AUGUST,2020

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 CEO'S DESK

The Covid-19 pandemic has disrupted life worldwide, thrusting unprecedented challenges in every sector. Governments are grappling with the mounting needs of public health while trying to resolve the economic crisis. The business landscape is likely to be transformed as the lockdown is gradually lifted and all learn to adapt to the 'new normal'. The current financial distress, significant market volatility, and depressed valuations will result in many corporates not being able to sustain its business on a standalone basis and may also face potential insolvency issues. On the other hand, this will create business opportunities for corporates and private equity (PE) funds with high levels of "dry powder" to invest in businesses facing liquidity crunches and impending debt obligation.

The government is looking to provide a pre-packaged resolution framework for stressed companies under the Insolvency and Bankruptcy Code (IBC). A pre-packaged resolution, where a company prepares a restructuring plan in cooperation with its creditors before initiating insolvency proceedings, reduces the time and costs involved in the process. Government has set up a committee to give a pre-pack framework. But if this must be drawn under law and not by market practice, it will require an amendment in law.

The government has asked state run banks to look out for insolvency cases that may also require initiation of individual bankruptcy process before the National Company Law Tribunal against personal guarantors to corporate debtors. This is to ensure banks explore all avenues of realizing their loans. The advisory, dated August 26, has also asked banks to consider setting up an IT system to collate data regarding personal guarantors to corporate debtors in all such cases for requisite follow up and "consequential action."

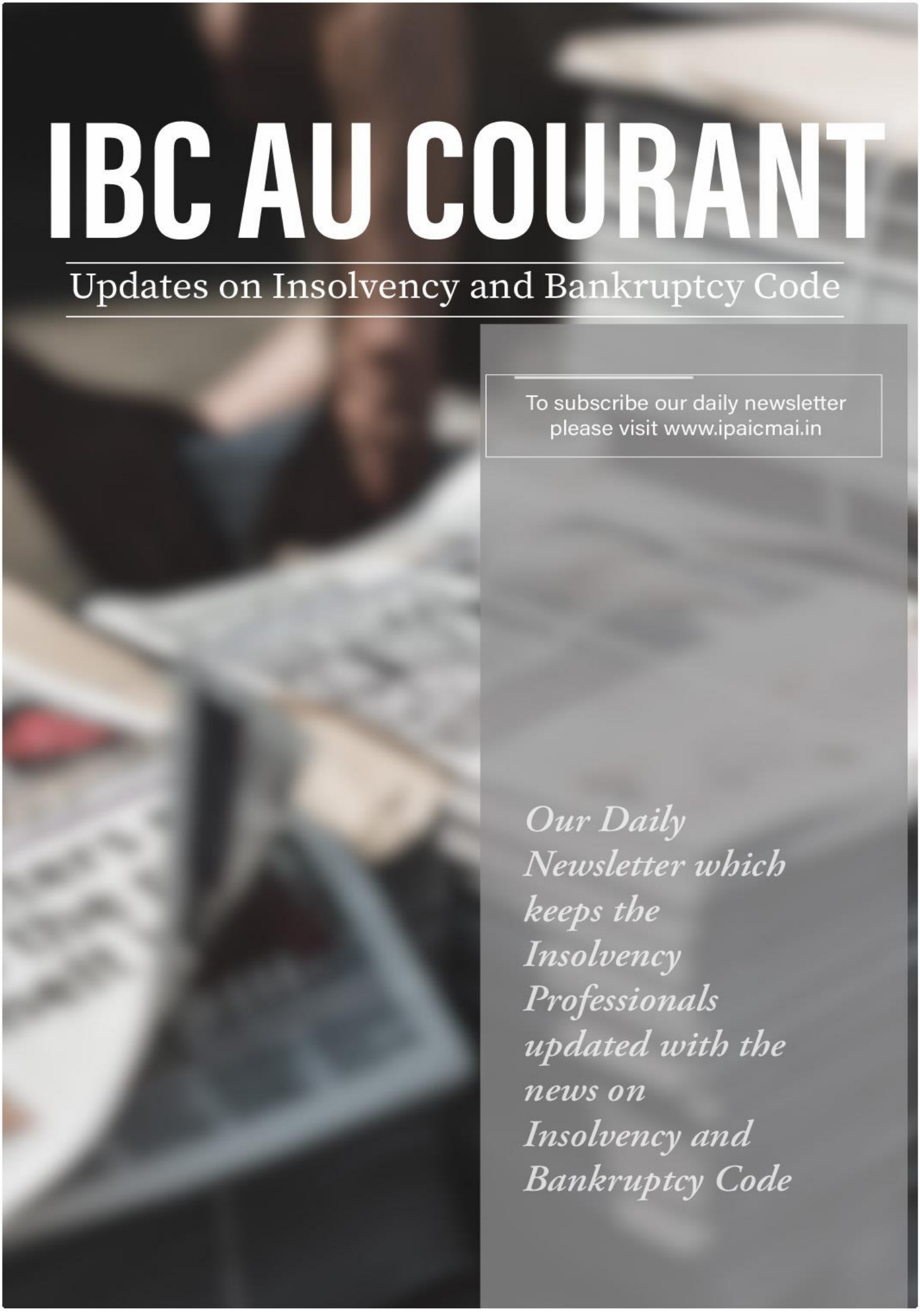
In a major amendment to the corporate insolvency resolution process (CIRP) regulations, the committee of creditors (CoC) can now vote on all compliant resolution plans simultaneously. The plan which receives the highest votes, subject to the 66% regulatory threshold, shall be considered approved

PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute
of Cost Accountants of India

EVENTS CONDUCTED

AUGUST,2020	
Date	Events
16th - 25th August 2020	30-hour certificate course on IBC
21st August, 2020	Round Table on " Statement of Best Practises: Role of IPs in Avoidance Proceedings
26th August, 2020	Round Table on " Statement of Best Practises: Role of IPs in Avoidance Proceedings



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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


ARTICLES
Insolvency Professional Agency of Institute of Cost Accountants of India

A STUDY OF IMPACT OF INSOLVENCY AND BANKRUPTCY CODE (IBC) ON NON-PERFORMING ASSETS IN INDIA

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Abstract
The level of non-performing assets (NPAs) best indicates the soundness of the banking sector of a country. Indian banking sector has been recently witnessing the threat of increasing NPA in India which is not only affecting the profitability but also the liquidity of the banks. While the financial markets saw many reforms in the last two decades, the legal framework for resolution of stressed assets did not keep pace with it. It was only in 2016 that The Insolvency and Bankruptcy Code (IBC) rolled out as an important measure to address the issue of NPA. According to the Reserve Bank of India, the recovery of stressed assets by scheduled commercial banks improved in 2018-19 which was propelled by the resolutions under the IBC. This resulted in more than half of the total amount recovered. It was stated in the report that 56% of the total non-performing assets (NPA) was recovered by scheduled commercial banks which amounted to Rs 1,26,085 crores. This paper is an attempt to understand the impact of IBC on the recoveries and occurrence of NPA.

1.0 Introduction

The Indian banking sector has gone through various changes over the last decade. Indian government had lot of worries about the increasing NPA. Increased rate of recovery in India and high percentage of NPA led to issues between Banks, organization and individuals. The Indian economy has emerged as one of the fastest growing economy. It is world's seventh largest in terms of nominal GDP. The financial system plays an important role in the development of the country's economy as it helps in wealth creation by linking a resident's saving into investment. Also, the financial system helps in the movement of funds from household to companies and help in the growth of the country. The structure of the Indian financial system can be divided into organized financial system and unorganized financial system. The banks are controlled by the RBI by keeping in check the CRR, SLR, Repo rate etc. This guarantee that the banks function properly, and they always have a provision of funds in case of emergency. The RBI regulates the banks and handles any kinds of problem that arises. The increase in the NPA over the decade led the RBI to introduce the insolvency and bankruptcy code. The law was announced as an effort to combine the large number of laws pertaining to insolvency and bankruptcy. This was a significant step taken towards the growth and stability of the banking sector in India. Although similar laws already in existence in other countries, India's introduction to IBC put it into the race of development with the other major countries such as US, UK and Germany. The introduction of insolvency code by the government of India in 2016 was aimed to bring down NPA and increase the recovery

time. This paper aims to bring out the changes the banks have seen over the last 3 years after the introduction of IBC and a pre and post analysis.

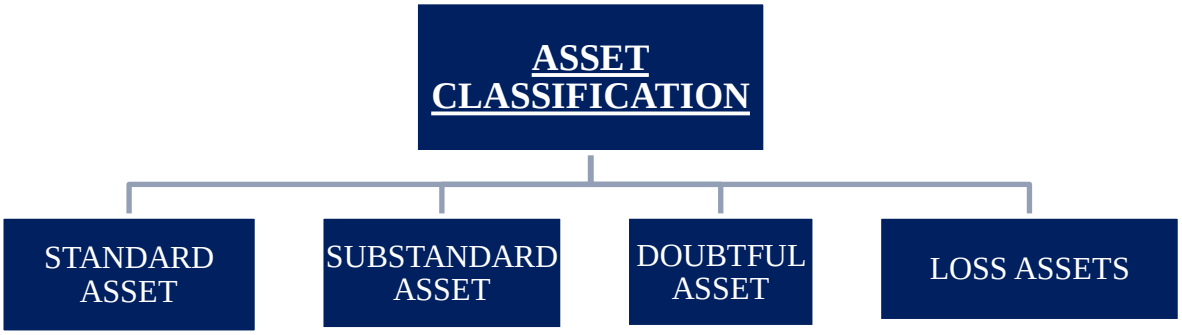
1.1 Banking Sector

Banking sector plays a very important role in the growth of the country and it is considered as the backbone of any nation. Shree M. Narasimhan Committee in 1991, led a financial sector reform. The Indian Banking System comprises of Scheduled and Non- Scheduled banks. Schedules banks are included under the 2nd Schedule of Reserve Bank of India, Act 1934, where it is further classified into nationalized banks; State Bank of India and its associates; Regional Rural Banks (RRBs); foreign banks; and other Indian private sector banks. The term commercial banks refer to both scheduled and non-scheduled commercial banks regulated under the Banking Regulation Act, 1949. As per Section 5(b) of the Banking Regulation Act, 1949, "banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise. The main functions of banks are to accept deposits from the public and lending the money for the purpose of investment or loan.

