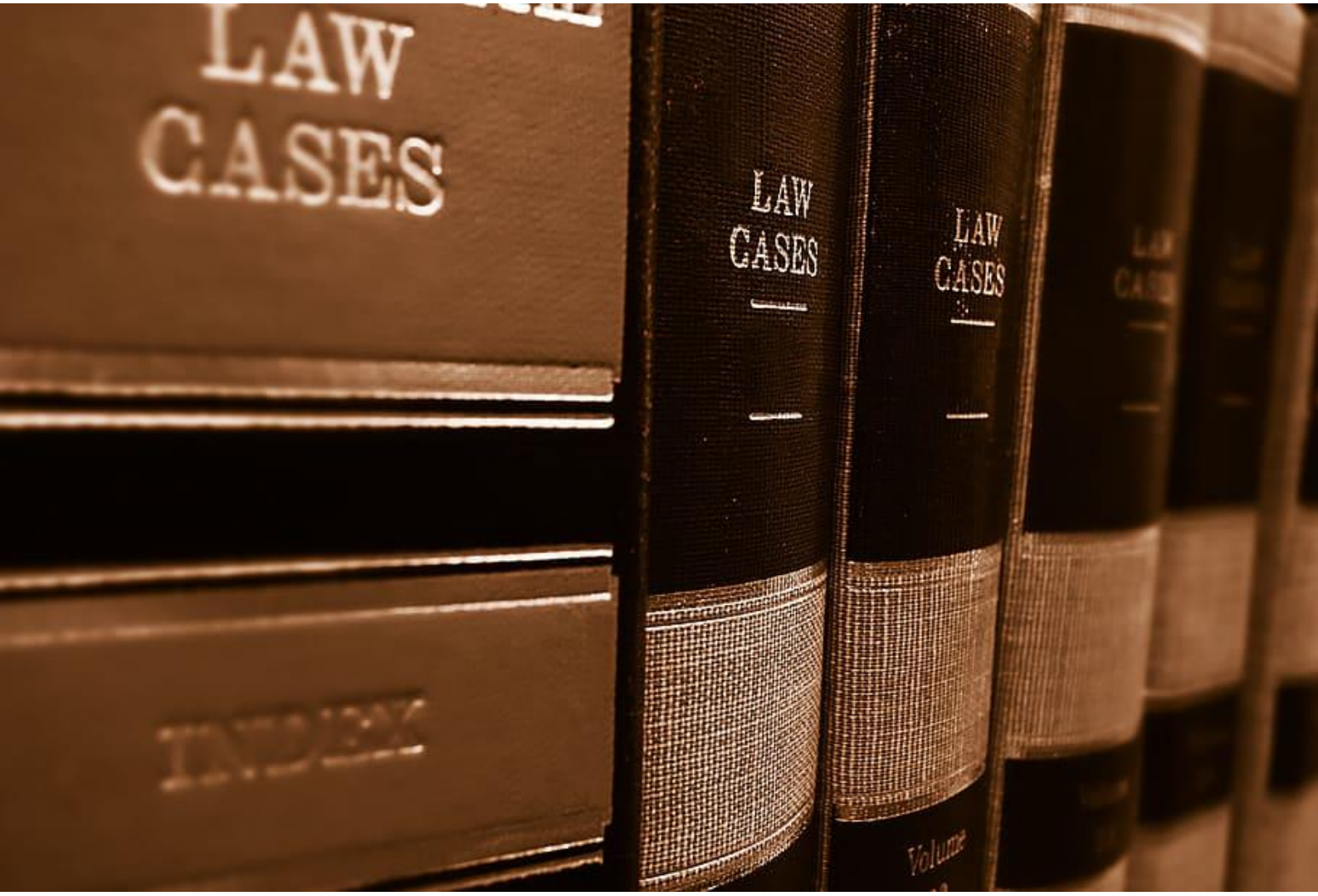
DECEMBER'2020

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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MD MESSAGE

Dear Readers,

The year rolled down and finally we have reached the last month of the year. This year has witnessed the most unprecedented times for which none of us was ready. As every state of affair has some good and some bad, a look back to the going year also leaves a heavy sediment of such experiences.

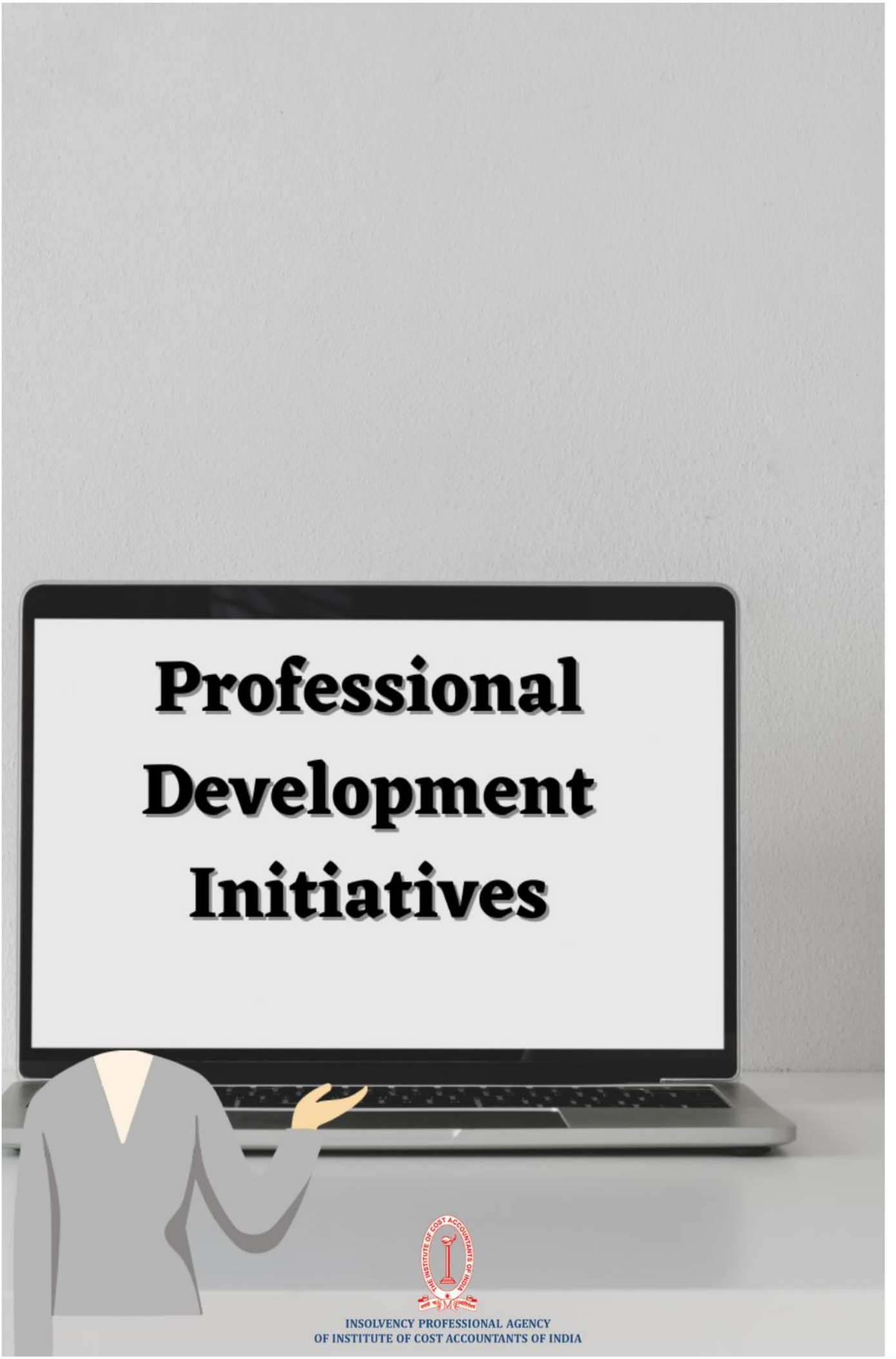
This year is an ideal year to exemplify the quality called "adaptability in human being" to tough situations. Suddenly an hour hit when the whole world came to a total stand-still and no one knew what was next was in store and the minds filled with blurriness of uncertainty. But soon, the world bounced back to a new modality of "work from home"- a concept being long set by the Information Technology fraternity. People were into a wake if really the concept could have been workable for all segment of work, and miraculously it was noticed that a quick pace majority of the industries shifted to the virtual mode. From IT, to education, to medical consultation, operational works in different organization, to judicial proceedings, all transcended to this new era of virtual platform and the so-called new normalcy was accepted world-wide.

