MAY,2022

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.

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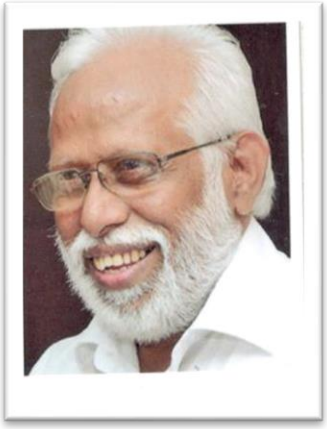
FROM THE DESK OF CHAIRMAN



The Insolvency and Bankruptcy Code, 2016 ("IBC") being relatively a new legislation, has witnessed inconsistent interpretation of its various provisions, especially in respect of some legal issues, which had some grey areas - the issues which are not specifically dealt with under the existing provisions of IBC. One of such interesting legal issues is effect of breach of settlement agreements, entered into between two parties, where one party promises to pay a certain sum to the other party and how to deal with the impact of breach of such a settlement agreement signed between two parties and the applicability of IBC.

Some situations are enumerated as follows:
i) Breach of a Settlement Agreement entered during the pendency of IBC proceedings
ii) Maintainability of IBC proceedings against breach of a Settlement Agreement

The above issues assumed significance on account of conflicting judgement passed by different National Company Law Tribunals ("NCLTs") across the country on the issue, whether a petition initiating Corporate Insolvency Resolution Process ("CIRP") against a Corporate Debtor, which is withdrawn under Section 12A of IBC, pursuant to a settlement agreement executed between the parties, can be revived, in the event of breach of provisions of such settlement agreement by the Corporate Debtor. Since there were divergent judgements by different NCLTs, it created confusing lack of uniformity regarding the rights of the Creditors.

Similar judgements by the Hon'ble NCLT have been noticed in the judgement of Vaishno Industries Pvt. Ltd. vs. Horizon Global Ltd., NCLT, Delhi Bench, thereby rejecting the application seeking revival of the application and instead granted liberty to the Operational Creditor to file a fresh application, in the matter of JFE Shoji Steel India Private Limited vs. Danke Technoelectro Pvt. Ltd. NCLT, Ahmedabad Bench, allowed the Operational Creditor to revive and restore the application in case of a default committed by the corporate debtor in adhering the terms of the settlement agreement.

However, the treatment in the recent judgement of M/s. ICICI Bank Limited vs. M/s. OPTO Circuits (India) Limited, the National Company Law Appellate Tribunal, Chennai Bench ("NCLAT"), stated that the CIRP can be revived in case of failure to abide by the terms of the settlement agreement executed between the parties.

In a case, the Financial Creditor had extended some credit facilities to the Corporate Debtor, who defaulted, and a debt fell due against the Corporate Debtor. Pursuant to such default, the FC initiated proceedings under Section 7 of IBC, before NCLT. Consequently, the NCLT, admitted the application filed by the FC and ordered to initiate CIRP against

the Corporate Debtor. The Corporate Debtor challenged the above order by filing a writ petition before High Court and the order admitting the above application was stayed by the High Court. During the pendency of the writ petition, the Corporate Debtor approached the FC with one time settlement ("OTS") proposal, agreeing to pay a mutually accepted sum in full and final settlement.

Subsequently, an application under Section 12A of the IBC was filed by the Corporate Debtor before NCLT, to seek termination of the CIRP. In view of the settlement agreement executed between the parties during the hearing, the FC filed a Memo, seeking liberty to restore the order of admission of the CIRP, in the event of a failure of the Corporate Debtor to adhere to the terms of settlement. However, the NCLT, impugned order and refused to allow the request made in the Memo. Instead, it granted liberty to the FC to file a fresh application in accordance with the provisions of the IBC. Feeling aggrieved by such order, an appeal was preferred by the FC before NCLAT.

Considering the above-mentioned judgements, the position with respect to settlement agreement entered into between the parties and of IBC on such settlement agreement has become crystal clear. It can be concluded, that in a case where, after the initiation of IBC proceedings, parties entered into a settlement agreement and there is a breach by the debtor, the creditors - both a financial creditor or an operational creditor, would have the liberty to revive the IBC proceedings. However, in a case, where a party wishes to avail the remedy under IBC for breach of the terms of a settlement agreement, an application under IBC shall not be maintainable.

Warm Regards,

Dr. Jai Deo Sharma,
Chairman, IPA ICAI

FROM THE DESK OF MANAGING DIRECTOR

The genesis of the introduction of GST in the country was laid down in the historic Budget Speech of 28th February 2006, wherein the then Finance Minister laid down 1st April 2010 as the date for the introduction of GST in the country. Thereafter, there has been a constant endeavour for the introduction of the GST in the country whose culmination has been the introduction of the Constitution (122nd Amendment) Bill in December 2014. This tax reform led to create a single national market with unified tax structure, common tax base and common tax laws for the Centre and States eradicating the various tax laws viz. Excise duty, Service Tax, VAT, CST. Another very significant feature of GST was that input tax credit was available at every stage of supply for the tax paid at the earlier stage of supply. This feature mitigated cascading or double taxation in a major way. This tax reform supported with extensive use of Information Technology [through Goods and Services Tax Network (GSTN)], led to a greater transparency in tax burden, accountability of the tax administrations of the Centre and the States and also it improved the compliance level at reduced cost of compliance for taxpayers. Studies indicate that introduction of GST instantly spurred the economic growth and potentially lead to additional GDP growth in the range of 1% to 2%. The gross GST revenue collected in the month of March 2022 is **₹ 1,42,095 crore** of which CGST is **₹ 25,830 crore**, SGST is **₹ 32,378 crore**, IGST is **₹ 74,470 crore** (including ₹ 39,131 crore collected on import of goods) and cess is **₹ 9,417 crore** (including ₹ 981 crore collected on import of goods). The gross GST collection in March'2022 is all time high breaching earlier record of ₹ 1,40,986 crore collected in the Month of January 2022 which was 15% higher than the GST revenue collected last year in the month of January 2021 improving the fiscal deficit to 6.71%.

In exercise of the powers conferred under section 168(1) of the CGST Act it has been clarified that no coercive action can be taken against the Corporate Debtor with respect to the dues for period prior to Insolvency Commencement Date. The dues of the period prior to the commencement of CIRP would be treated as 'operational debt' and claims may be filed by the proper officer representing the Indirect Taxes department before the NCLT in accordance with the provisions of the IBC. The tax officers shall seek the details of supplies made / received and total tax due/ pending from the Corporate Debtor to file the claim before the NCLT. This is in accordance with the provisions of the IBC and various legal pronouncements on the issue. Moreover, Section 14 of the IBC mandates the imposition of a moratorium period, wherein the institution of suits or continuation of pending suits or proceedings against the corporate debtor is prohibited.

A timeline of 90 (ninety) days from the Insolvency Commencement Date is available for filing of these claims. However, it has often been observed that there has been inordinate delay in filing of these claims by Customs and GST authorities. This leads to their claims not being admitted and gets extinguished once a Resolution plan is approved prior to receiving the claims within the prescribed timelines, thereby leading to rejection of the claims. Since the rejection leads to an impact on the state as well as countries revenue

system, the authorities litigate on the rejection of such claims. Despite the clarity of a settled position that no claims or demands can be raised once the plan is approved or be accommodated by the resolution applicant who has taken over the company through such a resolution plan.

To ease off the process by eradicating the possibilities of such litigation and avoid the huge revenue losses due to such inordinate delay in receiving the claims Ministry of Finance, Department of Revenue and Central Board of Indirect Taxes and Customs has recently introduced a Standard Operating Procedure in respect to the cases of Insolvency and Bankruptcy Code that a Nodal officer, who would of the position of Additional Director General, DGPM, to ensure filing of the claims with the IBBI in a timely manner and within the period of 90 days from the Insolvency Commencement Date. ln the interest of protection of government revenue and to make the entire process smooth and effective, the Nodal Officer for the CBIC for the receipt of information regarding initiation of the insolvency resolution process and dissemination of the same to the field formations for necessary action at their end in terms of the provisions of the Insolvency and Bankruptcy Code, 2016.

The Nodal Officer would also be responsible to disseminate the information received by him, through official email' to all Zonal Pr./ Chiel Commissioners with a copy to the concerned Pr. Commissioner/ Commissioner within 02 (Two) working days. The concerned office/ Commissionerate which has arrears pending against the unit company shall file its claims timely for safeguarding and realisation of the government dues and inform the fact of having filed its claim to the Nodal Officer through the ADC/ JC in the Chief Commissioner's Office (CCO). It would be a daily exercise for the Nodal Officer to check for any new parties going into insolvency from the website www.ibbi.gov.in will also be undertaken by all field formations for filing timely claims, as necessary. Correspondences with the Resolution Professional (RP) is to be made regarding finalisation of the Resolution Plan. Timely verification should also be done from the website www.ibbi.gov.in to check if any orders were issued by NCLT with respect to resolution, liquidation, and/or withdrawal of application. A monthly report of work done in terms of checking the public announcements, filing of claims, if any, and make liaison with IRP/RP/Liquidator for providing updates on cases would be sent to the Nodal Officer by the dealing officer in the CCO, in the prescribed format. In turn, the Nodal officer will submit a consolidated monthly report to the Board for the purpose of review of progress/ action taken by the field formations.

The initiative of CBIC and IBBI is a very vital step towards reaching a timely resolution, which shall contribute to avoiding unnecessary litigations, delays and shall definitely have positive stroke on effectiveness of IBC and favourable impact on Indian economy.

Warm Regards

AVM Rakesh Kumar Khattri (Retd.)
Managing Director, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

MAY, 2022	
5th May, 2022 to 11th May, 2022	55th Batch of Pre-Registration Educational Course- Online Mode
6th May, 2022 to 8th May, 2022	Master Classes On Personal Guarantors to Corporate Debtors under IBC, 2016
7th May, 2022	Workshop on Emerging Dimensions under Insolvency and Bankruptcy Code, 2016
13th May, 2022	Sensitization Program on Professional Misconduct of Insolvency Professionals
17th May, 2022	Essay Competition
21st May, 2022	Learning Session on Compliances to be made by IPs
27th May, 2022	60th National Cost Convention
27th May, 2022	Workshop on Role of Insolvency Professionals during CIRP & Practical Challenges faced

IBC AU COURANT

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

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA (IPA ICAI)

APPOINTMENT OF ARBITRATOR PENDING APPLICATION FOR CIRP APPLICATION

CS. DR. M. GOVINDARAJAN
Company Secretary & Insolvency Professional

Synopsis
In this article the question whether the arbitration proceedings can be initiated pending the admission of the application filed before the Adjudicating Authority for the initiation of corporate insolvency resolution process against the corporate debtor is discussed with reference to the judgment of Supreme Court and Mumbai High Court. According to their judgments arbitral tribunal can be appointed before the admission of the application for initiation of corporate insolvency resolution process by the Adjudicating Authority.

Arbitral Tribunal

The Arbitration and Conciliation Act, 1996 ('Act' for short) provides for the settlement of disputes between the parties to a contract by appointing an arbitrator. The clauses of the agreement shall provide for the settlement of disputes by means of arbitration. The arbitrator may be appointed by the parties themselves as per the agreement or the arbitrator may be appointed by the Court by filing an application under Section 11 of the Act by either party to the agreement with the prayer to appoint the arbitrator. The Court will hear the parties to the petition and appoints the arbitrator. The arbitrator is called as arbitral tribunal. The arbitrator will conduct the proceedings as per the procedure framed by him. After giving reasonable opportunities to the parties and considering the documents produced before him by the parties and pass an award which is binding on the parties. Appeal may be filed by the aggrieved party to set aside or modify the order. The Appellate Court may either set aside the order or modify the order of confirm the order.

Insolvency Process

The Insolvency and Bankruptcy Code, 2016 ('Code' for reference) provides for initiation of corporate insolvency resolution process by either the financial creditor or operational creditor against the corporate debtor under Section 7 or section 9 of the Code as the case may be. The application is to be filed before the Adjudicating Authority (National Company

Law Tribunal) which will admit the application once it is satisfied that the application is filed is proper.

