

The RP and Team developed a comprehensive strategy for the successful resolution of the Corporate Debtor, aggressively marketing the case to potential buyers and investors. They followed all mandated activities under the Code, including information memorandum, evaluation matrix, and invitation of resolution plans, as per the Code. The realization by each creditor group is given below.



HANDOVER OF THE CORPORATE DEBTOR TO THE SUCCESSFUL RESOLUTION APPLICANT

The resolution plan for the Corporate Debtor involved appointing a new board of directors and removing the previous board. Challenges included classification as an Active Non-Compliant company, non-cooperation from promoters, and structuring the new management. After approval, the Resolution Applicant took over management in compliance with NCLT order. The RP advised the Registrar of Companies (RoC) on the plan process and its impact on the company. Thereafter the RP as part of monitoring committee moved an application to the (RoC) for appointment of new Directors from the backend to implement its Resolution plan, as there was no formal process in place at RoC side.

CHALLENGES CREATED BY THE PROMOTER

The promoter's writ petition was dismissed by Bombay High Court, and he also failed to submit a resolution plan. The COC approved a plan by Sai Agro, leading to a personal vendetta against the RP and the COC, accusing them of ganging up against him. The promoter disrupted the plan approval process by filing applications with the NCLT, leading to litigations. The plan was approved by the Adjudicating Authority, but the NCLAT set aside the order and sent it back to the COC. The RP and KUCB challenged the order in the Supreme Court of India. Initially, the Apex court was not willing to entertain the matter. However, the RP submitted a short 3-page write-up on the entire matter and the bench headed by the then Chief Justice of India found merit in the RP's appeal. The Apex Court came down heavily upon the NCLAT and the promoter and passed a landmark judgment setting aside the NCLAT order and restoring the NCLT order. The Apex Court also upheld and ratified the actions taken by the RP which vindicated the RP's role in managing the entire CIRP. The order is part of Supreme Court "Reportable" judgments. The promoter made a series of allegations against the RP with the clear intention of destroying the career of the RP.

VALUE ADDITION BY THE RP AND THE TEAM

The RP and the team created value in the resolution process and extracted higher amount from the resolution plan with the help of the following strategies which resulted into maximization of resolution plan amount; 2.5 times the market value and more than 3 times the liquidation value of the Corporate Debtor.

Thorough Assessment: A comprehensive assessment of the distressed assets and liabilities was

conducted to understand potential value drivers.

Enhancing Asset Value: Effective strategies were deployed to enhance asset value, such as identifying new revenue streams.

Creative Solutions for a faster turnaround: The RP could not restart operations due to the COC's inability to approve interim funding for the plant. After the COC approved the resolution plan, the RP, with COC approval, allowed the SRA to run the plant on rent, allowing for repairs and maintenance before handover. This arrangement generated cash flow for the corporate debtor, reducing the burden on the COC and allowing the plant to restart immediately after handover.

Market Outreach: The RP and the team actively marketed the distressed assets to a wide range of potential buyers and investors to generate competitive offers. The RP has a strong network of investors, private equity players, HNIs, and lenders. They designed an information memorandum, presented it to investors, and generated interest. Nine prospective resolution applicants expressed interest, two completed due diligence, and one submitted the plan. Sai Agro (India) Chemicals' plan was approved unanimously.

Legal Expertise: The team leveraged legal expertise to navigate complex legal and regulatory frameworks, ensuring that the resolution plan is legally sound and maximizes value.

Transparency and Communication: The team ensured transparency and open communication with the resolution applicant throughout the due diligence process, building trust and confidence led to higher value.

MS. SUJATA CHATTOPADHYAY
INSOLVENCY PROFESSIONAL

The Resolution of Maruti Cotex Limited

INTRODUCTION

The ideal *fait accompli* of a successful Resolution Process is naturally revival of viable businesses. To this end, analysing the feasibility and viability of the Resolution Plan assumes immense significance.

While setting the evaluation matrix, very often quantitative parameters taken precedence over the qualitative parameters. However, it is when the Resolution Plan is an optimal combination of quantitative and qualitative parameters that the resolution is a resounding success**.**

About the CD

The Corporate Debtor ("CD") was incorporated for setting up a 100 % export-oriented unit in the year 2006 and was engaged in the business of spinning of cotton yarn. The CD established a unit spread over 3,22,109 sq. mtr. of land at MIDC, Kolhapur, Maharashtra.

The unit had 1,00,000 spindle production capacity and was operational during the period 2009 to 2013. Production stopped in January 2014. The CD had export obligations pursuant to the terms of the EPCG scheme.

An application under Section 7 of IBC was filed against the CD on 13.12.2017 for the defaulted amount of Rs. 194,36,76,833/- as on 15.02.2018. The application was admitted and CIRP commenced on 08.05.2019.

BREAKUP OF CLAIMS:

Sl. No.	Category	Amount (Rs. in Crores)
1	Secured Financial Creditors	547.92
2	Operational Creditors	2.92
3	Statutory dues	51.79
	TOTAL	602.63

There was a further Rs. 12 crores due to unsecured creditors which had not been claimed. Pertinently, there was also a claim of Rs. 9.50 crore imposed as late submission penalty of building completion certificate imposed by the MIDC.

RESOLUTION PLAN

Three compliant Resolution Plans were received by the Resolution Professional. Consequently, inter-se bidding followed wherein 8 rounds of bidding were carried out. The amount offered under the plan improved from Rs. 60 crores in the first round to Rs. 77.11 crore as the final plan amount.

