JANUARY'22

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 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 enrol 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 byelaws 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 its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavour 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.

INDEX

CHAIRMAN MESSAGE

Insolvency and Bankruptcy Code, having been promulgated and implemented in the year 2016, has completed its first 5 years. While it has largely validated itself as an effective mechanism for insolvency Resolution/liquidation, the frequent adjournments and other judicial intervention are proving to be a serious challenge to meet the timelines provided in the code for disposal of the cases. But the very fact that the ranking of India in the 'Ease of Doing Business' had shown a very significant improvement from 136 to 52 within the first 3 years of the implementation of the Code is a welcome sign. It leads to enhance the confidence of the investors with IBC providing easy exit option. On the other hand the fear of losing the control over business has also favourably impacted the corporate repayment culture amongst the Corporate Debtors. The intent of the Government to make the Code more effective can be inferred from the fact that the Code has been amended in the Parliament 6 times in first 5 years of its implementation. This makes the Code, not only an evolving law but also a dynamic platform for Insolvency Resolution and liquidation.

A quick and brief review of the robust nature of the Code would reveal that with approximately 4032 Insolvency Professionals, 595 Registered Valuers, 3 Insolvency Professional Agencies, 16 Registered Valuers' Organisations, Insolvency Professionals Entities, Registered Valuers Entities and Information Utility, Insolvency and Bankruptcy Code has made its mark as a game changer and a landmark legislation.

A look at the figures of September,2021 would reveal that the total number of 4708 cases were initiated under Corporate Insolvency Resolution Process, out of which 421 cases have seen the dawn of resolution. While 1419 cases have progressed towards liquidation, another 1228 cases have been closed or withdrawn or settled, with the remaining still undergoing CIRP.

In June, 2018, Section 12 A was inserted in the Code providing for withdrawal of insolvency application by the applicant with the approval of members of CoC (committee of creditors) with 90 per cent voting share. In other words, the section allows the corporate debtor another chance to make good on the default and regain control over the company. A close analysis of the above figures, would reveal that almost 27% of the cases where CIRP was initiated have been either settled or withdrawn. It is a welcome development if this trend leads to the perpetuity of the Corporate and a better recovery percentage of the corporate dues. However, before we come to a conclusion about this positive development, it would be good to undertake a closer scrutiny of the post withdrawal progress of the such cases. A rapid rise in the number of cases withdrawn under Section 12 A, are raising concerns in some quarters about the suspected misuse of this provision. This trend of number of cases withdrawn under 12A have been going up sharply since the December 2018 quarter, when the data on such cases was first disclosed. The number of cases of such withdrawals going up from 63 in the December 2018 quarter, to 91 in the March 2019, does make a good case for undertaking further study into the matter without losing sight of the fact that even NCLT recognises the commercial wisdom of the Committee of the Creditors in this respect.

The intent of insertion of Section 12 A was to give the corporate debtor a chance to introspect and if considered feasible, regain the control over the company by making a fresh offer to the lenders. It is in this backdrop, the rise in cases of withdrawal through settlement, review and mediation is opening a different paradigm of interpretations and

could eventually prove to be furthering attainment of the objectives of the Code for expeditious resolution under the IBC.

There have been some very contentious cases and judgements which allowed the withdrawal of insolvency application and settlement with the creditors, despite NCLT (National Company Law Tribunal) raising concerns over the status of the promoters or questioning the sources of funds. While the legitimacy of the source of funds is of concern to all, it should be for other investigation agencies to look into this aspect to take appropriate action at their end if any prima facie occurrence of fraudulent practices are inferred.

Let us look forward as Insolvency Professionals to contribute our might to the eventual success of the Code in attaining its avowed objectives.

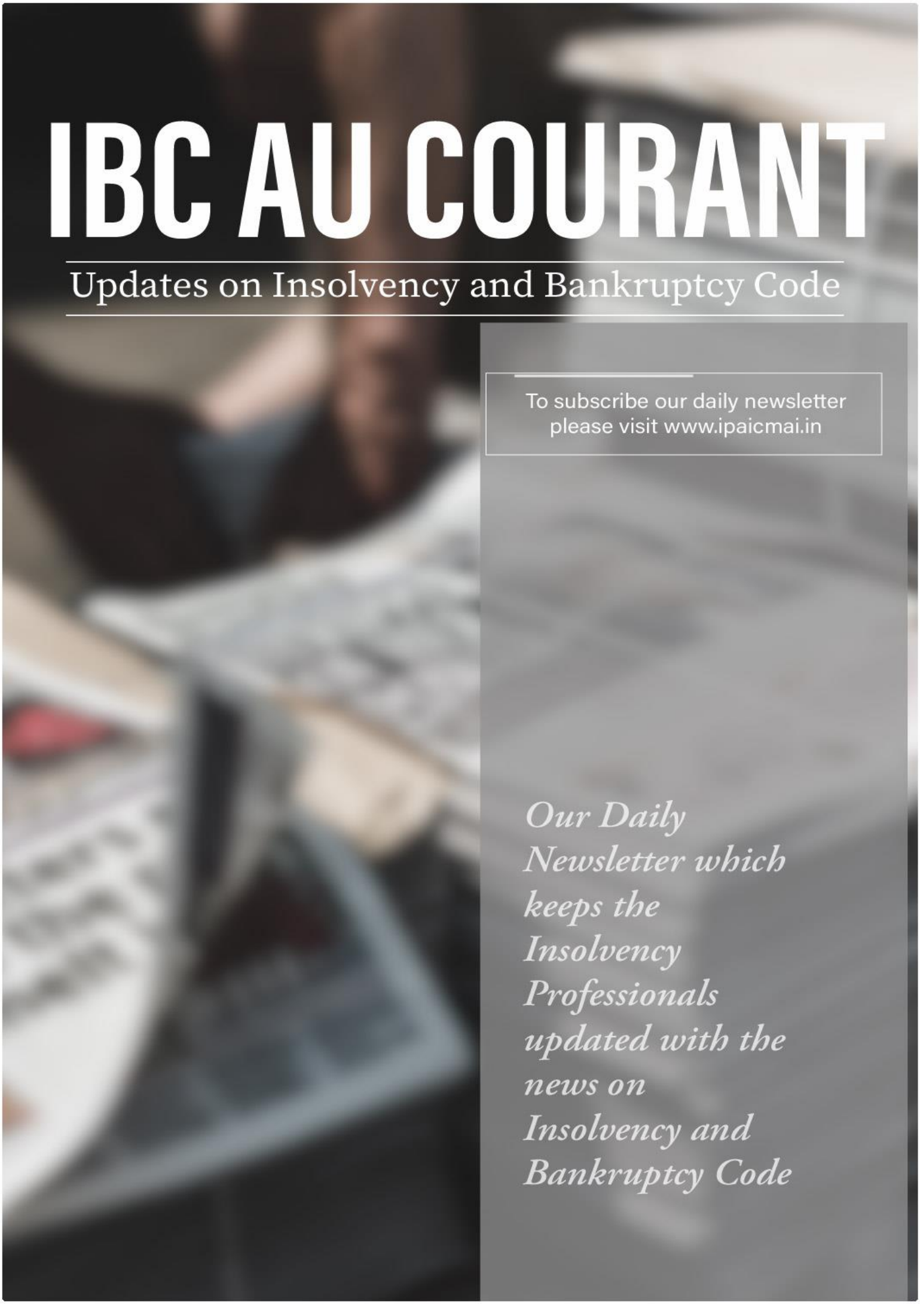
Warm Regards,

Dr. Jai Deo Sharma

PROFESSIONAL DEVELOPMENT INITIATIVES

EVENTS

JANUARY 2022	
3rd Jan'22	Workshop on Role of IP in Individual Insolvency and fresh start Process
7th Jan - 9th Jan'22	Master Class on liquidation
14th Jan'22	Workshop on Compliances to be made by IPs under IBC and to IPA
15th - 21st Jan'22	52nd Batch of PREC
22nd - 23rd Jan'22	Learning Session on Handling CIRP as a project
28th Jan'22	Workshop on Soft Skills developments for Insolvency Professionals
31st Jan'2022	Webinar on Platform for Distressed Assets



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

FRESH DEMAND OF INCOME TAX AFTER THE APPROVAL OF RESOLUTION PLAN

CS. DR. M. GOVINDARAJAN

Company Secretary & Insolvency Professional

In the earlier periods the dues of the income tax have preference over the other dues in case of a business entity is sold or liquidated. This scenario has been changed in corporate insolvency resolution process. The dues of the Government to the corporate debtor are treated as the dues of operational creditors. The Government has to file claim before the IRP/RP. The claim will be checked, and IRP/RP will decide the allowability of the debt which will be paid by the resolution applicant after the approval of the resolution plan by the Committee of Creditors and Adjudicating Authority. Therefore, the Income Tax Department cannot issue fresh demand of income tax after the approval of the resolution plan which has been confirmed by the Telengana High Court which has been discussed in detail in this article.