Issue

The issue to be discussed in this article is as to whether the petition filed before the Court for the appointment of arbitrator under Section 11 of the Act once the application for insolvency resolution process is submitted before the Adjudicating Authority with reference to the decided case law.

Analysis

In case of application filed by the financial creditor the Adjudicating Authority shall, within 14 days of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor. Section 7(5) of the Code provides that where the Adjudicating Authority is satisfied that-

- a default has occurred, and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- default has not occurred, or the application is incomplete, or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

> *"The Adjudicating Authority shall, within 14 days of the receipt of the application by an order admit the application if the application is complete. If the operational creditor proposes the name of interim resolution professional the Adjudicating Authority shall appoint him as interim resolution professional if there is no disciplinary case is pending against him."*

In the case operational creditor, the operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor. The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about the existence of a dispute, if any, or and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute or furnish the payment details. If the payments are not made or any objection is raised as to the dispute of the claims operational creditor may file an application before the Adjudicating Authority under section 9 for initiation of corporate insolvency resolution process. The Adjudicating Authority shall, within 14 days of the receipt of the application by an order admit the application if the application is complete. If the operational creditor proposes the name of interim resolution professional the Adjudicating Authority shall appoint him as interim resolution professional if there is no disciplinary case is pending against him. If the

operational creditor does not propose the Adjudicating Authority shall appoint the interim resolution professional from the panel available with them.

The date of admission of the application by the Adjudicating Authority is the commencement of corporate insolvency resolution process. The Adjudicating Authority passed moratorium under section 14 of the Code. The management of the corporate debtor is automatically suspended, and it will vest on interim resolution professional.

The Supreme Court in **'Indus Biotech Private Limited v. Kotak India (offshore) Fund and others'- (2021) 6 SCC 436** held that mere filing of the petition and its pendency before admission, cannot be construed as triggering of a proceeding *in rem.* The Court may appoint an arbitral tribunal on an application filed by the parties to the dispute before the admission of insolvency proceedings before the Adjudicating Authority.

In this case there was a dispute between the petitioner and the respondents that has been raised under a Share Subscription and Shareholders' agreement. The respondents filed an application before the Adjudicating Authority for initiation of corporate insolvency process. The petitioner filed a petition before the Adjudicating Authority for the appointment of arbitrator to settle the disputes between the parties under Section 11 of the Act. The petitioner contended that the petitioner was not liable to pay any amount to the respondents till the dispute is settled by arbitration. The respondents contended that they having subscribed to the optionally convertible redeemable preference shares of Indus Biotech, and on redemption of the same, the amount was required to be paid by Indus Biotech to respondents being an amount of Rs.367,08,56,503/- which had become due and payable to respondents. Since the said amount was not paid the respondents invoked the jurisdiction of Adjudicating Authority for the initiation of corporate insolvency resolution process against the petitioner. The appointment of resolution professional in this regard was also prayed.

"The respondents contended that they are having subscribed to the optionally convertible redeemable preference shares of Indus Biotech, and on redemption of the same, the amount was required to be paid by Indus Biotech to respondents being an amount of Rs.367,08,56,503/- which had become due and payable to respondents."

The petitioner filed a miscellaneous petition with the prayer for a direction to the parties to refer the dispute to arbitration. The Adjudicating Authority allowed the petition filed by the petitioner despite the objections made by the respondents. Against this order the respondent No. 2 filed a special leave petition before the Supreme Court.

The Supreme Court interpreted the provisions of section 7 of the Code. It culled out a distinction as to a position prior to the admission of the proceedings under Section 7 and the position post-admission of the proceedings. The Supreme Court observed that once the proceedings under Section 7 of the Code are admitted, then such proceedings would assume the status of proceedings *in rem.* Then third-party rights are created in all the creditors of the corporate debtor and the proceedings will have an *erga omnes* effect. The Supreme Court held that by

mere filing of the petition and its pendency before admission, cannot be construed as triggering of a proceeding *in rem*. In the instant case, the petition was yet to be admitted and, therefore had not assumed the status of proceedings *in rem*.

The decision of the Supreme Court has been followed by the Bombay High Court in **'Jasany Realty Private Limited v. Vijay corporation' – Commercial Arbitration Application (L) No. 1242 of 2022 – Bombay High Court – decided on 25.04.2022.** In this case the respondent, during the course of business, provided financial assistance to the applicant to the tune of Rs.4.50 crores with a loan agreement. The agreement was entered into between the parties on 23.04.2015. Due to negative impact in the business world another agreement was entered into between the parties on 05.07.2016. The due date of payment was extended by the second agreement from 30.06.2015 to 31.03.2017. Except the extension of due date all other conditions are same in both the agreements.

> "The High Court considered the submissions put forth by the applicant as well as the respondent. The question arises for consideration is whether mere filing of a proceeding under Section 7 of the Code, would amount to any embargo on the Court considering an application under Section 11 of the Act to appoint an arbitral tribunal."

The applicant defaulted in repayments of loan to the respondent. However, the petitioner issued a cheque dated 07.09.2021 to the respondent which was dishonored. Therefore, the respondent approached the Adjudicating Authority for initiating the corporate insolvency resolution process against the applicant under section 7 of the Code on 12.10.2021.

The applicant appeared before the Adjudicating Authority and got adjournments. Due to this no order has been passed by the Adjudicating Authority admitting the corporate insolvency resolution process under section 7(5) of the Code. Both the agreements are having arbitration agreement between the parties as per clause 16.

In the meantime, the applicant issued a legal notice to the respondent invoking arbitration agreement and called upon the respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between the parties under the two loan agreements. The applicant also proposed the name of the sole arbitrator in the said notice. The respondent did not respond to the notice. Therefore, the applicant filed the present application before the High Court under Section 11(6) of the Act with the prayer for the appointment of arbitral tribunal.

The respondent filed reply for the application filed by the applicant. The respondent raised an objection that the application is afterthought and an attempt to dilute the prior proceedings of initiating corporate insolvency resolution process before the Adjudicating Authority by the respondent against the applicant. The applicant admitted the liability. The present application has been filed to escape from the rigors under the Code. The respondent further submitted the following before the High Court-

- an offer was made by the applicant by forwarding an allotment letter dated 23.04.2015 of a flat in the upcoming project of the applicant named 'Gyan Ghar' to secure the amounts payable to the respondent;
- the Director of the Applicant had executed a deed of guarantee dated 23.04.2015 guaranteeing repayment of the loan/borrowing from the respondent;
- in discharge of the liability, the applicant had also issued a cheque of Rs.31,08,33,457/- towards payment of the respondent's dues up to 31.08.2021, which was in accordance with the terms and conditions of the loan agreement dated 05.07.2016, which was dishonoured;
- the liability of the applicant towards the respondent of a financial debt was clearly an admitted liability;
- the respondent has already set into motion, the proceedings before the Adjudicating Authority, Mumbai, under Section 7 of the Code on 12.10.2021;

Therefore, the respondent prayed that the application filed by the applicant ought not to be entertained by the High Court.

The High Court observed that the reply affidavit deals with the merits of the disputes between the parties, which, in the opinion of the High Court, may not be relevant so far as exercise of jurisdiction of this Court under Section 11 of the Act is concerned.

The High Court considered the submissions put forth by the applicant as well as the respondent. The question arises for consideration is whether mere filing of a proceeding under Section 7 of the Code, would amount to any embargo on the Court considering an application under Section 11 of the Act to appoint an arbitral tribunal.

The High Court observed that there is no dispute in regard to the arbitration agreements between the parties which is contained in Clause 16 of the agreement and also there is no dispute in regard to the invocation of the arbitration agreement. Thus, the primary consideration for this Court to exercise jurisdiction under Section 11(6) are certainly present.

The objection is on the ground that once prior in time to the present proceedings, when a recourse is taken by the respondent to the provisions of Section 7 of the Code, by initiating proceedings against the applicant before Adjudicating Authority, whether the Court in such event, would be precluded from exercising jurisdiction under Section 11 of the Act to appoint an arbitral tribunal?

The respondent contended that the corporate insolvency resolution proceedings are required to be given primacy, that is, till the Adjudicating Authority passes an order under sub-section (5) of Section 7, the application under Section 11 of the Act ought not to proceed, so as to appoint an arbitral tribunal. The applicant, on the other hand, contended that once no order is passed by the Adjudicating Authority admitting the Section 7 proceedings filed by the respondent against the applicant, there is no embargo on the powers of the Section 11 Court to adjudicate the Section 11 application. The corporate

insolvency resolution process only commences on the admission of the application by the Adjudicating Authority.

The High Court observed that the respondent had filed the proceedings under Section 7 of the Code against the applicant before the Adjudicating Authority on 12.10.2021. It is also clear that till date the Adjudicating Authority has not passed an order admitting the proceedings of the respondent filed under Section 7 of the Code.

Both the parties relied on the judgment of Supreme Court in ***'Indus Biotech Private Limited v. Kotak India (offshore) Fund and others'- (2021) 6 SCC 436.*** The High Court analyzed the said judgment in detail. In this case the Supreme Court held that by mere filing of the petition and its pendency before admission, cannot be construed as triggering of a proceeding *in rem*.

"Both the parties relied on the judgment of Supreme Court in **'Indus Biotech Private Limited v. Kotak India (offshore) Fund and others'- (2021) 6 SCC 436**. The High Court analyzed the said judgment in detail."

The High Court did not accept the contention of the respondents that mere pendency of the Section 7 proceedings and that too at preadmission stage would be an embargo for the Court, not to entertain a petition filed under Section 11 of Act. The High Court observed that in the facts of the present case as the Corporate Insolvency Resolution Process as initiated by the respondent under Section 7 of the Code is yet to reach a stage of the Adjudicating Authority passing an order admitting the said proceedings, the Court would not be precluded from exercising its jurisdiction under Section 11 of the Act, when admittedly, there is an arbitration agreement between the parties and invocation of the arbitration agreement has been made, which was met with a refusal on the part of the respondent to appoint an arbitral tribunal.

The High Court also did not accept the contention of the respondents that the petitioner ought to have filed an application under Section 8 of the Act before the Adjudicating Authority and having not filed such application, the present Section 11 application ought to be held to be not maintainable.

The High Court held that such right/remedy would certainly be available to a party till the proceedings under the Code are admitted as noted above. Once the Section 7 proceedings are admitted, the provisions of Section 238 of the Code would get triggered to override the application of all other laws, as in such event, the Corporate Insolvency Resolution Process would commence, against such corporate debtor as per the provisions of Section 13 of the Code which would be proceedings *in rem.* The Court would be required to allow this application by appointing an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under the agreements in question. The High Court allowed the petition.

However, the parties to the petition have settled the dispute there is no necessity for the High Court to appoint arbitrator.

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WITHDRAWAL OF RESOLUTION PLAN POST APPROVAL BY COC/NCLT

MR. MANISH DHIRAJLAL KANERIA
Insolvency Professional

Synopsis
We all know that running a Corporate Insolvency Resolution Process (CIRP) of an ailing Corporate Debtor is a herculean task. During CIRP, an Insolvency Professional (IP) is expected to steer a Vessel whose well experienced captains (erstwhile management) had already put it in a turbulence of operational and financial mismanagement.

The IP at one-hand strives hard to maintain the going concern status of the Corporate Debtor by managing the unpaid employees, running operations, managing vendors/ authorities and on the other hand, he has his other onerous duty towards Committee of Creditors (CoC), IBBI, NCLT etc. But all his efforts get paid off with one event i.e., the approval of a **"Resolution Plan"**. For resolution, he gathers up the historical information, data of past performance, order book, collate claims, took custody of assets, get on toss with various enforcement agencies to get custody of assets, formulate Information Memorandum, RFRP and what not. All that he strives for in the entire process is Resolution and undoubtedly, it is the Resolution Applicant (**RA)** who is a white knight to the Resolution Process of any Corporate Debtor. The RA study the Information Memorandum and conducts its own due diligence to assess the value of the Corporate Debtor and thereafter submit its Resolution Plan with the RP for evaluation and approval by the CoC. After multiple rounds of negotiation and inter-competition amongst the competing RA(s), the CoC finally approves the best resolution plan which later on, gets presented by the RP to the Adjudicating Authority for approval.