1.2 NPA in India

The main source of income of the banking sector is the interest from loans and advances and the repayment of the principal. It banks fail to get these incomes, then they are named as non- performing assets (NPA). According to the Reserve Bank of India, NPA is defined as a credit facility in respect of which the interest and/or instalment of principal is "past due" for a specified period. Generally, if the loan payments have not been made for a period of 90 days, the asset is classified as non-performing asset. the debtor is not able to meet the obligation. It is basically those which do not bring any return to the lender (Murari, 2014). NPAs wear out the financial strength and drain the capital of the banks (Ashly Lynn Joseph, 2014). Debt is classified as NPA when borrower has not repaid the amount for more than 90 days. There are two types of NPA namely Gross NPA and Net NPA. Gross NPA is the sum total of all loan assets reflecting the quality of the loans made by the banks. Net NPA Net are those for which the bank has deducted the provision regarding the same showing the actual burden on the banks. Several studies have been conducted to find out the trend of NPA, comparison has been done with private and public sector banks. In one such study conducted by (Murari, 2014) it was found that there was no significant difference in the Gross NPA ratio and Net NPA ratio of both public sector and the private sectors banks as both are trying to reduce their NPA using regulatory and supervisory pressure.

Based on the period, banks are required to classify their non-performing assets under following categories:



1. ***Standard assets*:** they are the performing assets in which payments are made regularly as and when they become due.
2. ***Substandard assets:*** Assets which remain unpaid for a period less than or equal to 12 months.
3. ***Doubtful assets:*** An asset is classified as doubtful if it has remained in the substandard category for a period of 12 months.
4. ***Loss assets:*** When the loan is not repaid even after it is under the sub-standard asset category for more than 3 years, it may be identified as unrecoverable by internal / external audit or by the RBI, it is called loss asset.

1.3. Insolvency and Bankruptcy Code 2016

Currently there are multiple overlapping laws which deals with financial failure and insolvency of companies and individuals in India. The present legal and institutional framework does not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system. The framework tried to bring in an element of time-bound and systematic resolution of insolvencies for maximization of value for all stakeholders and balancing of information asymmetry besides protection of interest of all stakeholders. In the year 2000, the level of NPAs rose drastically. During the year 2008 to 2014, Banks lent indiscriminately that led to a very high percentage of NPAs which was highlighted by the Asset Quality Reviews of the RBI and this led to a prompt action by the Government. A Committee was formed, which submitted its Report in 2015 recommending the IBC and immediately, a Bill was introduced in Lok Sabha and referred to a Joint Committee of Parliament. On 5 May 2016 IBC was approved by both Houses of Parliament and received the assent of the President of India on 28 May 2016.

2.0 Reasons for the increasing NPA in India

The banking sector in India has been facing the several problems of continuously rising NPAs. There are two main reasons for NPA i.e. External and internal reasons, where external reasons are related to those activities which are outside the reach of bank and internal reasons are related to the activities inside the banks.

External factors

1. **Wilful Defaults:** At times borrowers who are competent to repay the loans intentionally don't pay back. Such Borrowers should be recognised and proper actions should be taken to minimise this risk.
2. **Ineffective Recovery tribunal:** The Government has established a number of tribunals which work for recovery of loans and advances but due to their negligence and incapability, banks are the ultimate sufferers reducing their profitability and liquidity
3. **Natural calamities:** Natural calamities are also one of the reasons of increasing NPAs in India as India is frequently hit by them every now and then which makes the borrowers unable to pay back their loans and advances. For this the bank has to create large amount of provisions to set off the losses resulting in reduced profit for the banks.
4. **Lack of demand:** Entrepreneurs generally in the initial stages of their business cannot predict their demands properly and end up getting stuck in the situation where they are unable to repay the loans taken by them. The banks then have to sell off their assets to recover the loss which generally does not compensate the whole of the amount.

5. **Change of Government policies**: The Government keeps changing the policies related to the NPAs every now and then. Sometimes banks find it to difficult to cope up with the changes and as a result they end up on the losing side.

Internal factors

1. **Inefficient lending process:** Sometimes the proper background check of the borrower is no conducted leading to failure in payments. Therefore, it becomes important to see the capability and willingness to pay of the borrower.
2. **Managerial Deficiencies:** While lending the money, the banker should take tangible asset under custody to protect its money. Also, he should follow the "Principle of Diversification" and not provide loans and advances to particular section of the industries.
3. **Absence of regular industrial visit:** the irregularity of visits of the bank officials provide leniency to the customers for not paying on regular intervals and hence increasing the chances of NPAs.
4. **Inappropriate technology:** Crucial decisions are delayed due to inappropriate technology and Management information system (MIS) leading to poor credit collection

3.0 Analysis of trend in NPA

Table -1 exhibits the amount of Gross Advances and Gross during the period of 2007-08 to 2016-17. The amount of Gross Advances has increased from Rs.25034.31 billion in 2007-08 to Rs.84767.05 billion in 2016-17. Further, the amount of Gross NPA has also increased from Rs.566.06 billion in 2007-08 to Rs.7902.68 billion in 2016-17. The upsurge over the period was approximately 14 times during this time period.

Table- 1 Trend of Gross Advances over Gross NPA

Year	Gross Advances	Gross NPA
2007-08	25034.31	566.06
2008-09	30246.52	699.54
2009-10	32620.79	817.18
2010-11	39959.82	939.97
2011-12	46488.08	1369.68
2012-13	59718.2	1927.69
2013-14	68757.48	2630.15
2014-15	75606.66	3229.16
2015-16	81711.14	6116.07
2016-17	84767.05	7902.68

Source – RBI Publication

Table -2 shows the year-on-year percentage of net NPAs of public sector banks, new private sector banks and foreign banks. By comparing the performance on the basis of the mean value for the period, it has been observed that the % of net NPA is high in case of the public sector banks, as the mean value is 2.5700. Next is the place of new private sector banks whose mean value is 1.0200 and it is the lowest in the case of foreign banks is .47387

Table-2- *Year-on-Year percentage of net NPAs of public sector banks, new private sector banks and foreign banks.* Year	**Public Sector Bank**	**New Private Sector Bank**	**Foreign Bank**
2007-08	1	1.1	0.8
2008-09	0.9	1.3	1.8
2009-10	1.1	1	1.8
2010-11	1.1	0.6	0.7
2011-12	1.5	0.5	0.6
2012-13	2	0.5	1
2013-14	2.6	0.7	1.1
2014-15	2.9	0.9	0.5
2015-16	5.7	1.4	0.8
2016-17	6.9	2.2	0.6
Mean	2.57	1.02	0.97
S.D	2.10029	0.52239	0.47387

Source – RBI Publication

Table-3 shows the gross and net NPA as percentage of gross and net advances. As observed from the data NPA is showing a rising trend.
Table-3 NPA of Private Sector bank

(Amount in ` Crore)

Year (end-March)	Advances		Non-Performing Assets (NPAs)					
			Gross			Net		
	Gross	Net	Amount	As Percentage of Gross Advances	As Percentage of Total Assets	Amount	As Percentage of Net Advances	As Percentage of Total Assets
1	2	3	4	5	6	7	8	9
Scheduled Commercial Banks								
2011-12	4648808	5073559	136968	2.9	1.6	65205	1.3	0.8
2012-13	5971820	5879773	192769	3.2	2.0	98693	1.7	1.0
2013-14	6875748	6735213	263015	3.8	2.4	142656	2.1	1.3
2014-15	7560666	7388160	322916	4.3	2.7	175841	2.4	1.5
2015-16	8171114	7896467	611607	7.5	4.7	349814	4.4	2.7
2016-17	8476705	8116109	791791	9.3	5.6	433121	5.3	3.1
2017-18	9266210	8745978	1039679	11.2	6.8	520679	6.0	3.4

(Source: Database on Indian Economy, Reserve Bank of India, 2011-18)

Table-4 shows the gross and net NPA as percentage of gross and net advances. As observed from the data NPA is showing a rising trend.
Table 4 NPA of Public Sector Banks

(Amount in ` Crore)

Year (end-March)	Advances		Non-Performing Assets (NPAs)					
			Gross			Net		
	Gross	Net	Amount	As Percentage of Gross Advances	As Percentage of Total Assets	Amount	As Percentage of Net Advances	As Percentage of Total Assets
1	2	3	4	5	6	7	8	9
Public Sector Banks								
2011-12	3550389	3877308	112488	3.2	1.9	59391	1.5	1.0
2012-13	4560169	4472845	164461	3.6	2.4	90037	2.0	1.3
2013-14	5215920	5101137	227264	4.4	2.9	130635	2.6	1.6
2014-15	5616718	5476250	278468	5.0	3.2	159951	2.9	1.8
2015-16	5821952	5593577	539956	9.3	5.9	320376	5.7	3.5
2016-17	5866373	5557232	684732	11.7	7.0	383089	6.9	3.9
2017-18	6141698	5697350	895601	14.6	8.9	454473	8.0	4.5

4.0 Conclusion

Within a short span of 3 years, three years since it was legislated, the IBC has made material progress in addressing the logjams it was supposed to - which is faster recovery of stressed assets and quicker resolution timeline the code has proven to be a Sustainable solution to the problem of NPAS and the Government and IBBI in consultation with stake holders must resolve any concern arising in the current scheme, either by way of regulation or circulars etc. The Code has instilled a significantly better sense of credit discipline, while there is a sense of urgency and seriousness among defaulting borrowers because losing their asset is very much a possibility if the resolution process fails.