Income tax dues

Before the introduction of Insolvency and Bankruptcy Code, 2016 ('Code' for short) the income tax dues have got preference over the other dues in case of the company is liquidation or sold for certain reasons. In '**Dena Bank Vs. Bhikhabhai Prabhudas Parekh & Co.' (2000) 5 SCC 694,** Supreme Court has held that income tax dues being in the nature of crown debts do not take precedence over secured creditors who are private persons.

After the introduction of the Code, the scenario has been changed. The object of the Code is for the revival of the business of the corporate debtor. Therefore, the Code prescribes a detailed procedure for the insolvency resolution process. In this process once the application is admitted the Adjudicating Authority ordered for moratorium. The claims against the corporate debtor are to be submitted to the Resolution Professional, who in turn will check the claim and decided the claim. The claims of the Department i.e, income tax, indirect taxes are considered as that of operational creditors. No preference has been given to these departments as prevailing in the pre regime of the Code.

Fresh notice after approval of resolution plan

Once the application for initiation of corporate resolution process by the Adjudicating Authority moratorium comes into existence and no litigation will prevail against the corporate debtor. Further once resolution plan has been approved by the Adjudicating Authority it is binding on all stakeholders including Government Departments. The tax departments cannot issue any fresh notice after the approval of the resolution. The same has been upheld by the Telangana High Court in **'Sirpur Paper Mills Limited and another v. Union of India and two others'- 2022 (1) TMI 977 – Telangana High Court.**

In this case the petitioner No.1 is a company incorporated under the Companies Act, 1956 and is engaged in the business of paper manufacturing. Similar is the status of petitioner No.2. Rama Road Lines and others had filed an application under Section 9 of the Code as operational creditor for initiating corporate insolvency resolution process of petitioner No.1. The Adjudicating Authority admitted the application on 18.09.2017 and ordered for moratorium. A Committee of Creditor was constituted. A public announcement was made calling for claims from the creditors. The income tax department did not file any claim before the resolution professional. The prospective resolution applicants were invited for submission of resolution plan. The second petitioner, as a resolution applicant submitted the proposal for resolution plan. The said resolution plan was revised from time to time as sought for by the creditors. The final resolution plan was submitted by petitioner No.2 on 30.04.2018. The same was approved by the committee of creditors and it was approved by the Tribunal, vide its order dated 19.07.2018.

Vide notice dated 02.10.2018 issued by the Deputy Commissioner of Income Tax, Centralized Processing Centre (CPC), Bangalore, it was informed that there was some arithmetical error in the original return filed by petitioner No.1 for which petitioner No.1 was required to file revised return. The same was corrected by filing revised return on 17.10.2018. In the revised return, petitioner No.1 reduced the loss figure by Rs. 97,28,737-00 and claimed loss of Rs. 14,52,15,129-00 (Rs. 15,49,43,866-00 less Rs. 97,28,73700). Besides the above, there were no other changes in the revised return.

The petitioner No.1 informed the Deputy Commissioner of Income Tax, CPC on 01.11.2018 that the mistake in the original return was rectified in the revised return. However, respondent No.3 issued the first impugned notice under Section 143 (2) of the Act. The petitioner, in response to the notice of the Department submitted a reply on 14.10.2019. In the said reply the petitioner submitted the following-

- The factory of the petitioner remained closed from September 2014 onwards due to severe financial crisis;
- There were no sales and purchase transactions recorded during the assessment year 2017-18;
- The resolution plan has been approved by the Tribunal, all proceedings and claims arising from dues prior to approval of resolution plan stood discharged by virtue of Section 31(1) of the Code.

Aggrieved against the said notices the petitioners filed the present writ petition before the High Court as being illegal and *non-est* and further seek a direction to the said respondents not to reopen their claims which were settled in insolvency proceedings. The High Court by order

dated 20.12.2019 stayed the operation of the notices dated 22.09.2019, 21.10.2019 and 30.10.2019 till the next date of hearing, which order has been continued from time to time.

The petitioners submitted the following before the High Court-

- The respondent No. 2 is an operational creditor of the corporate debtor i.e, petitioner No.1.
- The respondent had ample opportunity to submit claims before the resolution professional. But it failed to do so.
- The resolution plan is binding on the corporate debtor as well as on the creditors and other stakeholders involved in the resolution plan.
- The rights/claims of respondent No.2 are well protected under the Code and therefore the respondent No.2 cannot exercise an independent right after an order is passed by the Tribunal approving the resolution plan.
- Clause 7.5 (c) of the resolution plan which states that upon approval of the resolution plan by the Tribunal all dues under the Act in relation to any period prior to the completion date shall stand extinguished and the corporate debtor shall not be liable to pay any such amount.
- All notices proposing to initiate any proceedings against the corporate debtor in relation to the period prior to the date of the order of the Tribunal and pending on that day shall stand abated and shall not be proceeded against.
- After the order of Adjudicating Authority no reassessment / refund or any other proceedings under the Act shall be initiated on the corporate debtor in relation to the period prior to acquisition of control by the resolution applicant.
- The impugned notices dated 22.09.2019, 21.10.2019 and 30.10.2019 for the assessment year 2017-18 in relation to period prior to the date of approval of the resolution plan would no longer be maintainable in view of the resolution plan.
- Section 238 of the Code says that provisions of Code shall have an overriding effect over all other laws.
- Return of income for the assessment year 2017-18 was filed on 07.11.2017 by the resolution professional on behalf of petitioner No.1. In the said return loss of Rs.15,49,43,866-00 was shown and refund of Rs. 11,47,698-00 on account of tax deduction at source (TDS) was claimed.
- Clause 7.5 of the resolution plan stated that the said clause specifically provides that there would be no further claims binding on the petitioners subsequent to the completion date, particularly, in the context of the Act.

The respondent 3 submitted the following before the High Court-

- The writ petition is not maintainable since the impugned notices were issued in exercise of the statutory jurisdiction vested with respondent No.3.
- The resolution plan sought to be relied upon by the petitioners is neither applicable nor binding upon the respondents.
- Respondent Nos.2 and 3 are neither operational creditor nor involved in the making of the resolution plan.
- Since petitioners are seeking to establish that by way of carry forward of accumulated losses and unabsorbed depreciation of approximately Rs. 377.00 crores for the assessment year 2017-18 to be set up against future profits and the refund of approximately Rd. 11,47,608-00 for the assessment year 2017-18, answering respondent is entitled to undertake proceedings which would establish the veracity and correctness of such claims.
- The impugned notices are in accordance with the Act, within jurisdiction and maintainable.
- As per those notices, petitioner No.1 has only been called upon to produce documents or furnish information in relation to its claim of carry forward of losses. There is nothing in the impugned notices which can be said to be in conflict with or in contravention of the resolution plan as approved.
- As petitioner No.1 was a loss-making entity no tax was payable and consequently no monies remain recoverable so as to require any claim to be made by respondent No.3 *vis-à-vis* petitioner No.1. Therefore, there was no requirement for the respondents to submit any claim before the resolution professional.
- The respondents did not receive any notice of the resolution plan and were not granted an opportunity to participate in the formulation of the resolution plan. Hence the resolution plan cannot be said to be binding on respondent Nos.2 and 3.
- The resolution plan cannot override or supersede statutory requirements.
- Any provision in the resolution plan contrary to or inconsistent with the statute would need to yield to such statutory prescriptions.
- The writ petition may be dismissed.

The High Court considered the submissions put forth by the parties to the writ petition. The High Court analysed the provisions of the Code. The High Court observed that the core objective for introduction of Code appears to be to provide an effective legal framework for timely resolution of insolvency and bankruptcy proceedings which would support development of credit markets while encouraging entrepreneurship. At the same time, the Code seeks to balance the interest of all the stakeholders in the payment of dues. It thus seeks to improve the ease of doing business, facilitating more investments, in the process leading to higher

economic growth and development. The High Court also analysed the provisions of sections 30, 31, 53 and 238 of the Code.