The successful Resolution Plan provided for the following payment structure:

Sl. No.	Category	Claim admitted (Rs. in Crores)	Amount Offered (Rs. in Crores)
1	CIRP Cost provision	1.00	1.00
2	Secured Financia Creditors	547.92	75.61
3	Operational Creditors	2.92	0.50
4	Statutory dues	51.79	
	TOTAL	603.63	77.11

The Resolution Plan was submitted to the Hon'ble NCLT, Mumbai Bench for approval on February 2, 2020, and was approved on July 2, 2020. The Plan provided for the payment of the full resolution plan amount within a period of 50 days, i.e., August 21, 2020. It is pertinent to state that this was at the peak of the covid 19 period, and the entire nation was going through a lockdown. Despite its best efforts, the Resolution Applicant could not raise the plan amount within the period stated in the Resolution Plan and sought an extension of 90 days for the payment. The extension was granted, and the Applicant could honour its commitment and made the payment in the extended period granted to it.

CHALLENGES FACED IN REVIVING THE CD

At the time the Successful Resolution Applicant (SRA) got possession of the Corporate Debtor, the unit had been closed for over 8 years. The SRA spent an additional Rs. 15 crores for refurbishment of machines, some of which had gone out of production.

The SRA was further faced with the demand from MIDC for the payment of not just the penalty of Rs. 9.50 crore imposed as late submission penalty of building completion certificate, but also a further Rs. 7.05 crore as transfer charges. The SRA unsuccessfully sought a waiver of these charges.

In August 2021, the final clearance was received from MIDC, and power was restored to the factory. Production finally commenced in the unit in November 2021, initially at a limited capacity.

CONCLUSION

What started off at a low key has yielded results in the last 2 years and the factory today employs 800 workers. The factory runs all the three shifts i.e., 24X7 and has achieved production of 25 tonnes per day of fine count yarn. The yarn produced is being exported to Bangladesh, China, and Korea.

MR. ASHOK KUMAR GULLA
INSOLVENCY PROFESSIONAL

Vardhman Industries Limited

APPROVAL AND IMPLEMENTATION OF RESOLUTION UNDER CIRP IN VARDHMAN INDUSTRIES LTD

BACKGROUND

- Vardhman Industries Limited (herein referred as VIL or Corporate Debtor or Company) was established in 1984 having a Registered Office at Vikram Tower, Rajendra Place, New Delhi- 110008, and factory at Village Beaopur, Shambu, Near Rajpura, Patiala District, Punjab and administrative office at Puha, Ludhiana.

- The Company was engaged in the manufacture of galvanized sheets (plain and coregulated) and color-coated sheets with an installed capacity of 2500 MT per month. It has multiple applications for the construction Industry for Roofing and Flooring, Consumer Products, and Other Industries.

- The Company had availed various credit facilities under Consortium Arrangement from State Bank of India and IDBI Bank and these credit facilities had become Non-Performing Assets with these banks in February 2017.

COMMENCEMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

- The application was filed under Sec 10 by the Company for initiation of CIRP with the Hon'ble NCLT, New Delhi Bench, and the same was admitted vide order dated 16th November 2017, appointing Mr. Manoj Maheshwari as Interim Resolution Professional (IRP).

- The members of the Committee of the Creditors (CoC) during the first meeting decided to replace IRP and accordingly, on the application filed with the Hon'ble NCLT, New Delhi bench order dated 17th January 2018, appointing Mr. Ashok Kumar Gulla as Resolution Professional (RP) in the CIRP of VIL.

PUBLIC ADVERTISEMENT

- Public Advertisement intimating about the commencement of CIRP and inviting claims from all the stakeholders was published in Business Standard (English and Hindi) in Delhi and Chandigarh Edition dated 21st November 2017 and in Punjabi Jagran, Ludhiana edition dated 21st November 2017.

TAKING CONTROL OF THE CORPORATE DEBTOR

- The IRP and thereafter RP intimated about the commencement of CIRP to Management, suppliers, vendors, Directors, management, workers, and employees and to statutory authorities.

- The Resolution Professional and his team from IPE took control of the assets of the corporate debtor, books and accounts and bank accounts with the help of the staff working in the company.

- The Company was working at the capacity utilization of around 20% at the time of taking over charge, since major suppliers had stopped supplying critical raw materials, hence negotiations were held with Suppliers and Vendors to ensure timely receipt of the raw materials and spares and follow up was made with the customers to get the sales proceeds in time.

- The cash flow was monitored closely, and all the staff were asked to improvise on production and cost-cutting. All these efforts helped to improve cash flow and payments to suppliers and staff were made in time and all Insolvency resolution Process Costs were met out of the cash flows generated during CIRP. Further, initiated necessary action for follow-up the account recoverable. With all these efforts, capacity utilization which was around 20% had gone up to 45% to 50% at the close of the Insolvency.

INVITATION OF EXPRESSION OF INTEREST (EOI)

- The RP arranged for getting Valuation done by the Registered valuers for arriving at Fair and Liquidation Value. Further, RP along with his Team have complied Information Memorandum, Request For resolution Plan (RFRP), Evaluation Matrix and also uploaded various documents on Virtual Data Room (VDR) to enable Prospective resolution Applicants (PRAs) to carry Due Diligence.

- Public Advertisement in Form G was released in Business Standard, New Delhi, and Chandigarh Edition and Punjabi Jagran on 26th February 2018 for inviting EOI from PRAs to submit a resolution Plan. In response to this Advertisement, Five EOIs were received but only one Resolution Plan was received from JSW Steel Ltd.

HOLDING MEETINGS OF COC TO DISCUSS THE RESOLUTION PLAN

- The resolution Plan submitted by JSW Steel Ltd was opened for the first time during the Fourth meeting of CoC held on 17th April 2018. It was decided to call representatives of the PRA to discuss further and negotiate on the Resolution Plan.

- The Representatives of PRA along with the Legal Counsel were invited to attend the 5th Meeting of CoC held on 27th April 208 and various issues pertain to (i) extinguish of mortgage charge of PNB on land parcel provided for credit facilities provided to their associate company (ii) wavier for any other liability of statutory authorities other than amount provided for in the resolution Plan (iii) approval for carry forward losses (iv) waiver/ extinguishment of any liability of PRA for legal cases filed/ to be filed against the Company. The members decide to discuss further all these issues and on the Resolution Amount acceptable to CoC in the forthcoming meetings.

