

JULY 2024



THE INSOLVENCY PROFESSIONAL

Your Insight Journal

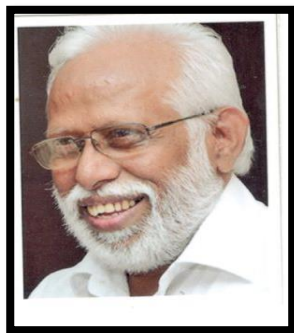


**INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA**

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll there under solvency 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 byelaws on payment of membership fee. We are established with a vision of providing quality services and adhering to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

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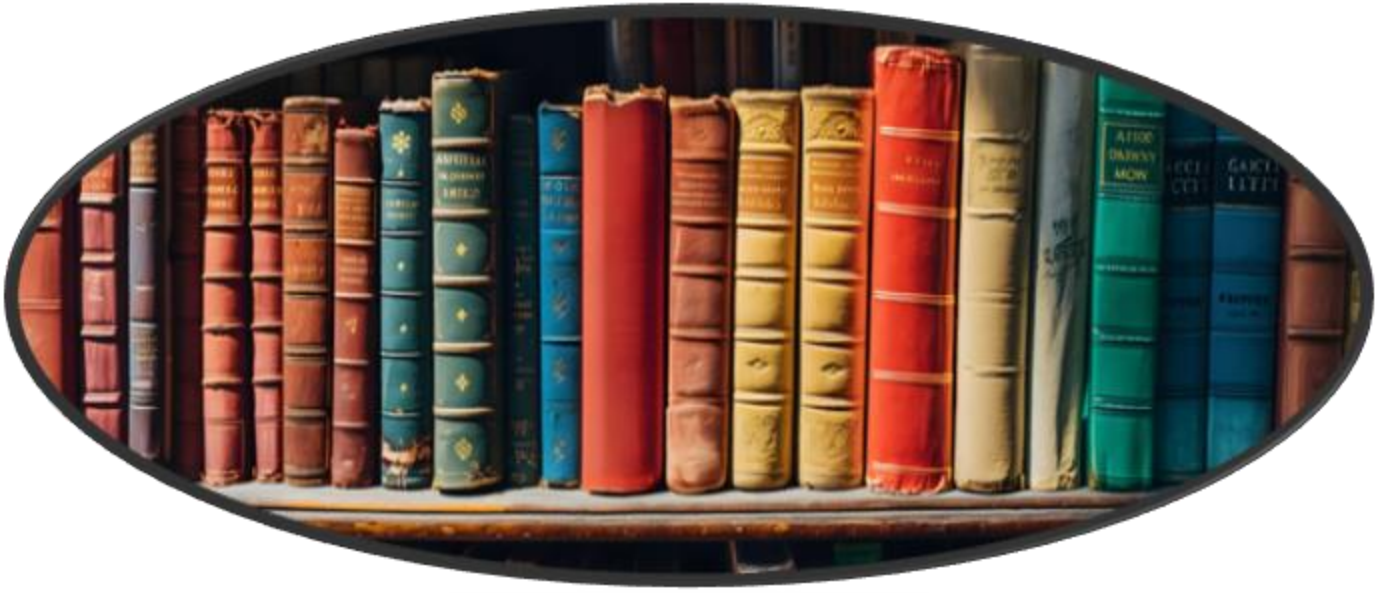


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MESSAGE FROM THE DESK OF MANAGING DIRECTOR

Dear reader,

Greetings to you from all of us in Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA-ICMAI). This journal is one of the publications regularly published by the Publications Division of IPA-ICMAI. This journal seeks to carry interesting articles and opinions that not just inform but provide an enlightened insight into issues of vital interest in the domain of insolvency and bankruptcy, corporate restructuring and rejuvenation and related subjects. The profession of IPs, being still in infancy, is continuously evolving with numerous court rulings from various courts apart from regulatory changes and hence demands a high level of attention of IPs in the midst of assignments and related preoccupations.

Professional development happens through continuous professional education including updates on changes in code and relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow IPs. The professional strength we gain and the satisfaction from the intellectual exercise in working for and preparing an opinion/ article shall drive us to be active participants in professional development activities.

At IPA-ICMAI, we strive to make our publications relevant, informative, interesting and lucid. This issue of the 'Insolvency Professional – Your Insight Journal' brings an interesting article on the business solution providing role of IP by Ms. Anju Sharma, IP, a very timely reminder to all IPs that they have much larger role than merely ensuring compliances and legal firmity of their assignment. The 1st article by Sameer Rastogi discusses the impact of Covid19 on effectiveness of Pre Packaged Insolvency Resolution Process.

I welcome your comments, observations and critique on the published articles in this journal. Your response will contribute to better understanding of the issues in the articles as also better appreciation of different perspectives. Also, I welcome you to contribute with your updates that would help our fellow IPs and opinions from your experiences that all of us can benefit from.

Wish you all happy reading.