Evolution has been the only constant, and again this was proven true in this pandemic situation. The World evolved and so did our country and all learnt the art of virtual platforms. We learnt the art of holding Webinars in place of Seminars, Virtual meetings in place of Physical long meetings, Online classes in place of Physical classes, Online hearing in place of Physical hearings in Court rooms and so on and so forth. People from all walks of life took long strides and geared up themselves to the IT revolution of virtual world.

With the year coming to a close, we all aspire to look forward to some more developments and at the same time with these newly learnt new normalcy if the previous normal life could be gained back.

With this aspiration I wish all my members a happy close to this going year.

Susanta Kumar Sahu
Managing Director



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

DECEMBER,2020	
Date	**Events**
5th– 6th Dec'20	Master Class on Group Insolvency
14th Dec '20	Webinar on Insolvency and Bankruptcy Journey and way forward in association with Enqube collaborations
18th– 20th Dec '20	Master Class on Personal Guarantors to Corporate Debtors
21st – 28th Dec'20	Pre- Registration Training jointly by 3 IPAs
22nd Dec'20	Roundtable on Discussion Paper on Engagement of Professionals

IBC AU COURANT

Updates on insolvency and bankruptcy code

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

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INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

INSOLVENT SUBSIDIARIES AND IMPLICATIONS UNDER INSOLVENCY

Mr. Anil Kumar Sharma
Insolvency Professional

Section 66 of the IBC Code 2016 of the IBC Code 2016 relates to Fraudulent Trading Or Wrongful trading provisions, the substance of Sec 66(1) seems to be to deter any person including the Corporate Debtors directors, officers of the Corporate Debtor or creditors indulging in any business of the Corporate Debtor with an intent to defraud creditors, then any person determined to be knowingly a party to the act can be ordered by the AA to pay by contributing to the Corporate Debtors assets.

Sec 66(2) of IBC Code 2016 a provision to deal with wrongful trading ,holds the Directors of the Insolvent entity liable for any lack of diligence on their part that may have the effect of not minimising any potential loss to the Creditors, if it is determined during the CIRP or Liquidation that there was no reasonable prospect for the CD to avoid Insolvency. As is obvious this has to get tested only in hindsight after the Corporate debtor has been admitted into an insolvency resolution process or when Corporate Debtor is put under Liquidation. Should the facts then result in an inference that the Directors of the Corporate Debtor were lax in using ordinary diligence expected of them leading to more losses to the Creditors, then the Liquidator or the IP can file an application under section 66(2) and ask the AA to order that the Directors contribute to the assets of the Corporate Debtor by an amount so determined.

Section 66(2) IBC 2016 also indirectly implies that the Directors of the Corporate Debtor should act responsibly according to their duties specific towards Creditors when a Corporate Debtor is in the Insolvency zone drawing its spirit from the duties of reasonable care prescribed for the Directors under Section 166(3) of the Companies Act 2013 which reads as follows:

"A Director of a company shall exercise his duties with due and reasonable care , skill and diligence and shall exercise independent judgment " however section 66(2) of IBC Code 2016 specifically invokes the Directors duties towards the creditors of the company in the insolvency zone to prevent reckless behaviour.

The text of Sec 66(1) however reads that " if during the CIRP or Liquidation process, it is found that **any business of the Corporate debtor has been carried out** with an intent to defraud creditors of the CD or for any fraudulent purpose the AA may on an application of the Resolution Professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make contributions to the assets of the Corporate Debtor as it may deem fit".

The reading of the section 66(1) is similar to Section 339(1) of the Companies Act 2013 except the Companies Act2013 also makes such person liable under Sec 447 of the Companies Act 2013. However Sec 66 of the IBC code is silent in this regard and bringing any noncivil proceeding in any case against the promoters are outside the powers of the RP or the Liquidator under IBC Code 2016.

The question arises if the phrase" that any business of the Corporate debtor has been carried out" in Sec 66(1) is implied as being relevant to Section 66(2) as well. The phrase "any business of the corporate debtor" then begs a question whether the sales of a Corporate Debtor as a going concern by a simple transfer of shares can be construed as a business of the corporate debtor under any circumstances . This is yet to be tested in the courts. Clearly if the assets are stripped away at undervalued prices or preferentially there is a case for claw back, but let us assume the Owner sells 100% of its shareholding to a new owner. In this case the company changes hands to a new shareholder along with all its business , assets and liabilities .

Let us assume the assets of the CD were X and Liabilities Y where X is say Rs 10 Crores and Y is Rs 50 Crores at the time of share transfer to a new owner , and a clear gap between Assets and liabilities exists at this time. Say 100% of the shares of the going concern CD are sold at Re 1 to the new shareholder but despite the new owner assuming the ownership Insolvency kicks in rapidly and assume that no liabilities stand cleared thereafter but in the meanwhile there is some reduction in assets say by Rs 5 Crores as Insolvency commences, leaving the resolution professional at the start of the Insolvency with total creditors liabilities of Rs 50 Crores and assets of Rs 5 crores instead, causing creditors a potential loss of Rs 5 crores.

It is possible in this situation that Sec 66(2) of IBC Code 2016 can come to the rescue of the Creditors through the RP or Liquidator who should have a case against the Directors to recover the loss should it be clear that Insolvency was inevitable /unavoidable when the shares were transferred and it is made out that the transfer of ownership led to potential increase in losses to creditors. Liquidator or RP should investigate the purchaser's credentials and proposals if it appears that the credentials were weak and the new promoter unfit in its ability to recapitalise , and there was lack of diligence on the part of a CD Directors .The RP/ Liquidator can chose to file an application against the Directors who were holding office in the period prior to share transfer and the phrase " business of the corporate debtor " even if construed as being relevant to the context of 66(2) could then have the expanded meaning to include sales of the company through transfer of shares. Since the substance of 66(2) is to minimise losses to creditors and hold Directors responsible towards Creditors in the insolvency zone for lack of diligence. Now lets' assume that the CD is a limited liability entity A and a Wholly owned subsidiary of a listed entity B a large company with significant assets and other businesses and since A is wholly owned by B the Limited liability principle would protect B from any liabilities of A as a

shareholder under this principle .It is also true that the liabilities of a wholly owned subsidiary are reflected in the consolidated financials as stated in the Section129(3) of the Companies Act 2013. The option is open to the holding entity to sell the subsidiary to a new owner by selling the shares of the subsidiary. The holding entity knows that the subsidiary needs additional capital investments but it may be shy of making any further investment in the subsidiary. The sales of the subsidiary may provide a cash return to the group, and once sold it does not need to continue funding the distressed company and transfers responsibility for the future operation of the company to its new owners. The holding entity also deconsolidates the assets and liabilities of the subsidiary from the group financials once sold and liabilities of the subsidiary are extinguished with some tax implications and over all makes the Holding company financials look better without carrying the Liabilities of the subsidiary.

In many such cases, a sale of the subsidiary may be in the best interests of all parties, including stakeholders such as creditors, employees etc . A responsible owner, recognising that there is value in a distressed subsidiary but unable or unwilling to continue to fund its operation can sell it to a new investor. This may return it to profitability and, prevent its collapse ,saving jobs and paying its suppliers.