- In all eight meetings of CoC were held to discuss in detail various terms and conditions and Resolution Amount with the representatives of PRA between 28th May 2018 to 10th August 2018. The PRA incorporated various modifications in the Plan so as to take care of the opinion of Resolution Professional and his Legal counsel that the Plan should be in compliance of Sec 30 (2) (e) of the Code. Further, the Plan was modified to meet the expectation of CoC on the Resolution Amount.

- The 13th Meeting of CoC was held on 10th August 2018 where all the members of CoC with 100% voting share approved the revised resolution Plan of JSW Steel Ltd.

APPROVAL OF THE RESOLUTION PLAN BY NCLT AND NCLAT

- The Application was filed by Resolution Professional seeking approval for the resolution Plan submitted by JSW Steel Ltd in the CIRP of VIL. The said application came up for hearings from August 2018 to December 2018 and finally the Plan was approved by Hon'ble NCLT, Delhi Bench on 19th December 2018. The Hon'ble NCLT, Delhi Bench also disposed two intervening applications filed by PNB and SBI.

- The Resolution Applicant sought various clarifications on the order dated 19th December 2018 of NCLT, Delhi and approached NCLAT in the matter. The Hon'ble NCLAT vide order dated 16th April 2019 provided further clarifications on the (i) approval for carry forward losses subject to approval by competent authority (ii) liabilities of the group companies and termination of these agreement (iii) right from recovery of receivables to be paid first to financial creditors and operational creditors and other matters.

- The Resolution Applicant further sought clarifications from NCLAT, and the Resolution Applicant thereafter approached the Hon'ble Supreme Court that vide order dated 10th May 2019 maintained the status quo and directed NCLAT to dispose of the Appeal.

- These pending issues were discussed several times with the NCLAT and finally NCLAT vide order dated 4th December 2019 and 11th December 2019 provided further clarifications on (i) right to recover the amount from the account recoverable to Resolution Applicant (ii) after the implementation of the Plan, the CD will not continue to be promoter of its associate company merely due to minor shareholding and thus not required to reclassify the company by way of separate procedure. The Resolution Plan with these modifications of the NCLAT Order dated 11th December 2019 was accepted by the Resolution Applicant.

SUPERVISION AND IMPLEMENTATION OF THE PLAN

- A Monitoring Committee was constituted with one member each from SBI and JSW Steel Ltd and ex-Resolution Professional to supervise and implement the Plan. JSW Steel Ltd deposited the Resolution Amount and the same was distributed to all the claimants on or before 31st December 2019.

- The documents of title of properties held with IDBI Bank were handed over to representatives of JSW Steel Ltd on 31st December 2019 and immediately thereafter both Banks filed online for the satisfaction of their charges with ROC. The Resolution Applicant took charge of the assets of the corporate debtor along with records and control on accounting software by deploying its own staff and retaining the existing staff of the corporate debtor. The Resolution Plan was thus fully implemented on 31st December 2019 and the role of the Monitoring Committee came to an end on the same day.

MR. PRATIM BAYAL
INSOLVENCY PROFESSIONAL

Birla Tyres Limited

- **Birla Tyres Limited** –Birla Tyres, the largest tyre manufacturer of eastern India has been resolved with desired value and speed. The account was into CIRP in May 2022, and I was appointed as RP in October 2022, as the relevant petition took long time to get allowed. Debt exposure around Rs 1700 Cr. Few of the key challenges included a large un mutated land bank -about 160 acres of land out of the total 180 acre of land was not in the name of the company. During the CIR process, I, as a RP, took special effort to get the mutation done in the name of the company seeking recourse to the highest authority of land revenue in the state of Odisha. This was a major hurdle as even the bank's security was very uncertain since though, they had the charge over the land, the same was not in the name of the borrower. This mutation gave the COC large relief during the CIRP process.

- Another challenge was the huge nonworking labour force and local unions who either knowingly or unknowingly was trying to create different roadblock in the process of CIRP. The RP took special effort to handle the situation in the plant with the help of local district administration. This aspect was really a critical area as it involved large scale human interference.

- Huge perishable finished stock was also another area of concern which was getting devalued day by day. During the CIRP the RP took special effort to realise those assets with the help of COC approval. There was serious resistance from the local nonworking labour unions etc in selling the out of warranty stocks. However, RP and his team from Price Waterhouse with day-to-day involvement at the factory site and round of discussions with the unions, local administration were able to sell those stocks through proper bidding process and realised a major portion of the CIRP cost. This also gave the COC huge relief as maintaining this substantially big plant and the assets was a costly affair.

- After serious market scouting two resolution applicants gave their plan there were round of discussions through which the Plan value was doubled. The final plan which was placed for voting was vetted from all the legal points including the recent judgement on PF and gratuity. The distribution was voted upon and to the best extent possible interest of all the stakeholders including the minority stakeholder were taken care of. The plan was approved with 78% of voting. The complex structure of the plan was presented before this COC in a structured way so that the scheme of arrangement and the demerger included in the resolution plan where understandable to the members of the COC.