Once the resolution plan is approved by the adjudicating authority, it shall be binding on the corporate debtor and its employees, members, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

The High Court observed that the Supreme Court in '**Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta' – 2019 (11) TMI 731 – SC,** held that any debt in respect of payment of dues arising under any law for the time being in force including the ones owed to the Central Government or any State Government, or any local authority which does not form a part of the approved resolution plan shall stand extinguished. Clarifying further it has been held that once a resolution plan is approved by the adjudicating authority, all such claims /dues owed to the State / Central Government or any local authority including the tax authorities who were not part of the resolution plan shall stand extinguished.

In the present case the Income Tax authorities are seeking information for the purpose of making assessment for the assessment year 2017-18 as the return of the corporate debtor (petitioner No.1) has been taken up for scrutiny under CASS. The assessment year 2017-18 (previous year 2016-17) covers the period prior to approval of the resolution plan by the Tribunal on 19.07.2018. Clause 7.5 (c) bars all notices to initiate any proceeding against the corporate debtor in relation to the period prior to the date of the Tribunal's order, clarifying that such notice would stand abated. All assessment proceedings relating to the period prior to the completion date would stand terminated with all consequential liabilities being abated. According to 17.7 (c) of the resolution plan, the corporate debtor is entitled to carry forward the unabsorbed and accumulated losses and to utilize such amounts to set off future tax obligations.

What the resolution plan provides, and which is in conformity with the law laid down by the Supreme Court is that on and from the date of approval of the resolution plan by the Tribunal, the same would prevail over the claims of the Income Tax Department and such claims which are outside the resolution plan for the period covered by the resolution plan would stand extinguished. The impugned notices seek to initiate assessment proceedings under Section143 (3) of the Act for a period which is squarely covered by the resolution plan as approved by the Tribunal.

The High Court quashed the impugned notices dated 22.09.2019, 21.10.2019 and 30.10.2019 being wholly unsustainable in law

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MEDIATION IN INSOLVENCY: A POTENTIAL GAME CHANGER

Dr. S K Gupta
Managing Director
ICMAI Registered Valuers Organization

Mediation, a form of Alternate Dispute Resolution, is still at a nascent stage of development in India. It is starting to gain popularity as a successful dispute resolution mechanism with the Supreme Court furthering its use to solve various kinds of disputes in the country, but there is one area where the use of mediation is still unexplored, i.e., cases pertaining to insolvency law under the framework of the Insolvency and Bankruptcy Code, 2016 (IBC).

The Perspective

Mediation is a form of Alternate Dispute Resolution in which a third neutral party attempts to assist the disputing parties in reaching an amicable settlement and a mutually acceptable agreement. It is the most uncomplicated method of dispute resolution where the third party acts as a mediator to resolve the dispute between the parties by using the means of communication and negotiation. The process of mediation is completely controlled by the parties since the mediator is only a medium to facilitate the process of reaching an amicable settlement. A mediator's suggestions are not binding on either of the parties. Mediation as a form of Alternate Dispute Resolution has attained a statutory status under various Indian laws and has also been recognized by the courts while pronouncing judgments.

Mediation, a form of Alternate Dispute Resolution, is still at a nascent stage of development in India. It is starting to gain popularity as a successful dispute resolution mechanism with the Supreme Court furthering its use to solve various kinds of disputes in the country, but there is one area where the use of mediation is still unexplored, i.e. cases pertaining to insolvency law under the framework of the Insolvency and Bankruptcy Code, 2016 (IBC).

How mediation differs from other ADR methods

There are many modes of Alternative Disputes Resolution (ADR): mediation, arbitration, negotiation, etc. Mediation is different from other ADR methods in the following ways:

A mediator cannot give orders to the parties: The mediator, who is not a party to the dispute, provides his or her services to settle the dispute and participates actively in the ongoing discussions to resolve the differences and conflicts. The purpose of the mediator, according

to Article 4 of the Hague Convention for the Peaceful Settlement of Disputes of 1899, is to bring coordination to mutually opposed claims and solve the parties' issues by pacifying the parties' feelings of wrath and resistance. But it is to be noted that a mediator cannot force the solution upon the parties or order them to reach a settlement. That choice is up to the parties and a mediator can only help in reaching a settlement. The moment he does so, his role ends there.

Mediation is a less formal method: This method is quite informal and flexible as it is not officially organized and recognized. No counsels are needed and the parties do not have to follow any formal rules relating to evidence or formalities like presenting witnesses.

Some laws mandate resolution through mediation before filing a suit: it is not a new concept. In fact, some statutes provide for mediation as a prerequisite to filing a suit in a Court of law.

Importance of mediation as an ADR mechanism, especially in view of insolvency proceedings

Mediation offers the flexibility to parties to come up with fresh solutions: Mediation encourages "party-driven solutions" by allowing the parties to reach an agreement via persuasion. The procedural and substantive norms of conflict settlement are left to the parties to decide. It can then assist the parties in reaching an arrangement that benefits both of them in some way, rather than pursuing the traditional route of dismantling assets and reorganizing business interests.

No party loses or wins: During mediation, both parties try to reduce their short-term expectations to a certain extent. Further, negotiations supervised by a mediator help the parties to reach a mutual decision without any legal foundation. Thus, it can be said that mediation increases the chances of a win-win situation, where no party wins or loses individually.

Reducing the burden of NCLT: Under normal conditions, an entire process of corporate insolvency should take not more than two hundred and 270 days in total. The difficulty is always faced in the timely completion of the CIRP (Corporate Insolvency Resolution Process) deadline. Due to the massive backlog of cases that the National Company Law Tribunal is overburdened with, the pendency in most instances surpasses a year. Determining whether to implement a resolution plan to liquidate the firm takes time as well.

Economically viable method for both the parties at dispute: During court proceedings, the professionals who are appointed under the statute must be paid more as the proceedings progress, causing the entire process to become costly. Mediation, on the other hand, as a means of conflict resolution, has the potential to have a substantial influence on the entire economic system. In a socio-economic sense, preventing a company from going bankrupt when it is experiencing financial difficulties would allow employees to remain employed, all available resources to be efficiently utilized, and relationships, such as those with small suppliers of

goods and buyers/customers of products and services, to be preserved. In larger insolvency cases, mediation may speed up the process along with cost-effectiveness, because of which more money may be saved which can be utilized in satisfying the creditors. Thus, mediation is the best-suited option in a country like India which has a high population and where wealth is unequally distributed.

Brings Uniformity in Cross Border Disputes: Different jurisdictions may handle legal matters differently as a result of cross-border conflicts. It is feasible for parties to discuss and use a uniform settlement process through mediation. For example, Jet Airways, one of the country's largest airlines, ceased operations in 2019 due to a lack of further cash/loan funding. A consortium of lenders led by the State Bank of India (SBI) attempted to revive the airlines by implementing a resolution plan. None of these strategies worked, therefore the lenders, led by SBI, filed insolvency proceedings against Jet Airways by approaching the National Company Law Tribunal (NCLT). While SBI began the proceedings in India, the Dutch Insolvency Court Administrator initiated a parallel proceeding for the sale of one of SBI's confiscated planes. NCLT was approached by the aforementioned administrator. It committed not to sell the asset that has been seized. It is possible that had the matter been mediated, Jet Airways would not have had to face such a situation.

How can mediation reconcile the interests of all the creditors in insolvency proceedings?

A very unique feature of mediation is that it requires minimal participation, which further means that not all the creditors need to be a part of the dispute resolution. Only the principal creditors and the debtor can be a part of the resolution. When a debtor and certain creditors reach an agreement, the other creditors are unable to contest the arrangement and must abide by it. If the court does not confirm the peaceful settlement that ends the issue, it does not affect creditors who are not participants in the agreement.

Case laws

V.K. Parvinder Singh v. Intec Capital Ltd. & Anr (2019) : In the case of *V.K. Parvinder Singh v. Intec Capital Ltd. (2019)*, an authorized representative of the promoters filed an Appeal against the admission order passed by the Adjudicating Authority. Before the formation of the Committee of Creditors, they also indicated their readiness to settle the claims of the Financial Creditors. The Appellate Tribunal chose a retired Judge to begin the mediation procedures between the parties since the parties, in this case, consented to it. Finally, the case was concluded through mediation, and the Appellate Tribunal was presented with the report. The order of the adjudicating authority was set aside by the Hon'ble Appellate Tribunal and held that the settlement terms should be treated as the Appellate Tribunal's directions and order.

