FEBRUARY'2021

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 strike of February, the welcome for budget becomes evident for every individual.

The Budget for the year 2021-22 was a much awaited one, which wished to witness the way forward for the most unprecedented event of a lockdown for almost three quarters and hitting and grounding the GDP of the country drastically like never before.

The Union Budget was presented on 1st of February 2021 and the theme of the Union Budget 2021-22 was to extend the goal of "Atmanirbhar Bharat" by emphasising thrust on self-reliance. The prerogative was clearly spelt with India's ability to become a global manufacturing hub across all sectors.

The Union Budget 2021-22 focusses majorly in six sectors namely Health and well-being, Physical and capital infrastructure, Inclusive development for Aspirational India, Re-invigorating human capital, Innovation and R&D and Minimum government and maximum governance.

The Ministry of Finance highlighted the importance of 'Atmanirbhar Bharat' to ensure that this post pandemic times be effective enough for India to ideally position itself and capitalize on the geopolitical and economic shifts.

The harnessing of information technology for good governance and administration, start-ups, MSMEs and the education system has been commendable. The convenience of NCLT framework being proposed to be strengthened by implementing an e-Courts system, and alternative methods of debt resolution. Additionally, a special framework for MSMEs shall also been introduced. These measures will ensure faster resolution of cases.

The Faceless Income Tax Appellate Tribunals is another step ahead. Faceless assessment for income tax has already been implemented. The next step is to have a faceless appellate centre. Electronic communications have been adopted for general communications and would be considered official in the coming days. Video conferencing will be available for personal hearings. The launch of data analytics, artificial intelligence, machine learning driven MCA21 Version 3.0 will be seen in this coming Financial year. This Version 3.0 will have some additional modules for e-scrutiny, e-Adjudication, e-Consultation and Compliance Management making the entire process user friendly and convenient. Another added feature to it would be that now the fillings, hearings and compliances would be more timeline based and punctual.

With the new scopes and opening the dawn of the newer India is awaited. Let us together apace ourselves for this newer India.