However if the subsidiary after coming under the control of the new owners fails to turn around and becomes insolvent in a short period causing losses to the creditors and if it is determined that the insolvency was inevitable or needed capitalisation and wasn't capitalised and the sale of the subsidiary contributed to the failure, there may be a case for the RP or the Liquidator to consider Section 66(2). Scrutiny of the sale of the company can throw up questions if the holding entity could have chosen voluntary insolvency of the subsidiary under Section 10 of the IBC code 2016 or could have instead chosen the recapitalization of the subsidiary under a joint venture. Existing IBC code 2016, Sec 66(2) has provisions that may apply against the Directors of the Insolvent CD if the conduct of the failed company's directors lacked diligence however it does not allow for the conduct or actions of holding entity to be investigated unless it can is proven that the sale was a case of fraudulent trading under 66(1) but only " business of the corporate debtor" under the circumstances is also seen to include the sales of the going concern by means of a share transfer.

This brings us to a question whether we need a new provisions under IBC to look at the holding entity shareholders (or the holding company's Directors) conduct and whether a provision is need that will allow a review of diligence on the part of a seller (shareholder) or holding company's Directors towards the Corporate Debtor 's creditors particularly when decision to sell is made by the holding company's directors or is based on the directions of the shareholder. On the face of it , Directors of a holding/parent company or its shareholders cannot be held liable for the sale of an insolvent subsidiary, even if is damaging to the subsidiaries' creditors and stakeholders, under the existing 66(2) provisions or under an interpreted meaning of the phrase:" business of the corporate debtor) . Existing Insolvency law in India tries to address

the conduct of the directors of the failed company (i.e. the subsidiary) in the Insolvency zone and can challenge certain transactions which have unfairly harmed creditors but it does not readily allow for the conduct or actions of directors of another company (for example a parent company) to be addressed.

Governments like UK as an example have held a view that holding company directors should be held to account if they conduct a sale (of a subsidiary) that harms the interests of the subsidiary's stakeholders (such as its employees or creditors), where that harm could have been reasonably foreseen at the time of the sale and intend to develop guidance on the steps that Directors should take when considering the sale of a subsidiary in the insolvency zone.[1]

Some believe that : A large subsidiary company within a group may have many employees and smaller businesses that may depend upon it for survival, and when such a company is in financial difficulty, any decision to sell it outside of formal insolvency proceedings should take into account the interests of its stakeholders this would include the impact of the withdrawal of the holding entity's financial support from the company when being sold and the ability of the purchasing party to provide such support in the future. And believe that penalties should be considered for directors who cause loss or harm include disqualification and personal liability.

Some others feel that the concern that shareholders will gamble with the creditors' money is the principal argument for imposing a duty on the board towards creditors when the company is in the vicinity of insolvency. This argument seems unpersuasive according to them. It is director and manager opportunism, rather than strategic behaviour by shareholders that is the real concern. Because secured creditors and other creditors are better able to protect themselves against that risk than are shareholders, there is no justification for imposing such a duty on the shareholders. We will have to wait and see how our law evolves through the Courts in India as instances of this kind unfold in the Insolvency courts.

[1](Ref Insolvency and Corporate Governance published by Department of Business, Energy and Industrial Strategy Government Response dated 26th Aug 2018)

HOMEBUYERS – A ROLLER COASTER JOURNEY

Mr. Sunil Gupta

Insolvency Professional

The journey of Homebuyers under Insolvency Bankruptcy Code, 2016 (IBC) is a roller coaster journey and seems that a bumpy road is still ahead. Under IBC , Financial Creditors and Operation Creditors can submit an application before adjudicating authority i.e. NCLT subject to fulfill of certain specified conditions. To move further, it is must to understand who are FC and OC because these two are the basic pillars of IBC.

Financial creditor is any person to whom a financial debt is owned and includes a person to whom such debt has been legally assigned or transferred to. Normally these are bank, financial institutions, and NBFC. In order to ascertain whether a person is a financial creditor, the debt owed to such a person must fall within the ambit a '*Financial Debt*' as under Section 5(8) of the IBC.

A financial debt is defined under Section 5(8) of the IBC to mean:

"a debt alongwith interest, if any, which is disbursed against the consideration for time value of money and includes-

a. Money borrowed against payment of interest;
b. Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;
c. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
d. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
e. Receivable sold or discounted other than any receivable sold on non-recourse basis;
f. Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;
g. Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

h. The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause"

Operational creditor is any person to whom operational debt is owned and includes a person to whom such debt has been legally assigned or transferred to.

In order to ascertain whether a person would fall within the definition of an operational creditor, the debt owed to such a person must fall within the definition of an operational debt as defined under Section 5(21) of the IBC.

An operational debt is defined under section 5(21) of the IBC to mean:

"a claim in respect of the provisions 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 Government, any State Government or any local authority".

Now question is whether Homebuyers are FC or OC-

After a lot of litigations at various stages, IBC was amended by Ordinance, 2018. It provided homebuyers the status of FC. This enabled the home buyers and other allottees (refers to buyers and long-term lessees under real estate projects) to invoke Section 7 of IBC (which allows financial creditor(s) (either individually or jointly) to file an application in NCLT for initiating corporate insolvency resolution process against a defaulting company) against defaulting promoters. Further, they have representation in the committee of creditors through an authorised representative (the authorised represent.

Various petitions (more than 150) were filed in Apex Court against said amendment. However, in the case of Pioneer Urban Land and Infrastructure Limited Vs. Union of India & Ors. [WP(C) No.43/2019 and other petitions], t**he Apex Court** dismissed all such petitions filed by builders/ developers and uphold the constitutional validity of status of allottees as FCs**. In its judgement, Apex Court held that**

the constitutional validity of the amendment will be decided on the background of the fact that the legislature must be given free play in the joints when it comes to economic legislation. For a clear understanding, the Apex Court then went ahead to examine the recommendations made by the Insolvency Committee Report wherein it was stated that the delay in completion of under-construction apartments has become a common phenomenon. Committee further agreed that amounts raised under home buyer contracts are a significant amount, which contributes to the financing of the construction of an asset in the future. Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised

from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. Thus, the Court observed that the legislative judgment in economic choices must be given a certain degree of deference by the courts. The deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code.The allottees/home buyers were included in the main provision, i.e. section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen."

However, this is not the end of journey. Now any single Homebuyers can submit an application as financial Creditor against the company.

Again, there is a twist, in the case of Flat Buyers Association Winter Hills-77, Gurgaon Vs. Umang Realtech Pvt. Ltd. through IRP & Ors. [CA(AT)(Ins) No. 926/2019], NCLAT held that CIRP against a real estate CD is project specific. It is limited to a project as per the plan approved by the competent authority and does not cover other projects which are separate at other places for which separate plans have been approved. The NCLAT also noted peculiar nature of real estate projects from the perspective of CIRP that: (a) FCs (Banks/ Financial Institutions/ NBFCs) would not like to take the flats in lieu of the money disbursed by them; (b) FCs (allottees) cannot take a haircut of flats, and (c) the allottees do not have expertise to assess 'viability' or 'feasibility' of a CD or commercial wisdom as other FCs. At the same time, no other allottees or creditors of other projects would have the right to put forward their claims before the resolution professional. The Appellate Authority used the term of "Reverse CIRP".

It allowed the promoters of the group to act as lenders and cooperate with the resolution professional to ensure that the project is completed in a timely manner. Project of the corporate debtor does not stop, but continues so that the allottees can bear the fruits of their investments and the resolution professional can maintain the company as a going concern. In this manner, the projects can be completed within a given timeframe, thereby protecting employment of a multitude of unorganised workers.

Appellate Authority relies the observation of Supreme Court in the case of "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. (2019 SCC OnLine SC 1478)" where Apex court observed

"90. In Swiss Ribbons (supra) this Court was at pains to point out, referring, inter alia, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts."