There is no denying that gross NPAs of Scheduled Commercial Banks(SCBs) have been increasing continuously for the reason stated above. As per RBI data, the gross NPAs stood at INR 323464 crores on March 31, 2015 and increased to an over INR 10.36 lakh crore figure by the end of 2017-18, fiscal on March 31. However, there is some respite in the last financial year as Gross NPAs of SCBs, which stood at INR 10,36,187 crores on March 31, 2018, declined by INR 97,996 Crores to INR 9.38, 191 crores as on June 30 2019. Crisil estimates that the banking sector's gross NPA has declined to 10 per cent in end-March 2019, from 11.5% the year before. Recovery under IBC accounted for 56 per cent of the total non-performing assets (NPA) recovery (of ₹1,26,085 crore) made by SCBs in 2018-19The recovery of stressed assets by scheduled commercial banks (SCBs) improved during 2018-19, propelled by resolutions under the Insolvency and Bankruptcy Code (IBC), which contributed more than half of the total amount recovered This reduction in the gross NPAs is certainly attributed to efficient and time bound resolution process under the code. The realization under the code has been certainly higher i.e an average of 43% to lenders than the previous regime which was 23%. and also average time taken under the code is 330 days. In contrast to this average time taken for resolution under previous regime was 4.3 years. Therefore, the enactment of the code has been instrumental in the recovery of NPAs.

Way Forward

There is a need for differential treatment in handling the amount of NPAs. For example, higher NPAS should be resolved differently than the lower ones. It is high time to implement the recommendations of the Sunil Mehta Committee, which classified NPAS into three categories which should be handled separately either by asset management companies if the NPA amount is higher or by bank-led resolution if the NPAS' amount is Lower. Also, the time limit to bring the resolution plan should be proportionate to the amount of NPAS.

LEASE HOLD RIGHTS UNDER IBC

Mr. Lakkaraju Srinivas
Advocate & Insolvency Professional

In this article we are going to discuss what are the rights of a person who is enjoying the lease under the Insolvency and Bankruptcy code 2016. But before discussing this aspect, let us understand what is lease and how many types of leases are there.

Lease is a contract by which one person handover the asset to the other person for the purpose of usage and the person in consideration of using the property will pay regular periodical payments. The person who is handing over the property is called Lessor and the person who is using the property is called Lessee. The lessor is the real owner of the property and the person, who is taking the property for the purpose of use, will pay certain regular payments which are called rent. So it is a contractual arrangement calling the lessee (User) to pay Lessor(Owner) for use of an asset. Generally the items that are generally deliver for the purpose of use are property, building, vehicles, Industrial and business equipment's etc.
Broadly put, a lease agreement is a contract between two parties, the lessor and the lessee. The lessor is the legal owner of the asset, while the lessee obtains the right to use the asset in return for regular rental payments. .

The most common form of real property lease is a residential rental agreement between landlord and tenant. As the relationship between the tenant and the landlord is called a tenancy,
The term rental agreement can refer to two kinds of leases. The Subject matter of lease may be tangible or intangible. The lease agreement in which tangible property will be let out just like let out land, building or goods etc .Similarly the lease agreement in which intangible property will be let out such as license, software programme etc. .
The term of the lease may be fixed, periodic or of indefinite duration. If it is for a specified period of time, the term ends automatically when the period expires, and the term's duration may be conditional, in which case it lasts until a specified event occurs, such as the death of a specified individual. A periodic tenancy is one which is renewed automatically, usually on a monthly or weekly basis. A tenancy at will lasts only as long as the parties wish it to, and may be terminated by either party without penalty.
In real estate law, we come across another term that is sublease .In this type of lease, the lessee will let out the subject of matter of property to another person. In otherwords,it is the name given to an arrangement in which the lessee (e.g. tenant) in a lease assigns the lease to a third party, thereby making the old lessee the sub lessor, and the new lessee the sub lessee, or subtenant. This means they are not only leasing the property, but also subleasing it simultaneously.[15] Generally Company's first take larger space of office for lease from the landlord and later some portion of this office will be let out to another company in order to save a portion of rent.. .
In brief we can say lease is a
a) A lease is a contract which lays down terms and conditions by which the owner of the property (Lessor) lease or rent a property to another (lessee) for the purpose of using the property

b) This contract guarantees the lessee to use the property for a certain period called lease period and similarly the owner of the property will be guaranteed in the form of assured return from the lessee for using the property.
c) Any breakage of the terms will lead to legal problems in a court of law

Difference between freehold land and leasehold land

Freehold means Free hold that means, the subject matter of lease is not subjected to any lease.. The person who is leasing out the property to another person shall be the real owner of the property. in this case. If he wants, he can make alterations in the structure of the building subject to obtaining necessary permissions from the competent authority's .Generally people prefer to buy the freehold land because once they purchase the property they become absolute owners of the property and they can enjoy the returns from the property absolutely. And also if they want they can resell the property to another person they can do so freely. .Similarly Banks and Financial institutions prefer to lend finance only against the freehold property. In Freehold property, the owner need not pay any rent for using the property. He can transfer or inherit the property to another by way of sale deed or gift deed etc
In case of leasehold property means, the subject matter of lease is under lease. That means the person who is using the property is not the real owner of the property. The person using the property has to make regular periodical payments to the real owner for a fixed term. After the term ends, the possession of the property will be reverted back to the real owner.

Differences between Financial lease and operating lease

Generally we come across two terms, such as financial lease and operating lease:

Financial lease

It is a contract in which lessor rent an asset to lessee in lieu of certain periodical payments. It is generally long term concept. In financial lease, the lessee will be given an option to purchase the asset at the end of lease period. So in financial lease; the ownership of asset will be transferred to the lessee after certain period. It is the responsibility of the lessee to maintain the asset during the lease period. The advantage of financial lease is depreciation charges can be allowed for tax deduction for lessee. Once the agreement of financial lease is signed, it cannot be cancelled. The example of agreement of financial lease is loan agreement in financial lease the option will be given to the lessee to purchase the asset at the end of lease period. Risk and return will be transferred to the lessee

Operating lease

It is a contract in which lessor rent an asset to lessee in lieu of certain periodical payments. The difference between financial lease and Operating lease is in case of financial lease, the ownership will be transferred to the lessee but in the operating lease, the ownership will not be transferred to the lessee and it is remain in the hands of lessor. This is the major difference between financial lease and operating lease. It is generally short term in nature. The maintenance of the asset will remain with the lessor only. The example of operating lease is rental agreement. It can be cancelled at any time. In operating lease , lease rental payments can be allowed as tax deduction .Risk and return are with lessor only

Which type of lease is best suitable for the business?

If you want to use the asset but do not want to purchase the asset because of large amount cash outflow, it is better to adopt operating lease. On the other hand if you want to purchase

the asset, but you do not have sufficient cash flow to purchase the item at present and you want to acquire the asset after certain period of time, then in such case financial lease is better

Now the question is whether a person who has given the property to another person on lease basis or on rental agreement and the lessee who is enjoying the property is not paying the rental amount. In such case, claim towards outstanding rent is an operational debt as defined under section 5(20) of IBC and also whether owner of the property can be categorised as Operational Creditor, who can file petition under section 9 of the IBC?

Before discussing the above question, we need to understand whether the claim towards rental dues comes under Operational Debt.

The Operational debt has been defined as per section 5(21) as a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Govt or State Govt or any local authority.

As per the above, Operational Creditors are those to whom the operational debt is owed or legally assigned to other by the Corporate Debtor. Hence Operational debt is a claim in respect of Provision of goods or services. Claim means right to payment or right to remedy for breach of contract giving rise to the right to payment.

The amount to be classified as operational debt; it has to satisfy the following

1. Amount should be classified as claim
2. Claim should fall within the definition of a debt as defined under section 3(11) meaning it should be by way of a liability or obligation due from any person
3. Debt should fall within the scope of definition of Operational Debt as per section 5(21) of the code

In other words in order to classify the amount of debt as Operational debt, it should be a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Govt or State Govt or any local authority

Thus, only if the claim by way of debt falls within one of the three categories as listed above, can be categorised as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorised as an operational debt, and even though there might be a liability or obligation due from Corporate Debtor and such a creditor cannot categorise itself as an "Operational Creditor" as defined under Section 5(21) of the I&B Code, 2016. Therefore, we are of the considered opinion that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot fall within the definition or 'Operational Debt.

As per Bankruptcy Law Reforms committee Operational Creditors are those whose liability from the entity comes from a transaction on operations .The committee while differentiating the types of creditors into Financial creditors or operational Creditors, the committee indicates the lessor who is giving the space on rental basis to the entity is an Operational Creditor to whom the entity owes monthly rent on a lease basis. Hence as per BLRC recommends the treatment of lessors /Landlords as Operational Creditors

The committee has pointed out that the enterprise will have different types of creditors, one is Financial Creditor and the other is Operational Creditor. The lessor who is giving the

premises on rent to the entity will be considered as Operational Creditor and the rental dues arising out of lease agreement is considered as Operational Debt.

As per section 7 of the CGST Act 2017, the expression supply includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

As per the above, lease is covered within the meaning & scope of supply and it is a taxable.

As per Schedule II of the CGST Act, 2017 wherein clear guidelines for classification of a transaction as either Supply of goods or Supply of services has been based on the following conditions

1. The transfer of title in goods is a supply of goods
2. The transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services
3. Any transfer of title in goods under an agreement which stipulates the condition that the Property in goods shall pass at a future date upon payment of full consideration as agreed is a supply of goods
4. Any lease ,tenancy ,easement ,licence to occupy the land is supply of services

Hence as per the above, what is important is transfer of title involves in the lease transaction or not. If the lease agreement stipulates transfer of title is a supply of goods and if a lease agreement does not stipulate transfer of title is supply of services

But the legislature has taken a contrary view and not accepted dues towards outstanding rent cannot be considered as Operational Debt. The different Tribunals are interpreting the Subject Matter in a different manners. NCLT Mumbai and New Delhi have held that the claim against the rental dues does not come under the category of Operational Debt. On the other hand, NCLT Kolkata held that, rent outstanding is operational debt and thus petition under Section 9 of the IBC claiming outstanding rent is maintainable.

On similar lines NCLT, Hyderabad, on January 21, 2019 had admitted a Section 9 insolvency petition filed against the Corporate Debtor, M/S. Walnut Packaging Private Limited. The petition was preferred by the Lessors of the Corporate Debtor with respect to a piece of land measuring about 1667 sq. Yards in Hyderabad. Being aggrieved by the Impugned order shareholders/promoter challenged the same in an appeal before NCLAT wherein NCLAT has set aside the Impugned Order.

In the case of Jindal Steel & Power Limited Hon'ble NCLAT held that tenancy does not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-section (21) of Section 5 of the IBC.