Regards,

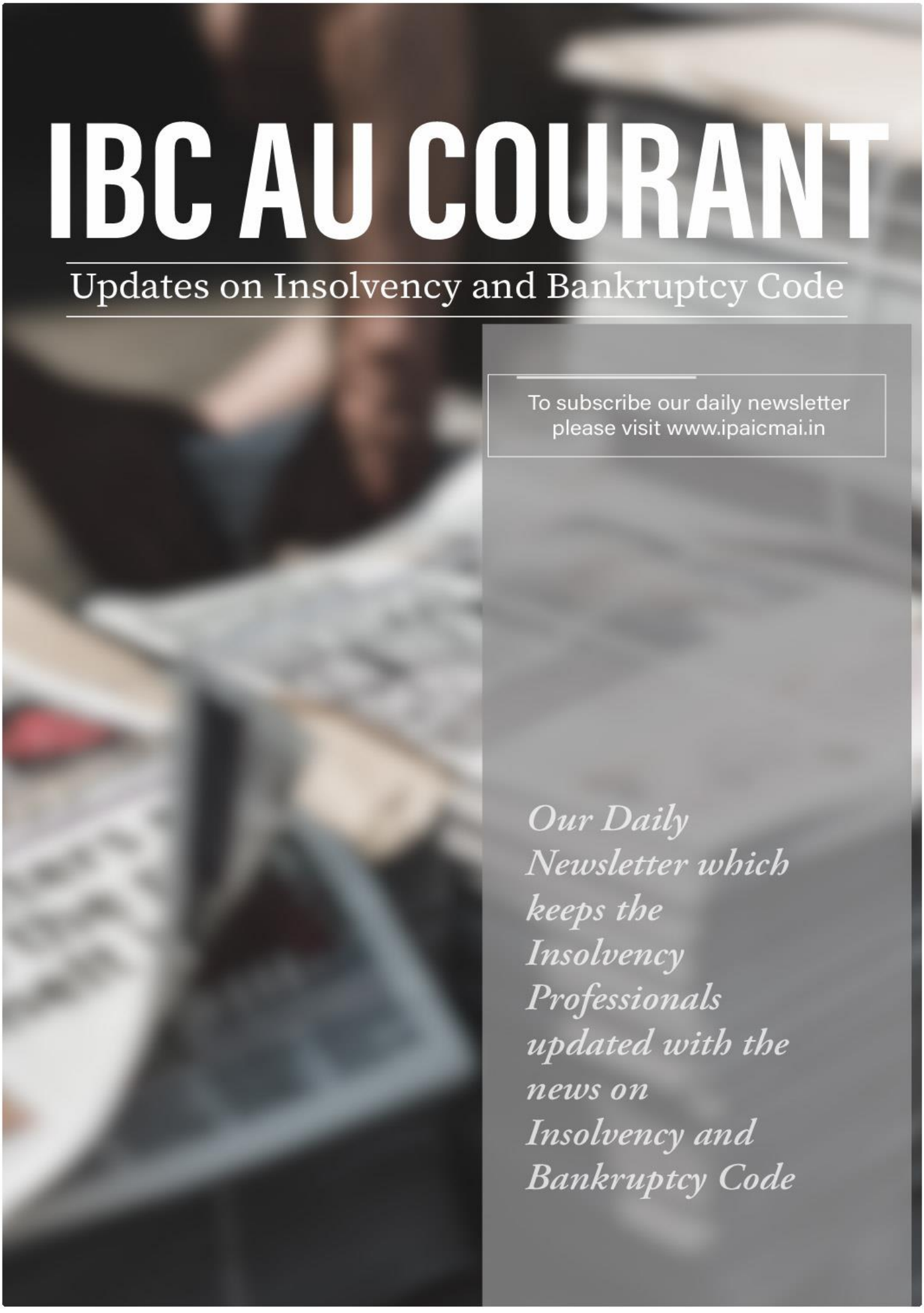
Susanta Kumar Sahu

Professional Development Intiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

FEBURARY'21	
Dates	**Events**
12th - 14th Feb'21	Master Class on COC
15th Feb '21	Workshop on Challenges faced by IP's During Liquidation Process
19th -21st Feb'21	Mater Class on Pre-Pack Insolvency
27th Feb'21	Workshop on Minerals (other than atomic and Hydrocarbons Energy Minerals) Concession (Amendment) Rules, 2021
06th – 07th March' 21	Master Class on Cross Border Insolvency
15th March'21	Services of Information Utility
20th -21st March' 21	Certificate Course on Leadership and Management
20th March'21	Services of Information Utility
27th March'21	Services of Information Utility



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
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SALE AS A GOING CONCERN

George Samuel
CMA & Insolvency Professional

The concepts of "Sale of the Corporate Debtor as a Going Concern" and of "Sale of business of the Corporate Debtor as a Going Concern" were introduced in the Liquidation Regulations respectively with effect from 01-04-2018 and 20-10-2018. This article attempts in some details on the provisions relating to the Sale as a Going Concerns to be of practical help in the conduct of Liquidation.

SALE AS A GOING CONCERN – CONCEPTUAL FRAMEWORK

The concept of "Sale as a Going Concern" is not defined in IBC nor is it defined in the Company Act, 2013 although in both Laws references to the phrase are made. The Legislative Guide on the UNICITRAL provides the definition of *"Sale as a going concern" as the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business.* The definition, however do not specifically state that the Going Concern Sale shall be a Sale in continuity of the business operations. The Going Concern Sales involve the transfer of all Assets and Liabilities, the transfer of name, fame and of intangible assets of the Company without disturbing the business continuum for a justifiable commercial and economic viable period. In Liquidation however only the beneficial liabilities get transferred.

Another term, "Reorganization" (that is synonymous to Resolution in IBC) is defined by UNICITRAL as, "*the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern*". UNICITRAL guide uses "Reorganization Plan" for "Resolution Plan" used in IBC and defines the Reorganization Plan as, "*a plan by which the financial well-being and viability of the debtor's business can be restored*".

The definition of Resolution Plan in IBC is contained in subsection 26 of section 5 of IBC; Resolution Plan is defined as *a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II*. So, Reorganization Plans and Resolution Plans are synonymous to mean Plans to continue the CD as a going concern or in other words, to continue the operations of the CD with a Plan which involves Reorganisation. Resolution Plans are not just Sales but Plans to continue the CD as a Going Concern.