Mr. G.S. Narasimha Prasad
Managing Director



PROFESSIONAL DEVELOPMENT INITIATIVES

EVENTS CONDUCTED

JULY 2024

Date	Events
05th -07th July, 2024	Master Class on Art of Handling a Resolution Plan was held from- 05th -07th July, 2024.
05th July, 2024	Seminar on Insolvency and Bankruptcy Code, 2016 was held on 5th July 2024 in Ahmedabad In Association with Institute of Cost Accountants of India Ahmedabad chapter.
12th July, 2024	Workshop on "Essentials of Valuation for Insolvency Professionals. was conducted on 12th July 2024.
13th July, 2024	A Webinar on role and opportunities of cost Accountants Under Insolvency and Bankruptcy Code 2016 was held on 13th July, 2024
18th July, 2024	A Workshop on "Judicial Pronouncements under IBC, 2016 was conducted on 18th July 2024
20 th July, 2024	INSOL India Seminar Navigating the Insolvency & Restructuring Landscape: Looking Ahead was scheduled on 20th July, 2024 in Bengaluru .
27 th July 2024	Workshop on "Navigating Moratorium and Interim Finance Strategies for Insolvency Professionals was conducted on 27th July 2024 .



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Updates on Insolvency and Bankruptcy Code

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ARTICLES



INSOLVENCY PROFESSIONAL AGENCY
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IMPACT OF COVID-19 ON THE EFFICIENCY AND EFFECTIVENESS OF PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS: LESSONS LEARNED

Mr. Sameer Rastogi
Insolvency Professional

ABSTRACT

The COVID-19 pandemic has brought heretofore unknown challenges for businesses worldwide, necessitating innovative approaches to bankruptcy resolution. In the Indian context, Pre-Packaged Insolvency Resolution Process (PPIRP) is becoming increasingly widely recognised as a potential strategy for successfully easing financial stress. This chapter undertakes a thorough analysis of the pandemic's impact and effectiveness on pre-packaged insolvency plans in India. This article first provides an overview of the various insolvency frameworks and their place in the Indian legal system before delving into the specific compliances that must be met before, during, and following the start of the resolution plan. The author also carefully considers the essential modifications to laws and procedures that were implemented during the epidemic. The current study contributes to the ongoing conversation on bankruptcy reforms in India by elucidating the shifting dynamics of corporate restructuring in the aftermath of the epidemic.'

INTRODUCTION:

India aims to integrate its current legal framework by enacting the Insolvency and Bankruptcy Code, 2016 (IBC), a single bankruptcy and insolvency legislation.

The IBC was introduced to the Lok Sabha in December 2015 and went into effect on August 5, 2016, and August 19, 2016. The government decided to enact stricter new legislation that would provide existing defaulters quick relief in favour of the lenient current bankruptcy statutes. The proposed bankruptcy law addresses present problems with insolvency and winding up, applying to individuals, limited liability companies, partnerships, and corporations, except financial service providers. The finance ministry drafted a bill to establish a resolution company to handle similar issues among financial institutions. The new law would speed up and enhance the debt collection process in India and simplify business transactions there. If followed to the letter, it would transform India's unfavourable image of non-performing assets, recovery, and litigation connected to India.

The World Bank's Ease of Doing Business report¹ states that India's bankruptcy resolution duration is about four years. The goal of the proposed bankruptcy and insolvency rules is less than a year, enabling quicker and more effective debt collection there². The government has developed a strategy to replace outdated bankruptcy regulations with new ones that would enable companies to close down stress-free and within a certain amount of time.

Maintaining these four institutional infrastructure components will ensure a

seamless bankruptcy and insolvency process:

- The Indian Bankruptcy Board is the Regulatory Authority³ (IBBI).
- National Debt Recovery Tribunal (DRT), National Company Law Tribunal (NCLT), and National Company Law Appellate Tribunal (NCLAT): Adjudicating Authorities
- IPAs, or professional agencies for personal insolvency
- Information Utilities (IUs) of Private Agency

CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

The Corporate Insolvency Resolution Process (CIRP) starts only when the minimum default amount of one lakh rupees or a larger amount that may be announced by the Central Government⁴ is announced. Applications for insolvency resolution under the IBC may be made by the corporate debtor or any of its creditors, operational⁵ or financial. The Corporate Insolvency Resolution Process is not allowed to start until the minimal default amount of one lakh rupees or a higher sum that may be declared by the Central Government, but not more than one Crore rupees⁶.

The Insolvency and Bankruptcy Code (Amendment) Act, 2019, guarantees a prompt resolution of claims and establishes minimal payments to operational creditors in any resolution plan⁷. An overall framework for insolvency and liquidation procedures of financial service providers is provided by the November 15, 2019 release of the

Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Pre-Package Insolvency Resolution Process (PPIRP) was introduced in India to address the financial difficulties faced by Micro, Small, and Medium-Sized Enterprises (MSME) during the COVID-19 pandemic⁸. The government announced a nationwide lockdown on March 24, 2020⁹, forcing most governmental and private offices to close and putting many MSME businesses at risk of closure. To provide a cushion for these businesses, the bankruptcy filing threshold was raised from Rs. 1,00,000 to Rs. 1,00,00,000, and the lockdown period¹⁰ was eliminated from the 330-day period stipulated in the Insolvency and Bankruptcy Code, 2016.

MSMEs are essential to the Indian economy, employing a significant portion of the population and contributing significantly to the GDP. The pandemic has caused financial difficulties for many people, leading to the need for an alternative insolvency resolution process that guarantees faster, more affordable, and value-maximizing results for all parties involved. The President issued the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, with the goal of adopting PPIRP under the Code.

BACKGROUND OF THE PRE-PACKAGE INSOLVENCY RESOLUTION PROCESS (PPIRP)

PPIRP is provided as a stress management tool for corporate MSMEs, offering a workable solution when there is a default of at least Rs. 1 crore, which is available

under the Corporate Insolvency Resolution Process (CIRP). It also covers defaults with an outstanding debt of at least Rs. 10 lakh and those occurring between March 25, 2020, and March 24, 2021. PPIRP has all the characteristics that make a CIRP untouchable along with the same laws and restrictions¹¹. However, it

is vulnerable to criticism in the quest of value maximization since it is neither totally private nor totally public.