Therefore, the said judgement will have far-reaching impact in near future, when already, petitions is pending in Supreme Court against the latest amendment , where 100 homebuyers or 10 % of homebuyers , whichever is lower, can submit an application either singly of jointly against developer / builder.

IBC FACILITATOR

Mr. Babu L. Gurjar-
FCMA, IP, RV (SFA)

Few words of great leaders sometimes inspire the entire humanity. When our popular Prime Minister, Shri Narendra Modi calls himself as " Pradhan Sevak" in place of Pradhan Mantri, the positive message of activism penetrates down- wards in the society. It brings out a sense of equilibrium in rights and duties of each and every country man standing at the top or down levels of the democratic civil system.

Insolvency and Bankruptcy Code (IBC) 2016, is itself a statute with modern progressive thought of the present Government having time bound framework for each activity. The code is matching with global standards. Insolvency and Bankruptcy Board of India (IBBI) is the regulatory authority for IBC. Insolvency Professional Agencies (IPAs), Insolvency Professionals (IPs), Information Utility (IU) and Adjudicating Authorities are its important organs running together in cohesion to keep the wheel of IBC driving for benefit of all stake holders.

As per the spirit of law makers, IBBI, besides being a regulator, also bears the responsibility of a facilitator for smooth implementation and operation of the Code. It has completed the herculean task of establishment of required infrastructure including all the constituent organizations envisaged in the statute. It has already come out with comprehensive regulations for all the activities. It has successfully developed battalion of required professionals of more than 3300 Insolvency professionals and about 3600 Registered Valuers with global standards of examination and pre-registration eligibility criteria along-with superb training programs. Periodical seminars/ workshops/ webinars are being conducted as a part of continuing education program for the benefit of IBC professionals.

All other organs of IBC work in the supportive umbrella of IBBI. So far IBBI is performing the task of the facilitator to all its organs successfully since its inception and that is why IBC is yielding fruitful results even in the initial years of operation. It has proved as an effective tool for recovery of doubtful/ loss assets of the banks, financial institutions and other operational creditors. It is far more effective than any other recovery statute in the country till now.

Benefits of this unique law may be increased further in true spirit of the law makers by further focusing upon the facilitation work of IBBI. Presently, various departments and sections of IBBI are providing supportive services. With the continuous enhanced scope of the code, IBBI may consider to create a separate Facilitation Department for the purpose.

Though, all the constituent organs of the code are equally important but IPs are its soldiers deployed in the field. The performance of IPs reflects net output of the Code. This is the reason why higher standards of work performance and code of conduct have been specified for them. The IP is always required to remain as fit and proper person with highest levels of integrity. IBBI enforces strict discipline and compliance of various provisions of IBC in an un-biased manner. An IP however, faces the ground realities of tough terrains like a soldier and always needs the morale support of his General. Some amount of further facilitation of IBBI to IPs may reduce the difficulties to the IPs and avoid future litigation.

Because of initial years of operation of IBC the prescribed procedures continuously need evolution and refinement as per requirement based on past experiences. The IRPs/ RPs some time required to take decision instantly or with minimum time consumption failing which there is always a possibility of loss to stake holders i.e. Creditors/ Corporate Debtor. All the decisions of IPs have to be in consideration of full amount of integrity and un-biasedness as per provisions of IBC and law of the land.

But sometimes, because of non-clarity of provisions or where provisions relating to specific situation are not available and the particular decision might cause a major impact which might be challengeable in law, the IRP/ RP seeks the necessary orders from the Adjudicating Authority (AA). This creates extra work burden on the AA causing delays in the proceedings of CIRP/ liquidation. Getting orders from AA consumes considerable time till than the situation might further aggravate.

For handling such situations in time bound manner and smoothening the IBC proceedings, IBBI may employ experts of the related subject matters in the Facilitation department to provide probable solutions to needing IPs. In extra-ordinary situations, IPs may refer the ambiguous matters to the Facilitation department instead of consuming valuable time of AA. It may be strictly ensured that the references might be allowed only in extra ordinary situations for deserving matters to avoid misuse of the facility.

The Facilitation department may also develop area-wise data base to provide supportive information about availability and rates of various type of professionals/ staff to be appointed by RPs during CIRP/ liquidation process, service providers, infrastructure facilities etc. IBBI may also consider recognizing such service providers from where IPs may hire/ acquire services. Generally, IPs have to hire professionals, staff, security personnel and arrange for infrastructure facilities on urgent basis in the areas about which the IRPs/ RPs may not have adequate knowledge. Such an integrated data-base/ system of recognized service agencies will lead to a transparent situation and will avoid any disputes in future.

The Facilitation department may also compile the data of all the approved resolution plans, liquidation proceedings on the basis of category of assets from where the RPs/ liquidators may

obtain the useful data for comparison. Periodical category-wise data of fee payment to IRPS/ RPs/ Regd. Valuers/ other professional may also be made available for bringing uniformity, reasonableness and transparency in fee payment.

RPs generally face problems of raising Interim Finance during CIRP process for keeping the Corporate Debtor ongoing. Financers are hesitating to finance the companies undergoing insolvency proceedings because of worse credentials/ CIBIL reports of CDs. Whereas, as per provisions of IBC Interim Finance bears priority over claims of creditors and in most of the cases it is well secured as far as repayment is concerned. For this purpose the Govt. may either think to establish a separate fund entity under the aegis of IBBI or RBI may considerer to make necessary amendments in guidelines for making way for introducing new financing schemes by banks for Interim Finance during CIRP process. This will mitigate a lot of problems of RPs for raising Interim Finance.

The above suggestions are in line with the already ongoing drive of IBBI for smoothening of operations and further streamlining of procedures.

PERFORMANCE ANALYSIS OF BINANI CEMENTS LIMITED PRE, DURING AND POST CIRP

Dr. S K Gupta- MD – RVO ICMAI

CA Roustam Sanyal – Student, Graduate Insolvency Program

CA G S Sudhir – Student, Graduate Insolvency Program

The enactment of the Insolvency and Bankruptcy Code, 2016 has brought about a tectonic shift in the entire business rescue mechanism of the country. It has provided for the re-organization of businesses in a time-bound and effective manner while simultaneously protecting the creditor's rights, along with balancing the interests of all the stakeholders. Under the previous regimes, the creditors were left at the mercy of the debtors. However, post the implementation of IBC, the credit culture of the borrowers has seen a paradigm transformation.

The enactment of the IBC is often hailed as the biggest economic reform post the Liberalization, Privatization and Globalization reforms of 1991. This is because it has provided companies with a smooth exit option. Companies are now able to resolve their stress in a cost effective manner and this has also led to value maximization of the business. At the center of the entire rescue mechanism under IBC, is the Resolution Professional (RP). The role played by an RP is pivotal to the entire process and a lot of the success depends on the skills, competence and commitment of the RP. There have some great success stories under the new regime and this article is a step to highlight one such company.

This article is a case study on the resolution of Binani Cement Limited. It provides a glimpse of the operational and financial performance of Binani Cement in the 'pre', 'during' and 'post-CIRP' phases. The case study delves into the details of the business operations of the company and the reasons that led to stress. It also tries to explore the future prospects of the company.

Synopsis

The Corporate Insolvency Resolution Process (CIRP) of Binani Cement commenced on 25th July 2017, and the resolution plan was approved on 19th November 2018. The financial health of Binani Cement Limited deteriorated post the financial crisis, mainly due to slowdown in construction sector, high cost of operations, lower capacity utilization, overseas expansion, penalties imposed for environmental destruction and external business environment in the infrastructure industry.