The Sales as Going Concern in accordance with Regulation 32 of the Liquidation Regulations is different that it is not a Resolution Plan, but simply a Sale, but as Going Concern. For that reason, the IBC that applies to CIRP are not applicable to Going Concern Sales in Liquidation; instead, Chapter III of IBC and Liquidation Regulations will be applicable. That means Section 53 will only be applicable in the distribution of proceeds from Going Concern Sales in the absence of any Regulations to specifically deal with the same.

The Reorganisation involves, inter alia, continuity as a "Going Concern"; the reverse is not true that the "Going Concern Sales" in Liquidation Regulations do not involve Reorganisation within the meaning provided in UNICITRAL guide or the measures listed in Regulation 37 of the CIRP Regulations. The Liquidation Regulations do not contain any provisions providing for an approval of a legally binding Reorganisation / Resolution Plan as in section 31 of the IBC.

CONCEPT OF GOING CONCERN – ACCOUNTING PERSPECTIVE

"Going Concern" concept is one of the accounting assumptions that is fundamental in the preparation and presentation of the financial statements and AS - 1 issued by the ICA of India states, "*the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations*."

The above description of the concept in relation to the preparation of the financial statements, but for the Sale of the CD or the Sale of the Businesses of the CD as a going concern in Liquidation, the concept needs a shift from an assumption to a concept for practice of Sale in Liquidation.

GOING CONCERN SALE – FURTHER INQUIRY

Two types of Going Concern Sales are possible under Liquidation Regulation 32, viz. the sale of CD as a going concern under clause (e) or the sale of business(s) of the CD as a going concern under clause (f). Either the entire CD or one or more businesses of the CD is sold without any further division. In the absence of a clear definition of the Going Concern Sales, the Regulations must be read in the light of the objectives of IBC to guide.

If strictly a verbatim meaning of the Going Concern Sale is considered, there will be no relinquishment of liabilities and so, no clean slate to start afresh. Again, the Going Concern Sale might also involve the transfer of employees belonging to the CD. On the other hand, in Liquidation, the liabilities are to be paid strictly as per the priority stated in Section 53. We shall discuss how these two conflicting ideas namely, Going Concern Sale and Distribution u/s 53 synchronize.

Both the Assets and the Liabilities constitute the object of sales in Sales as Going Concern. Under Regulation 39C of the CIRP Regulations and also in 32A of the Liquidation Regulations the Committee / Liquidator is required to **group the Assets and Liabilities, which according to its' commercial considerations, ought to be sold as a Going Concern under clause (e) and (f)**. The Regulations does not state that all **liabilities** of the business(s) of the CD are to be grouped. If the Committee considers some of the liabilities, can beneficially be included in a Sale as Going Concern, only such liabilities need to be considered. Care must however be exercised in the grouping and transfer of a liabilities, no compromise in mandatory distribution u/s 53 is made. Only commercial criteria shall govern the inclusion of liabilities for

Sale. Such liabilities may include the payment to workers besides the amount u/s 53 to ensure their continuity, the payment in lieu of guarantee given by banks etc.

The Liquidation is normally known to be antithesis to Going Concern and is considered as an undesirable and residual last activity. In Liquidation the identity of the CD is lost, it will result in job loss of employees and the economic activity might come to a dead end. But then whether a Going Concern Sale will be practical and beneficial than a sale under Liquidation?

Let us consider the sales in Liquidation other than the Sales as a Going Concern; the clauses (a) to (d) of regulation 32 of Liquidation Regulations deals specifically with the sale of **assets and assets only**, whether sold as standalone basis, slump basis, collectively or in parcels.

The buyer when he buys the assets of the CD in Liquidation, either he may be buying to subsequently sell the assets for a profit or to use the same in furtherance of his business. If the intention is to use the assets for an economic activity, restructuring the same to a commercially viable entity such liquidation is not undesirable. The buyer may infuse more funds, retain more employees, turn around the business, although in a new name; the business is taken over for more effective functioning. It is also true that if there is no commercial and economic viability for a reasonable period, it will be beneficial that the firm is liquidated ensuring no more wastage of energy to support an already ailing Unit.

GOING CONCERN SALE – SALE CONSIDERATION

How to initiate a Going Concern Sale with transfer of Assets and few of the beneficial Liabilities. The Liquidation Regulations do not contain any minimum price requirements for "Sales as a Going Concern" similar to a Resolution Plan process. A Resolution Plan can have an offer lesser or more than the Fair Value or the Liquidation Value. The consideration is the Plan must withstand the feasibility and viability standards of the Committee of Creditors.