- There was genuine issue in the claim that was submitted and was already accepted by the IRP. a large amount was from the promoter group which was scrutinised with very sincerely and after that a large

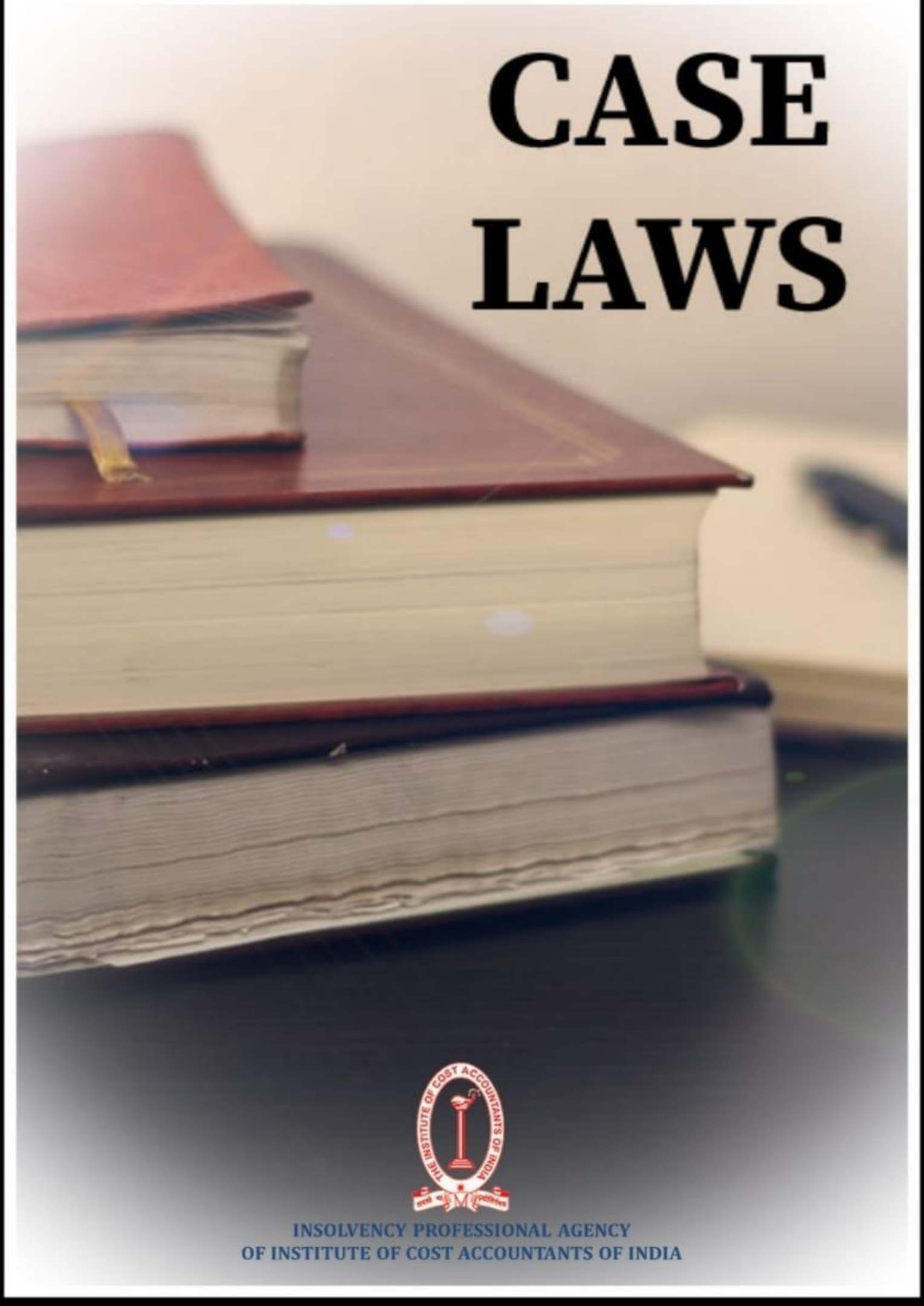
portion of the same was rejected. This was a fairy realistic but tough decision as the amount of claim was fairly large. Petitions were filed by the claimant against the RP's rejection decision. However, the petitions were dismissed at all the Juridical authority up to the apex court.

- During the CIRP all the minimum regulatory requirements including the listing requirement of the stock exchanges and the Secretarial requirements have been complied

- The COC was a fairly big there were 12 members in the committee of creditors representing both PSU banks, Private Banks, FIs and ARCs. All these financial institutions have their own process and concerns each of which were addressed during the entire process.

- Resolution plan was approved by the AA on 19th October 2024, with in a year of being appointed as RP replacing the IRP. The resolution plan has been implemented by January 2024. This is the largest Tyre manufacturing unit in Eastern India. The unit is expected to resume operation soon as have been informed.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 208 - INSOLVENCY PROFESSIONALS - FUNCTIONS AND OBLIGATIONS OF

Kapil Goel v. Insolvency and Bankruptcy Board of India [2023] 146 taxmann.com 554 (Delhi)/ [2023] 176 SCL 389 (Delhi)

Where Disciplinary Committee considering that RP had incorporated a partnership firm using 'IBBI' in firms' name in violation of section 208 suspended RP's registration, since name of partnership firm incorporated by RP had already been struck off from Register of Companies by Ministry of Corporate Affairs (MCA) and period of suspension of three months of RP's registration had already passed, no interference in Disciplinary Committee's order was required.

The petitioner-Resolution Professional (RP)had incorporated a partnership firm by name'IBBI Insolvency Practitioners LLP'. Considering that RP had used name 'IBBI' in firm's name, a show cause notice was issued to RP. Disciplinary Committee observed that RP's conduct was in violation of section 208, read with regulation 7(2)(a) and 7(2)(b) and directed RP not to take up any new assignment till 'IBBI Insolvency Practitioners LLP' was removed from Register of Companies by Ministry of Corporate Affairs (MCA) and suspended RP's registration as an insolvency professional for three months from date of issue of order.

Held that the name of partnership firm incorporated by RP had already been struck off and period of suspension of three months had already passed, therefore no interference was required in Disciplinary Committee's order. Respondent No. 1 held status of operational creditor; therefore, impugned order passed by the Adjudicating Authority did not suffer from any factual frailty.