While the Adjudicating Authority is considering the approval of Resolution Plan, the great heaven would obviously fall if this white knight i.e. RA suddenly turns up and reveal that he no longer wants to take over the Corporate Debtor and further, uses judicial processes to find faults in the resolution process and procedures conducted by the RP and CoC so that he can withdraw from the process of resolution safely.

In this article, we intend to discuss the commercial and legal aspects of those unfortunate instances where the successful Resolution Applicant withdraws from the resolution processes at different stages like- post CoC but pre-NCLT approval; or post NCLT approval. Be it at any stage, the effect of withdrawal is catastrophic with the CoC ultimately facing

more reduction in value and enhancement in the resolution process cost. This issue of withdrawal of resolution plans has gained even more momentum especially due to the outbreak of COVID-19.

While going through the bare provision of section 31 of the Code, one could argue that the plan would become ***binding upon approval*** by the Adjudicating Authority. Also, section 74(3) of the IBC provides that a person can be prosecuted or punished for contravening/violating the Resolution Plan ***only after its approval by the Adjudicating Authority***. On reading of these provisions, it is clear that upon approval by NCLT, the RA or anyone cannot withdraw from the Plan but there was some ambiguity regarding withdrawal of resolution plans which are pending for approval by NCLT. But this cannot be interpreted that before the approval by the Adjudicating Authority, a Resolution Applicant can walk out in a smooth and un-questioned manner. The BLRC (Bankruptcy Legislative Reforms Committee) Report, on which this Code is based upon, mentions that once the IP receives a binding plan from the RA, the CIRP can be closed by filing the same with the Adjudicating Authority. Importantly, the BLRC Report mentions the resolution plan as ***"binding agreement"***. Thus, the intention was clear that there should be a binding plan to be received from the RA from the stage of submission itself. The limited interpretation from section 31 is that post approval from the Adjudicating Authority, it would become binding upon all other stakeholders, like employees, shareholders, creditors, Central Government, State Government or any local authorities, Guarantors etc. who were not directly involved in the approval of the resolution plan but has some interest in the Corporate Debtor.

To understand this issue, let us analyze some of the judgments passed by the NCLAT and thereafter, the significant judgment passed by the hon'ble Supreme Court.

In the matter of "Astonfield Solar (Gujarat) Pvt. Ltd", NCLAT, has upheld the order of NCLT denying the RA to withdraw the plan. The NCLAT observed that the sanctity of the plan has to be maintained by all the stakeholders. The NCLAT held that over a period, there would be some erosion in the value of the assets of the corporate debtor, but that should not act as a reason for withdrawal by the RA. The judgment apparently seems to be appropriate as depreciation or normal wear-tear are an unavoidable part of any business cycle. But, in Astonfield case, since the very existence of business was lost due to subsequent events and the CoC was also agreeable for revision, the Supreme Court used its residuary powers and permitted the RA to make revisions subject to CoC approval.

> *"Going through the bare provision of section 31 of the Code, one could argue that the plan would become binding upon approval by the Adjudicating Authority. Also, section 74(3) of the IBC provides that a person can be prosecuted or punished for contravening/violating the Resolution Plan only after its approval by the Adjudicating Authority."*

Similarly, in "Committee of Creditors of Educomp Solutions Ltd. Vs. EBIX Singapore Pte Ltd." the NCLAT did not allow the withdrawal of the Resolution Plan before the approval by the Adjudicating Authority. In the said judgment, the Court placed heavy reliance on the famous latin maxim ***'Actus curiae neminem gravabit'*** *which means "the act of Court shall harm no one".* In other words, permitting the RA to withdraw from the plan while the Adjudicating Authority is

considering its plan would mean that the time taken by the Court has the effect of harming the interest of CoC which is impermissible under the law.

In author's view, these judgments were significant departures by the NCLAT from its own judgment rendered in "*Metalyst Forging Ltd*." wherein the NCLAT permitted Deccan Value Investors LP to withdraw from the Resolution Plan. The Court observed that the provisions of the IBC did not empower the NCLT to compel for specific performance by an unwilling RA as that would not plan a viable and feasible one.

The law on this issue was not very well settled with some contrary judgments of NCLAT supporting as well opposing the withdrawal. But as we all know the remarkable and swift contribution of the Hon'ble Supreme Court in shaping up a strong insolvency resolution framework by clarifying the ambiguities which IBC still carries with it. Similarly, this issue of withdrawal approached the Hon'ble apex court which was titled as "*Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited*".

The court had stated that the RA cannot withdraw the Resolution Plan once it is approved by COC for the following reasons:

> RA(s) are aware about the provisions of the IBC when they submit their Resolution Plan.

> RA(s) are given Information Memorandum and other information about the Corporate Debtor before they submit their resolution plans.

> RA(s) are fully aware about the conditions of the CD and the legal provisions, and the risk involved, thus, cannot be permitted to back out saying unawareness.

> There is no provision in the IBC permitting the withdrawal of resolution plan post approval by the CoC.

It was noteworthy to observe that even an un-avoidable situation like Covid-19 was not allowed as a ground to seek withdrawal for any resolution plan by the RA. On this point, the Court observed that the Government has not put any new provision to allow withdrawal despite such economic alterations, the way, a new section 10A has been inserted to prevent new cases of CIRP admission. Thus, in absence of any such new provision, withdrawal cannot be permitted on this ground.

"The NCLAT permitted Deccan Value Investors LP to withdraw from the Resolution Plan. The Court observed that the provisions of the IBC did not empower the NCLT to compel for specific performance by an unwilling RA as that would not plan a viable and feasible one."

The Critics' View

While the judgment of the Hon'ble Supreme Court is commendable which prevents the Resolution Applicants from making a mockery of the entire insolvency resolution framework but there also lies a flip side to the coin. The flip side of the judgment is in the fact that forcing a reluctant RA to continue with the resolution plan may enhance the possibility of liquidation of the Corporate Debtor (at a later point of time) because, RA would fail to implement the

Resolution Plan and, in such scenario, section 33(3) of the Code would get triggered which would result in initiation of the liquidation. But, by that time, the liquidation value of the assets would have further degraded from what it could have fetched, had there been a timely initiation of liquidation.

For instance, if we take the case of "Mandhana Industries Limited'' whose former successful RA namely Formation Textiles LLC withdrew from the process after a period of around one year from the approval of Plan by the NCLT. Resultantly, the adjudicating authority ordered for revival of the CIRP and fresh invitation of the Resolution Plans. In the second round of approval of the plan, the banks and financial institutions suffered a loss of INR 329 Crores on account of accepting a devalued resolution plan in the second round. It is a matter of public record that INR 307.38 crores, being the liquidation value as initially ascertained during the first round of CIRP, has fallen down to INR 184.92 Crores in the second round of CIRP. In addition to this, the failed Resolution Applicant has incurred trade creditors of around 22.53 Crores, the fate of whom are still unknown and several applications have been filed before the adjudicating authority by such unfortunate creditors to claim their amount.

"Resultantly, the adjudicating authority ordered for revival of the CIRP and fresh invitation of the Resolution Plans. In the second round of approval of the plan, the banks and financial institutions suffered a loss of INR 329 Crores on account of accepting a devalued resolution plan in the second round. It is a matter of public record that INR 307.38 crores, being the liquidation value as initially ascertained during the first round of CIRP, has fallen down to INR 184.92 Crores in the second round of CIRP"

Though looking at it from one angle that the RA has been allowed to withdraw is commercially bad, but had it been forced upon the reluctant RA to continue, the same would result in his failure to implement the plan which would lead to liquidation of the Corporate Debtor, may be at a later stage. But as evident from "Mandhana Case", after one and half year, the liquidation value had eroded by around 40%, what would have been the case had the liquidation process been delayed for another 1-2 years?

In other words, the results of a RA withdrawing from its resolution plan are undoubtedly far reaching and is a big dent to the already sick health of the Corporate Debtor but, is forcing an un-willing RA to continue is a commercially prudent stance, keeping legality aside for the time being? The answer seems to be negative as this un-willing RA would bring in his tenure: - "value erosion" of the assets of the Corporate Debtor, enhanced liabilities; and devastation to the going concern status of the Corporate Debtor.

The cases of Adhunik Metaliks Limited and Zion Steel Limited are notable examples which depicts failure of the RA to implement the resolution plan, though the liquidation was commenced initially, but the NCLAT intervened and got the revised resolution plan approved by the CoC which avoided the liquidation.

Amtek Auto Limited, is another landmark case, where Liberty House Group Private Limited, the former successful resolution applicant, failed to implement the resolution plan which led to initiation of liquidation. But owing to the Supreme Court's intervention, in the second

round, the plan of Deccan Value Investor LP(DVI) was approved. It is interesting to note that later even DVI intended to withdraw from its plan which the Supreme Court denied, and it would be interesting to witness how successfully DVI would be able to implement its plan. As per IBBI quarterly newsletters, the liquidation value of INR 4129 Crores fell down to INR 1543 Crores in the second round of approval of the resolution plan.

> *"If the debtor becomes disabled during the implementation of the plan, the debtor and creditors may once again re-negotiate on a new plan."*

Suggested way-out

Allowing an easy walk-out to the RA might not be in the interest of stakeholders but at the same time, compelling an un-willing RA, would also not achieve the intended purpose. As we all know that time is the essence under the IBC. So, the timely and commercial approach to such back out(s) could be: -

a) In exceptional cases like some natural calamity, destruction of majority of assets of Corporate Debtor etc., permitting RA to re-negotiate with the CoC, within a very limited and short span of time, in which case, the decision of the CoC shall be unchallengeable and unquestionable on any grounds of whatsoever nature. The same was followed by the Hon'ble apex court in "Astonfield" case after taking note of the fact that even the CoC also was inclined to consider the re-negotiation. By using its residuary power, the Court directed the parties to take a decision thereupon and submit the revised resolution plan to the adjudicating authority, if approved by the CoC. Importantly, the apex court made it clear that in absence of non-approval of the revised plan, the original plan which was submitted by Kundan Care shall remain in force.

   Some traces of re-negotiation in the approved resolution plan could also be found in BLRC report, though in respect of individual insolvency, which reads as:

   > *"If **the debtor becomes disabled** during the implementation of the plan, the debtor and creditors may once again re-negotiate on a new plan"*

b) In failure of re-negotiation or in other cases not fit for re-negotiation, allowing such un-willing RA to timely back-out with invocation of his performance bank security, forcing him to pay compensation to the CoC for the difference in the reduced value which the stakeholders receive along with the interest, and criminal prosecution only in the case of his failure to compensate. At the same time, in order to not let the failed RA to enjoy under the shelter behind the delayed judicial system, provisions of depositing some minimum percentage of compensation to secure bail alike what is required to file an appeal under section 148 of the Negotiable Instruments Act, 1881 could be inserted. The other restrictions may be further imposed upon officers of such failed RA like disqualification in directorship, debarment from security market etc.

Conclusion

The Code, enacted in 2016, is an economic legislation and not a criminal law, so the withdrawal should be viewed from an economic perspective. In Author's view, as a matter of general rule, withdrawal from the Resolution Plan should not be allowed. However, at the same time, compelling an unwilling RA to continue with the resolution plan would be like handing over the reins of a sick Corporate Debtor forcibly upon an un-interested rider in which case, the Resolution Plan cannot prove to be a viable and feasible one. Adopting such a strict approach in a commercial legislation might not serve the purpose. With such an approach, we could also lose the other objectives of the Code i.e., promotion of entrepreneurship. The other outcome of such approach could be fear amongst the RA(s) community who would be rendered remediless if all the sum and substance of the corporate debtor is lost for any uncontrolled reasons like un-precedented pandemic or any other natural calamity while his resolution plan was under consideration by the adjudicating authority. Even for a non-IBC case, when the Government is open for restructuring especially in case of natural calamity or other extra-ordinary events, then dis-entitling a RA from doing so might not fit the test of equality. So, a balanced approach must be followed to enable commercial legislation to work in a commercial manner.