During the Corporate Insolvency Resolution Process, a lot of companies showed interest in Binani Cement in the first round of bidding in late 2017. CRH, Lafarge Holcim, Heidelberg

Cement, India Cement, Orient Cement, Ramco Cement, Shree Cement, UltraTech Cement and Piramal Group were all linked to the auction. Eventually UltraTech Cement, JSW Cement, Ramco Cement, Heidelberg Cement India, Dalmia Bharat and a pair of Indian investors submitted bids and JSW Cement emerged as the winner with a bid of US$ 919 million. However, the emergence of an additional liability of around US$250m scuppered the auction when it turned out that Binani Cement had offered a corporate guarantee for the acquisition of a fibreglass asset in Europe known as 3B in 2012 by Binani Industries. By February 2018 the next auction was in progress and this time Dalmia Bharat Cement and UltraTech Cement led the race. Dalmia Bharat won the second auction with a bid of around US$1.03bn made in a consortium with Bain Capital's India Resurgent Fund and Piramal Enterprises.

At this point, the situation might have conceivably slowed down. Instead, UltraTech Cement kept on fighting and queried the entire bidding process. It then made a direct offer of US$1.11bn to Binani Cement in the form of a so-called 'comfort letter' that Binani Industries used to stop the insolvency process. At the same time it received approval from the Competition Commission of India in its bid for Binani Cement, the previous absence of which was one of the reasons its bid against Dalmia Bharat was rejected. The 44-page NCLAT order has shed a different light on the crux of the issue. According to the findings of the adjudicating authority, the CoC had, in fact, ignored the revised bid by UltraTech submitted much before the approval of Dalmia's plan, thereby failing to realize the intended purpose of resolution — one of maximization of value for all stakeholders. The NCLAT also found that the COC had failed to safeguard the interests of all stakeholders even while approving the resolution plan of Dalmia Bharat. By noting that a lesser percentage of claim was given to a certain set of similar creditors, the NCLAT found Dalmia Bharat's resolution plan 'discriminatory' against some operational and financial creditors.

The company was finally taken over by Aditya Birla Group owned Ultratech Cement and the new buyer has since renamed 'Binani Cement Limited' as 'Ultratech Nathdwara Cement Limited' and is running the operations successfully. Through its offer of Rs 7,950 crore for the asset, Ultratech has gotten the ownership of a 6.25 MT plant in the state of Rajasthan that comprises an integrated cement unit with capacity of 4.85 MT and a 1.4 MT split grinding unit. This paper provides an analysis of the operational and financial performance of the company in the pre, during and post CIRP phases.

Company Profile

Binani Cements was one amongst the large number of subsidiaries and step-down subsidiaries under of the umbrella of Binani Industries Limited. The company was incorporated on 15th January 1996 as Dynasty Dealer Private Limited. The name of the company was changed to

Binani Cement Private Limited and a fresh certificate of incorporation was issued to it by the ROC on 23rd April 1998. Subsequently the company was converted into a public company and the name was changed to 'Binani Cement Limited' vide a fresh certificate of incorporation dated 06th October 1998. What started off with a small capacity of 1.65 MTPA plant at Rajasthan, went on to become a global cement- manufacturing company, with an integrated plant in India, a clinker unit in China and a grinding unit in Dubai. Binani Cement was amongst the most popular cement brands in the western and northern markets of India known for its quality and consistency in international markets as well.

Company's Operations and Distribution

Binani Cement set up its first manufacturing plant in Binanigram, Rajasthan with a capacity of 1.65 million tons per annum (MPTA), in the year 1997. Over the years the company increased the capacity to 6.25 MTPA. After its success in the India market, Binani Cement expanded its global reach by setting up an integrated plant in China (Shandong Binani Rongan Cement Co. Ltd) with a capacity of 3 MTPA and a grinding unit in Dubai (Binani Cement Factory LLC) with a capacity of 2 MTPA. The aggregate global manufacturing capacity of the company stood at 11.25 MTPA. It also has limestone reserves of approximately 208 million tons which is capable of serving the needs of the company for another 30 years. Binani Cement is amongst the most popular cement brands in the western and northern markets of India and has a well-established sales network in UAE, UK, Sudan, South Africa, Tanzania, and Namibia.

Product range of the company

Ordinary Portland Cement (OPC)- This is a general-purpose, high-strength cement that is used for a wide range of applications covering ordinary, standard, high-strength concrete, plastering work and masonry, and precast concrete products. It combines with water, sand and stone to form a durable and strong construction concrete, capable of bearing great loads and is therefore widely used in civil engineering construction work. Binani Cements produced OPC cements of grade 43 and 53.

Pozzolona Portland Cement (PPC)- Portland Pozzolana cement is ordinary Portland cement intimately blended or interground with pozzolanic materials such as fly ash, calcined clay, rice husk ash etc. Portland cement clinker is either interground or intimately blended with specified quantities of gypsum and pozzolanic materials to produce Portland Pozzolana cement. The concrete produced by using Portland Pozzolana cement has high ultimate strength, is more durable and has a high degree of cohesion and workability in concrete. As a result, it has greater resistance to the attack of aggressive waters. PPC is the preferred choice of cement for building

hydraulic structures, mass concreting works, marine structures, masonry mortars and plastering.

Ground granulated blast-furnace slag (GGBFS)- Ground-granulated blast-furnace slag is obtained by quenching molten iron slag (a by-product of iron and steel-making) from a blast furnace in water or steam, to produce a glassy, granular product that is then dried and ground into a fine powder. It is used to make durable concrete structures in combination with ordinary Portland cement. It is known for its durability, extending the lifespan of buildings from fifty years to a hundred years. Binani Cements produced GGBFS of grade 120.

Reasons for financial stress in BCL

Binani was a victim of an attempt to expand during the construction slowdown. The company's goal was to expand in China at just the time when Indian construction sector slowed and became sluggish and financial markets crashed. The Chinese authorities prohibited further cement capacity expansion, preferring rather an industry consolidation and the decommissioning of inefficient wet-process plants. Another project to expand the company's production base with a new plant in Mauritius was scrapped in October 2012 when Binani Cement could not secure enough land for a 6.5 hectare site for the factory. Between 2013 and 2015, Binani Industries had been forced to sell a 40% stake in Binani Cement to raise capital. However, India's construction market slowdown was the final blow to Binani Cement. In February 2015, company sought to sell its 1.2 MTPA 'Neem Ka Thana' grinding unit in Rajasthan to reduce its debt; the deal didn't go through. In August 2016 Binani Cement was among 11 companies to have penalties imposed after the Competition Commission of India market price fixing allegations were investigated. The fine imposed was equivalent to 50 per cent of the company's net profits in the years 2009-2011. Further, majority of sales made to related parties were unrealised leading to shortage of funds and company's debt increased from Rs 103.98 crores in the year 2013 to whopping Rs 327.18 crores in financial year 2017.
Apart from the above factors, construction slow-down had created pressure on prices of cement due to over-capacity and lower demand from the commercial real-estate segment. High input costs also impacted profitability negatively.

Failure of Corrective Action Plan

The restructuring of the existing term loans was necessitated on account of lacklustre demand, decline in realizations, increase in costs and other extraneous circumstances including the impact of Rajasthan VAT. The consortium of banks had agreed to restructure the account under

Joint Lenders Forum (JLF) Mechanism. While a Corrective Action Plan (CAP) was finalized by JLF and Master Restructuring Agreement was signed, some of the consortium lenders had not sanctioned the facilities as per CAP and other lenders who had sanctioned facilities as per CAP did not disburse or partially disbursed the facilities as per CAP. As a result, the CAP could not be implemented in full within the time frame prescribed by Reserve Bank of India. Due to non-disbursement of facilities and partial implementation of CAP, the company could not honour its debt obligation in time resulting in the CAP being "declared as failed" by the lenders, and the company being taken to NCLT under the Code.

Performance Analysis

The performance of Binani Cements Limited, pre, during and post CIRP can be adjudged by measuring the impact of insolvency resolution on some of the key performance indicators of the company. The table below shows the changes in some of the important performance indicators such as sales, profitability, inventory management, cash flows, etc, as the company passed through the three different phases of insolvency, CIRP and successful resolution.