The 2008's Lehman Brothers case : Lehman Brothers Holdings Inc., a firm dealing in financial services globally, was founded in 1847 and filed for bankruptcy in the year 2008. One of the arms of Lehman Brothers dealt in derivatives. The arm was a counterparty to at least 1.2 million derivative transactions with over 6,500 different parties. Concerning the insolvency proceedings, an order mandating mediation for the disputes relating to the derivative contract was ordered by the court. After which, from about $9 billion outstanding claims, $333 million have been brought by 110 mediations brought for the estate of Lehman Brothers.

Thompson v. Greyhound Lines, Inc. (2013) : A company, Greyhound Lines Inc. in the USA faced insolvency in 2013. Because of this, property damage and personal injury claims were brought by thousands of claimants who suffered due to traffic accidents involving the vehicles of Greyhound. For resolution, the company set up a pre-reorganization Mediation plan and dealt with each of the creditors individually.

The process comprised of three stages, wherein the first stage was able to resolve half of the claims, The three stages are discussed as follows:

Stage 1 (the 'offer and exchange stage'): The creditor had to fill out a claim form for lost earnings, medical costs, and other losses.

Stage 2: Negotiation of damages was done by the parties in this stage. The parties engaged in mediation for 60 days, if the parties could not reach a decision or if the participation in this stage was declined by the creditor.

Stage 3: This stage was the final stage; if the final agreement was not reached by the parties in this stage, they would have had to go for arbitration.

This case is an excellent example of how mediation could result in a win-win scenario by reducing litigation expenses and balancing the parties' interests by resolving the dispute peacefully.

Position of other countries concerning the use of mediation in insolvency proceedings

Many countries like the USA, Netherlands, Hong Kong, Singapore, etc. have tried to inculcate dispute resolution through mediation in some bankruptcy cases. Out of these countries, one of the first countries to adopt it is the Netherlands.

USA: The USA uses mediation frequently and court-ordered mediation has proved to be very successful in cases like Lehman Brothers, Enron, etc. The concept was introduced in the country in 1986. The country saw increased use of ADR (mediation) in cases of insolvency in the year 1998 when the Alternative Dispute Resolution Act was adopted. According to the Act, civil actions (including bankruptcy disputes) need to be authorized by all the federal district courts. The Bankruptcy Court for the District of Delaware ruled in 2004 that parties must seek to

achieve an agreement through mediation before engaging in certain adversary actions. As a result, from 2000 to 2011, ADR was utilized in 60% of reorganization cases in the country.

Singapore: In 2018, the Singaporean Ministry of Law accepted insolvency mediation for dispute resolution as suggested by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring. The approved recommendations pertaining to use of insolvency mediation in the following cases include the resolution of individual creditor disputes with a debtor in a multi-creditor restructuring, management of multiple creditor disputes of the same nature, and achieving consensus in the restructuring plan between a debtor and its creditors.

European Union: ADR in the European Union (EU) took time to be accepted and emerged from the legislation. Many member states of the EU have brought in methods aiming at the pre-insolvency resolution of disputes. The methods' main aim is to rescue the debtor. For instance*:*

Under the French insolvency law, two procedures, conciliation and the ad hoc mandate are provided.

The procedure provided under the German insolvency law allows creditors and the debtor to negotiate an insolvency plan.

In Italy, the insolvency system provides several options for businesses in financial distress to restructure their debt, all of which are handled outside of court (partially or entirely).

Report of the working group on individual insolvency

In August 2017, a report on individual insolvency was published by the Insolvency and Bankruptcy Board of India (IBBI) and gave certain observations and recommendations with respect to the Insolvency and Bankruptcy Code, 2016, specifically part III, some of which are discussed as follows:

India currently lacks extensive expertise in dealing with individual insolvency and bankruptcy systematically. In this regard, the RWG (Report of Working Group) anticipated challenges in implementing efficient individual insolvency resolution and observed that mediation and counselling would be appropriate additional tools to the structure of individual insolvency in the Code.

Some legal modifications are necessary to include a mediation and counselling mechanism in the Code. However, it is first necessary to research to determine all necessary amendments to the Code to operationalize mediation and counselling within the present legal framework. For a better understanding, mediation and counselling mechanisms in other developed jurisdictions

such as the United Kingdom, the United States, Singapore, Hong Kong, Australia, South Korea, and the Philippines can be researched.

Recommended establishing a complete framework for individual insolvency and bankruptcy mediation and counselling, as well as making necessary amendments to the Code to assist individual insolvency and bankruptcy after proper research.

Embracing Mediation in Insolvency Proceedings: Suggestions and the way ahead

Responsibility of the Bar and Bench*:* For mediation to emerge as a mechanism resolution, particularly in insolvency proceedings, it is the responsibility of the Bar and Bench to create a strategy for it. Such a strategy can include following a formal insolvency process along with mediation which would help enable resolution across borders, cultures, and jurisdictions feasibly. More awareness can be brought about this form of the mechanism by talking about it in corporate judgments and opinions of the judges.

E-mediation: At a time when the whole world is facing the COVID-19 pandemic, e-mediation can be the way to resolve corporate disputes. This way would help in having a quick resolution of disputes and might save a company's life. Even in the post-COVID-19 pandemic scenario, this approach might be beneficial in addressing the problem of debt overhang, particularly individual financial suffering brought on by the crisis. Seeking the rapid advancement of technology and present-day problems, E-Mediation has the potential to grow rapidly in the near future.

Exploring potential use of Mediation in IBC

The IBC was introduced to tackle the issue of Non-Performing Assets (NPAs) and increasing bankruptcy cases in the country in a time-bound manner. It aims to consolidate and streamline laws relating to reorganization and insolvency resolution. The Preamble of the Code states the intent of the Code as "reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders." Additionally, the Code sets up National Company Law Tribunal (NCLT) and the Debts Recovery Tribunal (DRT) as Adjudicating Authorities to resolve insolvency and bankruptcy disputes via litigation. However, the IBC at present does not have a mechanism for out-of-court settlement of disputes related to insolvency and bankruptcy.

In this context, this article aims to explore the scope of insolvency mediation and study its efficacy as a dispute resolution mechanism under the IBC. The article supports the proposition that speedy redressal as envisioned under the IBC can be better achieved via

mediation—a time and cost-effective, consensual as well as collaborative process of dispute resolution.

A large number of pending insolvency cases direct us to adopt a mediation friendly jurisdiction as it will be an instrumental move in reducing the arrears of the party. Mediation must be inculcated as an intrinsic element of the prevailing legal culture so that it is perceived by a party that may be involved in a possible dispute as to the first or the most preferred option. Mediation in that sense must evolve in the long run under the aegis of a regulatory framework that is not necessarily dependent upon Courts or judicial institutions. However, at the present stage, there can be no gainsaying the fact that the Bench and the Bar have to fulfil important responsibilities towards achieving the goal of creating a viable mediation strategy.

Mediation and insolvency not being one of the most common combinations we need to understand each of them in its own light. Mediation is yet another means through which a third person called the mediator tries to resolve the dispute between the involved parties. Under the mediation, the mediator, which is not a part of the dispute, not only offers its services to settle the dispute but also plays an active role in the talks carried on for resolving the differences and disputes. According to Article 4 of the Hague Convention for the pacific settlement of the disputes of the year 1899, the function of the mediator is to bring coordination in the mutually opposed claims and solve the problems of the parties by pacifying the feeling of anger and opposition prevailing amongst them.

Mediation is a wholesome process where both parties can put forward their views without facing the pressure of winning or losing the battle. It allows them to not only resolve their disputes but boosts the alliance between the parties for future business models as well. Decisions reached during the mediation are acceptable since they are not imposed but come out as an agreement which is a consensus with the parties. Mediation holds the capability of providing an economical and expeditious solution to the problem that takes place between the parties. Another characteristic to take into consideration when we discuss mediation in insolvency cases is that, unlike formal proceedings, not all the creditors have to be part of the resolution. This means the meditation requires minimal participants i.e. the debtor and the principal creditors who initiate the proceedings.