The preamble of the issued Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 states that the COVID-19 pandemic¹² has hurt businesses, financial markets, and economies worldwide, including India. As part of its attempts to reduce the suffering brought on by the pandemic, the government halted petitions for the commencement of the corporate bankruptcy resolution process with respect to defaults occurring during a one-year period starting on March 25, 2020. With March 24, 2021, the suspension ended.

QUALIFICATIONS AND PRE-REQUISITES FOR PPIRP

A Corporate Debtor¹³ (CD) may request to have PPIRP started if it meets the requirements listed in section 7 sub-section (1) of the Micro, Small and Medium Enterprises Development Act, 2006, which designates CDs as MSME. Application materials must contain a copy of the most current Udyam Registration Certificate, evidence of turnover in accordance with Ministry of MSMEs Notification No. 2119(E)¹⁴, and documentation of the CD's investment in plant, machinery, or equipment to prove that the CD is an MSME. The PPIRP procedure is a hybrid approach,

combining a formal post-initiation phase and an informal pre-initiation phase. The post-initiation stage promotes value maximization and provides the resolution plan statutory protection, while the informality of the pre-initiation stage allows the CD and its creditors to quickly explore and discuss the best way to relieve stress in the enterprise¹⁵.

To proceed to the preconditions stage, the applicant must call meetings of unrelated financial creditors (UFCs) or financial

creditors who are not affiliated with the CD. If there is no debt on the CD or when all of the financial creditors are related, the applicant will call meetings of unsecured operational creditors (UOCs), who will carry out the same responsibilities as the UFCs¹⁶. The application should contain the notice calling the meeting to approve the appointment of an IP as RP along with a list of creditors and the amount outstanding to each in Form P2. Creditors holding at least 10% of the overall debt amount must provide the name of an IP who follows the regulations at the UFC meeting in order to be nominated as an RP. An IP may be appointed as RP provided they are independent of the corporate debtor, as are all other partners and directors of the insolvency professional company in which they are a partner or director. If a person satisfies the standards outlined in Rule 7, they are deemed independent.

The appointment as RP and the conditions of appointment in Form P3 must be approved by the UFCs, who together represent at least 66% of the debt payable to these creditors. The appointment

provides that the IP will be paid for various fees under section 54B for carrying out activities related to the pre-initiation phase, a fee and any related expenses for carrying out the PPIRP, and a fee under section 54J for handling the CD's case. For the application to initiate PPIRP, the applicant must include a declaration in Form 6, a list of creditors and the amount owed to each, a resolution of members or partners referred to in section 54A(2)(g), and a BRP. At least 66% of the total amount due to creditors must approve the application¹⁷ filed in Form P4 for the CD's PPIRP to begin in accordance with Section 54A(3).

COMMENCEMENT OF PPIRP

The only entity able to apply for the PPIRP launch is a corporation. The applicant must provide the AA, an electronic copy of Form 1 to start PPIRP¹⁸. The following supporting documents must be included with the application:

- The default-set records.
- Form P1 authorizing the IP to be put up as an RP candidate.
- Form P4 acceptance of UFCs for initiation.
- Form P5 agreement from the IP, if one is suggested to serve as the AR.
- A signed Statement P6 from partners or directors.
- CD disclosing on Form P7 the avoidance transaction or transactions.
- RP Form P8 report.

Before submitting the application with the AA, the applicant must serve a copy of it to the IBBI (beginning with PPIRP). The AA must determine within 14 days of receiving the application whether it is complete or reject it if it is not. Before an application is rejected, the applicant must

be given seven days to remedy any errors in the application file.

POST COMMENCEMENT AND CLOSURE OF PPIRP

The PPIRP (Proposed Resolution Plan) is a process initiated by the AA to address a company's debts. It begins with the approval of an application and is designed to be completed 120 days after it starts¹⁹. The RP must then apply for approval of the resolution plan or program termination 90 days²⁰ after the PPIRP begins. During the PPIRP, the Board of Directors and CD partners will maintain managerial control over the company's activities, protect its assets, and fulfill their legal or contractual rights and responsibilities. The CD must provide the RP with a list of claims, preliminary information memo, and a preliminary information memo within two days of the starting date.

The RP must notify the public in Form P9 within two days of the procedure starting and utilize its authority and responsibilities in compliance with section 54F. If the CoC grants its approval, it may alter the BRP.

The CoC may accept a BRP's proposal to the AA, provided it does not negatively impact claims owing to operational creditors²¹ (OCs). To compete with the BRP, the RP will ask potential resolution applicants to provide resolution plans²² if the CoC rejects the BRP or questions the claims of the OCs. The invitation for resolution plans should include all relevant dates, information on each stage of the procedure, goals, and means of communication between the RP and the resolution candidate.

The resolution plans submitted in response to the invitation and that comply

with regulations and the Code will be evaluated using assessment criteria. The resolution plan with the highest score will be chosen as the best alternative plan (BAP). If no resolution plan is offered, the CoC²³ may approve the BRP²⁴. If the BAP is clearly superior to the BRP, the CoC may consider approving it²⁵. If the BAP is rejected, the procedure is complete. If the BAP is not appreciably superior, the RP will notify the submitters of the results of both studies and provide an invitation to modify their plans in compliance with Rule 48. The process of improvement continues until one submitter fails to use the option within the allotted time. The CoC may consider approving the resolution plan with the higher score after the improvement process is over.