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

Hindustan Petroleum Corporation Ltd. V. S.S. Engineers [2023] 146 Taxmann.Com 524 / [2022] 234 COMP CASE 72 (NCLAT- New Delhi)

Where prior to issuance of demand notice, operational creditor itself invoked arbitration to settle dispute and stated that corporate debtor had raised issues relating to non- adherence of terms of contract, invocation of arbitration itself substantiated existence of dispute and, therefore, order passed by NCLT initiating CIRP against corporate debtor was to be set aside.

The corporate debtor floated a tender, which was assigned to the operational creditor for a turnkey basis project. There occurred some differences during execution of project resulting in non-payment of sum due by the corporate debtor. The operational creditor invoked an arbitration clause for recovery of unpaid amount. Thereafter, CIRP application was filed by the operational creditor due to unpaid bills and some were admitted by the NCLT. The corporate debtor vides instant appeal contending that providing substandard material and delayed execution of assigned project caused violation of tender conditions by the operational creditor, thereby raising dispute between both parties.

Held that since prior to issuance of demand notice the operational creditor itself invoked arbitration to settle dispute and stated that the corporate debtor had raised issue to non- adherence of terms of contract, invocation of arbitration itself substantiated existence of dispute and, hence, there being pre-existing dispute, order of the NCLT admitting section 9 application was to be set aside.

Case Review: S.S. Engineers v. HPCL Biofuels Ltd. [2023] 146 taxmann.com 523 (NCLT - Kol.), reversed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS – MORATORIUM GENERAL

Shekhar Resorts Ltd. v. Union of India [2023] 146 taxmann.com 121 (SC

Where appellant had applied for settlement under 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and was entitled to benefit under Scheme as Form No. 1 submitted by appellant had been accepted and also Form No. 3 determining settlement amount had been issued, however, appellant was not in a position to deposit settlement amount at relevant time in view of moratorium under IBC.

The appellant was engaged in the business of hospitality services. The Revenue Department conducted investigations for alleged evasion of Service Tax by the appellant. CIRP was initiated and the appellant was subjected to moratorium under section 14 from 11-9-2018. Subsequently, the appellant submitted an application for availing benefit of 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, wherein, Designated Committee directed the appellant to pay settled amount under Scheme, 2019 within 30 days. could have been made. Thereafter, resolution plan was approved by the NCLT due to which moratorium period came to an end on 27-7-2020. The appellant, therefore, expressed its desire to make full payment of the amount as ascertained by the Designated Committee, which was rejected on grounds that the last date for same had expired. On writ, the appellant sought directions for consideration of its case under Scheme, 2019. The High Court dismissed the petition on grounds that no direction contrary to Scheme, 2019 could have been issued and relief sought could not be granted as Designated Committee under Scheme was not existing.

Held that the appellant was not in a position to deposit settlement amount at relevant time due to legal impediment and bar to make payment of settlement amount in view of mortarium under IBC, but was otherwise entitled to benefit under Scheme as Form No. 1 submitted by the appellant had been accepted and Form No. 3 determining settlement amount had been issued, the High Court had erred in refusing to grant any relief to the appellant as prayed.

Case Review: Shekhar Resorts Ltd. v. Union of India [2022] 145 taxmann.com 657 (All.), reversed.

SECTION 66 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR WRONGFUL TRADING

Smt. Sudipa Nath v. Union of India [2023] 148 taxmann.com 33 / [2023] 177 SCL 259(TRIPURA)

There is no arbitrariness, matchless manifest arbitrariness in section 66(1) to entertain writ petition to declare said provisions as unconstitutional and ultra vires of article 14 of Constitution of India

The petitioner was a practicing advocate, he had filed an application under article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue appropriate orders or direction, directing the respondent-Union of India to forthwith take steps to declare section 66(1) as ultra vires on the vice of article 14 of the Constitution of India for being manifestly arbitrary and unconstitutional, unless to save if from unconstitutionality and in consonance with the scheme and object of IBC, scope thereof is enlarged by the Court by expanding the powers and jurisdiction of the NCLT by enabling it to declare fraudulent business transactions as void under section 66 and to entertain application under section 66(1) on its merits even if filed by any creditor or contributory of the Corporate Debtor. Principally, the issues raised in the instant petition dealing with the frauds of gigantic proportion are being played by the corporate to defraud the gullible creditors to siphon off public money. He contended that introduction of Insolvency

Bankruptcy Code (IBC) itself is in public interest.
According to him, grant of the prayer made by him would serve public interest and would enable maximum recoveries under IBC for the creditors of a corporate debtor. The petitioner further submitted that there is an urgent need of passing appropriate directions as prayed for by him in the interest of justice. The prayers, if granted, would strengthen the framework for insolvency & bankruptcy and would cause immense benefit to the creditors at large who would be able to make higher recoveries. The petitioner submitted that although broadly section 339(1) of the Companies Act, 2013/section 542 of the Companies Act, 1956 may materia to section 66(1), there is clear distinction in the application of the provisions and the scheme under the Companies Act vis a vis IBC.

Held that section 66(1) makes persons responsible for fraudulent conduct of business of company personally liable for fraudulent trading to recouping losses incurred thereby and provides that NCLT can pass order holding such persons liable to make such contributions to assets of the corporate debtor as it may deem fit. No power has been conferred on NCLT to pass such orders against other organizations/legal entities (other than corporate debtors) with whom such business was carried out. An application filed under section 66(1) by RP would not bar any civil action in accordance with law, either at instance of RP or liquidator or by the corporate debtor in its new avatar on a successful CIRP for recovery of any dues payable to the corporate debtor by such organization/legal entities. Any application filed under section 66(1) will have no effect on legality or validity of any independent criminal action in accordance with law against such organization/legal entities and persons responsible for conduct of their business with the corporate debtor. Therefore, legislature confers no jurisdiction but declaring any transaction as void, even if fraudulent, and confers jurisdiction on NCLT to fix liabilities on persons responsible for conducting business of corporate debtor, which is fraudulent or wrongful. There is no arbitrariness, matchless manifest arbitrariness in section 66(1) to entertain writ petition filed to declare said provisions as ultra vires of article 14 of Constitution of India and, therefore, section 66(1) is constitutional and said writ petition was to be dismissed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Platino Classic Motors India (P.) Ltd. v. Deputy Commissioner of Central Tax and Central Excise [2023] 157 taxmann.com 276 (Kerala)

Section 14 does not create a bar for finalization of assessment and adjudication proceedings in respect of taxes and, thus, subsequent to admission of resolution for liquidation, there was moratorium for recovery of tax dues but there was no bar for such finalization of assessment and adjudication proceedings.