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INSOLVENCY AND BANKRUPTCY CODE, 2016: TREATMENT OF THE EMPLOYEES AND WORKMEN

MR. SUMIT SHUKLA
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Synopsis

One of the Primary objectives behind the insolvency regime is to provide all the possible opportunities to the Corporate Debtor, facing various challenges such as financial stress, mismanagement, non-compliances, litigation which are usually contributes towards the closure of business and economic activities of the Companies resulting into the depletion of recoveries and realizations leading to the depletion of assets of the corporate debtor whether movable or immovable. As a consequence, Manpower and Human Resources of the Company who are also dependent on the Company gets affected very severely. At the beginning their salaries and wages gets delayed. And, if Company fails to revive the operations the loss of pay, loss of job and loss of retiral benefits are inevitable. As a consequence, the manpower resources have to find other alternatives which further causes adversities for the Company in its revival. Since human and manpower resources are critical for any organization for its survival therefore in the ensuing paragraphs of this article, we shall discuss regarding the manner in which the cost and expenses incurred on the salary and wages of the employees & workmen are to be dealt with during the insolvency resolution (revival) /Liquidation process within the IBC framework.

During the Resolution / Liquidationprocess of the Corporate Debtor apertinent issue that comes up very frequently wherein employees and workmen who are required to contribute during such processes but payment to such employees and workmen has always been disputed on some or other pretext. And as a consequence, a lot of judicial time, efforts and costs are being spent to resolve the matters arising out of the issues related to the employees and workmen.

However, on the other hand the treatment of the claims of Employees and workmen has been clearly defined in the Insolvency and Bankruptcy Code, 2016. The claims related to employees

and workmen are categorized as Operational Claim and the manner of distribution and priority has been defined in the provisions under section 53 of the Code.

Before we move forward, let's look at the key provisions under the Insolvency and Bankruptcy Code, 2016

Provisions under section 5(13) of the Insolvency and Bankruptcy Code, 2016 which are reproduced as under:

"Insolvency resolution process costs" means –
(a) the amount of any interim finance and the costs incurred in raising such finance;
(b) the fees payable to any person acting as a resolution professional;
(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
(e) any other costs as may be specified by the Board;

Further provisions under section 53 of the Insolvency and Bankruptcy Code, 2016 further provides the manner which signifies the importance given to such cost during the distribution of assets of the Corporate Debtor.

Provisions of section 53(1)(a) provides that "(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely: - (a) the insolvency resolution process costs and the liquidation costs paid in full;"

Further provisions under section 30(2)(a) again emphasis the treatment for the expenses incurred during the CIRP, that

"(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

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

> *"It cannot be disputed that as per Section 5(13) of the IB Code, "insolvency resolution process costs" shall include any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. It is also true that Section 20 of the IB Code mandates that the interim resolution professional/resolution professional is to manage the operations of the corporate debtor as a going concern and in case during the CIRP the corporate debtor was a going concern, the wages/salaries of such workmen/employees who actually worked, shall be included in the CIRP costs and in case of liquidation of the corporate debtor, dues towards the wages and salaries of such workmen/employees who actually worked when the corporate debtor was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per Section 53(1)(a) of the IB Code.."*

Putting together the above stated provisions of the code signifies that the Code provides for the priority payment of such cost, which has been incurred

after the admission of the application by the adjudicating authority till the conclusion of the process, while distributing the assets of the Corporate Debtor.

The Hon'ble Supreme Court of India has dealt with the issue in its order dated 19th April 2022 while disposing the CIVIL APPEAL NO. 5910 OF 2019 in the matter of Sunil Kumar Jain and others (Appellants) Versus Sundaresh Bhatt and others (Respondents). While passing the judgement the Hon'ble Supreme Court observed that

9. It cannot be disputed that as per Section 5(13) of the IB Code, "insolvency resolution process costs" shall include any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. It is also true that Section 20 of the IB Code mandates that the interim resolution professional/resolution professional is to manage the operations of the corporate debtor as a going concern and in case during the CIRP the corporate debtor was a going concern, the wages/salaries of such workmen/employees who actually worked, shall be included in the CIRP costs and in case of liquidation of the corporate debtor, dues towards the wages and salaries of such workmen/employees who actually worked when the corporate debtor was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per Section 53(1)(a) of the IB Code. Therefore, while considering the claims of the concerned workmen/employees towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the concerned workmen/employees actually worked while the corporate debtor was a going concern during the CIRP. The wages and salaries of all other workmen/employees of the Corporate Debtor during the CIRP who actually have not worked and/or performed their duties when the Corporate Debtor was a going concern, shall not be included automatically in the CIRP costs. Only with respect to those workmen/employees who actually worked during CIRP when the Corporate Debtor was a going concern, their wages/salaries are to be included in the CIRP costs and they shall have the first priority over all other dues as per Section 53(1)(a) of the IB Code. Any other dues towards wages and salaries of the employees/workmen of the corporate debtor shall have to be governed by Section 53(1)(b) and Section 53(1) (c) of the IB Code. Any other interpretation would lead to absurd consequences and violate the scheme of Section 53 r/w Section 5(13) of the IB Code. If any other interpretation, more particularly, the interpretation canvassed on behalf of the appellants is accepted, in that case, the wages/salaries of those workmen/employees who had not worked at all during CIRP shall have to be treated and/or included in the CIRP costs, which cannot be the intention of the legislature.

> *"Hon'ble Supreme Court further observed in Para 10 of the said orders that "On a fair reading of Section 5(13) of the IB code which defines "insolvency resolution process costs", it is observed and held that the dues towards the wages/salaries of only those workmen/employees who actually worked during the CIRP are to be included in the CIRP costs. The rests of the claims towards the wages/salaries of the workmen/employees, as observed hereinabove, shall be governed by Sections 53(1)(b) & (c) of the IB Code."*

Hon'ble Supreme Court further observed in Para 10 of the said orders that "On a fair reading of Section 5(13) of the IB code which defines "insolvency resolution process costs", it is

observed and held that the dues towards the wages/salaries of only those workmen/employees who actually worked during the CIRP are to be included in the CIRP costs. The rests of the claims towards the wages/salaries of the workmen/employees, as observed hereinabove, shall be governed by Sections 53(1)(b) & (c) of the IB Code."

While disposing the Appeal the Hon'ble Supreme Court has made the following concluding remarks:

14. In view of the above and for the reasons stated above, it is held as under:

i) that the wages/salaries of the workmen/employees of the Corporate Debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the Interim Resolution Professional/Resolution Professional managed the operations of the corporate debtor as a going concern during the CIRP and that the concerned workmen/employees of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) of the IB Code;

ii) considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.

15. As observed hereinabove, there are disputed questions, whether in fact the IRP/RP managed the operations of the corporate debtor as a going concern during the CIRP and there is a serious dispute whether Dahej Yard was operational during the CIRP or not and there is a serious dispute that the concerned workmen/employees of the Dahej Yard and the concerned employees of the Mumbai Head Office actually worked during the CIRP or not and therefore it is directed that let the appellants submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the corporate debtor as a going concern and that they actually worked during the CIRP and the Liquidator is directed to adjudicate such claims in accordance with law and on its own merits and on the basis of the evidence which may be laid/produced, irrespective of the fact whether the RP who himself is now the Liquidator included the claims of the appellants being wages/salaries during CIRP as CIRP costs or not. The Liquidator is directed to adjudicate such claims independently. If it is found that in fact the IRP/RP managed the operations of the corporate debtor as a going concern during the CIRP and the concerned workmen/employees actually worked during CIRP, their wages and

> *"The aforesaid exercise shall be completed within a period of twelve weeks from today and such amount shall be paid out of the amount which is directed to be kept aside earlier by the Adjudicating Authority/Appellate Tribunal and thereafter by this Court. Till such claims are adjudicated upon, the Liquidator is directed to keep aside the said amount exclusively to be used for the workmen/employee's dues which is to be paid on adjudication as above."*

salaries be considered and included in CIRP costs and they will have to be paid as per Section 53(1)(a) of the IB Code in full before distributing the amount in the priorities as mentioned in Section 53 of the IB Code. The aforesaid exercise shall be completed within a period of twelve weeks from today and such amount shall be paid out of the amount which is directed to be kept aside earlier by the Adjudicating Authority/Appellate Tribunal and thereafter by this Court. Till such claims are adjudicated upon, the Liquidator is directed to keep aside the said amount exclusively to be used for the workmen/employee's dues which is to be paid on adjudication as above.

In our view these orders the Hon'ble Supreme Court has crystalized the issues pertaining to the employees and workmen and which would prevent several future litigations around this.

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References:

1. Provisions of Insolvency and Bankruptcy code, 2016
2. CIVIL APPEAL NO. 5910 OF 2019 Sunil Kumar Jain and others (Appellants) Vs Sundaresh Bhatt and others(Respondents)

CLASSIFICATION OF PROPERTIES BETWEEN IMMOVEABLE AND MOVEABLE OR REAL AND TANGIBLE PERSONAL PROPERTY FOR VALUATION AND VALUATION OF INVENTORY ASSETS UNDER IBC

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Synopsis
Getting classification of assets right, before valuation is vital to conducting a successful valuation of assets, there are a variety of asset classes as relevant to valuation, some of these being tangible personal properties, real properties, inventories and intangible properties. This article attempts to assist Plant and Equipment Valuers with the guidance available in international standards and more importantly the Indian laws along with some case laws. In addition, this article attempts to offer clarity to the Resolution professional in awarding right scope of work to the relevant asset class Valuer.

Generally, classifying properties in valuation is a simple and straightforward exercise. However, there are instances when it gets difficult to determine the correct class of an asset and based on which an asset class valuer be assigned. Classification of Assets can at times be confusing and unsettling for a valuer. After, a Plant and Machinery asset class valuer gets a scope of work and a fixed asset register and other information, he draws a list of those assets that fall within the boundaries of the scope of valuation relevant to the asset class, to do this, he needs to quickly figure out any exclusions related to real property and separately excludes intangibles and inventories as well. A Resolution professional while awarding work to the Valuers must also properly allocate assets for valuation to various classes of valuers.

What IVS standard recommends:

Clause 20.7 of IVS 300, the IVSC standard for valuation of plant and equipment, requires valuers to comply with the requirement to identify the assets to be valued, and as per IVS 101 Scope of Work, clause 20.3(d), valuers have been advised to consider the extent to which an asset is attached to, or integrated with, other assets, to an extent it impacts the assets value. IVS does not clarify any more than this and also recommends that ventilation, air conditioning and heating or water or similar serves like gas supply systems should be treated as real property in particular if these services are to be treated as building services and not meant for production. Further, a Valuer has to identify assets that may be permanently attached to the

land which are not possible to remove without serious demolition of either the asset or any surrounding structure or building.

IVS 300 recommends that Plant and equipment being used for the supply or provision of services to a building are frequently integrated with the building and once these, equipment are installed and cannot be separated from the building these assets are to be treated as part of real property. These assets should normally form part of the immoveable or real property interest, and include once what was moveable property, since the primary function of these equipment's is to supply electricity, gas, heating, cooling or ventilation to a building.

This, exclusion should comprise all motors, compressors, pipes and ducts as part of the above service supply systems once installed, it is implied that all the imbedded electric wiring, escalators, elevators and sprinkler systems fall into this category.

IVSC recommends that if a valuer is asked to value such a plant and equipment separately as explained above, the scope of work must include a statement clarifying that the value of those items, would normally be included in the real property interest and may not be separately realizable and should be done by distinguishing these assets. Again, the valuer has been advised to ensure the assets are not omitted or counted twice when being valued separately.