The PPIRP process closes under several situations, including approval by the AA, lack of resolution plans, rejection of resolution proposals, support for the RP's request for termination, conversion of 66% of voting shares into CIRP, or termination following an order of termination²⁶. However, it has been observed that CD often suffers due to management's actions, raising questions about transparency and potentially undermining stakeholder claims.

CONCLUSION

The Pre-Packaged Insolvency Resolution Process (PPIRP) is a unique and customized insolvency resolution structure designed for financially troubled MSMEs. It offers a time-bound resolution procedure, combining legal and informal insolvency processes, and aims to reduce the complexity of the Corporate Insolvency Resolution Process (CIRP). The PPIRP process is designed to return MSMEs to their pre-pandemic status, as many were in danger of going bankrupt due to the COVID-19 epidemic.

The primary goal of PPIRP is to return MSMEs to their pre-pandemic status, as many were in danger of going bankrupt due to the COVID-19 epidemic. The protections and actions taken under the PPIRP system have greatly benefited MSMEs, making it a superior insolvency resolution procedure compared to the conventional CIRP process. In April 2021, IBBI made a major advancement by adding a new Chapter III-A to the IBC code 2016 and notifying the public of associated regulations and rules. Stakeholders should help in its realization and help India improve its standing internationally, as was done with the introduction of the IBC and GST in 2017.

Resolution Professional as a Business Solution Provider

Ms. Anju Sharma Insolvency Professional

The role of a Resolution Professionals can be considered as a Business Solution provider in the context of Insolvency Process. Under IBC Resolution Professional is appointed to manage the business of entity/person which is undergoing insolvency which could be CIRP, FFIRP, Liquidation etc. RPs play a very crucial to ensure that resolution process is conducted in a fair and time bound manner for maximization of values of assets and protection of livelihoods of its employees/workers.

As a Resolution Professionals their role extends beyond managing insolvency proceedings, they also act as a Business Solution Provider. If we talk about Duties of RPs, stake of each stakeholder of the entity is lies in the hands of RPs. So here it is the moral/fiduciary duty of the RPs to act in good faith, maintain integrity and uphold honesty throughout the resolution process for all the stakeholders. RPs act as a Business Solution Provider by performing below duties:

1. ASSESSMENT AND FINDINGS:

Financial Health: It is the duties and responsibilities of the RPs to assess the financial health of the company so that clear picture of the entity can be analyzed. RPs thoroughly put their efforts to review all financial records of the company to form an opinion about Company's Financial Health.

Operational Health: RPs evaluate the operational health of the company to run the business as a Going concern. They do the comprehensive analysis of the various operational facts, which may include: Quality controls, Logistics, Production Process, Risk Management, Operational

strengths and weaknesses, Contingencies etc. based on the industry.



2. STAKEHOLDERS MANAGEMENT:

RPs play a pivotal role in stakeholder management. They work independently for all the stakeholders of the CD which includes, debtors, creditors, employees/workers, suppliers, customers, Regulatory authorities and Potential Resolution Applicants.

RPs put all their efforts to run the company as a Going concern so that they can preserve its value, protect the interest of stakeholder and ensuring the continuity of company's operations. RPs aims to save the company from going into liquidation.

3. LEGAL AND COMPLIANCE WORK:

RPs ensure that during the insolvency process all the legal and regulatory compliances related to business entity is complied. Seek advice from legal, Valuer, regulatory and other experts for the related industry to ensure adherence to all the regulations and guidelines to run the company.

Ensures maintaining up-to-date accounts with the help of the experts is the

fundamental to ensuring transparency and trust throughout the process. RPs should ensure that the entity's financial records are accurate and up to date. This approach will enhance the credibility of the resolution process.

4. PROCESS RESTRUCTURING:

RPs put all their efforts to identify the best way to run the operations of the company in the given circumstances and restructure the processes as well by implementing the cost-cutting measures.

Streamlines the business process to enhance the productivity and efficiency. Negotiate with the creditors to manage the funds of the entity. Facilitates the fund raising of the entity so that entity funds can be managed and business of the entity can be run as a going concern.

5. TURNAROUND MANAGEMENT:

Identify the situation where immediate attention is required to manage the crisis of the entity.

For example: If there is any situation like Labor Union is on strike and to run the business all labor has to be back on the work in that case RP with the help of existing team or experts can negotiate with the Union so that work can be resumed.

The other potential hostile situations are while dealing with workers. They are insecure due to the development, the promoters/ Directors, invariably does not meet them or communicates with them after commencement of CIRP and in most of the cases their wages are pending and the financial situation on the personal front is precarious. The workers should be made to understand that the RP is appointed to revive the company and he is looking forward to their support in this journey.

6. COMMUNICATIONS AND TRANSPARENCY

It is the duty of the RPs to provide regular updates to all the stakeholders like Financial Creditors, Operational creditors or their Representatives, Government Authorities, AA etc. about the situation and process of the Resolution Process.

RPs shall maintain the transparency during the complete process of the insolvency resolution. This practice will build trust and alignment with the stakeholders which will facilitate the



smooth progress of insolvency resolution process.

7. VERIFICATION OF CLAIMS:

The role of Resolution Professionals is very critical in acknowledging and verifying the claims received from Financial Creditors (Secured/Unsecured), Operational creditors, Employees/Workmen, Government Authorities and others.

RPs should thoroughly scrutinize the documents received related to claims like: Documents of charge (in case of Secured Creditors), Agreements copy, Proof of debts, contracts, other relevant financial documents as applicable/available.