(₹ in lakhs)

Performance Indicators	2016-17	2017-18	2018-19	2019-2020
Net Profit Ratio (%)	-17.58%	-82.16%	-35.54%	4%
EBITDA Margin (%)	7%	-36%	10%	36%
Interest Coverage ratio (Times)	0.06	-1.39	0.11	1.13
Debt to Equity Ratio	30.82	18.36	1.19	1.21
Debtors days	109.82	109.33	35.67	0.66
Return on Assets	-6%	-38%	-10%	1%
Return on Capital Employed	1%	21%	4%	28%
Net Cash Flow from Operating activities (in lakhs)	6,760	12,890	-52,506	42,011
Basic EPS	-19.47	-205.44	-12.48	0.15

Source: Annual Reports for FY 2016-17, FY 2017-18, FY 2018-19, FY 2019-20

Pre and During CIRP

Before the commencement of CIRP, the plant operations were already halted since 23rd July 2017 due to shortage of working capital and non-supply of coal. However, the Resolution Professional resumed the plant operations from 11th August 2017. Further, company's net operating cash flows reflected an increase of 90% during the CIRP period as a result of better management control and operational efficiency which arrested progressive decline in key performance indicators witnessed in the period prior to CIRP.

During and Post CIRP

At the time when the resolution professional assumed office, the company was non-operational. The resolution professional after discussions with management and creditors started operations at the company's factory- which is in tandem with the objective of the code i.e., to keep the company as a going concern and restoring the health of the company. The results of the financial year(s) 2018-19 and 2019-20 show a positive trend in most of the performance and operational ratios. This is testimony to the fact that the resolution professional and the new management were able to successfully steer the company, towards the right direction, within a short span.

The net loss of the company gradually decreased during 2018-19 and finally turned positive 4% in the year 2019-20. The company's performance in terms of financial ratios also improved in the post CIRP period. The interest coverage ratio which measures how many times a company can cover its interest payments with its available earnings, improved in year 2018-19 primarily on account of higher operating profits and reduction in finance cost on account of reduction in external borrowings which has also resulted in a favourable debt equity ratio. The debtor days measures how quickly cash is being collected from debtors. It shows the time taken to convert sales to cash. The company's debtor days improved drastically from 109 days during CIRP to a mere 35 days post CIRP, which shows substantial reduction in time taken to convert sales into cash. This helped in better working capital availability to the company and also a significant improvement in company's net operating cashflows.

The Return on capital employed measures profits earned by the company by using its capital. The company had an eroded capital employed ratio during CIRP period which improved to 4% post CIRP and in year 2019-2020 it increased significantly to 28% which shows efficient deployment of funds into high profit generating projects. Even the Return on Assets, that was negative for consecutive years, finally turned positive in the FY 2019-20.The Net Cash Flow

outflow from operating activities was approximately Rs. 525 crores in FY 2018-19. This was on account of the amount paid off to the operational creditors after the of the resolution plan. Despite the huge payment made, the cash balance remained positive, the next year saw a drastic improvement in operational cash flows, which stood at Rs. 420 crores.

Future outlook

The Indian Construction Industry witnessed a contraction of 50.3%[1] in Q2 of year 2020, despite that the industry is expected to post a sharp rebound and grow by 11.6% in 2021 owing to lower base and pent-up demand. In August 2020, the Prime Minister announced that INR 111 trillion (US$1.5 trillion) will be invested on 7,000 projects across various sectors between FY 2020-25, which will enable the faster revival of the economy and aid in boosting employment. The industry's growth will also be supported by the government's focus on boosting the local manufacturing sector to become self-reliant and reduce dependency on imports. In addition, the government targets to construct 10 million affordable houses by 2022 and increase the share of renewable energy in total installed power capacity to 60% by 2030. This will support the industry's growth over the medium and long term. As several major trends play out at the national and global levels, including infrastructure upgrades and smart city initiatives, firms have opportunities to play central roles.

With the acquisition of Binani Cement, UltraTech has strengthened its already existing position of the largest cement manufacturer in India. Ultratech has been keen on expanding its market presence since the year 2017 when it went on an acquisition spree by acquiring six integrated plants of Jaypee Associates and added capacity of 21.2MT. Further, it also acquired the cement business of Century Textiles and Industries. The acquisition of Binani Cements provides UltraTech access to large reserves of high-quality limestone. It also consolidated the company's leadership in the fast-growing Northern and Western markets in the country. Recently in July, 2020 UltraTech Cement announced its plan to divest its entire 92.5 per cent stake in China's Shandong Binani Rongan Cement Company. It is part of UltraTech's strategy to sell-off its non-core assets and use the proceeds to deleverage the balance sheet.

Ultratech looks to sell the associated global assets it inherited with the recent acquisition of Binani Cement in an insolvency-driven process. The global assets that UltraTech plans to sell include the Binani 3B - the Fibreglass Company, with plants in Europe and Goa; a three-million tonne per annum (MTPA) joint venture cement plant in China; and a 2.5 MTPA grinding unit in

the UAE. Binani Cement owned a 49 per cent in the UAE venture. As per market estimates, if UltraTech manages to sell all the three assets, it will recover close to half of the ₹7,900 crore paid for the acquisition of Binani Cement.

Conclusion

The Insolvency and Bankruptcy Code provides for a time bound process within which a stressed company has to be resolved. This ensures that the value of the assets is maximised and that the losses of the creditors are reduced. Most of the times businesses fail because of the poor decisions of its management and not because of the viability of its operations. The success of a resolution depends on multiple factors. The role played by an RP is one of the most important ones. The underlying asset base and the future prospects are also factors that determine the value that prospective resolution applicants will be willing to pay for a stressed company. Binani Cement is a prime example of a company that had a strong asset base but was facing financial and operational stress. Under the umbrella of Ultratech Cement, the company has a huge scope of improving its operational efficiency. As per recent media reports, UltraTech is planning to ramp-up the production capacity of the UltraTech Nathdwara Plant.

During the CIRP, a total claim of Rs. 7202.36 crores were admitted by the Resolution Professional, out of which Rs. 6469.36cr belonged to the financial creditors and Rs. 733cr belonged to the operational creditors. Of this, the financial creditors were able to realize 100% of their claims while the operational creditors were able to realize an amount of Rs.633.64cr, which is approximately 86.44% of their admitted claims. This makes the takeover of Binani Cement by the Aditya Birla Group one of the most successful resolutions under IBC. However, it remains to be seen what the growth trajectory of the company will be in the near future.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

✓ **Panoramic Universal v. Sanitech Engineers & Consultants (P.) Ltd. -[2020] 114 taxmann.com 547 (NCL-AT)**

Where operational creditor accepted that terms of settlement had been reached between parties before constitution of CoC, order initiating CIRP against corporate debtor under section 9 was to be set aside.

CIRP was initiated against the corporate debtor on application filed by the operational creditor under section 9. The appellant was ready to settle matter with the operational creditor and CoC had not been yet constituted. The operational creditor accepted that terms of settlement had been reached between parties.

Held that in view of terms of agreement as reached between parties, CIRP order passed by the Adjudicating Authority was to be set aside and application under section 9 was to be dismissed.

Case Review : Sanitech Engineers & Consultants (P.) Ltd. v. Sri Vatsa Hotels (P.) Ltd. [2020] 114 taxmann.com 546 (NCLT - Hyd.), Reversed.

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

II. SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

✓ **Neeraj Jain v. Cloudwalker Streaming Technologies (P.) Ltd. - [2020] 114 taxmann.com 589 (NCL-AT)**

I. If demand notice is issued in Form 3, of IB (Application to Adjudicating Authority) Rules, 2016, copy of invoice is not mandatory provided that documents to prove existence of operational debt and amount in default is attached with application.

II. *Where operational creditor placed few e-mails to allege that corporate debtor sent projected future demand as a result of which it acquired more goods but same was not taken by corporate*

debtor, in absence of any copy of invoice or copy of bank statement, no operational debt was proved.