> *"Clause 20.7 of IVS 300, the IVSC standard for valuation of plant and equipment, requires valuers to comply with the requirement to identify the assets to be valued, and as per IVS 101 Scope of Work, clause 20.3(d), valuers have been advised to consider the extent to which an asset is attached to, or integrated with, other assets, to an extent it impacts the assets value..."*

Intangibles:

An Intangible asset, is one having no physical existence yet having value based on rights and privileges associated with it (e.g., going concern value, goodwill, and other intangibles such as contracts, assembled workforce and computer software) IVS 300, the international IVSC standard on valuing plant and equipment also clarifies that, intangible assets, fall outside the class of plant and equipment assets? And suggests that an intangible asset may have an impact on the value of plant and equipment assets and if required are to be included and valued. For instance, Valuers may need to value dies and patterns, operating software, technical data, and patents, all examples of intangible assets that could impact the value of plant and equipment assets, depending on whether or not they are included in the Scope of Valuation. IVSC further provides that when there is an intangible asset component, the valuer should follow IVS 210 standard on Intangible Assets. IVSC recommends that a Valuer should be careful, when plant and equipment is valued using an income approach, to make sure that components of value relating to intangible assets, goodwill and other contributory assets are excluded (see 60.2, IVS 210 Intangible Assets).

The 3rd Edition of the Fundamentals of Appraising Machinery and Technical Assets, ASA offers following guidance in this respect: The values of the real property and intangible assets are typically developed by appraisers experienced in real estate and financial valuation. If the appraiser needs to bring the income approach value indication down to the level of value of the machinery and equipment, his or her task is to determine the values of the real property

and intangibles and deduct these from the total value of the tangible and intangible assets. Valuations for financial reporting typically are multidisciplined projects and include tangible asset valuation professionals (e.g., MTS, Inventory, Real Estate) and business and intangible asset valuation professionals. It is important that all of the disciplines coordinate their efforts. As with any multidisciplinary valuation project, communication among the team members is important to assure that no assets are missed or double counted.

Now it has been an enigma for some, as to who should value intangibles like software's that are as an example closely integrated to a plant system for example a DCS in a power plant comprises hardware, software, and services, the major component types of DCS in a distributed control system.

> *"IVS 230 draft was developed by the Business Valuation Board at IVSC which determined through a consultation process that no major changes were needed to the exposure draft of IVS 230 but did make a number of minor updates to the exposure draft of IVS 230."*

Guidance offered by accounting standard IndAs 38, is further helpful in determining as to which intangible assets could be considered as part of property plant and equipment. Its guidance reads as follows: (and this quite agrees with the advice offered by IVS 101 to valuers to consider the extent to which assets are integrated with the other) Some intangible assets may be contained in or on a physical substance such as a compact disc (in the case of computer software), legal documentation (in the case of a license or patent) or film. In determining whether an asset that incorporates both intangible and tangible elements should be treated under Ind AS 16 Property, Plant and Equipment or as an intangible asset under this Standard, an entity uses judgement to assess which element is more significant. For example, computer software for a computer-controlled machine tool that cannot operate without that specific software is an integral part of the related hardware and it is treated as property, plant and equipment. The same applies to the operating system of a computer. When the software is not an integral part of the related hardware, computer software is treated as an intangible asset.

Inventories:

IVSC has announced a new standard IVS 230 effective 31st January 2022, for valuation of inventories, the exposure draft was put up on 30th January 2020. According to IVS 230, Inventory broadly includes goods which will be used in future production processes (i.e. raw materials, parts, supplies), goods used in the production process (i.e. work-in-process), and goods awaiting sale (i.e. finished goods) much in line with the definition in IndAs2 the Accounting standard for Inventories. IVS 230 draft was developed by the Business Valuation Board at IVSC which determined through a consultation process that no major changes were needed to the exposure draft of IVS 230 but did make a number of minor updates to the exposure draft of IVS 230. Inventories according to IndAs2 do not include spare parts, servicing equipment and standby equipment which meet the definition of property, plant and equipment as per AS-10, Property, Plant and Equipment (PPE).

This in a way settles the question as to who should lead Inventory Valuation based on the categories of asset Valuers that are registered under RV rules, 2017. The fact that the Exposure draft preparation IVS 230 was led by the Business Valuation Board at IVSC and not the Tangible Assets Board tells us to pin the responsibility of Inventories valuation on the Security and Financial Assets valuers. Notwithstanding, who should do the Valuation of Inventories, the two methods proposed by IVSC include, the Bottom-Up method (sort of replacement cost method) and the Top -down method (similar to sales comparison method). Any Inventories pertaining to real property have been excluded from the IVS 230 as having been covered under IVS 410, covering Valuation of development property.

In particular while carrying out Inventories valuation, due consideration is required to be given to the Intangibles that have bearing on valuation of inventories either by way of Intangibles related to manufacturing processes or pull marketing or any other.

Distinctions between Immoveable and moveable property as drawn under Indian laws:

In order to appreciate some complexities around classification of Real and tangible personal property, we need to look at the provisions of "The Transfer of Property Act" and also see relevant Indian and international case laws but apart from this the Valuer needs to follow guidance offered by IVSC as above or any other permitted international valuation standard.

Before we look at the Transfer of Property Act, we must look at the other laws in India that define moveable and immoveable properties. The General Clauses Act, 1897, defines Immoveable and moveable properties as under:
(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;
(36) "movable property" shall mean property of every description, except immovable property;

Normally, movable assets are referred to as tangible personal property, however the term tangible personal property refers to the right of ownership and not the actual asset itself. A similar distinction exists between real property and land, real property means all rights over as recognized by law (with such advantages and exceptions as the law has seen fit to establish) Jurisprudence and Legal theory by V D Mahajan, Fifth Edition).

> *"The Apex Court distilled Section 3 of the Transfer of Property Act further in the above judgement and held that an attachment of a plant to a foundation cannot be compared to imbedding a wall in land as the foundation is meant only to provide stability to the plant especially so if it can be easily detached from the foundation."*

The Supreme Court of India has laid down a test to distinguish between moveable and immoveable as found in the well-known case of Municipal Corporation of Greater Bombay vs Indian Oil Co Ltd 1991 Suppl (2) SCC 18 can be summarized as under:

"The test was one of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the

former is positive it must be movable property but if the answer to the latter part is in the positive, then it would be treated as permanently attached to the earth."

Yet another asset class nomenclature that needs clarity is that of a "fixture", in English Law, it is generally classified as that property which "was moveable at one time but has since been installed or attached to the land or building in a somewhat permanent manner in a way that it is regarded as part of the real estate.

However, the Indian Law is at variance with the English law, it was held in Mofix Sheik v. Rasik Lal Ghose (1910) I.L.R. 37 C. 815, that the technical English Law of Fixtures is not applicable to India. The provisions as to fixtures are somewhat alluded to in the Transfer of Property Act, Section 8 of the Transfer of Property Act.

> *"the lessee may even after determination of lease remove, at any time, whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth; provided he leaves the property in the state in which he received it;" -this section is relevant when classifying moveable property for Valuation held by a lessee in a factory on lease from a lessor, even though it may be attached to earth."*

The Transfer of Property Act 1882 (The TP Act) -Section 8 (regarding operation of transfer) states that unless the transfer deed states expressly to the contrary or implies otherwise, a transferor passes to the transferee along with land property all interest including all things attached to the earth and includes any machinery attached to the earth along with its moveable parts.

Section 3 of the TP Act defines expression "attached to earth" as including:

(a) rooted in the earth such as trees and shrubs;
(b) imbedded in the earth, as in the case of walls or buildings; or
(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

The Apex Court in India has, very clearly, spelt out the difference between movable and immovable machinery as defined in the General Clauses Act in the Commissioner of Central Excise, Ahmedabad as Appellant versus Solid & Correct Engineering Works & Others.

The Apex Court distilled Section 3 of the Transfer of Property Act further in the above judgement and held that an attachment of a plant to a foundation cannot be compared to imbedding a wall in land as the foundation is meant only to provide stability to the plant especially so if it can be easily detached from the foundation. For an attachment to fall in the third category it must be for permanent beneficial enjoyment of that to which the plant is attached.

In English law, the general rule is that what is annexed to the freehold becomes part of the realty under the maxim quid quid planteater solo, solo credit (Mulla the Transfer of Property Act, the 13thEdition). However, this principle has not been applied, in Indian courts.

The Indian law on Fixtures has been held to be different as between a lessor and a lessee and also a mortgagor and mortgagee, thus it was held in Promanicks' case (Thakur Chander Promanick v Ramdhone 1866), "that buildings and other improvements do not by the mere accident of their character of their attachment to the soil become the property of the owner of the soil." (ibid)This was in line with the Section 108(h) of the TP Act which was enacted later in 1882 which provides for the lessees right to remove fixtures.

The Sec 108(B) under subclause (h) of the TP Act 1882 states regarding rights of Lessees as follows:

"(h) the lessee may even after determination of lease remove, at any time, whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth; provided he leaves the property in the state in which he received it;" -this section is relevant when classifying moveable property for Valuation held by a lessee in a factory on lease from a lessor, even though it may be attached to earth.

In a landmark case, Jnan Chand Chugh vs Jugal Kishore Agarwal and Ors, on 21 September, 1959, the High Court of Calcutta observed in its judgement quoted Lord Lindleys' observation that English Common Law related to Fixtures has no application as between Lessor – Lessee and Mortgagor – Mortgagee after enactment of The TP Act and other statutes.

> *"Railway siding as part of a thermal power utility or a steel plant is treated as immoveable property (components of railroad track that are assembled and attached to the land are considered real property), RCC ash storage silo, RCC water reservoirs are immoveable properties, a pump station or water treating plant structure is an immoveable structure. Any tunnel for movement of traffic or passengers is real property but a tunnel for conveying coal or waste heat is a tangible personal property."*

Intention, degree and object of annexation principle:

The question in Indian Law whether, a chattel that is embedded in earth has become immovable property, is decided by the same principles as those that determine what constitutes an annexation to the land, under English Law. (Mulla the Transfer of Property Act,13th Ed)

In Holland vs Hodgson Blackburn J devised an important principle:

That, to meet the requirement of what constitutes sufficient annexation for the purpose of meeting the definition of what is attached to earth according to him." It is a question he felt depended on the intention, degree and object of annexation.

Therefore in a known ruling by Madras High Court in the matter of Perumal Vs Ramaswami, 1969, the court was of the view and held that the test to be performed to decide whether a Chattel forms part of the land or building should be based on whether annexation is for the permanent object of enjoyment of the land/ building or the plant itself , therefore in this matter before the court, it was held that the Fetter engine and the pump-set were movable properties, and that there was nothing wrong in the procedure applied to the attachment and sale thereof.

These principles stated above are relevant to identifying assets, when there is doubt in classifying assets, between Immoveable or moveable assets, it is important to apply these principles during Insolvency or Liquidation for instance, in sales of assets when assets are being conceived to be sold under Regulation 32 (c) and 32 (d) of the IBBI (Liquidation Process) Regulations 2016, as sales of assets collectively or sales of assets in parcels (e.g. land parcels). Classification is also significant when cost allocation of assets is being made within a fixed asset register, under a class of either immoveable or moveable property.

It therefore applies from what has been said above, that generally in a factory the part of the electric supply system including wiring and electrical fixtures that render building services , meant to keep the building services running will be included in real property, thus a fire sprinkler system, elevators, water supply and plumbing system for basic building services in a factory will form part of the real property or immoveable property because these assets were intended for the beneficial enjoyment of the building and not the plant.