8. EXPRESSION OF INTEREST:

Form G Under IBC is use to invite expression of interest (EOI) for Resolution Plans for a Corporate Debtor. It serves as a comprehensive document providing essential information to attract potential resolution applicants who can offer viable solutions for the CD's financial troubles.

This form contains all the details which ensures transparency about the company/person to the prospective resolution applicants with the necessary information to submit their Expression of Interest. Examples: Last 2 years complete financials, Operation and financial health of the entity, Fixed assets details etc.

RPs shall provide the detailed expression of interest by sharing all the relevant and critical details asked by Prospective Resolution Applicants to that they can take the best decision by analyzing the actual **Financial and Operational Health** of the company.

9. ANALYSIS OF RESOLUTION PLANS:

As a Resolution Professionals, it is a very crucial role to select the best Resolution Plan by applying analysis skill, taking help of industry experts wherever required. Below are some points which RPs Shall consider while

selecting the Plan to put for COC's approvals:

- Legal and Regulatory Compliance.
- Eligibility checks as per section 29A of the IBC.
- Business Continuity
- Financial Viability
- Impact on stakeholders (Like %age of haircut etc.) etc.

10. IMPLEMENTATION OF APPROVED RESOLUTION PLAN:

Once approved by COC it is the duty of the RPs that it is implemented smoothly by regular monitor the progress of the plan. RPs shall ensure that plan is executed effectively, continuously monitoring progress to compliance with legal requirements.

Regularly track the progress of plan, identify the risks that can impact the successful implementation of resolution plan. And maintain the communications with all the stakeholders.

This approach helps ensure that the objectives of the resolution plan are met, leading to sustainable growth of the company.



CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
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SECTION 3(11) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEBT

Vijay Jain v. Laxmi Foils (P.) Ltd. [2024] 162 taxmann.com 79 (NCLAT- New Delhi)

Where documents placed on record by appellants-shareholders of corporate debtor was not signed by corporate debtor and balance sheet of corporate debtor also showed that unsecured loan owed to appellants was nil and same was acknowledged by appellants, impugned order passed by NCLT rejecting section 7 application filed by appellant was justified.

Appellants, shareholder of the corporate debtor, had extended credit facilities to respondent-corporate debtor for business purposes in form of interest-free unsecured loans. Thereafter a Memorandum of Understanding (MoU) was entered into between the corporate debtor, 'OFB' and appellants in terms of which 'OFB', was to purchase shareholding of the corporate debtor. Meanwhile, appellant's entire shareholding was acquired by 'OMAT', subsidiary company of 'OFB', in terms of share purchase agreement and, new management took over affairs of the corporate debtor. Appellants claimed their outstanding financial debt and filed an application under section 7 before NCLT on basis of 'MoU' and a sale purchase agreement (SPA) executed

between parties in which it was agreed that loans extended by appellants to the corporate debtor would be repaid by respondent on closing date. However, NCLT rejected said application on ground that the appellant had failed to prove existence of any debt. It was noted that provisional balance sheet of the corporate debtor showed that unsecured loan owed to directors and shareholders of the corporate debtor was nil and that said document was also signed by appellants.

Held that absence of proof of a crystallized debt was also validated by balance sheet of the corporate debtor, which was also acknowledged by the appellants and which reflected that no amount as claimed by them was due and payable. Once closing had been achieved by the corporate debtor in terms of SPA and same had been acknowledged by the appellants upon signing balance sheet with nil statement, issue with respect to any amount due and payable by the corporate debtor did not arise. Therefore, NCLT had rightly dismissed section 7 application filed by the appellants.

Case Review: Vijay Jain v. Laxmi Foils (P.) Ltd. [2024] 162 taxmann.com 78 (NCLT - New Delhi) (para 19) affirmed

SECTION 238 - OVERRIDING EFFECT OF CODE

Accipiter Investments Aircraft 2 Ltd. v. Union of India [2024] 162 taxmann.com 165 (Delhi)

Where Go Air had leased 54 aircrafts from petitioners/lessors and due to Go Air's default in lease payments petitioners terminated agreements and applied for de-registration of aircrafts with DGCA and DGCA informed petitioners that their

application could not be accepted in view of insolvency commencement order passed by NCLT in respect of GO Air, in view of fact that termination of lease agreements was not directly linked to insolvency but stemmed from breaches prior to insolvency date and that insolvency commencement order was passed after lease agreements were terminated, DGCA's rejection was

inappropriate.

Go Air had leased 54 aircraft from petitioners for a period of 10 years each. Owing to defaults in payment of lease rental amounts under lease agreements by Go Air, lease agreements qua all 54 Aircraft were terminated by petitioners. As a necessary corollary to termination notice, application under rule 30(7) of Aircraft Rules were filed by petitioners for de-registration of aircrafts with DGCA. In meantime, Go Air filed a petition under section 10 of IBC for initiation of voluntary corporate insolvency resolution process. NCLT admitted said petition and as a consequence of which, a 'moratorium' was imposed under section 14. DGCA informed petitioners that their de-registration application could not be processed in view of insolvency commencement order passed by NCLT. Aggrieved by impugned rejection letter issued by DGCA, petitioners filed instant petition. Go Air opposed said petition on ground that since, it was NCLT that passed Insolvency Commencement Order that had been relied upon by DGCA in impugned letter, it could only be NCLT that would have exclusive jurisdiction to hear cases in relation to impugned letter. Further, de-registration would adversely affect over 4000 employees of Go Air. It was noted that termination had neither arisen out of nor relating to insolvency but on account of breaches to lease agreements, which occurred much prior in time to insolvency

commencement date. These could not be equated with conditions 'arising out of' or 'in relation' to insolvency. Although, termination notices did refer to insolvency being one of many events of default, insolvency was not what had led to termination. Further, out of 4,621 employees approximately 2,278 employees remained on rolls of company, out of which none were reporting to work as a result of non-payment of their dues/salaries. It had now been almost 1 year since Go Air suspended its business operations and admittedly, for last more than 6 months, Go Air did not have any employees reporting to work. No doubt, return of aircraft would cause hardship to Go Air. This, however, could not be used as a defense to not de-register aircrafts. Principle of 'dura lex sed lex' applied, emphasizing that law, no matter how harsh, must be upheld.