The Going Concern Sale is not Resolution Plan and the yardsticks applicable for Liquidation shall only apply. In a sale by Auction in Liquidation the auction shall start with a minimum reserve price equivalent to the Liquidation Value of the Assets under consideration of sale. The Liquidation Regulations also do not contain any provision for a deferred payment plan beyond 90 days. For these reasons to withstand legal issues, the Going Concern Sale shall start with a Minimum Price Tag at Liquidation Value of the assets of the Business / CD considered for such Sale.

GOING CONCERN SALE – BUSINESS & LIQUIDATION VALUES

The Liquidation Value or the Fair Market Value do not have much relevance in the determination of the Value of a Business as both the Values are of Assets and a summation of the values of Assets may not be the Business Value. There could be synergic effect in the value of business when an effective management is put in place. It may also be true that a reverse synergic effect applies that the value of assets separately will have more value than when put together as a Business. Reverse synergy may be because the CD have assets that do not contribute to revenue generation in its' business.

So, for a decision between the two alternatives viz. Sale of Assets in Liquidation under clauses (a) to (d) or the Sales as a Going Concern under clauses (e) or (f) of Regulation 32, a comparison between the Liquidation Value and the Business Value will be appropriate. Another step shall be to separate the Assets, like unused land, building or other non-revenue earning SBUs, which is estimated to fetch good sale value when sold separately of the Businesses for sale as Going Concern.

The Business Value is something the prospective Buyer also will weigh. For the Liquidator he may start with an auction of Sale as Going Concern with a Minimum Reserve Price equivalent to the Liquidation Value of assets. When a Swiss Challenge method of auction can be tried, the

likely offer value will be a value between the Liquidation Value and the Buyer's perception of the Business Value.

It is worth mentioning that the Sale as a Going Concern in accordance with the above method do not presently have a fool proof legal backing of the IBC or Liquidation Regulations and is suggested to be tried only with the approval of the Adjudicating Authority after taking the consent of the Committee of Creditors or the Stakeholders Consultation Committee, as the case may be.

GOING CONCERN SALE AND SLUMP SALE

As with Going Concern Sale, the Sump Sale under Regulation 32 (b) is also not defined in IBC or Regulations thereunder. In Income Tax Act, 1961 a definition is provided in Section 2 (42C) as: *"slump sales" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.* For the purpose of this clause the term *undertaking shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.*

The definition is for the purpose of determining the Capital Gain on such slump sale where the transfer of assets and liabilities of undertaking are involved. Where the sale value is in excess of the Net Worth of the undertaking calculated in accordance with the Income Tax working of Value, Capital Gain will result. Both the Assets and the Liabilities of undertaking(s) are considered in the determination of Net Worth.

That is not the case with the Slump Sale as per Liquidation Regulation 32 (b) where the assets only are involved in the transfer. The liabilities are not sold; the liabilities, to the extent of claims received and accepted, are separated and paid as per the scheme of distribution u/s 53

of the IBC. If the Going Concern concept is added to the Slump Sale it will be synonymous with the Going Concern Sales. However, Slump Sales in Liquidation with only Assets and no Liabilities cannot be termed as a Going Concern Sales; the GST may be applicable to such Sales.

GOING CONCERN SALE – INITIATION & TIME FRAME

As per Regulation 32A (4) of the Liquidation Regulations, "*if the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32*"

There is only 90 days available to the Liquidator to try the Sales as Going Concern and in the absence of specific provisions, the period of 90 days will also be counted as part of the Liquidation period. The period of 90 days may be too short period for completing a Sale as a Going Concern. Hence, ideally any Plan for the Going Concern Sale must be made in the CIRP period.

Regulation 32A of the Liquidation Regulations contains provisions relating to the initiation of Sale as Going Concern. Where the Committee has recommended the Sale as a Going Concern during the CIRP phase under 39C of the CIRP Regulations, the Committee would have identified the group of Assets and Liabilities to be sold as Going Concern Sale. If Committee has not made any recommendations but the Liquidator is of the opinion that Sale as a Going Concern under clause (e) and (f) of Liquidation Regulations 32 will maximise the value of the CD, he may identify the group of Assets and Liabilities in consultation with the Stakeholders Consultation Committee. The Regulations, however, do not provide for fixing a consideration for such a Sale either by the Committee or by the Liquidator in consultation with the Consultation Committee.