In the USA, where ADR is utilized in three contexts for insolvency disputes. Firstly to resolve disputes and achieve a consensus concerning reorganization plans. Secondly for single creditor disputes and lastly for multiple-creditor claims of the same nature. It is the judicial power to confirm or go against the choices of certain creditors. Thus, when a debtor agrees with some creditors, the other creditors cannot challenge the agreement and must comply with it. In other words, if the peaceful settlement ending the dispute is not confirmed by the court, it does not have an effect over the creditors who are not parties to the agreement

Advantages of Insolvency Mediation

Debtor Rehabilitation: The primary advantage of insolvency mediation is that it promotes rehabilitation and reorganization of the corporate debtor under the insolvency resolution process. The Code encourages a fresh 'earned start' for the debtor which can fruitfully be attained through mediation. The consensual approach of mediation can allow the debtors to exercise certain control over their assets while also curing their over-indebtedness. Thus, mediation is an excellent dispute resolution tool for creditors and debtors who aim to ensure repayment of debt as well as sustainability of the business enterprise.

Development of Holistic Resolution Plan: Mediation allows parties to come up with creative out-of-the-box solutions that incorporate the common interests of all parties to the mediation. This contributes to the possibility of development of a holistic resolution plan that is financially beneficial for all creditors—financial as well as operational. Such a resolution plan would provide impetus to rehabilitation and resolution of the corporate debtor rather than purely serve as a debt recovery mechanism.

Time and Cost Efficiency: Under the IBC, the corporate insolvency process is ideally stipulated to be completed in 270 days. However, due to practical difficulties, this deadline is usually extended. Mediation, a time-efficient mechanism, can help not only in easing the burden of cases on courts but also ensuring a time-bound resolution process as envisioned under the Code. Additionally, mediation reduces the procedural complexity of the process and makes it a cost-efficient alternative. This is economically viable for the parties and helps in maximizing the value of assets as envisaged under the Code. Thus, mediation helps both the debtor and creditor to avoid long-drawn court proceedings and reduce expenses in terms of time and money.

Consideration of Common Interest: The corporate insolvency resolution process (CIRP) under the IBC is collective in nature where debts of all creditors are sought to be settled. Mediation can help facilitate a process that accounts for the needs and interests of all stakeholders—the financial creditors, the operational creditors, the corporate debtors and the new investors.

Preserving Reputation and Relationships: The private and confidential nature of mediation ensures that the reputation of the insolvent corporate debtor is not damaged beyond repair. The goodwill of the corporate debtor is preserved as financial information about the corporate debtor is confined between stakeholders. Thus, mediation ensures that the credit history of the debtor is not impacted in a detrimental manner and the

debtor avoids the stigma associated with insolvency. Additionally, the inclusive and cooperative nature of the mediation ensures that the relations between the creditors and debtors are preserved for future collaborations. The debtor may have an incentive to make a higher offer to creditors as the resources exhausted in court procedures are saved, benefitting creditors and improving the creditor-debtor relationship.

A possible drawback of insolvency mediation can be the absence of a formal binding decree as given under court proceedings. Insolvency proceedings are proceedings in rem and affect multiple stakeholders like employees, creditors, workmen etc. who should be assisted with equitable treatment under a binding decree. This can make it unsuitable for large insolvency cases involving multiple stakeholders. However, taking everything into account, mediation has preponderant advantages that can help in successful implementation of the insolvency resolution process envisaged under IBC.

Scope for Reform under IBC

Firstly, insolvency mediation can be used to resolve disputes for individuals and partnership firms. In cases of personal insolvency, court proceedings help in managing repayment and availing discharge under the Code. However, this process alone may not adequately achieve the aim of personal insolvency—rehabilitating the debtor and avoiding repeated insolvency. Here, mediation can be a useful tool that can act supplementary to court proceedings.

The Insolvency and Bankruptcy Board of India (IBBI) Working Group on Individual Insolvency recommended mediation for personal insolvency as "majority of insolvency and bankruptcy proceedings involving individuals may not involve contentious issues, voluminous stakeholders, and high amount of debt or disputes justifying adjudication by authorities such as the Debt Recovery Tribunals (DRT)."[24] Following this recommendation, the Code can be suitably amended to allow for court-ordered informal and out-of-court mediated settlements in individual insolvency cases.

Secondly, mediation can be used to facilitate collective settlement of multiple claims of the creditors on the corporate debtor company through multi-party negotiations.[25] In such a scenario, mediation could be under the initiative of the committee of creditors and the insolvency resolution professional. As mentioned earlier, this would help in development of a holistic resolution plan where common interests of all stakeholders would be taken into consideration.

Lastly, with the IBC being a recent legislation and mediation being at a developing stage in the country, a court-ordered mediation on a case-by-case basis will be more suited than compulsory pre-litigation mediation for all types of insolvency cases. In this context,

there is a need for development of judicial guidelines on triggering of insolvency mediation. These guidelines should deal with judicial referral of insolvency cases to mediation as under the Code. These can be developed based on stipulated criteria of income, assets and debts. Thus, taking everything into account, it can be concluded that there is a scope for reform under insolvency law in introducing a time-bound mediation process that incorporates debt negotiation and settlement to build a robust insolvency resolution regime in the country.

Conclusion

India is witnessing a new trend, where parties are resorting to Alternative Dispute Resolution methods and trying to make out-of-court settlements. This method of resolution not only saves time but is economically viable too. One of such methods is 'Mediation'. It is time India take a leaf out of the Singapore and Lehman Brothers books. Mediation saves time, money and ensures confidentiality of negotiations which is lacking in insolvency proceedings. Since mediation allows parties to come up with out-of-the-box solutions, there is also a possibility that the resolution plan arrived at during mediation shall be more financially beneficial for financial as well as operational creditors than a vanilla resolution plan involving sale of assets and reconsolidation of business interests.

In November 2019, while giving an interview to Economic Times, the Former CJI Hon'ble Mr Justice S. A. Bobde rightly highlighted how mediation is one of the important ADR mechanisms. He also observed that pre-litigation mediation could be mandated as far as commercial matters are concerned. Mediation can indeed become the future of resolving insolvency proceedings, provided people become more aware of it and its advantages over other dispute resolution methods like litigation or arbitration, and required frameworks are brought into place.

The objectives of The Insolvency and Bankruptcy Code 2016 have been cleared since its inception and for full attainment of these objectives, it shall be very important to adopt a mediation process. Mediation can be no doubt a budding field in a country like India which stands second in the line of massive population and has been facing economical threats due to its uneven wealth distribution. Mediation along with its various online facets will not only prove effective during the pandemic but also in the long run as we face new financial challenges every day. With technology developing at a fast pace, e-Mediation has the potential to pick up shortly. The total product of Mediation and formal insolvency procedure has the potential of ensuring justice in a time bound manner while enabling dispute resolution across borders and jurisdiction. Of course, mediation is not the one-stop solution for resolving all the insolvency disputes, but through it, a company's value can be preserved if both parties involved in the process try adopting a settlement-oriented approach.

AUCTION UNDER IBC 2016 Vs SARFAESI ACT 2002

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By way of auction or private sale the liquidator can sell the assets of the corporate debtor which is under liquidation as per regulation 33 of IBBI liquidation process regulations. Under SARFAESI Act, the procedure for enforcement of security interest is contained in section 13 to 19 as well as in SARFAESI Rules. This article is an attempt to understand the differences in the auction procedure between IBC, 2016 and SARFAESI Act, 2002.

Either under Insolvency and Bankruptcy Code (IBC) 2016 or under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) act, 2002 the last step in realisation of assets of corporate debtor or Personal guarantor is auction if all other attempts fail. However, the procedure is different in conducting auction under IBC 2016 when compared to SARFAESI act 2002. In this article some of the provisions relating to auction under both IBC, 2016 as well as SARFAESI Act are discussed.

1. The procedure for conducting auction under IBC 2016 is contained in schedule I of the IBBI liquidation regulations while chapter III section 13 to 19 SARFAESI Act as well as SARFAESI rules contains the procedure for enforcement of security interest under SARFAESI.

2. Mode of sale. As per regulation 33 the liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I. If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority.