Order of liquidation in recommended 33 was passed by NCLT against the corporate debtor, liquidator was appointed, and moratorium was commenced. The respondent/Commissioner of tax assessed taxes applicable on assets of the corporate debtor and finalized said assessment vide impugned order. The liquidator issued a public notice and received claims from creditors of the corporate debtor including respondent. Instant writ petition was filed by the corporate debtor against impugned order, contending that impugned order was issued after commencement of moratorium under section 14, and it was not afforded with an opportunity to present its case. It was noted that show cause notice was issued by the respondent to the corporate debtor to which reply was filed and after hearing parties impugned order was finalized.
Held that section 14 does not create a bar for finalization of assessment and adjudication proceedings in respect of taxes. Since subsequent to admission of resolution for liquidation there was moratorium for recovery of tax dues but there was no bar for finalization of assessment and adjudication proceedings, instant writ petition was to be dismissed and claims of the respondents were to be considered according to law.

SECTION 22 - CORPORATE INSOLVENCY RESOLUTION PROCESS – RESOLUTION PROFESSIONAL - APPOINTMENT OF

Sanjay Kumar Agarwal v. Central Bureau of Investigation, Anti-Corruption Bureau, Dhanbad [2023] 149 taxmann.com 146 / 177 SCL 511

Resolution Professional will come within meaning of a public servant under section 2(c) of Prevention of Corruption Act for reason that definition of public servant as given under PC Act is very wide and expansive, it is not limited to those serving under Government or its instrumentalities and drawing salary from public exchequer; appointment of Resolution Professional is made during resolution process before Company Law Tribunal with its approval, he will be a public servant under section 2(c)(v) of PC Act.

Held that Resolution Professional will come within meaning of a public servant under section 2(c) of Prevention of Corruption Act for reason that definition of public servant as given under PC Act is very wide and expansive, it is not limited to those serving under the Government or its instrumentalities and drawing salary from the public exchequer. Functions and obligations of Insolvency Professionals are as set out under section 208 of the I& B Code, which are public in nature, these functions intimately relate to matters relating to loans extended by Banks which are investments from public at large and, therefore, will come within meaning of public duty as provided under section 2(c)(viii) of the P.C. Act. IBC is a self- contained Code but only with respect to matters provided therein, it does not cover matters where RP takes bribes in order to favour a party for which Prevention of Corruption Act, 1988 is squarely applicable. Since appointment of Resolution Professional is made by the National Company Law Tribunal, which is the Adjudicating Authority for insolvency resolution process of companies under the I&B Code, 2016 and Resolution Professional has a key role to play in insolvency resolution process and to protect assets of corporate debtors, from his nature of assignment and duty to be performed, his office entails performance of functions, which are in nature of public duty and, therefore, will come within meaning of public servant both under section 2(c)(v) & (viii) of the PC Act.

SECTION 96 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - INTERIM-MORATORIUM

Bhavesh Gandhi v. Central Bank of India [2023] 149 taxmann.com 310 / [2023] 177 SCL 564 (NCLAT-New Delhi)

Where insolvency resolution process against corporate guarantor had already been initiated under section 95 by a creditor, subsequent application filed under section 95 by another creditor of same transaction could not be proceeded with in view of prohibition created by section 96 and, therefore, subsequent application was to be set aside.

The corporate debtor was extended various financial facilities by CDR lenders which included respondent bank and SBI. The appellant gave a personal guarantee to CDR lenders. An application under section 95 was filed by SBI against the appellant in which order had been passed by the Adjudicating Authority directing for commencement of interim moratorium and appointment of RP. Later, the respondent bank filed an application under section 95 against the appellant. The Adjudicating Authority passed the impugned order directing the RP to file a report within two weeks. Aggrieved by said order, the appellant filed instant appeal and submitted that by virtue of order, in which interim moratorium had commenced, application could not have been filed by the respondent bank under section 95 and same should have been stayed by the Adjudicating Authority.

Held that section 96 provides that during moratorium period, any legal action or proceeding pending in respect of debt shall be deemed to have been stayed, thus, application of respondent bank was hit by section 96(1)(b)(ii) and the Adjudicating Authority could not have proceeded with said application and appointed RP, and impugned order passed by Adjudicating Authority was to be set aside.

Case Review: Central Bank of India v. Bhavesh Gandhi [2023] 149 taxmann.com 309 (NCLT - Ahd.), reversed.

SECTION 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

Jalan Fritsch Consortium v. Regional Provident Fund Commissioner [2023] 149 taxmann.com 454 / 177 SCL 502 / 237 COMP CASE 204 (SC)

Workmen and employees are entitled for payment of full amount of provident fund and gratuity till date of commencement of insolvency, which amount is to be paid by successful resolution applicant consequent to approval of resolution plan.

The NCLAT in its impugned order had held that workmen and employees were entitled for payment of full amount of provident fund and gratuity till date of commencement of insolvency, which amount was to be paid by the successful resolution applicant consequent to approval of resolution plan in addition to 24 months workmen dues as workmen were entitled to under section 53(1)(b).