In the case of M/s Manjeera Retail Holding Private limited Vs Blue Tree Hospitality Private limited,Hon!ble National Company Law Tribunal has held that the claim towards the outstanding lease charges does not come under the category of Operational debt and Petitioner cannot be considered as Operational Creditor to file an application under section 9 of the Insolvency and Bankruptcy code 2016.

In this case the Petitioner M/s Manjeera Retail Holding Private limited has leased out a space for running restaurant and bar to M/s Blue Tree Hospitality Private limited for a lease period of around 9 years with an understanding that the Corporate Debtor has to pay monthly rent as revenue share at 13.5% of business turnover with a minimum of Rs.7,21,279/-

As the Corporate debtor has committed default in payment of rent, the Petitioner has filed an application under section 9 of the Insolvency and Bankruptcy code 2016 for recovering the amount.

The Humble Tribunal has relied its decision on the verdict of Parmod Yadav & Anr Vs Divine Infracon Private ltd and held that the Transactions relating to the immovable property cannot be considered as a transaction falling under the term "Operation" as well as "Operational debt" unless such a transaction having a correlation of direct input to the output produced or supplied by the Corporate Debtor. Hence the Petitioner cannot be considered as an Operational Creditor and he cannot file an application under section 9 of the Insolvency and Bankruptcy code 2016.

But some Tribunals have taken contrary view. In the case of Mahesh Madhavan Vs M/s Black N Green Mobile Solutions Private limited, the Hon'ble Bench has held that an application under section 9 can be filed for recovery of arrears of rent. Similar is the view was taken by the Hon'ble Kolkata bench and passed an order in the case of Sarla Tantia Vs Nadia Health Care ltd

But the Apex court has held that the claim for arrears of rent would fall under the purview of providing services and the consideration that is receivable would become Operational debt in the case of Mobilox Innovations Pvt ltd Vs Kirusa Software Private ltd .

It was held that receiving any consideration by way of rent, lease from time to time and license fee for letting out the premises would fall under the purview of providing services and the consideration that is receivable becomes an Operational debt. It has relied upon the report of Bankruptcy Law Reforms Committee which considers a lessor as an Operational Creditor and also relied upon the provisions of section 2(a) of the Central Goods and Services Tax Act 2017 which states that any lease to occupy is a supply of service and hence recovery of arrears of rent is an operational debt within the meaning of section 5(21) of the code, contrary to the view expressed in earlier case laws.

PLAYING THE DEVIL'S ADVOCATE - WITH REGARDS TO CBI'S JURISDICTION OVER IP'S

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I am aware that I am writing a piece that will be read by stalwarts and veterans of the battlefield, among others. They have -been-there-and-done-that. As for me, I have never been there and never done that ever before, but indeed raring to go.

I wanted to be able to contribute to this journal and was unable to decide what is the subject I would write on and that made me turn my attention to a terrain I am familiar with. Plus of course the fact that I am an admirer of Khushwant Singh's style and philosophy of writing, which is to ensure that reader gets something out of the document- a new perspective, a view from another angle, even a provocation to question certain established premises, both outside and within his/her own mind.

I did not want to write on any of the so-called practical aspects of the profession or my two-cents on the so-called practical aspects of the provisions of the Code, simply because that would be akin to a first-time entrant in the national cricket team dishing out advise to a Tendulkar or a Dhoni on the finer aspects of reverse-swing. But the greenhorn can definitely comment about the situation and the status of the domestic pitch in his own backyard where a Tendulkar or a Dhoni might not have been before. This piece is akin to that.

It is on what I would call an emerging area of jurisprudence in a most interesting confluence of laws- *CBI's jurisdiction over an Insolvency Professional* while acting as an IRP, or RP or Liquidator. For the purposes of this article I am not going into details of what and who CBI is and what and who they investigate. I will presume that the readers will know this already. I *will* however go into the details of who is or who is not a Public Servant, because when it comes to the jurisdiction of CBI (particularly the ACB) with regards to matters of corruption, the public servant definition is at the very core, and the very genesis of an investigation. Equivalent to tracing an 'index patient', if you will, as per medical parlance.

Let me begin constructing the premise for the discussion on the subject.

PREMISE 1:

1. PUBLIC SERVANT OR NOT?

An Insolvency Professional is a Public Servant? Or Not? This is a question that gains traction and begs

an answer in light of CBI's FIR no. RC-DAI-2020-A-0001 (CBI, ACB, New Delhi Unit) from Book No. 1119 at serial no. 10 dated 11.01.2020. Incidentally, it features as Insolvency Professional as its subject of investigation, or might I say object of interest. Intriguingly, it invokes Section 7 & 7A of the PC Act, 1988 (as amended in 2018) along with 120-B of the IPC and filed under Section 154 of the Cr. PC. What intrigues me is the following entry from the FIR documents;

Suspected Offence is 'Criminal Conspiracy, Demand of undue advantage by public servant, Taking undue advantage to influence public servant by corrupt or illegal means.'

The FIR on its last page (Page No. 3) concludes in a routine and matter-of-fact language with the following phrase:

"Hence, a Regular Case is registered and entrusted (NAME LEFT OUT BY THE AUTHOR INTENTIONALLY), Inspector, CBI, ACB, New Delhi for investigation."

Hence the question, Is An Insolvency Professional Public Servant, Or Not?
Let's a take a look at the definition of a 'Public Servant' as defined in the Indian Penal Code, 1860. For the purposes of this article, the term "public servant" shall have the same meaning as assigned to it in section 21 of the Indian Penal Code, 1860 (45 of 1860).
The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:— 1*****
Second.—Every Commissioned Officer in the Military, 2[Naval or Air] Forces 3[4*** of India];

5[Third.—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]

Fourth.—Every officer of a Court of Justice 6[(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.—Every officer of 7[the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.—Every officer whose duty it is as such officer, to take, receive, keep or expend any property on behalf of 7[the Government], or to make any survey, assessment or contract on behalf of 7[the Government], or to execute any revenue-process, or to investigate, or to report, on any matter

affecting the pecuniary interests of 7[the Government], or to make, authenticate or keep any document relating to the pecuniary interests of 7[the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of 7[the Government] 8***;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

9[Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]

10[Twelfth.—Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).]

Illustration

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

9[Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

1 *Cl. First omitted by the A.O. 1950.*

2 *Subs. by Act 10 of 1927, s. 2 and the First Sch., for "or Naval".*

3 *The original words "of the Queen while serving under the Government of India, or any Government" have successively been amended by the A.O. 1937, the A.O. 1948 and the A.O. 1950 to read as above.*

4 *The words "of the Dominion" omitted by the A.O. 1950.*

5 *Subs. by Act 40 of 1964, s. 2, for cl. Third.*

6 *Ins. by s. 2, ibid.*

7 *Subs. by the A.O. 1950, for "the Crown" which had been subs. by the A.O. 1937, for "Government".*

8 *Certain words omitted by Act 40 of 1964, s. 2.*

9 *Ins. by Act 39 of 1920, s. 2.*

10 *Subs. by Act 40 of 1964, s. 2, for Cl. Twelfth.*

11 *Explanation 4 omitted by Act 39 of 1920, s. 2.*

PREMISE 2:

Now, let us turn out attention to the treatment of the words 'public servant' with regards to the IBC, 2016. The IBC, 2016 states that:
Section 232: The Chairperson, Members, officers and other employees of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Code, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).
The section does not mention anywhere the phrase or designation 'Insolvency Professional'.
Interestingly, the very next section talks about an Insolvency Professional:
233. Protection of action taken in good faith. - No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member, officer or other employee of the Board or an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations made thereunder
There is no need to interpret the intent of the legislature here. In their infinite wisdom, they left out Insolvency Professional from the purview of Section 232, but deemed it necessary to make a mention in Section 233
And that should perhaps put an end to all speculation around whether or not an IP is a public servant.

PREMISE 3 and a lead to Conclusion:

It can safely be concluded that an IP is not and cannot be a Public Servant for the following reasons:

NOT PAID BY THE STATE: One of the principal tests of whether or not one is a Public Servant generally is to see whether or not he/she is being paid a remuneration by the State. An IP is never paid any remuneration by the state- either directly or indirectly unless if ever he/she becomes and IRP by virtue of a nomination by an FC or OC who happens to be an instrument of the state. Then again, just as an Advocate or a Chartered account who is paid his/her fees by a Government Agency does not become a public servant merely by the fact of such payment, an IP cannot be deemed as a Public Servant even if he/she were to be paid fees to function as an IRP by an instrument of the state. An RP or a Liquidator is clearly not paid by the State in any instance or under any circumstances.

APPOINTED BY THE STATE: Another test of whether or not a person can be deemed to be a public servant is to determine who appointed the person to the particular position. We are aware that there are possibilities of the Adjudicating Authority making a reference to the Insolvency and Bankruptcy Board of India to recommend an IP for appointment as IRP, RP or

Liquidator. That alone by no stretch of imagination confer or fasten the status of a 'public servant' on the appointee. Any appointment, including one where the Board makes the recommendation happens under the aegis of the IBC, 2016 and we have already seen what Section 232 says in the code. Therefore, such an appointment must be read within the ambit of the entire code, and particularly Section 232 of the code.

WORKS FULL-TIME FOR THE STATE: A public servant is forbidden from taking up any business or employment outside of his/her work for which he/she is appointed. A notable exception, to the best of my memory, is an ANIMAL WELFARE OFFICER who were (I am not certain if they are still appointed) appointed in consultation with the Animal Welfare Board of India and were clearly deemed to be public servants. They were not paid any remuneration (to the best of my knowledge) and were deemed to be holding 'honorary' posts and almost all of them had other sources of income. Nonetheless, there are numerous precedents where they have been charged with corruption clearly indicating that they were treated as public servants for the purposes of Prevention of Corruptions laws for the time-being in force.

INTERNATIONAL JURISPURDENCE: United States Trustees appoint and supervise private trustees who administer bankruptcy estates under chapters 7, 11, 12, and 13 of the Bankruptcy Code. Private trustees are not government employees.2 They do, however, work in concert with the United States Trustee to ensure the efficiency and integrity of the bankruptcy system. Chapter 7 trustees are often referred to as "panel trustees" because they are appointed by the United States Trustee to a panel in each judicial district. Once trustees are appointed to the panel, chapter 7 cases generally are assigned through a blind rotation process. The chapter 7 trustee collects assets of the debtor that are not exempt under the Bankruptcy Code, liquidates the assets, and distributes the proceeds to creditors.