The maximum time for the Constitution of the Stakeholders' Consultation Committee is 75 days of commencement of Liquidation (30 days for submission of claims and 45 days, from the submission of claims, for filing of the List of Stakeholders with the Adjudicating Authority). A best crashed time for the constitution of the Consultation Committee may be a minimum of 45 days. So, if the Liquidator has to determine the group of assets and liabilities in consultation with the Stakeholders Consultation Committee there will be a lapse of at least 45 days and the Liquidator will be left with only 45 days to carryout the Sale as Going Concern. Therefore, it will be in the interest of the process and the stakeholders that the determination of the Going Concern Sales and the grouping of Assets and Liabilities shall be decided at the CIRP period in accordance with the CIRP Regulations 39C.

ABBREVIATIONS USED

➔*IBC*	*Insolvency and Bankruptcy Code, 2016*
➔*IBBI*	*(Insolvency Resolution Process for Corporate Persons) Regulations, 2016*
➔*Liquidation Regulations*	*IBBI (Liquidation Process) Regulations, 2016*
➔*CD*	*Corporate Debtor*
➔ *UNICITRAL*	*United Nations Commission on International Trade Law*

TAKEAWAYS FOR HOME BUYERS FROM SUPREME COURT JUDGEMENT

Sunil Kumar Gupta

Insolvency Professional

IN THE CASE OF MANISH KUMAR VS, UOI {WP (C)NO 26 OF 2020 WITH 40 OTHERS WRIT PETITIONS}

SC upholds IBC amendment requiring not less than 100 or 10% of homebuyers to initiate Corporate Insolvency and Resolution Process (CIRP) against Developer/builders and dismissed the writ petitions filed by home buyers and clarified various practical aspects that would provide some sort of guidelines to homebuyers to implement the provisions of law to initiate CIRP.

Government by way of ordinance amended the IBC, 2016 in December 2018 to introduce a minimum threshold of 100 or 10 per cent home buyers whichever is lower required to take a defaulting developer to the NCLT for starting the CIRP proceeding by adding a third proviso to section 7(1) of the IBC which is reproduced as under:

"The third proviso to section 7(1) provides that the financial creditors mentioned under clause (a) and clause (b) of subsection (6A) of Section 21 (i.e., debenture holders and other security holders) and the allottees of real-estate projects can make application for initiation of CIRP against the corporate debtor only if

- *The application has been made jointly by not less than 100 allottees of a particular project; or*
- *1/10th of the total number of allottees of the particular project*

whichever is lower."

Prior to this, a single homebuyer can file an application as financial creditor with a minimum claim of Rs. 1 lakh against the defaulting developer/builder. Against this Group of home buyers filed multiple writ petitions in Supreme Court and stated that such amendment is arbitrary and

discriminatory. Further, Homebuyers stated that it is practically impossible to bring in homebuyers together because most of the applications were filed with NCLT under construction projects and there is no mechanism through which a homebuyer may form a Group to file an application under Section 7. It was also stated that it was a differentiated treatment compared to other financial creditors.

SC upholds IBC amendment requiring not less than 100 or 10% of homebuyers to initiate Corporate Insolvency and Resolution Process (CIRP) against Developer / builders and dismissed the writ petitions filed by homebuyers. It also said that if a single buyer was allowed to move application against a builder, it may pose a risk to the interests of a large number of other stakeholders. The apex court also justified the amendments to the code, saying buyers already have a platform in the form of RERA to approach, in case of any issues or if they find the IBC route too difficult.

It was held that the Code deals with proceedings in rem, under which homebuyers may want the corporate debtor's management to be removed and replaced so that the corporate debtor can be rehabilitated. On the other hand, the RERA protects the interests of the individual investor in real estate projects by ensuring that homebuyers are not left in the lurch, and get either compensation or delivery of their homes. Thus, if there is a failure to reach a critical mass for initiation of CIRP, it may indicate that in such cases another remedy may be more suitable.