   However, the liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when (a) the asset is perishable; (b) the asset is likely to deteriorate in value significantly if not sold immediately; (c) the asset is sold at a price higher than the reserve price of a failed auction; or (d) the prior permission of the Adjudicating Authority has been obtained for such sale:

   Under SARFAESI Act sale can be made in case of movable assets in one or more lots and in case of immovable property whole or any part by any of the following methods.

a) obtaining quotations from parties dealing in the secured assets in the case of movables and similar secured assets in case of immovable assets who are interested in buying such assets. In this mode no public notice is required
b) inviting tenders from the public
c) holding public auction including through e-auction mode
d) By private treaty.

3. Before initiating the process of public auction, the liquidator shall issue a public notice of an auction in the manner specified in Liquidation regulation 12(3). The Liquidator may apply to Adjudicating Authority to dispense with this requirement keeping in view the value of the asset intended to be sold by auction.

The announcement shall be published- (a) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the corporate debtor conducts material business operations; (b) on the website, if any, of the corporate debtor; and (c) on the website, if any, designated by the Board for this purpose.

In the case of SARFAESI the following notices are to be issued before proceeding to auction:

i) Demand notice under section 13(2)
ii) Possession notice in case movable property as per rule 4 enclosing panchnama in form Appendix I and inventory taken possession in the form Appendix II of the rules and in case of Immovable property in form No IV of Appendix of rules.
iii) Sale notice of thirty days as per rule No. 6 if sale is being affected by either inviting tenders from the public or by holding public auction in form Appendix II A of the rules.

If first sale fails and the sale is required to be conducted again then sale notice period can be reduced to not less than 15 days.

Service of demand notice under section 13(2) Rule 3: The service of demand notice shall be made by delivering including hand delivery or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by

i) registered post with acknowledgement due or
ii) by Speed Post or

iii) by courier or

iv) by any other means of transmission of documents like fax message

v) or electronic mail service

If borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality. Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate

Service of possession notice: In case of Movable properties as per rule No. 4 notice to be sent to borrower enclosing panchnama in form Appendix I and inventory taken possession in the form Appendix II of the rules. All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes specified under rule 3.

In case of Immovable properties as per rule No.8 possession notice in case to be served to borrower in form No IV of Appendix of rules by affixing the on the outer door or at such conspicuous place of the property.

The possession notice shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer. All notices under these rules may also be served upon the borrower through electronic mode of service.

Service of sale notice: The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets. If the sale is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in form given in Appendix II-A and in case of Immovable property in form Appendix IV A which is to be published in two leading newspapers, including one in vernacular language having wide circulation in the locality.

If the sale fails and is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower for any subsequent sale

Every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale both in case of movable and immovable on the web- site of the secured creditor.

4. The earnest money deposit shall not exceed ten percent of the reserve price. The reserve price shall be the value of the asset arrived at in accordance with regulation 35.

   In case of SARFAESI, the earnest money deposit will be stipulated by the secured creditor and the authorised officer fix the reserve price of the property in consultation with the secured creditor.

5. Valuation : In the case of IBC during CIRP the resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35. Valuer should be a registered valuer registered with IBBI on or after 01.02.2019.

   In case of liquidation where the liquidator is of the opinion that fresh valuation is required he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses.

   In case of SARFAESI, estimated value of secured assets to be obtained by authorised officer before sale. Approved valuer under SARFAESI means a person registered as a valuer under section 34AB of the Wealth-tax Act, 1957, and approved by the board of directors or board of trustees of the secured creditor, as the case may be.

6. Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to twenty-five percent of such value to conduct subsequent auction. Where an auction fails at reduced price the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.

   In case of SARFAESI the sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor provided that no sale under this rule

shall be confirmed, if the amount offered by sale price is less than the reserve price. However if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

7. On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days wef 30.09.2021 (earlier it is 15 days) of the date of such demand provided that payments made after thirty days shall attract interest at the rate of 12%. Sale shall be cancelled if the payment is not received within ninety days.

In case of SARFAESI where movable secured assets is sold, sale price of each lot shall be paid as per the terms of the public notice or on the terms as may be settled between the parties, as the case may be, and in the event of default of payment, the movable secured assets shall be liable to be offered for sale again

In case of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent of the amount of the sale price, which is inclusive of earnest money deposited and balance amount of purchase price payable shall be paid by the purchaser to the authorised as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

8. On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.

In case of SARFAESI on payment of sale price, the authorised officer shall issue a certificate of sale in the prescribe form Appendix III to rules specifying the movable secured assets sold, price paid and the name of the purchaser and thereafter the sale shall become absolute. The certificate of sale so issued shall be *prima facie* evidence of title of the purchaser. In case of immovable property on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to rules.

Limitations of SARFAESI act: Provisions of SARFEASI Act will not apply in some of the cases as under:

1. Banks cannot take physical possession from the tenant who is protected under Rent control act by invoking the provisions of SARFAESI Act as it cannot override Rent Control Act.
2. NBFCs having assets worth more than Rs.100 crores in the last audited balance sheet can only invoke for enforcement of security interest under SARFAESI Act if outstanding loan is more than 50 lacs as on date while for Banks, FIs and ARCs it is Rs.1 lakh of outstanding balance.
3. Security interest on agricultural land not enforceable under SARFAESI
4. SARFAESI Act not applicable where outstanding is less than 20% of the principal amount and interest thereon.
5. A pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872.
6. Creation of any security in any aircraft and in any vessel

Though the cost involved in realisation is less under SARFAESI act when compared to IBC, in respect of medium and large units taking physical possession and sale of assets under SARFAESI is difficult particularly in case of running units as there will be résistance from workers and employees. Resolution professional will ensure continuation of business in such cases and resolution plan will be worked out for revival without killing the business and thus in medium to large cases IBC is highly effective.

Further IBC will prevail over SARFAESI. As stated under section 238 of IBC all the provisions of IBC will prevail over any other laws. Further IBC is independent from SARFAESI Act and proceedings under any other law do not affect the creditor's right to file an application under IBC

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 196 - BOARD - POWERS AND FUNCTIONS OF

- **B.Rajesh v. Union of India - [2020] 121 taxmann.com 17 /[2021] 163 SCL 122 (Madras)**

Writ petition filed by petitioner, MD of corporate debtor, seeking direction to IBBI to dispose of his compliant against order of NCLT had become infructuous when NCLAT on an appeal preferred by petitioner had disposed of petition filed by him against order of NCLT.

The CIRP application under section 9 was admitted against the corporate debtor declaring it as insolvent. The petitioner, who was managing director of the corporate debtor, having found lacunae and inordinate delay in commencement and implementation of CIRP, approached the NCLT by filing MA/498/2018 seeking relief to exclude period of alleged delay (120 days) on part of the Interim Resolution Professional from 270 days period and direction to RP and CoC to consider resolution plan filed by applicants. Siad application was dismissed by the NCLT. Simultaneously, MA/460/2018 was filed by the Resolution Professional (RP) and corporate debtor against the operational creditor, which was disposed off with passing of liquidation order under section 33. The petitioner filed complaint against order in MA/498/2018 with Insolvency Board. In the meanwhile, appeals against order of NCLT in MA/460/2018 under section 33 for liquidation of the corporate debtor and order in MA/498/2018, rejecting plea to exclude 120 days from CIRP period, and plea to reconsider two resolution plans by CoC were dismissed by the NCLAT. The petitioner filed writ petition praying to issue a writ of Mandamus directing Board to dispose off his complaint.

Held that writ petition was infructuous for reason that the NCLAT on an appeal preferred by petitioner had disposed of both petitions filed by him against orders of NCLT with direction to liquidator to follow liquidation rules.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

Liability of principal borrower and guarantor remain coextensive and respondent/Bank is well entitled to initiate proceedings against guarantor under SARFAESI Act, during continuation of Insolvency Resolution Process against Principal Borrower.

- **Kiran Gupta v. State Bank of India - [2020] 121 taxmann.com 23 (Delhi)**

Respondent No. 4, the Principal Borrower had obtained loans from the respondent/State Bank of India (Bank). The petitioner, who is the wife of the promoter of the principal borrower, stood as a guarantor for repayment of the loans. The Bank filed an insolvency petition against the principal borrower under the provisions of the IB Code before the NCLT, Delhi. During the pendency of the insolvency proceedings against the principal borrower, the Bank issued a Notice under section 13(2) of the SARFAESI Act, to the petitioner, who had stood as a guarantor for the principal borrower. The petitioner by way of instant writ petition challenged the action of the Bank of initiating proceedings against the petitioner under the SARFAESI Act, when insolvency proceedings had been initiated against the Principal Borrower under the IB Code and the same were pending before the NCLT.