In UK, An Official Receiver is employed by the Insolvency Service and is a civil servant of the court to act in cases of compulsory liquidation and bankruptcy. The Official Receiver is appointed liquidator on the making of the winding up order, and administers the first stages of the winding up procedure. In this article, we are outlining what is an official receiver, and their role in the process.

One is not to confuse the 'Official Liquidator' appointed in India under the Companies Act, 2103 with the 'Liquidator' appointed under the IBC, 2016. The former is clearly a public servant, whilst the jury is out on the latter causing this document to be written.

CONCLUSION

Reading the Premises 1, 2 and 3 and definitions and treatments of the phrase or words 'public servant' as found in Section 21 of the Indian Penal Code, 1860 read at once and together with Sections 232 and 233 of the IBC, 206 and in light of the 'tests' to determine whether or not a post or a person falls within the ambit of 'public servant', a prudent exponent of law will come to the infallible conclusion that an IP is not an public servant at any point of time including when acting as an IRP, RP or Liquidator.

ENDNOTE, AS AN AFTER-THOUGHT:

The author of this document, despite the conclusion set forth by himself that an IP is not and cannot be deemed to be a public servant, is all in favour of an IP being held accountable as a public servant. Why Not? And here are the top reasons, and expectations by way of rights that accumulate to an IP, mounted upon the duties imposed on an IP deemed to be a public servant:

- It Is Public Service Indeed
- Accountability And Adherence To Highest Ideals needs law and order supervision.
- Weeding Out The Corrupt can only be in the best interests of the whole profession.
- What's To Fear For One Who Is Honest- NOTHING AND NOBODY!! An honest IP has nothing to fear from a CBI, or for that matter, any investigation.

EXPECTATIONS IN RETURN, WHICH ARE ACTUALLY A MATTER OF ACCRUED RIGHTS must include, but certainly not be limited to:

- IP Must Have Right To Invoke Section 186 To 190 That Empower A Public Servant. It is only fair that if one is treated as a Public Servant while interpreting one particular set of laws, then

  one must be allowed to call oneself a public servant as per all other set of laws that favour such an interpretation.
- Issuance Of An Appropriate Identity Card To The IP. Let it be known to the whole world that an IP is a public servant. It will come in aid of his/her work and enable its effective discharge.
- Inclusion In Central Government Health Schemes That Cover Self And Family. We all know the cost of healthcare in our country and even the most honest IP will need help with this aspect of his/her life.
- Right To, And Access To Government Accommodation At Par With Officers In A Similar Rank. And of course, all other perks as well. Why not?
- And Right To A Pension (Why Not? And I am sure this calls for a separate discussion altogether).

Now, if the powers that be deem an IP to be a public servant and treat him/her like one for the purposes of imposing penalties and punishments without granting the rights or expectations as set out here, then they are setting up a rot in the very system which will spread quick, spread wide and will actually need the CBI to step in often and everywhere! Now that will be one giant irony that CBI inadvertently became the instrument that unknowingly, and again inadvertently, set-off practices that it wished to, and stepped into curb in the first place.

CROSS BORDER INSOLVENCY

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Meaning of Cross-Border Transactions:

The rapid rate of globalization has led to increased levels of interaction among nations and dilution of barriers to facilitate trade: movement of goods, capital, labour and technology. With this, there can be seen a surge in cross-border investment activities and the issues of insolvency therefore, can have global consequences. If the insolvency or liquidation proceedings with reference to unpaid debt is initiated in a country other than the one where the registered office of corporate debtor exists, it can be called a case of Cross Border Insolvency or International Insolvency.

The need to harmonize legislations across various nations with respect to cross border insolvency has arisen due to:

• Continuous global expansion of trade and investments which has led to the occurrence of cross-border insolvency transactions
• Numerous difficulties associated with the proceedings: time, cost, cumbersome procedures and formal requirements, conflicting court decisions on the same or similar matters, uncertainty and moreover unpredictability
• There exists inadequate legal responses due to differences in regulatory platforms across nations which ultimately hampers the rescue of 'financially troubled' organisations and protection and hinders maximization and protection of the value of assets of the insolvent debtor against dissipation.

With all the 'Make in India' schemes, creditors and corporates are attracted to set up manufacturing facilities in the country which becomes a responsibility for India to protect all the stakeholder's investments when any company faces insolvency.
At present, the Indian law promotes an ad-hoc structure of these laws through Sections 234 and 235 of The Insolvency And Bankruptcy Code, 2016. The two provisions which assist the cross-border disputes currently:

Agreements with Foreign Countries (Section 234):

According to this the Central Government may enter into an agreement with the Government of any country outside India for enforcing provisions of this Code.
Further, the Central Government may by notification in the Official Gazette, direct the application of the provisions of the Code in relation to assets or property of a corporate debtor or debtor including- personal guarantor of a corporate debtor, situated outside India through a reciprocal arrangement.

Letter of Request (Section 235):

If the action relating to assets of a corporate debtor situated outside India is required with respect to insolvency, the Section empowers the resolution professional, liquidator or bankruptcy trustee to make an application to NCLT. If it deems it fit, the Hon'ble Adjudicating Authority can issue a letter of request to the court of such country with whom bilateral agreement has been signed.

These provisions have an underlying premise which is the existence of a bilateral agreement between India and the said jurisdiction. But India has neither entered into a bilateral agreement not have these provisions been notified yet.

Bilateral Agreements:

IBC has been formulated by the legislation in order to get speedy and smooth disposal of the cases in regards to insolvency and bankruptcy but it can be concluded that there exists a problem with the current position since, it involves lengthy and cumbersome negotiations with individual countries to conclude the agreements which mostly have different terms and conditions and a varied procedure in their own respective insolvency law regimes.

The objective of timely recovery of debts as laid down by the Code would not be achieved. Considering the principles of transparency and equity, the insolvency procedure conducted should be the same for all the countries entering into the reciprocal agreements. And if different processes are undertaken, then points of conflicts emerge since the reciprocal agreements do not include a feature to coordinate the procedure of insolvency related with multiple jurisdictions and involving multiple branches of a single entity. If the assets of the corporate debtor and a personal guarantor are located in a country with which there exists no bilateral agreement, and evidence or action relating to such assets is required in connection with the resolution process or liquation proceeding, the Liquidator will be left helpless and it would compromise the insolvency proceedings.

Recommendations by Various Committees:

The issues relating to cross-border insolvency have been looked into previously by Justice Eradi Committee in the year 2000 under the chairmanship of Justice V Balakrishna Eradi. It mandated the adoption of UNCITRAL Model as adopted by United Nations General Assembly Resolution 52/158 dated 15th December, 1997 to deal with such insolvency issues by amending Part VII of Companies Act, 1956. The Report took into account the in-bound and out-bound requests for recognition of foreign proceedings, coordination of proceedings in two or more States and participation of foreign creditors in the insolvency proceedings.

In 2001, Professor NL Mitra Committee brought to light the need to have a uniform law. It provided that the laws are outdated and not comparable to the International legal standards and there was a need of renewal of Bankruptcy Code in India. The Indian law, as it exists today, provides only for the recognition of foreign judgments. Neither the Civil Procedure Code nor any other law deals with the recognition of foreign proceedings. The UNCITRAL Model law caters to this deficiency. The Advisory Group recommended a comprehensive corporate bankruptcy code which should incorporate the provisions relating to reorganisation

on renegotiation (similar to Chapter XI proceedings of US Bankruptcy Code) and settlement of issues related to Cross-Border claims and counter claim settlement and cross-border corporate insolvency.

JJ Irani Committee in the year 2005, again stressed upon the need for articulating a comprehensive framework. These recommendations for adopting the Model Law as a separate chapter in the Code would lead to greater flexibility and adaptability, reducing contracting costs for nation states.

While considering the IBC Bill 2016, the Joint Parliamentary Committee on Insolvency and Bankruptcy Bill 2015 had also expressed the critical need to address the cross-border insolvency issues.
In the year 2018, Insolvency Law Committee submitted its report to Ministry of Corporate Affairs and recommended amendments in the Code for the inclusion of cross border insolvency laws. It was proposed to draft a separate chapter in the Code for the inclusion of the UNCITRAL Model.

The UNCITRAL Model:

This Model provides a procedural framework for cooperation and information exchange in the cross border insolvencies. It does not attempt unification of substantive insolvency law. Its key aspect is harmonisation, uniform interpretation and respecting the differences in procedural laws. Being a model legislation and not a treaty/convention, countries may incorporate it into their domestic laws with any changes that they deem fit. There exists an intent of flexibility in the Model so that countries with a substantive difference in laws of insolvency can adopt the same with ease.
As of June 2020, the legislation based on the Model Law has been enacted in 47 States (50 Jurisdictions): including Australia (2008); Bahrain (2018); Burkina Faso (2015); New Zealand (2006); Mauritius (2009); Japan (2000) and others.

Key elements of the Model Law:

- **Assess**: It specifies as to who has the standing to initiate an action for recognition of a foreign proceeding and for assistance. It allows foreign representatives and creditors to commence and/or participate in local proceedings. It aims to address the formalities to be satisfied and establishes evidentiary presumptions along with authorizing the courts of the enacting States to seek assistance abroad for local proceedings.

-**Recognition**: The Law aims to establish clear, straightforward conditions for recognition without any unnecessary formality or procedure. It provides a presumption as to the authenticity and accuracy of documents.

-**Relief / Assistance**: It provides for discretionary interim relief (before recognition) to protect the assets of debtor and interests of the creditors. There is a standardised "automatic" stay policy as an effect of recognition of foreign main proceedings. There also exists a discretionary relief for foreign main and non-main proceedings. It does not import the effects of the foreign insolvency order.