Held that there was no error in the order of NCLAT and therefore, appeal against said order was to be dismissed.

Case Review: Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. [2023] 146 taxmann.com 31 (NCLAT- New Delhi), affirmed.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

TUF Metallurgical (P.) Ltd. v. Union of India [2023] 157 taxmann.com 424 (Delhi)

Where pursuant to initiation of CIRP of corporate debtor, RP invited claims from creditors, however, respondent/revenue had not submitted its claim before RP to recover tax claims to be paid by corporate debtor for assessment year 2017-18 and meanwhile resolution plan for corporate debtor was approved by NCLT, right of respondent to recover amount due had extinguished.

CIRP was initiated against the corporate debtor and RP was appointed. RP made a public announcement calling upon all creditors to submit their proof of claims. Concededly, respondent/revenue did not lodge their claims with RP. Meanwhile, resolution plan of successful resolution applicant in respect of the corporate debtor was approved by CoC and subsequently by NCLT. It was thereafter respondent/revenue issued assessment order and demand notice against the corporate debtor qua assessment year 2017-18, raising income tax claims.

Held that resolution plan qua the corporate debtor having been approved by NCLT, tax claim pertaining to assessment year 2017-18 stood extinguished, thus instant writ assailing tax claim of revenue was to be allowed.

Case Review: Ghanshyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [2021] 126 taxmann.com 132/166 SCL 237 (SC) (para 10) followed.

SECTION 60 - CORPORATE PERSONS ADJUICATING AUTHORITIES - ADJUDICATING AUTHORITY

Zee Entertainment Enterprises Ltd. V. IndusInd Bank Ltd. [2023] 157 Taxmann.Com 425 (Delhi)

Where Writ Court directed that no coercive action be taken against appellant-guarantor till next date of hearing, however, said order was subsequently modified granting liberty to bank to take recourse to legal remedies available towards recovery of outstanding loan amounts, accordingly, bank filed an application under section 7 of IBC against appellant for recovery of outstanding amount, there was no disobedience or violation of Courts order by bank and thus, contempt petition was to be dismissed.

The appellant-Zee was guarantor to loan availed by the respondent no 2 from bank in terms of Debt Service Reserve Account (DSRA) Guarantee Agreement. The bank issued notice to the appellant invoking the DSRA Guarantee Agreement and calling upon the appellant to pay Rs.83 crore. The appellant filed a civil suit along with an application seeking interim relief that bank be restrained from seeking recovery of any amount under DSRA agreement. The writ Court by order dated 25-2-2021 directed that no coercive action be taken against the appellant till the next date of hearing. Thereafter, the bank filed an application under section 7 of IBC. The appellant filed an application before NCLT under section 60(5) contending that section 7 application was in contempt of order passed by Division Bench of writ court. It was noted that the order dated 25-2-2021 only restrain bank from initiating coercive steps against the appellant. Further, writ court vide order dated 3.12.2021 modified its previous order and granted liberty to bank to take recourse to legal remedies available towards recovery of outstanding loan amounts. Further, the bank had a legal right to proceed against a guarantor, which in this case was the applicant, in an appropriate court of law. This legal right to proceed against a guarantor before various judicial forums, would include NCLT under IBC. Lastly, the appellant in its application seeking interim injunction never sought any relief to restrain the bank from initiating IBC proceedings and had prayed for a restraint from initiating recovery proceedings only.

Held that every individual has a right to file any legal proceed in till specifically prohibited by law or by a stay / injunction order granted by the competent court, and accordingly, there was no disobedience or violation of Courts order dated 25.2.2021 and 3.12.2021 and contempt petition was without merit and thus, was to be dismissed.

GUIDELINES FOR ARTICLES

The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

✓ The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.

✓ The article should be topical and should discuss a matter of current interest to the professionals/readers.

✓ It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.

✓ The length of the article should be 2500-3000 words.

✓ The article should also have an executive summary of around 100 words.

✓ The article should contain headings, which should be clear, short, catchy, and interesting.

✓ The authors must provide the list of references if any at the end of article.

✓ A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.

✓ In case the article is found not suitable for publication, the same shall not be published.

✓ The articles should be mailed to "publication@ipaicmai.in".

RESIDENTIAL PROGRAM

"A NATURE'S RETREAT"

DELVING INTO INSOLVENCY AND BANKRUPTCY

14TH MARCH – 17TH MARCH 2024

PUDUCHERRY

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

ABOUT US

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICMAI) is a frontline regulator registered with the Insolvency and Bankruptcy Board of India (IBBI).

IPA ICMAI has professional members enrolled with it from versatile disciplines which include CMA, CS, CA, Bankers, Lawyers, Management Experts etc. to ensure continuous growth of the professional members and as a part of continuous learning process,

IPA ICMAI has a proven track record of introducing various initiatives from time to time in the form of **IBC Au-Courant** (Daily Newsletter), **The Insolvency Professional: Your Insight Journal** (Monthly E-Journal), **IBC Dossier** (Bulletin on brief of landmark judgements), **IBC Case Books** (A detailed study of company's insolvency/liquidation process), **Preparatory Education Course for Limited Insolvency Examination, Certificate Courses** in various domains related to the insolvency and bankruptcy along with the routine series of webinars, roundtables, conference and workshops for the entire professional fraternity across India. Till date IPA ICMAI has a record of conducting maximum inspection of its professional members across India with an intent of improving their performance in line with the best practices.

FUNCTIONS

Pursuant to provision of the Insolvency & Bankruptcy Code, IPA ICMAI performs the following functions, namely:

1. Grant membership to people who fulfil all requirements set out in its byelaws on payment of membership fee.
2. Lay down standards of professional conduct for its members.
3. Monitor the performance of its members.
4. Safeguard the rights, privileges and interests of insolvency professionals who are its members.
5. Suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its byelaws.
6. Redress the grievances of consumers against insolvency professionals who are its members.
7. Publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.
8. Professional Development of its members.
9. Development of Profession of Insolvency & Bankruptcy.