Held that neither section 14 nor section 31 places any fetters on banks/Financial Institutions from initiation and continuation of proceedings against guarantor for recovering their dues. Liability of principal borrower and Guarantor remain coextensive and respondent/Bank is well entitled to initiate proceedings against guarantor under SARFAESI Act during continuation of insolvency resolution process against Principal Borrower.

SECTION 220 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - APPOINTMENT OF

- **CA V. Venkata Sivakumar v. Insolvency and Bankruptcy Board of India (IBBI) - [2020] 121 taxmann.com 69 (Madras)**

Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016 by which it became necessary for Insolvency Professionals (IP) to obtain a valid Authorisation For Assignment (AFA) before taking up assignments as an IP with effect from 1-1-2020 and regulation 12A of Insolvency and Bankruptcy Board of India (IBBI) (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws IPA Regulations) are not arbitrary and unconstitutional.

Regulation 7A was introduced in IP Regulations and by insertion of regulation 7A it became necessary for IPs to obtain a valid Authorisation For Assignment (AFA) before taking up assignments as an IP with effect from 1-1-2020. For purpose of giving effect to regulation 7A, regulation 12A was inserted in Model Bye-Laws IPA Regulations. The petitioner was an insolvency professional who was enrolled with Insolvency Professional Agency (IPA). He challenged constitutional validity of regulation 7A and regulation 12A.

Held that criteria stipulated in regulation 7A and regulation 12A for eligibility of IP are not unreasonable or arbitrary but appear to be germane for deciding eligibility of an IP for AFA. Since such measures are intended to regulate profession and not to deprive a person of right to practice profession, they are not violative of articles 14, 19 and 21 of Constitution. Thus, regulations 7A and 12A are not arbitrary and unconstitutional and writ petition filed by petitioner challenging said regulations was to be dismissed.

SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

- **Insolvency and Bankruptcy Board of India v. Lalit Kumar Jain - [2020] 121 taxmann.com 364 /[2021] 163 SCL 291 (SC)**

Where several Writ Petitions had been filed in different High Courts challenging Notification dated 15-11-2019 by which Part III of IBC, 2016 and other provisions relating to personal guarantors of corporate debtors had been brought into force, they were to be transferred from High Courts to Supreme Court to avoid conflicting decisions by High Courts and to authoritatively settle law.

By a Notification dated 15-11-2019, Ministry of Corporate Affairs, Government of India brought into force provisions of IBC, 2016 insofar as they related to 'personal guarantors to corporate debtors' with effect from 1-12-2019. Writ petitions were filed in High Court of Delhi and other High Courts challenging above Notification and a declaration was also sought that sections 95, 96, 99, 100, 101 of the I&B Code are unconstitutional insofar as they apply to personal guarantors of corporate debtors. The petitioner contended that several Writ Petitions had been filed in other High Courts also and hence requested for transfer of Writ Petitions from all High Courts to the Supreme Court to avoid confusion caused by possible divergence of opinions expressed by High Courts.

Held that since Insolvency and Bankruptcy Code is at a nascent stage, it is better that interpretation of provisions of Code is taken up by the Supreme Court to avoid conflicting decisions by High Courts and to authoritatively settle law. Therefore, Writ Petitions were to be transferred from High Courts to instant Court.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Kridhan Infrastructure (P.) Ltd. v. Venkatesan Sankaranarayan - [2020] 122 taxmann.com 88 /[2021] 163 SCL 198 (SC)**

Liquidation of corporate debtor should be a matter of last resort as IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not mere recovery of monies due and outstanding.
[2020] 122 taxmann.com 88 (SC).

Corporate insolvency resolution process against the corporate debtor was initiated and Resolution Professional was appointed. The resolution plan of appellant/resolution appplicant was approved by the Adjudicating Authority. NCLT was thereafter moved on ground that Resolution Plan had not been implemented by the appellant. Hence an application was filed under section 33 seeking liquidation of the corporate debtor. This was allowed by the NCLT. After that appellant filed an appeal before NCLAT, and a revised time line was agreed upon, under which appellant was to make a payment upfront of Rs. 15 crore within seven days of order of NCLAT, which was liable to be forfeited if appellant failed to make balance upfront payment of Rs. 50 crore within three months thereafter. Appellant had in compliance with order of NCLAT, deposited Rs. 15 crores and also filed an undertaking, accepting its obligation to make an upfront payment of Rs. 50 crore within three months from date of reversal of liquidation order and also unconditionally agreed to forfeiture of amount already deposited in case it failed to deposit Rs. 50 crore

Held that liquidation of corporate debtor should be a matter of last resort. IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not mere recovery of monies due and outstanding. Therefore, appellant in order to demonstrate its ability to implement resolution plan shall deposit an amount of Rs. 50 crores upfront in terms of understanding arrived at and liquidation order was to be stayed.

CASE REVIEW : Kridhan Infrastructure (P.) Ltd. v. Venkatesan Sankaranarayan [2020] 120 taxmann.com 197(NCL-AT), Order stayed.

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

- **GGS Infrastructure (P.) Ltd. v. Commissioner of CGST & Central Excise - [2020] 122 taxmann.com 250 (Bombay)**

Where Resolution Plan sanctioned by NCLT provided for settlement of dues of operational creditors at rate of 5% of principal amount only with waiver of interest, penal interest and penalty and that claim raised on account of service tax dues fell under definition of operational

creditors, service tax liability that would crystallize upon adjudication would be settled at 5% of amount of principal dues i.e. at par with other operational creditors under resolution plan.

Resolution Plan sanctioned by the NCLT provided for settlement of dues of operational creditors at rate of 5 per cent of principal amount only with waiver of interest, penal interest and penalty. Principal service tax dues was quantified by the GST Commissioner at Rs. 7.02 crore. The tribunal noted that claim raised on account of service tax dues fell under definition of operational creditors and held that service tax dues that would be crystallize upon adjudication should be settled at par with other operational creditors under resolution plan. However, revenue recovered Rs. 6.24 crore from banks and various debtors.

Held that once a resolution plan is approved by committee of creditors and further approved (or sanctioned) by adjudicating authority, same is binding on all creditors including Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force. Directions of GST Commissioner for appropriation of whole amount of Rs. 6.24 crore could not be sustained and Revenue should retain 5 per cent of Rs. 7.02 crore from Rs. 6.24 crore and refund balance amount to the petitioner.

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

- **Sumitra Devi Shah v. Tata Steel BSL Ltd. - [2021] 123 taxmann.com 383 /[2021] 164 SCL 406 (Calcutta)**

Where plaintiff could not prove that resolution plan included his claim, he would not be entitled to any relief in proceedings under Chapter XIIIA of Original Side Rules.

Held that in a proceedings under Chapter XIIIA of Original Side Rules, defendant is entitled to unconditional leave to defend suit, in event, defendant establishes that it has a substantial defense to claim. Where plaintiff had not produced any document to establish that Resolution Plan approved in respect of the corporate debtor had claim of plaintiffs and defendant had set substantial defense to claim, that, claim of the plaintiff did not survive approval of the Resolution Plan, the plaintiff would not be entitled to any relief in proceedings under Chapter XIIIA of the Original Side Rules.

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

(ii) SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

- **Phoenix Arc (P.) Ltd. v. Spade Financial Services Ltd. [2021] 124 taxmann.com 24 /[2021] 165 SCL 21 (SC)**

(i) Where company Spade and its subsidiary AAA had granted inter corporate deposit to corporate debtor, commercial arrangements between Spade, AAA and corporate debtor were collusive in nature and they would not constitute a 'financial debt' under section 5(8) and, hence, Spade and AAA were not financial creditors of corporate debtor; Spade and AAA also being related parties to corporate debtor under section 5(24) were to be excluded from CoC in CIRP of corporate debtor in accordance with first proviso to section 21(2)

A company 'Spade' had granted inter corporate deposit to corporate debtor and its subsidiary AAA had purchased developmental rights in a project of corporate debtor. Spade and AAA filed their claims as financial creditors in CIRP of the corporate debtor. NCLT had held that AAA and Spade had to be excluded from Committee of Creditors (CoC) formed in relation to Corporate Insolvency Resolution Process (CIRP) initiated against the corporate debtor. In appeal, the NCLAT by impugned order held that Spade and AAA were financial creditors but the NCLT rightly excluded both Spade and AAA from participation in CoC as they were related parties of the corporate debtor. The Appellant (Phoenix), financial creditor of the corporate debtor, challenged decision of the NCLAT holding Spade and AAA as financial creditors.