-**Cooperation and Coordination**: It provides express legislative authority for judicial cooperation to facilitate communication and case management. It authorizes cooperation to the maximum possible extent including direct communication between-
I. Courts
II. Courts and Foreign Representatives
III. Foreign Representatives

It also facilitates coordination of concurrent proceedings hence, does not prevent commencement of local proceedings not terminate or prevent the recognition of the foreign ones. The UNICTRAL Model Law is the most widely accepted blue-print to effectively deal with the cross-border issues and ensures the least intrusion into each country's internal insolvency and bankruptcy laws. Presently, India has to enter into bilateral agreements with other countries but upon adopting the UNCITRAL Model law it would be uniform for all the countries who have signed the treaty.

Key Advantages of Adopting the Model Law:

1-**Foreign Investment**: Making proper legislation for cross- border insolvency issues would further lead to increased investment of the foreign nations in Indian companies boosting our economy. The adoption of the Law would provide avenues for recognition of foreign insolvency proceedings fostering cooperation between domestic and foreign courts and professionals. The Model Law has gained significance and its adoption would align India with the best practices in insolvency resolution and liquidation followed globally. It would lead to a positive outcome in terms of global investors, creditors, governments, MNCs and International organisations with regard to the robustness of India's financial sector.

2-Flexibility: Since the Model Law is designed in a way that it respects differences among national insolvency laws while adopting a globally accepted framework. It will also lead to a reduction in time for exchange for relevant information between countries.

3-Protection and Prioritizing Domestic Proceedings: The Model Law has a provision for refusal of recognition of the foreign proceedings or any assistance if such an action contradicts the domestic policy. It also have a precedence to domestic proceedings like in case of a moratorium due to recognition of foreign proceedings will not prevent or hamper in any way the commencement of domestic insolvency proceedings.

4-The Model Law acts as a mechanism for cooperation between courts and insolvency professionals in both foreign and domestic jurisdictions. This would facilitate faster and more effective conduct of the concurrent proceedings.

5-Boost the Economy: The basic object behind this model law is to ensure that the interest of banks and person involved including the creditor are protected in regard to cross border insolvency matters. By formulating these provisions there will be substantial growth in mergers and acquisitions which would thereby enhance the economy of the country.

India is in a dire need to adopt the Model Law in order to get a level playing field. Due to the current Covid-19 situation, the insolvency laws and proceedings are unstable but once IBC

gets back on track then it is a must for the Government to re-consider and adopt the UNCITRAL Model.

Centre of Main Interest (COMI):

The Model Law sets out this principle for determining the jurisdictions of the proceedings. Article 16 states that COMI corresponds to the place where debtor has its registered office or habitual residence in case of individual, and is dependent on many factors like: seat of an entity having major stake in terms of asset control and operations. The debtor cannot easily escape its liabilities by changing COMI as per wish since now the determination depends upon assessment by third parties. Hence, the Model Law addresses this issue present in our current legal framework.
The public notice issued by the Ministry of Corporate Affairs on 20 June 2018 has certain deficiencies yet to be resolved:

- There is no provision relating to prohibition or stay of foreign non-main proceedings.
- Section 2(c) defines the establishment as a place where corporate debtor carries out non-transitory economic activity three months before commencement of Insolvency Proceedings in COMI but fails to include all places where principle economic activities may be carried out by the Corporate Debtor.
- The notice also does not highlight the individual bankruptcy cases hence, restricting cross-border insolvencies to corporate debtors only.

Issue of Reciprocity:

The Report of Insolvency Law Committee which was constituted to examine the issues relate to the current framework of IBC recommended the adoption of Model Law. However, the proposed draft by the committee disregards the objectives of coordination and cooperation as laid down by the Model Law and mandated the requirements of reciprocity. Till the time the Model Law is enforced by a significant number of countries, the requirement of reciprocity as an absolute measure must be done away with by the courts and the discretion of case to case basis should be given as in the case of Rubin v Eurofinance . There could be issues with reciprocity since an entity could always be reluctant to become part of insolvency proceedings relying on defences like 'lex suits' and 'absence of a bilateral agreement.' Our Government has a sort of mental reservation and block as to the issue of reciprocity which needs to be addressed and done away with.

Framework for Cross Border Insolvency in Other Countries and Jurisdictions:

Australia:
The regulatory framework that existed therein was not sufficient and capable to deal with the complexities involved in the cross-border insolvency cases. Being well aware of the fact that bilateral treaties can provide some solution but are not easy to negotiate and have intricacies involved, it passed the Cross Border Insolvency Act in the year 2008 which explicitly provided for the adoption and enforcement of the United Nations Commission on International Trade Law ["Model law"].

United States of America:
Chapter 15 was newly formed and added to the Bankruptcy Code in US by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997.

Other countries like South Africa, Myanmar which have recently adopted the UNCITRAL Model Law have been widely celebrated. It is expected to bring in significant changes in terms or practice and procedure laid.

Jet Airways Case Study:

This is a landmark case on the issue of Insolvency Proceedings which brings to light the lacunae in IBC to deal with cross-border insolvencies in the country.

The proceedings were initiated against Jet Airways (Corporate Debtor) in India as well as Netherlands. Jet Airways has assets and properties in both India as well as outside of India. In the Netherlands (North-Holland) where the Regional Hub is situated, acting upon a complaint filed by two European Creditors, an Administrator had been appointed by a Dutch Court, to take charge of the assets of debt-ridden Jet Airways and confiscate a Boeing 777 owned by Jet Airways. The Administrator approached its Indian counterpart for access to the financials as well as the assets of Jet. The Mumbai Bench of NCLT vide its Order dated 20th June 2019 declared the bankruptcy proceedings overseas against Jet to be null and void. To which the Dutch Court Administrator filed a petition at NCLAT against the order.
The critical questions that came up before the NCLAT for consideration were:

1-Whether separate proceedings in Corporate Insolvency Resolution Process (CIRP) against a common 'Corporate Debtor' can proceed in two different jurisdictions.
2-Whether by a Joint Agreement or understanding between the Resolution Professionals of Jet (Indian RP) and Administrator in Netherland (Dutch Trustee) as approved by

NCLAT, can proceed for maximisation of the property of Jet Airways balancing all the stakeholders: Indian/Offshore Creditors/Lenders.

-NCLAT stayed the orders of NLCT and proposed to clarify the law on the action to be taken when there are two parallel insolvency petitions filed. NCLAT directed the Resolution Professional of Jet to cooperate with the Administrator. It asked them to be open to Dutch court administrator to collate the claims of the Offshore Creditors and forward their claims to Indian RP for the purpose of preparing the Information Memorandum along with approval of COC.
-It asked the Dutch Court Administrator not to sell, alienate, transfer, lease or create any third-party interests on the offshore movable and immovable assets which are or may be taken in the Administrator's possession.
-The Indian RP on the other hand will ensure that 'Corporate Debtor' remain a going concern and would take the assistance of Board of Directors (suspended), paid Director and the employees.

-During the pendency of Appeal before NCLAT, the Dutch Administrator may negotiate matters with Indian RP in consultation with COC to reach terms of settlement in the best interest of the 'Corporate Debtor' and all stakeholders.

Owing to the non-cooperation of the Indian Resolution Professional, the NCLAT intended to have a join 'Corporate Insolvency Resolution Process.' It asked the COC to confirm by way of Affidavit as to who will be bearing the fee and cost of Dutch Administrator.
The next hearing held on 26 September 2019 had both the Administrator and Indian RP to file the 'Terms & Conditions' of the Cross-Border Insolvency Protocol before NCLAT.
NCLAT cleared few details like:

-The Dutch Administrator would have the right to attend COC meeting but no voting rights thereat.
-The COC stands no right to object the Administrator to participate in the meetings and has no role to play since the agreement is reached between the Administrator and the Indian Resolution Professional.

The case of Jet Airways is a perfect example to show the dire need of adopting UNCITRAL Model in India. At a time when India is the preferred foreign investment destination, and has gained even more significance during the Covid time, becoming the stomping ground for the world's leading multinational corporations, it is startling that the IBC which was enacted just a few years ago chose to give a miss to the United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency (Model Law).

The Protocol that was followed in this case was a minor image of UNCITRAL Model itself and virtually operated under its shadow. This clearly shows that Indian Market is capable of handling and catching up with the global standards. The Protocol was completely in consonance with the Model Law. Jet Airways is not a standalone case and there could be many other cases that could potentially follow. This was one of the few cases which dealt with parallel proceedings and cross-border Insolvency in India and one which was set in the right direction. Indian cross-border regime is very rudimentary at this stage and this order opens up the Pandora's Box.
So, it becomes important that there is a uniform pattern taken up and harmonization of foreign creditors and insolvency proceedings with the domestic insolvency proceedings are done in manner which protects the alienation of assets while also balancing the claims of creditors or administrators. It can be expected that more of judgments: like Jet Airways, Amtek Group, Videocon, Essar Steel would now be pronounced by the courts in near future.

Way Forward:

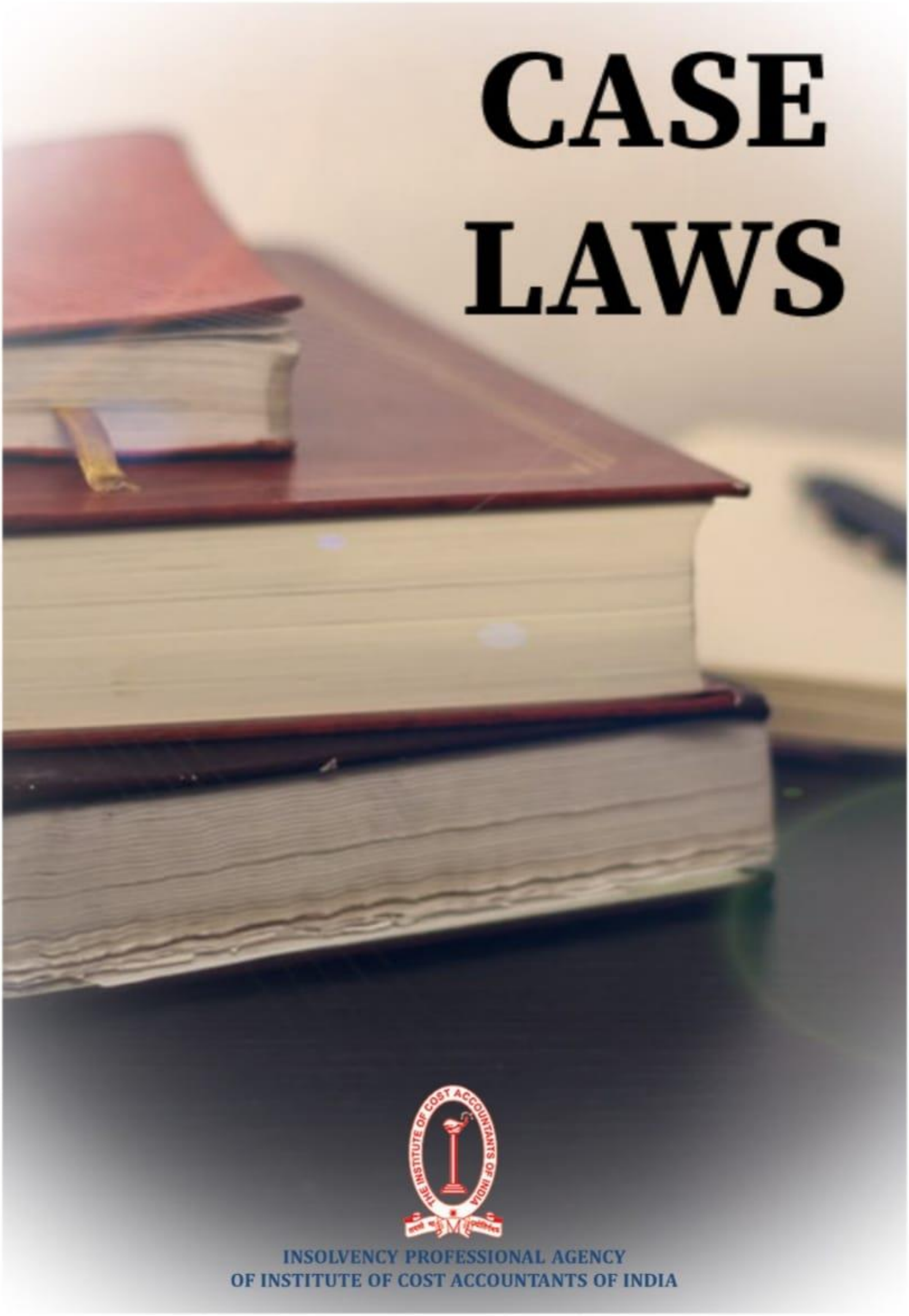
It is evident that there exist multiple problems which are left unanswered in the current framework. There is no provision for foreign representatives to apply to the Indian courts. The Model Law seeks to alleviate these issues by acting as a pragmatic legal framework which unlike a treaty or a convention is a model form of legislation.

The Appellate Tribunal in Jet Airways case has successfully attempted to extend the principles of Model Law into our Domestic Laws and hence this being the optimal time for India to adopt such a legislation. The rather conservative approach of the Indian Government by not

opening the path to insolvency judgements of foreign courts and over regulating the laws needs to be addressed. Since, the Government has shown no signs of urgency and considers it to be a threat to our sovereignty, so the judiciary had stepped up in the Jet Airways Case which proved to be a healthy outcome and precedent. While the Protocol drafted in the Case plugs a huge gap, it is in no way a substitute for a comprehensive cross-border Insolvency law. Adoption of the UNCITRAL Model Law is a necessity and not an option for India without which the Code will be left incomplete.

Without a proper framework there lingers a threat for the foreign investors to invest in India or even set up manufacturing units. Before the inclusion of the Public Notice as a chapter in the Code, there needs to be a re-look at the flaws in certain provisions although it has resolved the problem of cumbersome process and provides a much faster remedy to the foreign creditors in cross-border insolvency matters. So, In order to overcome the drawbacks of current law the adoption of Model Law expeditiously is recommended.

CASE LAWS



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SECTION 31 - RESOLUTION PLAN - APPROVAL OF

✓ **Sales Tax Department v. Aryavart Chemicals (P.) Ltd. - [2019] 111 taxmann.com 435 (NCL-AT)**

Dues towards ESIC and PF contributions would not come within meaning of operational debt while dues towards sales tax is operational debt; no discrimination could be alleged if in Resolution plan, ESIC and PF were provided 100% claim amount while sales tax much lesser.

Grievance of the appellant-Sales Tax Department was that in the resolution plan approved by the Adjudicating Authority, the Sales Tax Department had been provided with 6.1 per cent of its claim and the Customs Department was provided with 5.1 per cent of its claim while ESIC employees/contribution, ESIC employers' contribution, Provident Fund employees' contribution and Provident Fund employers' contribution were provided with 100 per cent of the claim amount. The Sales Tax Department alleged discrimination.

Held that amounts pending towards ESIC employees 'contribution, ESIC employers' contribution, Provident Fund employees/contribution and Provident Fund employers' contribution did not come within meaning of operational debt. The Sales Tax Department being an operational creditor could not be equated with ESIC or PF and no discrimination could be alleged in claim distribution.

Case Review : *Panama Petrochem Ltd. v. Aryavart Chemicals (P.) Ltd. [2019] 111 taxmann.com 434 (NCLT - Mum.), affirmed*

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

✓ ***Mahender Kumar Khandelwal v. Insolvency and Bankruptcy Board of India - [2019] 111 taxmann.com 464 /[2020] 157 SCL 695 (Delhi)***

Where petitioner Resolution Professional had deposited with Registry of Court monetary penalty imposed on him, operation of order of respondent - IBBI insofar as it prevented petitioner from accepting a new assignment as an Interim Resolution Professional (IRP) or Resolution Professional, was to be stayed.

The petitioner was Resolution Professional of the corporate debtor. The IBBI by impugned order held that the petitioner would not accept any new assignment either as Interim Resolution Professional (IRP) or Resolution Professional (RP) till he deposited monetary penalty of Rs. 29,24,167 with the Board.

Held that since the petitioner had deposited with the Registry of Court the monetary penalty imposed on him, operation of the impugned order, insofar as it prevented the petitioner from accepting a new assignment as an Interim Resolution Professional (IRP) or Resolution Professional, was to be stayed.

SECTION 231 - BAR OF JURISDICTION

✓ **Anand Rao Korada Resolution Professional v. Varsha Fabrics (P.) Ltd. - [2019] 111 taxmann.com 474 /[2020] 157 SCL 350 (SC)**

Where insolvency petition against corporate debtor had been admitted but during pendency of moratorium High Court by impugned order started auction proceedings of assets of corporate debtor, High Court ought not to have proceeded with auction of assets of corporate debtor, once proceedings under IBC had commenced and an order declaring moratorium was passed by NCLT.

A financial creditor filed petition under section 7 against the corporate debtor which was admitted by NCLT and moratorium was declared. However, during pendency of moratorium, The High Court by impugned order started auction proceedings of assets of the corporate debtor.

Held that the High Court ought not to have proceeded with the auction of property of the corporate debtor, once proceedings under IBC had commenced, and an order declaring moratorium was passed by NCLT . Therefore, impugned order passed by the High Court was to be set aside.

SECTION 40 - CORPORATE LIQUIDATION PROCESS - CLAIMS - ADMISSION OR REJECTION OF

✓ **KSB Shanghai Pump Co. Ltd. v. Lanco Infratech Ltd. - [2019] 112 taxmann.com 36 /[2020] 157 SCL 163 (NCL-AT)**

Where it was not clear as to whether amount had been realised by corporate debtor on invocation of bank guarantees or not, direction sought by appellants to direct liquidator to not to pay any amount to corporate debtor could not be ordered; however, if corporate debtor had received amount out of performance bank guarantees, in such case, appellants could file their respective claim before liquidator who would decide claim in terms of section 40.

Company 'TANGEDCO' awarded contract for setting up thermal power project to the corporate debtor. The corporate debtor entered into sub-contract with the appellant-Chinese companies for design, engineering, supply, manufacture, assembly etc. Advance bank guarantee as well as performance bank guarantee was issued by Bank of China on behalf of appellants in favour of the corporate debtor. However, CIRP was initiated by a creditor against the corporate debtor. Subsequently, the Adjudicating Authority passed an order for liquidation of the corporate debtor and bank guarantees were invoked though it was not clear as to whether amount which was to be released by bank of China on invocation of aforesaid Bank guarantee had been realised by the corporate debtor or not.

Held that direction as sought for by appellants to direct liquidator to not to pay any amount to the corporate debtor, could not be ordered. However, if the corporate debtor had received amount out of performance bank guarantees, in such case, appellants could file their respective claim before the liquidator who would decide claim in terms of section 40.

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

✓ **Action Ispat & Power (P.) Ltd. v. Shyam Metalics & Energy Ltd. - [2019] 112 taxmann.com 45 /[2020] 157 SCL 143 (Delhi)**

Merely because company judge had ordered winding up of a company, it did not follow that company should necessarily be liquidated or dissolved, other options available, such as, to resolve/revive company should be explored.

The respondent company filed petition for winding up of the appellant company for its inability to pay debts. Meanwhile, I & B code was notified. The SBI, being a secured creditor sought transfer of winding up proceedings to NCLT, which was allowed by the Company Judge. The appellant claimed that winding up order had already been passed, and thus, the winding up proceedings couldn't be transferred to NCLT.

Held that merely because the Company Judge had passed order for winding up of the appellant, it did not follow that the appellant should necessarily be liquidated or dissolved. Other options available, namely to resolve/revive the appellant, should also be explored for which NCLT was invested with jurisdiction.

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

✓ **Accord Life Spec (P.) Ltd. v. Orchid Pharma Ltd. - [2019] 112 taxmann.com 149 /[2020] 157 SCL 122 (NCLAT- New Delhi)**

Where in CoC approved resolution plan, amount offered in favour of stakeholders including financial creditors and other operational creditors was less than liquidation value of corporate debtor, such resolution plan could not be accepted.

The resolution plan submitted by a resolution applicant DLL was approved by the CoC as well as by the Adjudicating Authority. In CIRP against the corporate debtor, the appellant, one of the unsuccessful resolution applicant, filed an application for direction to the Resolution Professional to reconsider the resolution plan submitted by it which was earlier rejected by the Committee of Creditors. The Adjudicating Authority dismissed the application on the ground that resolution plan was considered on merit, based on viability and feasibility of the plan. In the instant appeal, the appellant contended that the resolution plan submitted by DLL was not viable nor was it feasible. It was stated that actual 'Resolution Value' proposed by DLL was 570 crores as against the liquidation value of Rs. 1309 crores. The successful resolution applicant, on the other hand, stated that the liquidation value is only a notional value and the same can never be realized in case of actual liquidation.