> *"Cold storage – comprising built-in cold storage rooms including refrigeration and related equipment – are Real property. Cooling towers - primary use for manufacture are considered Tangible personal property. Boilers with the primary use meant for manufacture or production process are considered Tangible personal property. However, Boilers - for service of the building– are considered Real property. Sprinkler system – are Real property."*

This principle therefore excludes from immoveable property, the electrical supply system meant to serve a charging plant, in a battery manufacturing unit or for that matter, also excludes a water supply system acting as circulating water system for heat exchange in production of electricity. These assets are not classified under immoveable property being mainly beneficial and annexed to land for the purpose of use of machinery. A boiler plant foundation is part of plant and equipment in tangible personal property and is not part of real property. A chimney stack servicing a production process will be part of the moveable property in a coal fired power plant except for the supporting RCC structure for reasons of permanent annexation. A central heating system for building services should be treated as real property and not moveable property annexed permanently to the building with an intent of enjoyment of the building but a dehumidifier and heating system for a certain production process should be treated as a moveable property. Railway siding as part of a thermal power utility or a steel plant is treated as immoveable property (components of railroad track that are assembled and attached to the land are considered real property), RCC ash storage silo, RCC water reservoirs are immoveable properties, a pump station or water treating plant structure is an immoveable structure. Any tunnel for movement of traffic or passengers is real property but a tunnel for conveying coal or waste heat is a tangible personal property.

Large tanks of metal are used for storage of petroleum products in oil refineries or installations. These tanks, even though not embedded in the earth, are erected at site, post completion these tanks cannot be physically moved. For sale/disposal these have to be dismantled and then sold as metal sheets/scrap, it is not feasible to assemble the tank all over again. These tanks are, therefore, considered immoveable forming part of Real property.

Thus, Cold storage – comprising built-in cold storage rooms including refrigeration and related equipment – are Real property. Cooling towers - primary use for manufacture are considered Tangible personal property. Boilers with the primary use meant for manufacture or production process are considered Tangible personal property. However, Boilers - for service of the building– are considered Real property. Sprinkler system – are Real property. Tanks - Bulk storage (large capacity water & fills) above or below ground are considered Real property. Tanks - welding steel pressure tanks, (for propane, butane, and natural gas storage) are considered Personal property. Towers - cellular, radio broadcasting and television – are again considered Personal property. Water treating and softening plant building and structure – is Real property but equipment for water treatment and softening plant is considered as a personal property, escalators and elevators are considered Real property.

Conclusion:

Firstly, the inclusion of personal tangible property as immoveable /real property has been a matter of disputes in courts for a long time, however, several, Judicial pronouncements providing lasting principles have made the distinction between the two easier to apply.

Secondly, Inventory assets are to be valued using the standard under IVS namely IVS 230 by a SFA Valuer.

Thirdly, Intangible assets that are integrated with the Plant assets and required essentially to operate the plant and assets need to be considered as part of Plant and Equipment assets.

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MY LAVASA STORY

CMA HARSHAD S. DESHPANDE
Company Secretary & Insolvency Professional

"Nothing is more satisfying than feeling of doing something for common man"

My journey with #Lavasa Corporation Ltd (Debt size appx 9500 Cr) started around 6 months back when I was appointed as Authorised Representative for home buyers (appx 1200 home buyers) by #NCLT, Mumbai.

Till that time water had already flown a lot, CIRP almost nearing 3 years. Financial creditors, OC, RP team all trying sort the mess. Home buyers literally lost patience for paying up EMI for home they never got. Repeated attempt by RP team to find Resolution not yielding desired results. Hope was going down with everyday.

Once I took over my mail box was flooded with emails with all sorts of complaints. Could feel the restlessness in whole process. Gradually started talks with members to understand the concerns and points of view. The story began to unfold with every interaction had with different stakeholder.

RP invited again for round of EOI and we could get some Ray of hope in form of finding Prospective Resolution Applicants. Then began the rounds of meetings formal COC as well as informal. Each COC member, RP team negotiating hard in order to get best for all stakeholders. Understanding every word written in Resolution plan, understanding the implications and trying to reorganise in order to protect stake of home buyers. Pending litigations and few for applications in NCLT made the situation even more dynamic as well as complex. Nevertheless, there was always hanging sword of adhering to timelines given by Hon NCLT.

After ensuring necessary compliances, the Resolution Plan were put to vote. More than 30 COC members with single digit voting share with mix of PSU Banks, Private Banks, NBFC, ARC & homebuyers, it was task to achieve requisite 67% majority for approval of Resolution Plan. Moreover, there was huge risk of liquidation if desired voting is not achieved.

Round of meetings happened again, it was quite experience in making common home

buyer understand the IBC framework. Many could not understand why their contracts are not getting fulfilled. Pic is from one such meeting with homebuyers who welcomed me even at difficult juncture.

Finally the news came and the Resolution Plan is approved by COC. Now the Plan will be put forth for approval by NCLT and then implementation will happen in due course.

Nothing can satisfy homebuyers except their HOME. Realising the hard reality haircut was inevitable. We could do what maximum we could have.

Conclusion:

Takeaways for all those people who put their life savings for buying a HOME:

1. Precautions to be taken while buying home
2. Avoiding FOMO
3. IBC is fundamental law which all citizens should know just like Income Tax, Act or GST

Reference:

https://www.hindustantimes.com/cities/pune-news/residents-small-investors-hopeful-as-dpil-takes-over-lavasa-city-corporation-101640713441496.html

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

- **JSVM Plywood Industries Ltd. v. State of Assam [2021] 130 taxmann.com 24 /[2021] 226 COMP CASE 328 (Gauhati)**

Where lien on bank account of petitioner company was created on ground that during moratorium period directors of corporate debtor siphoned of Rs. 32.50 lakhs by way of transferring same to account of petitioner towards payment of dues, since, lien on bank account had caused unnecessary hardship to petitioner, and petitioner was ready to furnish indemnity bond undertaking to refund entire amount, lien created upon bank account of petitioner was to be lifted.

An insolvency proceeding had been initiated in respect of the corporate debtor company and moratorium had been declared. In the meantime, an FIR was lodged by the Resolution Professional (RP) of the corporate debtor alleging that suspended director of the corporate debtor siphoned of Rs. 32.50 lakhs by way of transferring same to account of petitioner company towards payment of dues, which the corporate debtor owed to the petitioner for supplying goods. On basis of said FIR and upon instructions of RP, ICICI Bank, in which petitioner had account, proceeded to mark a lien on account of the petitioner. It was noted that lien on bank account of the petitioner had caused unnecessary hardship to the petitioner, which had more than 300 employees. Further, the petitioner was ready to abide by any condition including execution of bond for alleged amount of Rs. 32.50 lakhs.

Held that in lien created upon bank account of the petitioner was to be lifted

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Kotak Mahindra Bank Ltd. v. Indian Specialty Fats Ltd. [2021] 130 taxmann.com 37 (NCL-AT)**

Where CIRP application under section 7 was filed beyond three years from date of classification of account of corporate debtor as NPA or even from date of issuance of recovery certificate, said application was barred by limitation and was to be dismissed.

SBI had sanctioned loan to the corporate debtor in 1996. Due to default in repayment of debts, loan account of the corporate debtor was declared as NPA. SBI filed recovery proceedings before the DRT in year 2000 and final order came to be passed on 23-10-2002 culminating in issuance of recovery certificate which was pending execution before the Recovery Officer. Meanwhile, SBI by deed of assignment dated 16-1-2006, assigned loan to the applicant. Applicant filed CIRP application under section 7 against the corporate debtor. NCLT dismissed CIRP application for being barred by limitation.

Held that, computed from date of classification of account of the corporate debtor as NPA or even from date of issuance of recovery certificate, filing of application under section 7 was beyond three years, therefore prayer of the applicant to trigger CIRP against the corporate debtor had rightly been declined.

Case Review : Kotak Mahindra Bank Ltd. v. Indian Speciality Fats Ltd. [2021] 130 taxmann.com 36 (NCLT-Cuttack), affirmed.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **Vidharbha Industries Power Ltd. v. Axis Bank Ltd. [2021] 130 taxmann.com 125 (NCL-AT)**

Financial woes of corporate debtor and liquidity problems faced by it, whether forced upon it or of its own making, had no bearing on commencement of insovlency resolution and cannot be permitted to be a stumbling block in triggering of CIRP at instance of financial creditor when existence of financial debt and default in discharging such debt was admitted.

The appellant/corporate debtor, a power generating company, had been in default in respect of facilities provided by the financial creditor bank. The financial creditor filed CIRP application under section 7. The corporate debtor filed application before NCLT seeking stay of further

proceedings in said petition on grounds that it had been reeling under massive financial stress due to problems confronting power sector; and that its claims relating to recovery of dues pending before Apex Court and other authorities were substantial in nature and sufficient to repay dues of the financial creditor. The NCLT rejected application of the corporate debtor with observation that decision in matters pending before Apex Court and other authorities would not have any impact on issues involved in petition under section 7.

Held that under section 7 all that the Adjudicating Authority is required to do is to ascertain existence of default and on being satisfied that a default has occurred and application is complete, the Adjudicating Authority is required to admit application. Financial woes of the corporate debtor and liquidity problems faced by it, whether forced upon it or of its own making, had no bearing on commencement of insolvency resolution process and cannot be permitted to be a stumbling block in triggering of CIRP at instance of the financial creditor when existence of financial debt which the corporate debtor was obliged to pay and default in discharging of such obligation was admitted. Therefore, appeal against order of the NCLT was to be dismissed.

Cases Review : Vidarbha Industries Power Ltd. v. Axis Bank Ltd. [2021] 130 taxmann.com 124 (NCLT - Mum.), affirmed.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **Krishna Garg v. Pioneer Fabricators (P.) Ltd. - [2021] 130 taxmann.com 127 (NCL-AT)**

Where CIRP was withdrawn upon filing of settlement terms but such settlement terms were not incorporated in order of Adjudicating Authority, such terms would not assume character of decree of Court and breach thereof would not entitle financial creditor to come back and seek revival of CIRP.

Appellants-financial creditors initiated CIRP against the corporate debtor. However, a settlement was arrived at between parties, in pursuance whereof appellants received some postdated cheques. The Adjudicating Authority allowed appellants to withdraw application and terminated CIRP. Thereafter, appellants filed application for revival of CIRP alleging

non-adherence of settlement terms by the corporate debtor. The Adjudicating Authority by impugned order rejected said application.

Held that since neither settlement terms were filed nor same were brought on record and incorporated in order of the Adjudicating Authority with liberty to revive/restore CIRP in event of the corporate debtor not adhering to terms of settlement or postdated cheques issued to appellants being dishonored, it could not be said that settlement terms not incorporated in order of the Adjudicating Authority assumed character of decree of Court, breach whereof would entitle appellants-financial creditors to come back and seek restoration/revival of CIRP. Therefore, there was no legal infirmity in the impugned order.

Case Review : Smt. Krishna Garg v. Pioneer Fabricators (P.) Ltd. [2021] 130 taxmann.com 126 (NCLT - New Delhi), affirmed.

SECTION 19 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INTERIM RESOLUTION PROFESSIONAL - PERSONNEL TO EXTEND CO-OPERATION

- **Venugopal Dhoot v. Pravin R. Navandar [2021] 130 taxmann.com 286/[2021] 168 SCL 5 (NCL-AT)**

Where for purpose of taking charge of corporate debtor, RP could have obtained account details of corporate debtor from its bank which was under his control, he could also have taken assistance of RoC to obtain financial statements, but he failed to do so, ex-directors of corporate debtor could not be held responsible for non-availability of documents and therefore, proceedings initiated against them by NCLT under section 70 could not be sustained.

Corporate Insolvency Resolution-Process (CIRP) of the corporate debtor was commenced and RP was appointed. The RP alleged that despite repeated requests and instructions, appellant-ex-directors of the corporate debtor failed to handover all information including books of account/bank accounts of the corporate debtor. The RP filed application under section 19(2) against appellants seeking necessary direction for co-operation. In response, appellants contended that whatever documents in their possession had already been handed over to the RP. It was noted that bank account details of the corporate debtor could be obtained by the RP from bank which was under his control at the

moment. Further, the RP being competent professional and bankers within his charge, he could have reconstructed books of account with assistance of an expert IT professional. The RP could also have taken assistance of concerned Registrar of Companies/MCA website and had obtained financial statements/annual return, but he failed to do so.