Held that disputes which arise solely from or relate to insolvency of corporate debtor are to be governed by NCLT. Where applications are filed under IBC, 'by or against' a corporate debtor and where there is a nexus between dispute and insolvency of such corporate debtor, only NCLT has power to adjudicate. NCLT must not, however, usurp legitimate proceedings of other Courts. Thus, impugned order of DGCA declining to process de-registration applications of petitioners was to be set aside and DGCA was to be directed to process de-registration applications in terms of rule 30(7) of Aircraft Rules.

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

Arunkumar Jayantilal Muchhala v. Awaita Properties (P.) Ltd. [2024] 162 taxmann.com 203 (NCLAT- New Delhi)

Where appellant, ex-director of a corporate debtor challenged admission of application filed under section 7 on ground that a sum of Rs. 5 crores given by financial creditor wasn't a loan but a part payment deposit for

a land project, in view of fact that said amount was transferred through RTGS and corporate debtor's balance sheet categorized it as Long Term Borrowings, disbursement was a loan and, therefore, impugned order passed by NCLT admitting section 7 application was justified.

Respondent no. 1-financial creditor had disbursed a loan amount of Rs. 5 crores to the corporate debtor. The financial creditor repeatedly demanded repayment of loan amount but no payment was received. Accordingly, an application under section 7 was filed against the corporate debtor and same was admitted by NCLT vide impugned order. Aggrieved by NCLT's order, the appellant, ex-Director of the corporate debtor, filed instant appeal on ground that disbursal of Rs. 5 crores was not in nature of a loan but a part payment deposit for purpose of developing a land project and, thus, R1 did not fall in category of financial creditor. It was noted that money was actually disbursed to the corporate debtor through RTGS and a letter from Bank authorities testified that an amount of Rs. 5 crore was paid from account of R1 to the corporate debtor. It was further noted that in balance sheet of the corporate debtor said amount was showed under head of 'Long Term Borrowings from Related

Parties, which clearly evidenced that disbursal was a loan.

Held that for any debt to be treated as a financial debt, pre requisite is disbursal of money to borrower for utilization by borrower and that disbursal must be against consideration for time value of money even if it is not interest bearing. Once a debt became due or payable, in law and in fact, and if there was an incidence of non-payment of said debt in full or even part thereof, CIRP may be triggered by the financial creditor as long as amount in default was above threshold limit. Since money was advanced towards working capital needs of the corporate debtor and for boosting its economic prospects, it was a disbursal against consideration for time value of money and, therefore NCLT had rightly admitted section 7 application and initiating CIRP.

SECTION 18 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INTERIM RESOLUTION PROFESSIONAL - DUTIES OF

Mrs. Durdana Aabid Ali v. Vijay Kumar V Iyer (Resolution Professional of Future Retail Ltd.) [2024] 162 taxmann.com 208 (NCLAT- New Delhi)

In view of Explanation (a) to section 18, assets owned by a third party in possession of corporate debtor are excluded from scope of CIRP and moratorium; where lease period of subject property had expired and there was no subsisting contract between appellant-owner and corporate debtor, subject property could not be included in list of assets of corporate debtor and fell outside scope of CIRP and moratorium.

The appellant, who was registered owner of a building, had entered into lease deed with FWSL, leasing out said

building. Thereafter, lease deed was assigned by FWSL to the corporate debtor by a Deed of Assignment. After the corporate debtor was admitted into CIRP, Resolution Professional (RP) was appointed who issued a notice to the appellant seeking inspection and access to said building. The appellant filed an application before NCLT to set aside notice of RP. However, NCLT refused to direct withdrawal of notice of RP and dismissed said application. It was noted that lease period between FWSL and the appellant had ended on 14-11-2021 and, there was no evidence regarding extension of lease period and notice of inspection of subject property was issued by RP on 29-3-2023 after date of expiration of lease period. It was

further noted that Lease Deed expired prior to commencement of CIRP of the corporate debtor.

Held that in view of Explanation (a) to section 18, assets owned by a third party in possession of the corporate debtor are excluded from scope of CIRP and moratorium. Subject property could not be included in list of assets of the corporate debtor as there was no subsisting contract between appellant and the corporate debtor, which would entitle RP to claim any right, title or interest in subject property. Appellant was a third party and undisputedly subject property was owned by the appellant and there was nothing fool-

proof to show that the corporate debtor was in occupation of same and, therefore, subject property clearly fell outside scope of CIRP and consequently moratorium. Since there was no substantive evidence to establish that property was in possession of the corporate debtor, RP could not have taken possession of leased property by virtue of section 14(1)(d) and, therefore, impugned order passed by NCLT was to be set aside.