Held that if in CoC approved resolution plan, amount offered in favour of stake-holders including financial creditors and other operational creditors was less than liquidation value, such resolution plan could not be accepted. Further, infusions of fund for maximization of assets of corporate debtor cannot be counted for purpose of amount, which is being kept for

distribution amongst stakeholders including financial creditors and operational creditors and if it is less than liquidation value, such resolution plan cannot be upheld, being against the object of the Code and section 30(2).

Case Review : *Accord Life Spec (P.) Ltd. v. Sripathan Venkata Subramanian Ram Kumar [2019] 112 taxmann.com 147 (NCLT - Chennai), reversed*

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

✓ **State Bank of India v. Accord Life Spec (P.) Ltd. - [2019] 112 taxmann.com 150 /[2020] 157 SCL 121 (SC)**

Stay granted on NCL-AT's ruling that in CoC approved resolution plan, if amount offered in favour of stakeholders including financial creditors and other operational creditors was less than liquidation value of corporate debtor, such resolution plan could not be accepted.

The NCLAT held that where in CoC approved resolution plan, amount offered in favour of stake-holders including financial creditors and other operational creditors was less than liquidation value, such resolution plan could not be accepted. It further, held that infusions of fund for maximization of assets of the corporate debtor cannot be counted for purpose of amount, which is being kept for distribution amongst stakeholders, including financial creditors and operational creditors, and if it is less than liquidation value, such resolution plan cannot be upheld, being against object of the Code and section 30(2. On appeal before the Supreme Court, further proceedings were to be stayed.

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

✓ **Navdeep Rinwa v. Hexagon Nutrition (P.) Ltd. - [2019] 112 taxmann.com 232 /[2020] 157 SCL 195 (NCL-AT)**

Where matter had been settled and due amount had already been paid by corporate debtor to operational creditor and committee of creditors had not been yet constituted, order initiating CIRP under section 9 against corporate debtor was to be set aside.

CIRP was initiated against the corporate debtor for default in payment. In appeal, the corporate debtor submitted that it was ready to settle matter with the operational creditor. The operational creditor stated that matter had been settled and due amount had already been paid by the corporate debtor. The committee of creditors had not been yet constituted.

Held that the order initiating CIRP under section 9 against the corporate debtor was to be set aside

Case Review : *Hexagon Nutrition (P.) Ltd. v. Rajasthan Drugs & Pharmaceuticals Ltd. [2019] 112 taxmann.com 231 (NCLT - Jaipur), reversed*

SECTION 9 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR

✓ **Smart Timing Steel Ltd. v. National Steel And Agro Industries Ltd. - [2019] 112 taxmann.com 313 /[2019] 217 COMP CASE 502 (SC)**

Where appellant-operational creditor failed to furnish copy of certificate from financial institution maintaining accounts of appellant confirming that there was no payment of unpaid operational debt by corporate debtor, NCLAT was justified in upholding order of NCLT dismissing petition filed by appellant for initiation of CIRP on failure to annex copy of certificate as required under section 9(3)(c).

The appellant-operational creditor had filed petition under section 9 for initiation of corporate Insolvency resolution process (CIRP). NCLT dismissed said petition on ground that the appellant failed to furnish copy of certificate from financial institution maintaining accounts of the operational creditor confirming that there was no payment of unpaid operational debt by the corporate debtor in terms of section 9(3)(c). The NCLAT upheld order of NCLT holding that filing of copy of such certificate from financial institution was mandatory.

Held that the NCLAT was justified in upholding order of NCLT dismissing petition filed by the appellant for initiating CIRP on failure to annex copy of certificate as required under section 9(3)(c).

Case Review : Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd. [2017] 82 taxmann.com 136 /[2017] 142 SCL 382 (NCL-AT), affirmed

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SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

✓ **Sobodh Kumar Agrawal v. EIH Ltd. - [2019] 112 taxmann.com 350 (NCL-AT)**

Claim against corporate debtor and counter claim by corporate debtor in same proceeding could not be decided by Arbitral Tribunal during moratorium.

During moratorium period, Resolution Professional filed interlocutory application seeking direction to the Arbitral Tribunal adjudicating dispute of the corporate debtor and its operator to pronounce final award.

Held that claim of operator could not be determined by the Arbitral Tribunal during period of moratorium passed by the Adjudicating Authority and in such a situation, as it could not be decided what amount can be taken and counter claim by the corporate debtor also could not proceed during moratorium.

Case Review : *K.S. Oils Ltd. v. State Trade Corp. of India Ltd. [2018] 91 taxmann.com 423/146 SCL 588 (NCL -AT), followed*

SECTION 35 - CORPORATE LIQUIDATION PROCESS - LIQUIDATOR - POWERS AND DUTIES OF

✓ **Manjit Commercial LLP v. SPM Auto (P.) Ltd. - [2019] 112 taxmann.com 352 /[2020] 158 SCL 151 (NCL-AT)**

Where appellant raised an objection that liquidator deliberately reduced reserve price of an asset of corporate debtor which could not be auctioned in order to favour a pre-decided buyer, in view of fact that as per clause (4) of Schedule-I of IBBI (Liquidation Process) Regulations, 2016, Liquidator was allowed to reduce reserve price by 75 per cent, whereas in instant case he had reduced reserve price only by 15 per cent, objection raised by appellant was to be set aside.

In course of liquidation process Liquidator invited bids for auction. One asset of company in liquidation could not be auctioned. The liquidator thus reduced reserve price of said asset by 15 per cent and invited bids for auction again. The appellant raised an objection that reserve price was reduced by the liquidator with sole objective to favour a pre-decided buyer. The Adjudicating Authority set aside said objection.

Held that in view of fact that as per clause (4) of schedule-I of the IBBI (Liquidation Process) Regulations, 2016, the liquidator was allowed to reduce reserve price by 75 per cent whereas in instant case he had reduced reserve price only by 15 per cent, impugned order passed by the Adjudicating Authority rejecting appellant's objection was to be upheld.

Case Review : *SPM Auto (P.) Ltd. v. Regal Metel & Ferro Alloyes [2019] 111 taxmann.com 534 (NCLT - New Delhi), affirmed*

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

✓ **Saregama India Ltd. v. Home Movie Makers (P.) Ltd. - [2019] 112 taxmann.com 389 /[2019] 217 COMP CASE 276 (NCL-AT)**

Where a marketing agency, appellant, paid amount under marketing agreement to TV programme/Serial producer in lieu of rights of 'free commercial time' (FCT), since there was no clause that amount paid by appellant was to be repayable along with interest over a period of time, same would not be give rise to financial debt.

The appellant was marketing agency and the respondent was TV programme/serial producer for telecast in TV channels. The respondent had share in free commercial time (FCT) in TV programs/serials. They entered into a marketing agreement whereby the respondent sold rights of entire 'free commercial time' (FCT) available for programme exclusively to the appellant-marketing agency for which the appellant paid amount to the respondent. As per said agreement the appellant was to market and sell FCT. In marketing agreements and subsequent correspondence exchanged between the appellant and the respondent, no way it was mentioned that amount paid by the appellant was to be repayable along with interest over a period of time.

Held that as per section 5(8), a financial debt means a debt along with interest, if any, which is disbursed against consideration for time value of money. Since the appellant had not disbursed money against consideration for time value of money, claim of the appellant was not to be a financial debt within meaning of section 5(8).

Case Review : *Saregama India Ltd. v. Home Movie Makers (P.) Ltd. [2019] 112 taxmann.com 388 (NCLT - Chennai), affirmed*

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

✓ **Ashoke Ghosh v. Ranjan Kumar Sovasaria - [2020] 113 taxmann.com 46 (NCL-AT)**

Where a suit between parties was pending with regard to same claim as sought in CIRP application, there was a pre-existing dispute; in view of fact that parties had settled matter before constitution of CoC, and fees and cost of RP had also been settled, order initiating CIRP under section 9 against corporate debtor was to be set aside

CIRP application of the operational creditor against the corporate debtor was admitted. The corporate debtor contended that there was a civil suit pending with regard to same claim and that the corporate debtor was ready to settle matter with the operational creditor. The operational creditor accepted that they had settled matter. From terms of settlement it was found that a suit was pending with regard to same claim. The committee of creditors had not been yet constituted.

Held that in view of fact that there was pre-existing dispute and parties had settled matter before constitution of the CoC, order initiating CIRP against the corporate debtor was to be set aside.

Case Review : *Ranjan Kumar Sovasaria v. Apeejay Tea Limited [2020] 133 taxmann.com 45 (NCLT - Kol.), reversed*

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

✓ **Anil Syal v. Sanjeev Kapoor - [2020] 113 taxmann.com 52 /[2020] 157 SCL 522 (NCL-AT)**

Where amount being claimed by demand notice was not related to corporate debtor but related to its sister concern corporate entity, service of demand notice could not be treated as valid service and CIRP application under section 9 against corporate debtor was not maintainable.

A service contract was entered into between the operational creditor and the corporate debtor (FLSPL) for running route vehicles in Freight Line Haul Operations. The operational creditor provided logistics services to the corporate debtor and raised invoices. On perusal of record, it appeared that purported invoices were issued against Flywheel Logistics Pvt. Ltd. (FLPL), however, demand notice issued under section 8 was issued to the corporate debtor (FLSPL).

It was on record that FLPL and FLSPL were different corporate entities having different CIN numbers and registered addresses.

Held that it was clear that the operational creditor had no right to claim dues relating to invoices raised against FLPL from corporate debtor FLSPL, which was a separate corporate entity. Since amount being claimed by said demand notice was not related to the corporate debtor but related to its sister concern company (FLPL), service of demand notice could not be treated as valid service and CIRP application under section 9 against FLSPL was not maintainable.

Case Review : *Kapoor Logistics v. Flywheel Logistics Solution (P.) Ltd. [2020] 113 taxmann.com 51 (NCLT - New Delhi), set aside*

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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