The Apex Court also observed that what distinguishes the real-estate creditors from other financial creditors is numerosity, heterogeneity and individuality in decision making. Thus, acknowledging the possibility of individual allottees crowding the Adjudicating Authority, and hence becoming a peril for the law, the amendment was thought fit in view of the numerosity. Further, given that the real-estate creditors are not completely denied the right to recourse under the Code, the additional threshold could not be considered as being discriminatory.

Apex court clarified various issues on practical difficulties in the Judgement which are very important takeaways for the Homebuyers to initiate the process of CIRP. In this article, we will

elaborate such practical aspects which would provide some sort of guidelines and practical aspect to implement the provision of law to initiate CIRP.

It is very mush clear that homebuyers may file an application under IBC in a Group only. This is applicable to residential as well as commercial property.

The Group means- the real estate allotee have to file a joint application before the NCLT with 10% of the total allottees of the Real Estate Project or 100 real estate allotees from the same project, whichever is less. The said threshold limit is project specific. It was stated. "*The rationale behind confining allottees to the same real estate project is to promote the object of the Code. The allottees in one project may not have much of a complaint, while the complaints of allottees in another project may be more serious. In the latter case, it may be easier for the allottees to fulfil the statutory mantra in the impugned provisos, with the junction of likeminded souls. If, however, all projects are considered, the task would be much more cumbersome. The requirement of the allottees, being drawn from the same project, stands to reason and does not suffer from any constitutional blemish".*

For example, if a Developer is running 4 projects and homebuyer of project 1 is willing to initiate CIRP against the builder where total allotments of flats are 200 nos. The threshold limit to initiate CIRP will be 10% of 200 nos. or 100 buyers whichever is less i.e., minimum 20 homebuyers are required to file an application. Threshold limit is Project specific only or for the same project. The term real estate project will carry the same meaning as defined in Section 2(zn) of RERA Act. In the same example, homebuyers of another project can not be counted to work out threshold limit.

Further, it was stated that the said threshold limit is only to initiate the CIRP and must be complied with as on the date of filing of the application. The numbers of allotment may increase or decrease after filing the application. It has no adverse impact on the proceedings. Homebuyers must have to comply threshold limit at the time of submission of application.

How such numbers will be calculated? Whether will such be based on no of unit to be constructed, already constructed, or based on allotment. The Apex Court clarified that the

counting of numbers for threshold limit will be based on the "Allotment" of property. The term 'allottee' will carry the same meaning as defined in Section 2(d) of RERA Act. Any person who has booked an apartment/plot/building etc. or who has an allotment letter or agreement to sell etc., assignee, transferee etc. is an allottee. Therefor, allottee will be counted based allotment letter issued by the Builder/Developer. For example-If a person (Mr. X) is having two allotment in a same project, will be counted 2, similarly if there are joint allottee of a property, this will be treated as one. If there are 500 proposed units in a real estate project but only 200 units are allotted, then the total allottees will 200. So, allottee status is calculated unit-wise and not person wise.

The biggest challenge is how to get contact details to comply the threshold limit to initiate the application. The honorable court stated that, "*Section 11(1)(b) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. Regulations require the promoter to open a webpage for the project and post and update information relating to allotments*."

The Supreme Court also quoted the example of Rule 4 of the Haryana Real Estate Regulatory Authority, Gurugram (Quarterly Progress Report) Regulations 2018 which states that a promoter has to quarterly upload the information of allottees on a webpage and therefore, updated information can also be collected by the allottees to meet the requisite threshold.

Directions are provided to RERA Authority to follow it strictly. Further, allottees may participate in real estate allottees associations which is required to be made /updated under section 19 (9) of the RERA Act.

To initiate CIRP, the basic condition is, there must be a "default" under section 7 of IBC. Such default need not be qua the applicant or applicants. Any number of applicants, without any amount being due to them, could move an application under section 7, if they are financial creditors (FCs) and there is a default, even if such default is owed to none of the applicants but to any other FC." For example, out of 100 allottees, only 20 homebuyers have dues over 1 crore, but remaining 80 homebuyers, will back the application, although they have dues /

default less than Rs. 1 crore. It is not required that all individual homebuyer have dues more than Rs.1 crore to initiate CIRP. It may be possible, there is no default for such 80 buyers.