Case Review: Mrs. Durdana Aabid Ali v. Vijay Kumar V Iyer (Resolution Professional of Future Retail Ltd.) [2024] 162 taxmann.com 207 (NCLT - Mum.), reversed.

SECTION 29A - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION APPLICANT - PERSONS NOT ELIGIBLE TO BE

Namdev Hindurao Patil v. Virendra Kumar Jain, Liquidator [2024] 162 taxmann.com 248 (NCLAT- New Delhi)

Where appellant-resolution applicant was declared a wilful defaulter much prior to submission of its resolution plan and there was no judicial stay existed in favour of applicant regarding its status as wilful defaulter on date of submission of resolution plan, impugned order passed by NCLT that appellant was not eligible to submit resolution plan was justified.

CIRP was initiated against the corporate debtor and RP published an expression of interest (EoI), wherein last date of submission of EoI was 23-1-2022. Thereafter, resolution plan submitted by parties was approved with a 66.37 per cent voting share. However, CoC did not vote on resolution plan of appellant-resolution applicant and declared him as ineligible resolution applicant due to his wilful defaulter status. Aggrieved by CoC's

action the appellant filed an application before NCLT on ground that CoC wrongly declared him as wilful

defaulter on 19-7-2021 and on 4-10-2021, which was challenged by the appellant before appropriate Court and RP permitted the appellant to submit resolution plan subject to outcome of challenge by the appellant. NCLT vide impugned order, discarded the appellant's pleadings on ground that the appellant was declared a wilful defaulter way back on 19-7-2021 and 4-10-2021 by respondent No. 2 bank, whereas the appellant submitted its resolution plan on 12-5-2022 and, thus, as per section 29A on date of submission of resolution plan, the appellant was clearly ineligible to submit resolution plan.

Held that relevant date was date of submission of resolution plan and the appellant was not eligible to submit a resolution plan on 12-5-2022, as he had already been declared as wilful defaulter on 17-7-2021 and 4-10-2021 i.e., much prior to submission of

resolution plan by him. Since no judicial stay existed in favour of the appellant on 12-5-2022 regarding his status as wilful defaulter, the appellant was not eligible to submit a resolution plan and, therefore, impugned order passed by NCLT was justified.

v. Vivek Murlidhar Dabhade [2024] 162 taxmann.com 247 (NCLT - Mum.), affirmed

Case Review : Namdeo Hindurao Patil

SECTION 5(8) - FINANCIAL DEBT

Pawan Kumar Manguturam Bairagra v. Encore Asset Reconstruction Company Ltd. [2024] 162 taxmann.com 363 (NCLAT- New Delhi)

Where appellant, a suspended director of corporate debtor, challenged NCLT's order admitting section 7 application filed by R1(assignee) on ground that there was no valid assignment agreement, however, Assignment Agreement was both registered and stamped, as per Maharashtra Stamp Act, 1958, thus, no error had been committed by NCLT in relying on Assignment Deed on basis of which R1 had filed section 7 application.

A bank (original lender) had sanctioned a term loan of Rs.10 Crore to Borrower No.1 and Rs.15 Crore term loan was sanctioned to Borrower No.2 . In pursuance of said loan facilities, the corporate debtor had executed two registered simple mortgage deeds in favour of Bank for securing two loans. Meanwhile, Borrower-1 and Borrower-2 loan accounts were declared non-performing assets(NPA). Thereafter, several loan accounts including Borrower's loan accounts were assigned by bank in favour of Respondent No.1(assignee) and bank intimated the corporate debtor, Borrowers that both loan accounts were declared NPA and, Respondent

No.1 sent notices under section 13(2) of SARFAESI Act, 2002 to Borrowers and

the corporate debtor and filed section 7 application demanding repayment of outstanding amount under loan accounts. Aggrieved by NCLT's order, the appellant, suspended director of the corporate debtor filed instant appeal on ground that there was no valid Assignment Agreement in favour of Respondent No.1 and, invocation of guarantee by Respondent No.1 vide its notice was not valid. It was noted that stamp duty was paid on Assignment Agreement issued by State of Maharashtra and said agreement was registered and, said registration itself gave a presumption that document was duly stamped, as per Maharashtra Stamp Act, 1958.

Whether on strength of sub-section (2) of section 5 of SARFAESI Act when financial creditor has acquired assets of bank, financial creditor shall be deemed to be lender and shall be entitled to file section 7 application against corporate debtor who has mortgaged its immovable property as well as executed deed of guarantee to secure loan facility - Held, yes - Whether there was no error committed by NCLT in relying on Assignment Deed on basis of which respondent No.1 had filed section 7 application - Held, yes - Whether Respondent No.1 was fully entitled to

file section 7 application against corporate debtor and there was no ground to interfere with impugned order passed by NCLT admitting Section 7 application against corporate debtor.

Case Review: Encore Asset Reconstruction Company (P.) Ltd. v. Bairagra Builders (P.) Ltd. [2024] 162 taxmann.com 362 (NCLT-Mum.), affirmed.

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

Tulip Hotel (P.) Ltd. v. JC Flowers Asset Reconstructions (P.) Ltd. [2024] 162 taxmann.com 426 (NCLAT- New Delhi)

Where notice had been duly served upon corporate guarantor demanding payment and there being a clear default on part of corporate guarantor to clear outstanding due thus, NCLT had rightly admitted section 7 application for initiation of CIRP process after coming to correct conclusion that financial creditor had successfully proved financial debt and default on part of corporate debtor as Corporate Guarantor.