I. Held that section 8(1) does not provide the operational creditor with discretion to send demand notice either in Form 3 or in Form 4 of IB [Application to Adjudicating Authority] Rules, 2016, as per its convenience; applicability of Form 3 or Form 4 depends on whether invoices were generated during course of transaction or not; copy of invoice is not mandatory if demand notice is issued in Form 3 provided that documents to prove existence of operational debt and amount in default is attached with the application.

II. The operational creditor and corporate debtor entered into supply agreement under which operational creditor had been importing and supplying LED TVs to corporate debtor from time-to-time. The operational creditor alleged that it suffered loss on account of the corporate debtor not taking delivery of 21,808 LED TVs which were imported and shipped based on assurance given by the corporate debtor. Initially the operational creditor, issued a notice against the corporate debtor for making payment, failing which the operational creditor threatened to refer dispute to the Arbitral Tribunal. However, said notice was withdrawn on pretext that the corporate debtor would take appropriate steps for payment. Subsequently, demand notice under section 8(1) was issued, however, the operational creditor failed to submit copy of invoices; or documents under which debt had become due nor did it file copy of bank statement to prove due. The operational creditor solely placed reliance on few e-mails to allege that it had suffered losses on account of projections for demand provided by the corporate debtor.
Held that figures provided by the corporate debtor were only projections that did not constitute binding purchase order under supply agreement and further there was a pre-existing dispute; thus, entire claim of the corporate debtor was an uncrystallised claim which could not be adjudicated by the Adjudicating Authority exercising summary jurisdiction; thus, order of NCLT admitting petition for corporate insolvency resolution deserved to be set aside.

Case Review : Cloudwalker Streaming Technologies (P.) Ltd. v. Neeraj Jain, Director of Flipkart India (P.) Ltd. [2019] 111 taxmann.com 83 (NCLT - Bang.), Set aside.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

- ✓ **Rajendra K. Bhutta v. Maharashtra Housing & Area Development Authority - [2020] 114 taxmann.com 655 /[2020] 160 SCL 95 (SC)**

Section 14(1)(d) will apply to statutorily freeze 'occupation' that may have been handed over under a Joint Development Agreement.

Held that section 14(1)(d), when it speaks about recovery of property 'occupied', does not refer to rights or interests created in property but only actual physical occupation of property. Therefore, section 14(1)(d) will apply to statutorily freeze 'occupation' that may have been handed over under a Joint Development Agreement.

Case Review : Rajendra K. Bhuta v. Maharashtra Housing & Area Development Authority [2019] 101 taxmann.com 413/151 SCL 613 (NCL-AT), Set aside.

I. SECTION 43 - CORPORATE LIQUIDATION PROCESS - PREFERENTIAL TRANSACTIONS AND RELEVANT TIME

II. SECTION 5(7) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL CREDITOR

✓ **Anuj Jain v. Axis Bank Ltd. - [2020] 114 taxmann.com 656 (SC)**

I. Where corporate debtor (JIL) mortgaged its properties to secure loan provided to its holding company JAL, impugned transactions were transfers for benefit of JAL, who was related party of JIL and were given in preference in terms of section 43(2) and, therefore, security interest created by JIL in favour of lender of JAL was to be released and discharged.

II. Where lender bank extended various credit facilities in favour of holding company (JAL) of corporate debtor (JIL) and corporate debtor created security in favour of lender bank by mortgaging its land, lender bank on strength of mortgages, might be secured creditors, but it could not be said that corporate debtor owed them any financial debt and, therefore, such lender of JAL did not fall in category of financial creditors of corporate debtor.

I. The applicant- lender bank extended various credit facilities in favour of JAL, which was holding company of the corporate debtor JIL. In respect of such credit facilities, the corporate debtor JIL created security in favour of the applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL. Such transactions took place around time when accounts of JIL were declared NPA . For creation of mortgage to secure debt of JAL, The corporate debtor did not take 'No objections' of its own lenders. Finding these transactions preferential, undervalued and fraudulent, the NCLT held

that security interest created by JIL in favour of the lender of JAL was to be released and discharged. However, said order of the NCLT was set aside by the impugned order of NCLAT.

Held that impugned transactions had been of transfers for benefit of JAL, who was a related party of the corporate debtor JIL and was its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and impugned transactions have effect of putting JAL in a beneficial position than it would have been in event of distribution of assets being made in accordance with section 53 and, thus, the corporate debtor JIL has given a preference in manner laid down in sub-section (2) of section 43. Since impugned transactions had not been in ordinary course of business or financial affair of JIL, impugned transactions were not of excepted transfers in terms of sub-section (3) of section 43. Thus, transactions in question were hit by section 43 and the NCLT having rightly held so, had been justified in issuing necessary directions in terms of section 44 in relation to transactions concerning in question and NCLAT had not been right in interfering with well-considered and justified order passed by the NCLT.

II. The applicant- bank extended various credit facilities in favour of JAL, which was holding company of the corporate debtor JIL. In respect of such credit facilities, the corporate debtor JIL created security in favour of the applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL.

Held that debts in question were in form of third party security; said to have been given by the corporate debtor JIL so as to secure loans/advances/facilities obtained by JAL from the respondent-lenders; such a 'debt' was not and could not be a 'financial debt' within meaning of section 5(8) and, hence, the respondent-lenders, mortgagees, were not 'financial creditors' of the corporate debtor JIL. Thus, lender of JAL on strength of mortgages in question, might fall in category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it could not be said that the corporate debtor owed them any 'financial debt' within meaning of section 5(8) and, hence, such lenders of JAL did not fall in category of 'financial creditors' of corporate debtor JIL.

Case Review : IDBI Bank Ltd. v. Jaypee Infratech Ltd . [2018] 93 taxmann.com 308 (NCLT - All.) and Central Bank of India v. Anuj Jain [2018] 96 taxmann.com 150 (NCLT - All.), Affirmed; Axis Bank Ltd. v. Anuj Jain [2019] 108 taxmann.com 13 /[2019] 156 SCL 47 (NCL-AT), Set aside.

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

- ✓ **State Bank of India v. Maithan Alloys Ltd. - [2020] 114 taxmann.com 738 (NCL-AT)**

Where there was no provision in terms and conditions of auction to withdraw from auction process once it was agreed by successful bidder 'M', NCLT erred in permitting 'M' to withdraw from process of liquidation and directing liquidator to refund sum deposited by 'M' and considering proposal of respondents who had not participated in auction but had approached NCLT with higher offer.

The appellant was financial creditor of the corporate debtor which was under liquidation. During liquidation process, respondent- 'M' was declared successful bidder and deposited requisite amount. Respondent Nos. 2 to 4 who had not even participated in public auction filed application before the NCLT and the NCLT by impugned order permitted 'M' to withdraw from the liquidation process and accepted higher bid of respondents directing the liquidator to refund sum deposited by 'M'.

Held that respondent Nos. 2 to 4 did not participate in e-auction and filed an application as objectors and offered a higher price in order to create a lust for worth maximization and thereby vitiated whole process. There was no provision in terms and condition of auction to withdraw from auction process once it was agreed by the successful bidder 'M'. Section 35(1)(f) empowers the liquidator to sell property of the corporate debtor in liquidation by public auction and, hence, there was no need for the Adjudicating Authority to direct the liquidator for considering proposal of respondent Nos. 2 to 4 who had approached the Adjudicating Authority after due date of finalization of auction. Therefore, impugned orders of the NCLT were to be set aside with direction to 'M' to complete sale transaction by paying sale consideration.

Case Review : State Bank of India v. Impex Metal and Ferro Alloys Ltd. [2020] 114 taxmann.com 735 (NCLT - Kolkata); State Bank of India v. Impex Metal and Ferro Alloys Ltd. [2020] 114 taxmann.com 736 (NCLT - Kolkata) and State Bank of India v. Impex Metal and Ferro Alloys Ltd. [2020] 114 taxmann.com 737 (NCLT - Kolkata), Set aside.