Held that in such circumstances, it could not be said that appellants were fully responsible for non-availability of documents, therefore, proceedings initiated by the NCLT under section 70 against appellant for alleged misconduct in course of CIRP could not be sustained.

Case Review : Pravin R. Navandar, In re [2021] 125 taxmann.com 173/164 SCL 441 (NCLT - Mum.) (SB), reversed.

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

- **Anoop Kumar Chhawchharia v. Emgreen Impex Ltd. [2021] 130 taxmann.com 475 /[2021] 168 SCL 125 (NCL-AT)**

Where there was no confirmation of counter claim of corporate debtor from operational creditor and same was unsupported by documents, there was no pre-existing dispute between parties and CIRP against corporate debtor was rightly initiated by NCLT.

The respondent-operational creditor had filed petition under section 9 against the appellant-corporate debtor. The NCLT had initiated corporate insolvency resolution process (CIRP) based on observation that the operational creditor had elaborately explained faulty procedure followed by the corporate debtor and offences committed by the corporate debtor in CGST Act. The appellant-corporate debtor filed appeal against order passed by the NCLT on ground that there was a valid pre-existing dispute as the corporate debtor had made a counter claim against the operational creditor.

Held that there was no confirmation of counter claim of the corporate debtor from operational creditor, even in reply to demand notice and counter claim was unsupported by documents like invoices, delivery challans and GST payments. Therefore, impugned order of the NCLT of initiating CIRP against the corporate debtor was justified.

Case Review : Emgreen Impex Ltd. v. ANR International (P.) Ltd. [2021] 128 taxmann.com 68 (NCLT - New Delhi), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Kishore Bachuram Kapdi v. Bank of Maharashtra [2021] 130 taxmann.com 467 /[2021] 168 SCL 143 (NCL-AT)**

When date on which account was declared Non-Performing Asset (NPA) was 28-10-2016 and there was balance confirmation on 15-7-2019, limitation period was to be calculated from 15-7-2019 and, therefore, application filed under section 7 on 28-7-2020 was not time barred.

The financial creditor had filed an application under section 7 against the corporate debtor. The NCLT admitted said application by impugned order. On appeal, the appellant, director of corporate debtor, stated that he could not appear before the Adjudicating Authority as when matter was filed appellant was suffering from COVID and, thus, could not defend matter before the Adjudicating Authority. The appellant stated that debt concerned was time barred.

Held that, when date on which account was declared Non-Performing Asset (NPA) was 28-10-2016 and there was balance confirmation on 15-7-2019, limitation period was to be calculated from 15-7-2019 and therefore, application filed under section 7 on 28-7-2020 was not time barred. Since the corporate debtor was a company in which there were more than one directors, the corporate debtor could not claim that since one director was suffering from COVID, the corporate debtor could not cause appearance before the Adjudicating Authority. Therefore, there was no substance in appeal and same was to be dismissed.

Case Review : Bank of Maharashtra v. Afcan Impex (P.) Ltd. [2021] 130 taxmann.com 466 (NCLT - Ahd.), affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS – MORATORIUM-GENERAL

- **Anjali Rathi v. Today Homes and Infrastructure (P.) Ltd. [2021] 130 taxmann.com 253 (SC)**

Where settlements were arrived at between petitioners - home buyers and corporate debtor - developer, before Supreme Court, even though moratorium was declared against corporate debtor, petitioners were not prevented by moratorium from initiating proceedings against promoters of corporate debtor in relation to honouring settlements.

Home buyer agreements were entered between petitioners-home buyers and the corporate debtor-developer. Housing project was abandoned, as a result, petitioners instituted proceedings before NCDRC and NCDRC allowed claim of petitioners directing the corporate debtor to refund principal amount together with interest. Meanwhile, proceedings were initiated against the corporate debtor under section 9 and same was admitted. The CoC approved resolution plan submitted by the consortium of home buyers and the Adjudicating Authority was yet to decide on application for approval of said resolution plan. Petitioners, in instant special leave petition, raised grievance that application filed for initiation of corporate insolvency resolution process was merely to stall refund of amount due to petitioners in terms of NCDRC order. Petitioners submitted that during course of proceedings before the instant Court, settlements were arrived at and therefore promoters of the corporate debtor shall be held liable personally to honour settlement.

Held that moratorium was only in relation to corporate debtor and not in respect of directors/management of corporate debtor, against whom proceedings could continue. Thus, petitioners were not to be prevented by moratorium under section 14 from initiating proceedings against promoters of corporate debtor in relation to honouring settlements reached before the instant court.

Case Review : Today Homes & Infrastructure (P.) Ltd. v. Gaurav Jain [2021] 129 taxmann.com 416 (Delhi), set aside.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **K. N. Rajakumar v. V. Nagarajan [2021] 130 taxmann.com 254 (SC)**

Where resolution of CoC approving withdrawal of CIRP proceedings initiated against corporate debtor was supported by requisite majority and

thus, NCLT allowed application for withdrawal of CIRP, since, after withdrawal of CIRP proceedings, management of corporate debtor was handed over to its directors and from that date RP and CoC became functus officio, appeal filed by operational creditor seeking to set aside resolution passed in CoC meeting was rightly dismissed by NCLT.

Application under section 9 filed by the operational creditor against the corporate debtor was admitted by the NCLT. The appellant, a director of suspended board of the corporate debtor, submitted that parties had reached settlement. Said agenda was put to vote in the CoC meeting and CoC by requisite majority decided to file an application under section 12A before the NCLT for withdrawal of CIRP. The NCLT subsequently, allowed application for withdrawal of CIRP.

Held that since after withdrawal of CIRP proceedings, powers and management of the corporate debtor were handed over to the directors of corporate debtor and from that date RP and CoC in relation to Corporate debtor had become functus officio, NCLT had rightly disposed appeal filed by operational creditor to set aside resolution passed in CoC meeting.

Case Review : K.N. Rajakumar v. V. Nagarajan [2021] 129 taxmann.com 417 (NCLAT - Chennai), affirmed.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME LIMIT FOR COMPLETION

- **Jalesh Kumar Grover v. Committee of Creditors of Akme Projects Ltd. - [2021] 130 taxmann.com 334 (NCL-AT)**

Where CIRP related to real estate project involving legitimate interests of various stakeholders including homebuyers/allottees, issue related to exclusion of period while computing CIRP period had to be seen from prism of realism and pragmatic approach should be adopted by Adjudicating authority and, therefore, period, during which matter in regard to exclusion of specified entities in COC as financial creditors was sub-judice before Apex Court, was to be excluded while computing period of 330 days for completion of CIRP.

The appellant/resolution professional of the corporate debtor filed application before the Adjudicating Authority to extend period of

corporate insolvency resolution process beyond 330 days for further period of 90 days. The Adjudicating Authority rejected said application on ground that 270 days had already been excluded for litigation and in terms of order dated 30-9-2020, last opportunity had been granted by the Adjudicating Authority to conclude CIRP. The resolution professional submitted that CIRP related to Real Estate Project and two entities had sought inclusion in Committee of Creditors (CoC) as financial creditors which was declined by the Adjudicating Authority and order of the Adjudicating Authority was upheld by the instant Appellate Tribunal by order dated 27-1-2020; that against order passed by the Appellate Tribunal, appeal was preferred before the Apex Court which came to be dismissed in terms of judgment dated 1-2-2020 upholding orders of the Appellate Tribunal; and that therefore, prayer for exclusion of time period spent in such litigation was to be allowed.

Held that, this being a real estate project involving legitimate interests of various stakeholders including homebuyers/allottees, issue related to exclusion of period while computing CIRP period had to be seen from prism of realism and pragmatic approach should have been adopted by the Adjudicating Authority more particularly when the appellant had specifically sought exclusion on ground that matter in regard to exclusion of specified entities in CoC as financial creditors was sub-judice before the Apex Court. This was a fit case for exercise of the appellate jurisdiction to exclude period of 112 days from 13-10-2020 up to 1-2-2021, i.e., date when the Apex Court pronounced order, while computing period of 330 days for completion of CIRP.

Cases Review : Hari Krishna Sharma v. Akme Projects Ltd. [2021] 130 taxmann.com 333 (NCLT - New Delhi), reversed.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME LIMIT FOR COMPLETION OF

- **Rajesh Goyal v. Babita Gupta [2021] 130 taxmann.com 423 (NCL-AT)**

Where Appellate Tribunal had upheld concept of reverse CIRP and had directed promoter to cooperate with IRP to disburse amount as financial creditor and timelines were set, however promoter sought for extension of time for project completion due to outbreak of COVID-19 and extension was

allowed, exclusion of time spent in passing order i.e. from proposed exclusion date to date when order was passed was to be allowed.

Allottee-financial creditors moved an application under section 7 for initiation of CIRP against the corporate debtor an infrastructure company. NCLT admitted said application. Thereafter, promoter of the corporate debtor preferred an appeal which was decided by the NCLAT by order dated 5-2-2020, holding concept of reverse CIRP and directing the promoter to cooperate with the IRP, to disburse amount as the timelines were set. Thereafter, an appeal was filed by the promoter to seek extension of timelines stipulated in judgment dated 5-2-2020, due to outbreak of COVID-19. The NCLAT vide order dated 4-3-2021, disposed of application allowing to extend timelines envisaged in order dated 5-2-2020, without altering, substituting or modifying its structural terms. The applicant promoter filed instant application seeking clarification of order dated 4-3-2021. It was submitted that revised timeline proposed by the applicant in chart was up to 15-1-2021, as same was based on assumption that order would be passed around 15-1-2021, however, since order was passed on 4-3-2021 i.e. after 48 days from proposed exclusion date, therefore, exclusion for period when order was passed i.e. 4-3-2021, may be granted, otherwise it would cause irreparable loss.

Held that in view of above facts, the applicant would be entitled to get revised timeline with exclusion up to 4-3-2021, for completion of project.

Case Review : Rajesh Goyal v. Babita Gupta [2021] 130 taxmann.com 422 (NCLAT - New Delhi), Modified.

SECTION 8 - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEMAND BY OPERATIONAL CREDITOR

- **Abhinandan Jain v. Tanaya Enterprises (P.) Ltd. - [2021] 130 taxmann.com 469 (NCL-AT)**

Where documentary evidence on record established that demand notice was served by registered post at 'registered address' of corporate debtor, it was not concern of applicant operational creditor as to who received it; there was satisfactory service of notice.

The applicant/operational creditor engaged in business of manufacturing and trading of fabrics and garments supplied goods to the

respondent/corporate debtor and raised invoices. The corporate debtor made only part payment. The operational creditor issued a demand notice but the corporate debtor failed and neglected to make payment of demand. The Adjudicating Authority admitted application under section 9 filed by the operational creditor. On appeal it was contended by the corporate debtor that all six invoices and delivery challans raised by the operational creditor were false and fabricated; and that demand notice was served upon a Chartered Accountant firm and not upon the corporate debtor. It was noted that all six invoices and delivery challans raised by the operational creditor had been duly acknowledged by the corporate debtor by putting their stamp and, hence, denying and disputing invoices and delivery challans did not have any foundation. Further, it was established that demand notice had been duly served through registered post at registered address of the corporate debtor and a proof of delivery by way of acknowledgement card had been attached by the operational creditor.

Held that as long as demand notice had been addressed properly and once served at registered address, it was not concern of the applicant as to who received it. Since communication on record clearly established that there was a default and debt due as claimed by the operational creditor, there was no illegality or infirmity in the impugned order of the Adjudicating Authority in admitting CIRP application.

Case Review : Tanaya Enterprises (P.) Ltd. v. Risa International Ltd. [2021] 130 taxmann.com 468 (NCLT - Mum.), affirmed.

Words of Encouragement

IPA ICAI organized the 55th Batch of Pre-Registration Educational Course for the new entrants into the profession. The participants shared their views after attending the training program, which boosted the morale of Team IPA ICAI. Express gratitude to the participants.