Normally an application under IBC is filed within three years from the date of default as per Limitation Act. It may possible, in joint application, some homebuyers having a time barred claim or default dates are different including time barred and within the time limit. For example, Mr. Z is having allotment letter issued in 2015 and flat is to be delivered within say 3 years as per such letter. Such homebuyers, still file an application under joint application in a Group. The condition of "default should not be time barred" may be fulfilled by a part of the allottees in joint application along with other conditions like threshold limit and default amount must be in excess of Rs. 1 crore. Even in Joint application, those allottees can also participate whose default itself has not happened. However, time period to file a case can be extended u/s 5 of Limitation Act by the NCLT if sufficient cause is stated or shown.

As per judgment, all pending cases have to be withdrawn and refiled after achieving the relevant threshold limit i.e.,10% 100 buyer group. Originally, the time was given as per the law to do this within one month from 28.12.2019 till 28.01.2020. Since this time has already expired, the Supreme Court has extended the time to do the same by two months with proper application to excuse delay. However, there is a relief / wavier in terms of payment of court fee on such application.

Reference: The above interpretation is based on the Apex Court judgement and summary published by IBBI

WHAT CONSTITUTES THE URGE TO INITIATE INVESTIGATION INTO AFFAIRS OF THE COMPANY U/S 213?

Rohit Dubey

Advocate, Company Secretary

Sajal Awasthi

Advocate, Supreme Court of India

The Section 213 of the Companies Act, 2013 empowers the NCLT to order an investigation into the affairs of the company on grounds of fraud, misfeasance or misconduct or withheld of information being done within the company. The debatable question of law that arises here is that "what all actions had been previously recognised by the courts in past to be sufficient enough to urge an Investigation under Section 213". The Authors have made an exhaustive attempt in this research study to discuss specific judicial observations of NCLTs and erstwhile company courts which are necessary to understand the position of law in relation to the abovestated question, and the interrelation of the power under Section 213 with the proceedings under Insolvency and Bankruptcy Code, 2016

INTRODUCTION

A company, whether private or public, plays a pivotal role in driving the base and superstructure of the economy of a country. Besides earning profits, a company lays down its traces over the society, and the manner in which the corporate governance is carried on within the company has been important. But, whenever the internal management or the persons in charge of management redirects the affairs of the company to their personal gains and interests, and the corporate governance lacks in transparency & accountability, then there comes the need of an investigation into the affairs of the company, which is embodied under Section 213 of the Companies Act of 2013 (been brought into force w.e.f. 01.06.2016). The provision for investigation into the affairs of the company is not new, the similar provision was also there in the Companies Act, 1956 (Section 237).

Section 213 of the Companies Act, 2013 empowers the National Company Law Tribunal (hereinafter referred to as 'Tribunal') to order an investigation by the Central Government in cases, wherein, an application is made by the certain persons, seeking an investigation into the

affairs of the company or on an application suggesting fraud, misfeasance or misconduct or when any information is withheld. The said provision of law further empowers the Central Government to appoint Inspectors and seek report, on the basis of which, stringent punishment for fraud can be imposed by appropriate authority under Section 447 of the Act.

For better understanding and linking the further deliberations, the relevant portion of Section 213 is reproduced hereunder:

"213. The Tribunal may, —

(a) On an application made by—

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or

(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—

(i)the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,"

Upon in-depth reading of the aforementioned provision of law, it can be stated that Section 213 puts forth two classes of persons who can approach the tribunal invoking provisions of Section 213 i.e.) members of the concerned company under clause (a) and 'any other person' under clause (b). The clause (b) provides for circumstances, which shall warrant the tribunal that an investigation into the affairs of the company is ought to be done or is necessary to be undertaken. It is pertinent to mention here that clause (b) of Section 213 has a wide amplitude because of inclusion of the term 'any other person' which enables any stakeholder in a company, other than its members, to file an application seeking investigation in the management/affairs of the concerned company. However, The debatable question of law that arises here is that ***"what all actions had been previously recognised by the courts in past to be sufficient enough to urge an Investigation under Section 213"***. The Authors have made an exhaustive attempt in this research study to discuss specific judicial observations which are necessary to understand the position of law in relation to the above stated the question of law.