Bank (original lender) had sanctioned a Cash Credit Facility to Borrower Nos. 1 and 2 and to disburse said loan, and appellant as corporate guarantor executed a Deed of Guarantee in favour of Bank to guarantee loan facility. Since, Borrowers committed default in making repayment, bank invoked Corporate Guarantee demanding the appellant to pay due amount. Meanwhile, the appellant assigned debt to respondent-financial creditor. Respondent filed an application for substitution of their name in place of Bank which was allowed by NCLT. Later respondent filed an application under section 7 which was admitted by NCLT vide impugned Order. Aggrieved by NCLT's order, instant appeal was filed on ground that section 7 application filed by 'R' on behalf of respondent on

basis of Power of Attorney without any supporting Board Resolution of financial creditor and, thus, was not maintainable. It was noted that R was duly authorized by Bank through Power of Attorney pursuant to a Board Resolution to file necessary applications for commencement of legal proceedings not only against Borrower but also against their Hypothecators/Mortgagors/Guarantors.

Where a corporate debtor gives a guarantee in respect of a loan transaction, right of the financial creditor to initiate action against the corporate guarantor gets triggered moment principal borrower commits a default and in other words, when default was committed by principal borrower, amount became due against both principal borrower and corporate guarantor and hence both became liable to pay amount when default was committed. Section 7 application was filed by a duly authorized person on behalf of respondent and thus, objection raised by appellant in this regard were misconceived and unsustainable. When notice had been duly served upon the corporate guarantor demanding payment and there being a clear default on part of the corporate guarantor to clear outstanding due, NCLT had rightly admitted section 7 application for initiation of CIRP process after coming to correct conclusion that Respondent No.1 had successfully proved financial debt and default on part of the

corporate debtor as Corporate Guarantor.

Case Review: J.C. Flowers Asset Reconstructions (P.) Ltd. v. Tulip Hotels (P.) Ltd. [2024] 162 taxmann.com 425 (NCLT-Mum.), affirmed.

SECTION 238 - OVERRIDING EFFECT OF CODE

C.A. Jasin Jose v. Directorate of Enforcement [2024] 162 taxmann.com 478 (Kerala)

Where NCLT directed liquidation of corporate debtor and pending liquidation proceeding properties of corporate debtor had been attached at instance of ED due to which entire proceedings before NCLT had come to a stand-still, interest of parties could be safe guarded by permitting sale to go on and, thus, ED was directed to lift attachment subject to a condition that proceeds of sale would be liable for attachment by Enforcement Directorate.

The petitioner was Liquidator of company 'A', which was the corporate debtor in proceedings before NCLT. Liquidation proceedings had already been initiated. Pending liquidation proceedings,

properties of the corporate debtor had been attached at instance of Enforcement Directorate (ED). Liquidator had approached Writ Court stating that he was not able to proceed because of attachment and entire proceedings before NCLT had effectively come to a stand-still. Petitioner, hence, requested for an interim order permitting sale to take place as part of liquidation process, after lifting attachment order issued by ED.

Held that interest of parties would be safe guarded by permitting sale to go on and ensuring that proceeds of sale would be liable for attachment by ED. In above circumstances, interim direction was to be passed to lift attachment effected by ED on properties, which were subject matter of liquidation, to facilitate Liquidator to sell properties.

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

Metamorphosis Trading LLP v. Sankalp Engineering and Services (P.) Ltd. [2024] 162 taxmann.com 504 (NCLAT-New Delhi)

Where amount of debt due by corporate debtor to IIL was assigned to appellant by way of a Deed of Assignment, however, assigned amount was clearly shown as trade receivable in Deed of Assignment since, there was no contract or agreement between corporate debtor and IIL that defined said debt as a loan, it could not be considered a loan, NCLT did not commit any error in rejecting section 7 application filed by appellant.

The corporate debtor was a wholly owned subsidiary of IIL, the corporate debtor had approached IIL for financial assistance, which was provided. Meanwhile, liquidation proceedings commenced against the corporate debtor and liquidator published Process Memorandum wherein amount in default by the corporate debtor was recorded as Rs.5.10 crores. The financial creditor had bid for the assets/receivables of IIL and entered into a Deed of Assignment with Liquidator of IIL whereby the assets of IIL were transferred in favour of the financial

creditor. Subsequently, the financial creditor issued a legal notice and filed a section 7 application before NCLT, which was rejected by NCLT on ground that debt and default did not exist. It was noted that Deed of Assignment showed that 'receivables' of IIL were assigned a sum of Rs.25 lakh only on an 'as is where is', 'as is what is' and 'whatever there is' and 'no recourse' basis and Annual Report of IIL for F.Y. 2015-16 of IIL had shown it under Head of "Receivables" and not under Head of "Inter corporate Loan" which should have been treatment in case amount was a loan.

Held that for any creditor to become financial creditor under section 5(7), there must be a financial debt which is owed to that person and such a person can either be principal creditor to whom financial debt is owed or may be a legal

assignee to whom such debt has been transferred. When assigned amount had been clearly shown as trade receivable in Deed of Assignment, it could not be viewed as a loan particularly when there was no contract/agreement between the corporate debtor and IIL recording advance of any loan. There was nothing placed on record by the appellant to substantiate that disbursement had been made for consideration for time value of money, thus, NCLT did not commit any error in rejecting section 7 application filed by appellant.

Case Review: Metamorphosis Trading LLP v. Sankalp Engineering Services (P.) Ltd. [2024] 162 taxmann.com 503 (NCLT-Mum.) (para26) affirmed.

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.
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