SECTION 5(7) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL CREDITOR

✓ ***Anuj jain v. Axis Bank Ltd. Etc. - [2020] 115 taxmann.com 1 (SC)***

SC stays operation of NCLAT's order treating lender banks of holding real estate company, JAL to be financial creditors of subsidiary corporate debtor JIL

Promoters of the corporate debtor (JIL) created mortgage of immovable property owned by it to secure debts of related party, i.e., JAL. Lender-banks of JAL claimed to be financial creditor(s) of JIL. NCLT had rejected that claim. However, NCLAT by impugned judgment allowed appeal(s) filed by stated lender-bank(s), who were claiming to be financial creditor(s) of JIL.

Held that lender-banks of JAL could not be regarded as financial creditor(s) of JIL and, therefore, operation of the impugned judgment of the NCLAT was to be stayed.

Case Review **:** Axis Bank Ltd. v. Anuj Jain [2019] 108 taxmann.com 13/156 SCL 47 (NCL - AT), Stayed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

✓ **Palladian Hotels (P.) Ltd. v. Hotel Horizon (P.) Ltd. - [2020] 115 taxmann.com 10 (Bombay)**

Where bank guarantee furnished by corporate debtor in favour of applicant was an independent transaction and was issued pursuant to a consent order passed by Court and was not a step in execution of any arbitral award, and thus, would not fall under section 14(1); it could have been rightly en-cashed.

The applicant and the respondent had entered into a Term Sheet, whereby the applicant had deposited a sum of Rs. 38.53 lakhs with the respondent as and by way of security deposit. Said Term Sheet contemplated a final leave and license agreement to be executed between parties within four months, failing which Term Sheet shall stand canceled and security deposit would have to be refunded to applicant. No leave and license agreement was however, finalized, hence, the applicant filed a winding up petition against the respondent in view of the respondent

having failed to return security deposit with interest to the applicant. The court passed an order in said company petition by consent of parties. Dispute between parties was referred to arbitration. The respondent undertook to furnish a bank guarantee of a nationalized bank in name of Prothonotary and Senior Master of instant Court for a sum of Rs. 38.53 lakhs. The Arbitrator made an award allowing claims made by the applicant and rejected counter claim filed by the respondent. The Arbitrator also granted liberty to the applicant to apply to instant Court for en-cashment of bank guarantee furnished by the respondent. However, it was found that during pendency of arbitration proceedings, the applicant had filed a company petition under section 7 against the respondent before the NCLT in respect of default and the NCLT had by an order admitted said company petition and passed an order under section 14 with effect from date of said order by prohibiting institution of any suit before any Court of law, transferring/encumbering any assets of debtor etc. The applicant sought directions from the High Court to direct Prothonotary and Senior Master of Court to encash bank guarantee furnished by the respondent/corporate debtor.

Held that since bank guarantee furnished by the respondent/corporate debtor in favour of the applicant was an independent transaction and was issued pursuant to a consent order passed by the Court prior to imposition of moratorium and was not a step in execution of any arbitral award, it would not fall under section 14(1); it could have been rightly en-cashed by the Prothonotary and Senior Master of Court.

SECTION 52 - CORPORATE LIQUIDATION PROCESS - SECURED CREDITOR IN

- ✓ **State Bank of India v. Anuj Bajpai (Liquidator) - [2020] 115 taxmann.com 15 /[2020] 160 SCL 44 (NCL-AT)**

Where it comes to notice of Liquidator that a secured creditor intends to sale assets, to persons who are ineligible in terms of section 29A, it is always open to reject application under section 52(1)(b), read with section 52(2) and (3).

Held that in view of section 52(4), secured creditor is entitled to enforce, realise, settle compromise or deal with secured assets in accordance with such law as applicable to security interest being realised and apply proceeds to recover debts due to it. Even if section 52(4) is silent relating to sale of secured assets to one or other persons, explanation below section 35(l)(f) makes it clear that assets cannot be sold to persons who are ineligible under section 29A and said provision is not only applicable to the 'Liquidator' but also to 'secured creditor', who opt out of section 53 to realise claim in terms of section 52(1)(b) read with section 52(4).

Thus, if it comes to notice of the Liquidator that a secured creditor intends to sale assets, to persons who are ineligible in terms of section 29A, it is always open to reject application under section 52(1)(b), read with section 52(2) and (3).

Case Review : Anuj Bajpai v. State Bank of India [2019] 104 taxmann.com 408/153 SCL 544 (NCLT - Mum.), Affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- ✓ **Piyush Periwal v. Stressed Assets Stabilization Fund (SASF) - [2020] 115 taxmann.com 18 (NCL-AT)**

Where corporate debtor committed default in repayment and it filed a reference before Board for Industrial and Financial Reconstruction (BIFR) and BIFR proceedings terminated on 1-12-2016, cause of action to file application under section 7 accrued to financial creditor from 1-12-2016 and thus, section 7 application filed on 12-3-2019 as well within period of three years provided under Limitation Act

IDBI bank granted loan to principal borrower for which corporate debtor stood as guarantor - Principal borrower committed default in repayment, therefore, IDBI bank recalled loan facility as well as invoked corporate guarantee - Subsequently, IDBI transferred its debt to appellant 'SASF' - SASF filed instant application to initiate CIRP against corporate debtor - Corporate debtor raised a dispute that said application was barred by limitation - It was noted that corporate debtor had made a reference before Board for Industrial and Financial Reconstruction (BIFR) and BIFR proceedings were terminated on 1-12-2016 when SICA was repealed and therefore, cause of action to file application under section 7 accrued to SASF from 1-12-2016 - Whether thus, instant section 7 application being filed on 12-3-2019 was well within period of three years provided under Limitation Act and thus, same was to be admitted.

Case Review : Stressed Assets Stabilization Fund (SASF) v. National Plywood Industries Ltd. (NPIL) [2020] 115 taxmann.com 17 (NCLT - Guwahati), Affirmed.

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

✓ **Anil Duggal v. Roofs & Ceilings P. Ltd. - [2020] 115 taxmann.com 118/[2020] 160 SCL 136 (NCL-AT)**

Where corporate debtor admitted that he had defaulted in payment of outstanding amount due to cash crunch and was willing to pay same, CIRP order was rightly admitted against corporate debtor.

The operational creditor supplied material for roofing to the corporate debtor and raised invoices. The corporate debtor made only part payment. A demand notice was issued by the operational creditor. The corporate debtor despite services of demand notice neither submitted reply nor made any payment of said outstanding amount. It was noted that there was sufficient evidence on record to prove amount due and payable against the corporate debtor.

Held that since the corporate debtor admitted that he had defaulted in payment of outstanding amount due to cash crunch and was willing to pay the same, CIRP was rightly admitted against the corporate debtor.

Case Review : Roofs and Ceilings v. Dugal Associates [2020] 115 taxmann.com 117 (NCLT - New Delhi), Affirmed.

SECTION 11 - CORPORATE INSOLVENCY RESOLUTION PROCESS - PERSONS NOT ENTITLED TO MAKE APPLICATION

✓ **Abhay N. Manudhane v. Gupta Coal India P. Ltd. - [2020] 115 taxmann.com 190 (NCL-AT)**

Corporate debtor in respect of whom a liquidation order had been made was not entitled to make application to initiate corporate insolvency resolution process under section 7 or 9 against its debtors and other companies.

Held that corporate debtor, in respect of whom a liquidation order had been made, was not entitled to make application to initiate corporate insolvency resolution process under section 7 or 9 against its debtors and other companies.

Case Review : Abhay N Manudhane v. Gupta Coal India (P.) Ltd. [2020] 115 taxmann.com 180 (NCLT - Mum.), Affirmed.

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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.