“NATURE IS THE SOURCE OF ALL TRUE KNOWLEDGE”

Nature encompasses the interaction between physical surroundings and all living beings, including the atmosphere, climate, natural resources, ecosystem, flora, fauna, and humans.

It is a precious gift from God to our planet, providing everything necessary for sustaining life. Often referred to as ‘Mother Nature’, she continuously nurtures us with her abundant offerings. From the food we eat and clothes we wear to our homes, nature provides it all. Everywhere we look presents a glimpse of nature’s beauty – trees, flowers, landscapes, insects, sunlight, breeze – all elements of our environment. Simply put, our environment is nature itself. And it has existed since long before the dawn of humanity.

The transformative power of nature significantly affects our mood and behavior.

Nature is a source of inspiration, a symbol of strength and resilience, and a sanctuary for peace and introspection. It reminds us of the importance of perseverance in the face of adversity, the value of ambition, and the significance of environmental stewardship.

It is very important to relax in the lap of nature for mental peace and growth of oneself.

When peace and harmony are maintained, things will continue to run smoothly without any delay. Moreover, it can be a savior for many who do not wish to engage in any disrupting activities or more.

By being in a very challenging ecosystem, one must adopt a mental and spiritual ideology that embodies a positive attitude to have successful resolution and revival of a company.

PUDUCHERRY ("PONDICHERRY")

Puducherry (the official name was changed from Pondicherry in 2006), it has colonial structures, seafront promenades, spiritual havens, tree-lined boulevards, unexplored and pristine beaches, and enchanting backwaters. It is also known for textiles, silk, and traditional doll-making as well as high quality pottery, handmade paper, leather, and aromatics. And of course, the never-to-be-forgotten French connection.

The French quarter with many colonial buildings & churches, the old town with its temples & statues, the pristine beaches & the clean marina, the nearby temple town of Chidambaram and the mangroves at Pichavaram all together make Puducherry a rejuvenating experience in the barmy spring.

ABOUT THE PROGRAM

Insolvency Profession is one of the most demanding career options a professional can undertake. It is certainly one of the most rewarding as well as Challenging.

This program is specially designed considering all factors for individual well-being, peace of mind, relaxation, personal & professional development. More so, Professionals who work under strict regulatory timelines. This program brings together all stakeholders on a single platform: -

1. Regulators
2. Adjudicators
3. Bankers
4. Valuers
5. Legal Practitioners
6. Forensic Auditors
7. Domain Experts from Industry Segments
8. Corporates with success stories as well as Insolvency

Professionals (IP) The program focuses on the following: -

1. Rejuvenation and Stress Reduction
2. Physical Fitness
3. Individual Therapy
4. Family Time
5. Enhancing Knowledge
6. Networking
7. Open and free discussions
8. Expanding Horizon

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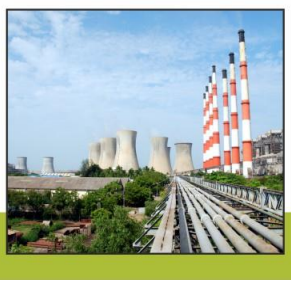
To reap the benefits of the renewable energy revolution, as a part of the National Solar Mission, Government of India has set a target to achieve 1,75,000 MW of Solar Power. NLCIL has an ambitious plan to establish 6031 MW of renewable energy projects including 200 MW Wind Power Projects in Tamilnadu and various states. Presently, the Company has a total renewable energy capacity of 1421 MW which includes 1370 MW of Solar Power Plants and 51 MW Wind Power Plant. NLCIL is the first CPSE to cross 1 GW capacity in solar power generation and became the member of International Solar Alliance (ISA)

Renewable Energy Projects under operation

- 141 MW Solar Power Projects (SPP) including Roof top solar project at Neyveli. A 10 MW Solar Power Project in Neyveli, under Mini Smart City Scheme is under construction.
- 1209 MW Solar Power Projects at Tirunelveli, Virudhunagar, Ramanathapuram and Thoothukudi Districts of Tamilnadu.
- 200 KW, R&D Pilot Scale Floating SPP in Neyveli New Thermal Power Project's Raw Water Reservoir.
- 20 MW SPP, integrated with 8 MWHr Battery Energy Storage System at South Andaman Island. This is the largest battery bank in India for catering the variation in solar insolation.
- 51 MW (34 x 1.5 MW) Wind Power Project at Tenkasi District in Tamilnadu.

Renewable Energy Projects under consideration

- A JV Company, "Coal Lignite Urja Vikas Pvt Limited" is incorporated on 10.11.2020 with Coal India Limited for establishing 3000 MW Solar Power Projects at various parts of the country.
- On 15-06-2023 NLCIL has incorporated a wholly owned subsidiary Company (NLC India Renewables Limited)
- An MoU was signed with Assam Power Distribution Company on 09-08-2022 to develop 1000 MW Solar Power Project in the State of Assam. Another MoU was signed with Grid Corporation of Odisha (GRIDCO) on 01.12.2022 for developing Renewable Energy and Green Hydrogen Projects in Odisha.
- Won bid for 660 MW Solar Power Projects, floated by Solar Energy Corporation of India (SECI) and Indian Renewable Energy Development Agency (IREDA)



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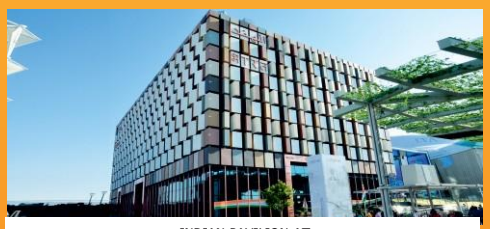

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