Mr. Rohit Bansal, B. Tech, MBA

"Thanks IPAI ICAI for wonderful program for 7 days. This training program is particularly good and valuable for us, as we are going to step into the future IP role who will work in ensuring the Key economic indicators of our country intact. Very insightful & interactive training! Presentations were interesting & quite interactive which had kept all engaged. **A real eye opener for the challenges faced by IP's during their assignments is a Key take away for me in this training.** As an Engineer & management graduate, in a mix of all advocates, CA, CS participants & listening to all of them patiently, sometimes I felt like that on an IP role, there will be lot of complex issues to handle but at the same time, I felt thrilled that I will get an opportunity to work along & learn from brightest minds in our country and will try to implement the best management practices into this profession from my area of expertise. In one of our faculty's presentation slide, it was mentioned to consider **" CIRP / Liquidation as a Project Management"** which gave a lot of strength to me because my overall experience in Project Management will give me an impetus to bring "Schedule, Cost & Quality" i.e. three important pillars of Project Management into this profession. Overall, the course was very informative, concise & effective in conveying information.

Mohammad Lutful Kabir
Ex-Banker

The 7day PREC Program organized jointly by the IPA wings of ICAI, ICMAI and ICSI has met with the expectations of the participants like me on many counts (I am sure my other co-participants shall have many other points to add which I would have missed in this note). This write up makes an attempt to list out those areas that have made this program a great value add for the aspiring IP professionals waiting at the entry gate to venture into the challenging world of insolvency. It also has attempted to put forward a couple of suggestions which could make this program stand out in the crowd with its distinguished character and professional fervor.

(i)**Coverage** – The program aimed at covering all relevant topics under IBC and greatly succeeded in achieving its objectives. The topics covered have been exhaustive and the program designers have drawn up a structured approach while imparting the contents in a logical sequence most of the time. This approach helped the participants to connect to the topics in a seamless and comprehensible fashion.

(ii)**Faculties** - The selection of faculties from the practicing IPs gave the program a more practical flavor. The experience sharing helped us to appreciate the underlying thought

process behind the various IPC provisions from every case specific examples that were shared by the learned and seasoned professionals during their deliberations.

(iii)**Interactive Sessions** – Although the program the mode of sharing of content with the participants have been largely interactive. It goes to the credit of the faculties who have made the sessions so interesting that the participants' enthusiasm got further bolstered to come with many queries based on their own perspective and understanding of the topic. It helped us to walk with the deliberations without getting left out during such long hours of deliberation even spread over the weekend without break.

(iv)**Process & Compliances** - The program designers did not lose sight of the fact that this being a new profession and the entrants to this unique profession comes from a diverse professional & experience background, the processes and compliances deserve a special session and that was thoughtfully placed at the end. This session was very informative and a handholding approach of walking through the live platform of IBBI helped the participants a lot to know that what all processes and formalities they needed to take care from taking admission to assignments to reporting as per the prescribed processes and compliances.

Now a couple of points that could make the 7 days session still better and they are as under:-

(i)**Group exercises and mock role play** – While appreciating that the virtual mode has its own limitations for such mode to be practiced, a couple of more group exercises and animated discussions could have been an icing on the cake for an otherwise brilliant program that is PREC. We had one such session on COC meetings and that was a hit. I am sure that when the physical training sessions are back in the game such sessions would surely be included by the organizing body.

(ii)**Logical Breaks –** The 7-day program should have a day's break. The program started on a Thursday and we could have provided a break on Sunday which is normally a general holiday for all. It helps participants to unwind, reflect and look back on the previous 3 days program and give time to them to organize for the next day's program and also take care of their domestic responsibilities. It also helps refueling with fresh energy and strength for the next episode.

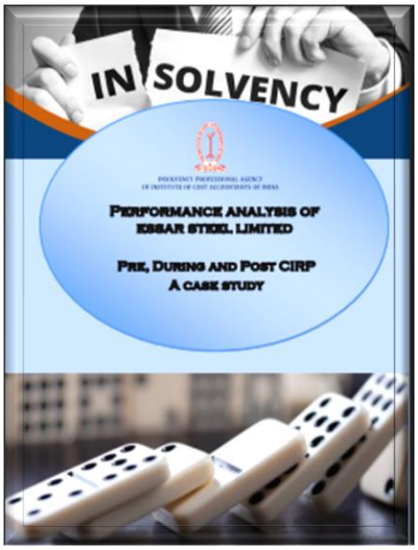
Last but not the least this note would remain incomplete if we do not mention about the coordinators of the program who worked relentlessly to keep the sessions undisturbed and hence enjoyable. They were quick to revert to our queries and closed them immediately. A big thumbs up for Suparna and Shubham who still continue to anchor this batch post the program.

Mr. Hiren Tanna, Banker, working with ICICI

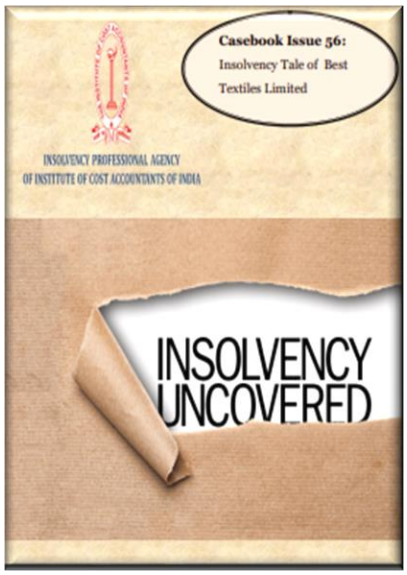
We are glad that we the participants from various state of one India got opportunity to participate in pre-registration 50 hour training conducted by IPA-ICAI 55TH Batch. It was forward looking training, to mark a first step to Insolvency Professional and training was remarkable due to schedule, accordingly to topic of course with enormous experience shared by tutor, who themselves resolved the cases in real life situations. The course really was exceptional and was clear, prepared, concise, and effective in conveying information. Best of luck for new Batches to come.

PUBLICATIONS

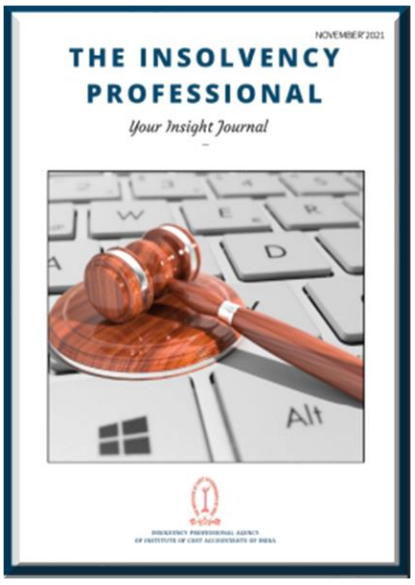
IBC AU COURANT



SUCCESS STORY



CASEBOOK



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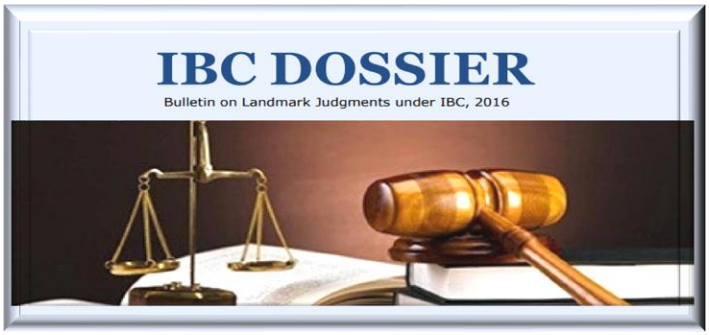
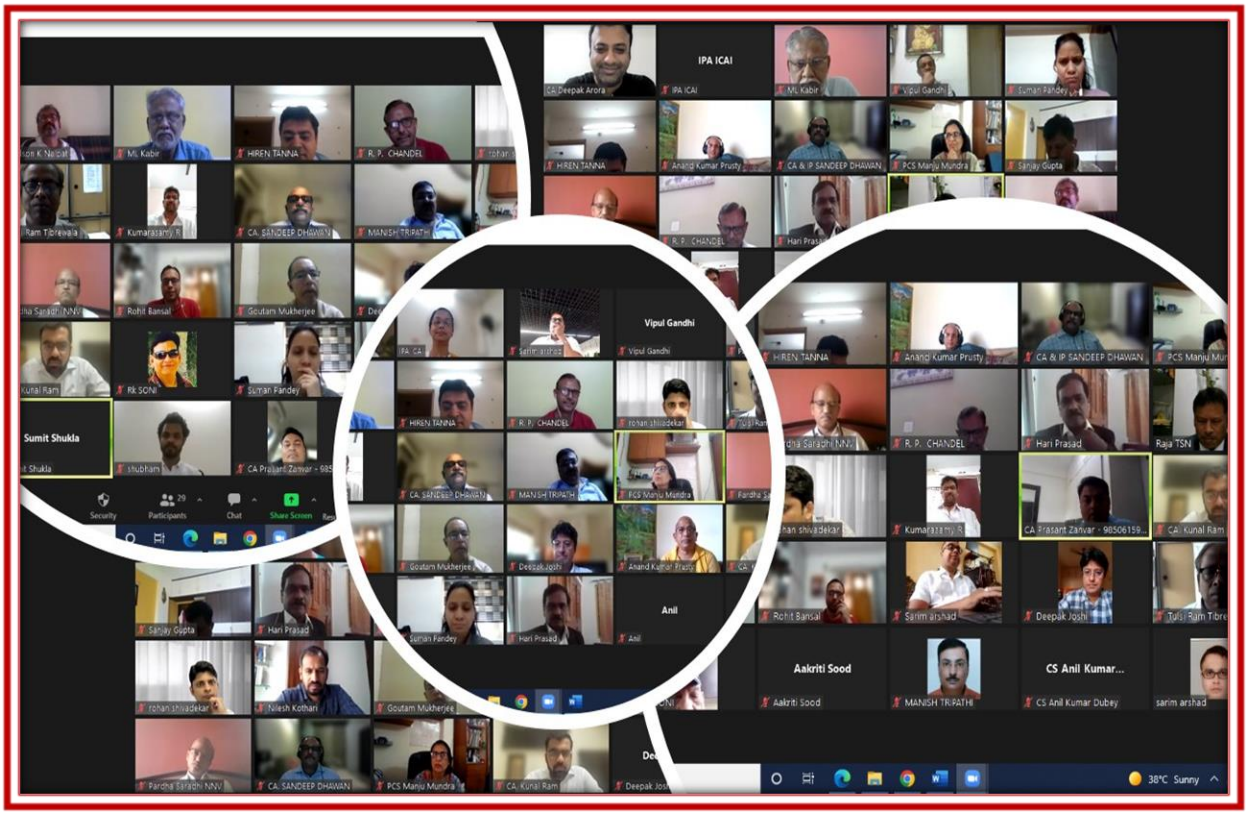


IBC DOSSIER

GALLERY



55th BATCH OF THE PRE-REGISTRATION EDUCATIONAL COURSE CONDUCTED ONLINE FROM 5th MAY 2022 TO 11th MAY 2022

1ST INTERNATIONAL RESEARCH CONFERENCEON INSOLVENCY AND BANKRUPTCY ORGNIASED BY IBBI IN ASSOCIATION WITH IIM AHMEDABAD ON 30TH APRIL, 2022 & 1ST MAY, 2022

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GUIDELINES

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

- ✓ ***The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.***
- ✓ ***The article should be topical and should discuss a matter of current interest to the professionals/readers.***
- ✓ ***It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.***
- ✓ ***The length of the article should be 2500-3000 words.***
- ✓ ***The article should also have an executive summary of around 100 words.***
- ✓ ***The article should contain headings, which should be clear, short, catchy and interesting.***
- ✓ ***The authors must provide the list of references, if any at the end of article.***
- ✓ ***A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.***
- ✓ ***In case the article is found not suitable for publication, the same shall not be published.***
- ✓ ***The articles should be mailed to "publication@ipaicmai.in".***

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