Held that since commercial arrangements between Spade and AAA, and the corporate debtor were collusive in nature, they would not constitute a 'financial debt' under section 5(8) and, hence, Spade and AAA were not financial creditors of corporate debtor. Since 'AA' who was in control of Spade and AAA held positions in the corporate debtor, AA, Spade and AAA were related parties of the corporate debtor under section 5(24) during relevant period when transactions on basis of which Spade and AAA claimed their status as financial creditors took place. Therefore, decision of the NCLAT, inasmuch as it referred to Spade and AAA as financial creditors, was to be set aside and decision of the NCLAT, inasmuch as it referred to Spade and AAA as related parties of the corporate debtor under section 5(24), was to be affirmed.

(ii) Where a financial creditor seeks a position on CoC on basis of a debt which was created when it was a related party of corporate debtor, exclusion which is created by first proviso to section 21(2) must apply.

Held that where a financial creditor seeks a position on CoC on basis of a debt which was created when it was a related party of the corporate debtor, exclusion created by first proviso to section 21(2) must apply. While default rule under first proviso to section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from CoC, those related party financial creditors that cease to be related parties in order to circumvent exclusion under first proviso to section 21(2), should also be considered as being covered by exclusion thereunder. On facts under heading 'Corporate insolvency resolution process - Financial debt', since transactions between Spade and AAA on one hand, and corporate debtor on other hand, which gave rise to their alleged financial debts were collusive in nature, there existed a deeply entangled relationship between Spade, AAA and the corporate debtor, when alleged financial debt arose and while their status as related parties might no longer stand, pervasive influence of AAA (promoter/director of corporate debtor) over these entities was clear, and allowing them in CoC would definitely affect other independent financial creditors. Therefore, decision of the NCLAT, inasmuch as it excluded Spade and AAA from CoC in accordance with first proviso of section 21(2) was to be affirmed.

Case Review : Spade Financial Services Ltd. v. Hari Krishan Sharma [2021] 124 taxmann.com 23 (NCL-AT), partly affirmed.

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

- **Phoenix ARC (P.) Ltd. v. Ketulbhai Ramubhai Patel [2021] 124 taxmann.com 90 /[2021] 164 SCL 468 (SC)**

Where facility agreement was executed between borrower and lender and corporate debtor had only extended security by pledging shares, without undertaking to discharge borrower's liability, lender at best will be secured creditor qua corporate debtor and not financial creditor qua corporate debtor.

Facility agreement was executed between borrower 'D' and lender 'L'. The corporate debtor was not a party to the facility agreement. It was borrower who was to repay loan. Thereafter, Board of Directors of the corporate debtor passed a Resolution to provide an undertaking to effect that 100 per cent of its shareholding in GEL shall not be disposed of so long as any amounts were due and payable and outstanding under financial assistance proposed to be

provided by the lender to the borrower. Accordingly, a pledge agreement was executed between the corporate debtor and lender by which agreement, shares of GEL were pledged as a security and a deed of undertaking was also executed by the corporate debtor in favour of the lender.

Held that since only security was created by the corporate debtor in shares of GEL and there was no liability to repay loan taken by borrower on the corporate debtor, pledge agreement executed subsequent to facility agreement was security in favour of lender who at best will be secured creditor qua corporate debtor and not financial creditor qua corporate debtor.

Case Review : Phoenix ARC (P.) Ltd. v. Ketulbhai Ramubhai Patel [2021] 124 taxmann.com 89 (NCL -AT), affirmed.

SECTION 10A - CORPORATE INSOLVENCY RESOLUTION PROCESS - SUSPENSION OF INITIATION OF

- **Ramesh Kymal v. Siemens Gamesa Renewable Power (P.) Ltd. [2021] 124 taxmann.com 226 /[2021] 164 SCL 455 (SC)**

Bar under section 10A against initiation of CIRP of a corporate debtor at instance of eligible applicant shall not operate in respect of any default committed prior to 25-3-2020.

Held that object of legislation by inserting section 10A has been to suspend operation of sections 7, 9 and 10 in respect of defaults arising on or after 25-3-2020 i.e. date on which Nationwide lockdown was enforced disrupting normal business operations and impacting economy globally. Section 10A clearly bars filing of application for initiation of CIRP of a corporate debtor at instance of eligible applicant in respect of default arising on or after 25-3-2020 and shall not operate in respect of any default committed prior to 25-3-2020. Therefore, bar created is retrospective as cut-off date has been fixed as 25-3-2020 while newly inserted section 10A introduced through Ordinance has come into effect on 5-6-2020. However, retrospective bar on filing of applications for commencement of CIRP during stipulated period does not extinguish debt owed by the corporate debtor or right of creditors to recover it.

Case Review : Ramesh Kymal v. Siemens Gamesa Renewable Power (P.) Ltd. [2020] 120 taxmann.com 452/[2021] 163 SCL 417 (NCLAT - Delhi), affirmed.

SECTION 238 - OVERRIDING EFFECT OF CODE

- **Om Prakash Agrawal v. Chief Commissioner of Income Tax (TDS) - [2021] 124 taxmann.com 305 (NCL-AT)**

In regard to recovery of Government dues (including income-tax) from company-in-liquidation under IBC, there is inconsistency between section 194-IA of IT Act and section 53(1)(e) of IBC and, therefore, by virtue of section 238 of IBC, section 53(1)(e) shall have overriding effect on provisions of section 194-IA of IT Act.

The liquidator filed an application before the Adjudicating Authority for a direction against successful bidder in auction held for sale of assets of the corporate debtor and Income-tax Authority not to deduct 1 per cent TDS from sale consideration on premise that Income-tax dues could be recovered by department as per waterfall mechanism set out under section 53. The Adjudicating Authority dismissed said application.

Held that in regard to recovery of Government dues (including income-tax) from company-in-liquidation under IBC, there is inconsistency between section 194-IA of the IT Act and section 53(1)(e) of the IBC and, therefore, by virtue of section 238 of IBC, section 53(1)(e) of the IBC shall have overriding effect on provisions of section 194-IA of the IT Act. Liquidator of a company-in-liquidation under IBC is not required to file income-tax return and, therefore, then there is no question of claiming refund of TDS deducted under section 194-IA of the IT Act. The Adjudicating Authority had erroneously held that deduction of tax at source does not mean raising demand for collection of tax by department. TDS under section 194-IA of the Income-tax Act, is an advance capital gain tax, recovered through transferee on priority with other creditors of company and, hence, inconsistent with provision of section 53(1)(e) and by virtue of section 238, provision of section 53(1)(e) shall have overriding effect. Therefore, impugned order was not sustainable and was to be set aside and IT department was to be directed to refund amount of TDS to the appellant, which was deposited by successful bidder with the department.

Case Review : Om Prakash Agarwal v. Chief CIT (TDS) [2020] 119 taxmann.com 160 (NCLT - New Delhi), set aside.

SECTION 32A OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIABILITY FOR PRIOR OFFENCE

- **Union Bank of India E Andhra Bank v. Union of India [2021] 124 taxmann.com 330 /[2021] 164 SCL 748 (Delhi)**

Where Corporate Insolvency Resolution Process had been initiated against corporate debtor and while implementation of resolution plan was in process impugned order of provisional attachment of assets of corporate debtor had been passed by Directorate of Enforcement under Prevention of Money-Laundering Act, 2002, resolution plan having already been approved and ED's order of provisional attachment of properties of corporate debtor having been passed after approval of resolution plan by NCLT, said provisional attachment would prima facie be contrary to section 32A.

Corporate Insolvency Resolution Process had been initiated against the corporate debtor. Resolution plan was finally approved by the NCLT. However, while implementation of resolution plan was in process, impugned order of provisional attachment of assets of the corporate debtor had been passed by the Directorate of Enforcement under provisions of the Prevention of Money Laundering Act, 2002.

Held that resolution plan had already been approved, and the ED's order of provisional attachment of properties of the corporate debtor had been passed after approval of resolution plan by the NCLT, said provisional attachment would prima facie be contrary to section 32A

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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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