CONTENT

From a bare reading of the Section it is clear that the circumstances under which investigation can be ordered under clause (a) of Section 213 are wholly different from those enumerated under clause (b). Under clause (a) it is enough for the applicant to give evidences to show that there are good reasons to carry out an investigation in to the affairs of the company. Whereas, under clause (b) it is necessary to satisfy the authority/tribunal that the business of the company is being conducted fraudulently or unlawfully or the persons concerned in the management are guilty of fraud or misfeasance or there is concealment of relevant information. Therefore, the scope for ordering investigation under clause (a) is far wider than the scope under clause (b) where an element of fraud is required to be proven to the satisfaction of the tribunal. Under clause (b), the tribunal is empowered to order investigation *Suo moto* if the circumstances detailed therein exist.

INTER-RELATION BETWEEN IBC AND SECTION 213 OF THE COMPANIES ACT, 2013

In respect of investigation into affairs of the company under insolvency, the NCLAT in Lagadapati Ramesh v. Ramanathan Bhuvaneshwari [I (2020) BC 28], held that the NCLTs/NCLAT on receipt of application of alleged violation of Section 213, 447 of the Companies Act, 2013 or 68, 69, 70, 71, 72 and 73 of the Insolvency and Bankruptcy Code, 2016, on such consideration and being satisfied that there are circumstances suggesting that defraud etc. has been committed, may order investigation and direct Central Government to take further action.

The CLB in Mayank Kocher v. Transport & Handling Equipments MFG. Co. P. Ltd, [(2008) 143 Comp Cas 601 (CLB)], while discussing section 235 of the erstwhile Act held that,

"Under this Section directing an investigation is only analogous to the issue of a fact-finding commission by a civil court for looking into accounts or making an investigation and does not amount to a judgment within Clause 15 of the Letters Patent, so as to enable an aggrieved party to appeal."

In the case of M. Srinivas v. Ramanathan Bhuvaneshwari Resolution Professional & Ors., 2019 SCC Online NCLAT 1001, the question for consideration before the NCLAT was whether the Adjudicating Authority, having dual jurisdiction under the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016, can direct the Central Government to refer the investigation into the affairs of the Corporate debtor and other group of companies. The NCLAT held to affirmative and observed to the effect that provisions of law make it clear that the National Company Law Tribunal is empowered to deal with Insolvency resolution and liquidation for corporate persons including corporate debtors. Therefore, merely because additional power has been vested in the authority, the power to pass order under Section 213 the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016 does not stand extinguished.

RESTRICTIVE APPROACH VIS-À-VIS CLAUSE (B) OF SECTION 213

In the early 1980s, the Kerala High Court in Mrs U.A. Sumathy and Anr. v. Dig Vijay Chit Fund (P) Ltd., [1983 53 CompCas 493 (Ker)], observed to the effect that section 235 of the Companies Act, 1956 does not postulates precise circumstances which are to be proved, so as

to trigger an investigation, but in the least, the materials on record to be examined must be such as to satisfy the court that a deeper probe into the company affairs are desirable in the interest of the company.

Similarly, in Hariganga Cement Ltd. v. Company Law Board & Anr. [(1988) Bom 603], Bombay High Court held to the effect that the power of the adjudicating authority i.e. erstwhile Company Law Board under section 237(b) of the Companies Act, being wide in nature and scope, should be exercised with immense circumspection and in a judicious manner. It was noted that such discretionary power would have to be exercised in a reasonable manner and not in the absence of circumstances not warranting investigation, into the affairs of the company.

In the matter of Binod Kumar Kasera vs Nandlall & Sons Tea Industries (P) Ltd. & Ors [(2010) 153 Comp. Cas. 184 (CLB)], it was made clear that a prima facie evidence and something more substantial than an allegation will be required. The authority held that,

"where the facts are disclosed on the basis of the records like the balance sheet of the company, an investigation would not be ordered. Hence, there must exist at least a prima facie evidence that the affairs of the company are being run in a fraudulent and unlawful way so as to defraud its creditors or is contrary to the interest of the company itself which would lead to the conclusion that an investigation would be necessary. Mere allegation of a disgruntled shareholder would not be a sufficient ground to order an investigation".

In Mrs. U.A. Sumathy v. DIG Vijay Chit Fund (P) Ltd. [(1983) 53 Comp. Cas. 493], the Single Judge of the Kerala High Court considered the scope of Section 237 of the Act of 1956 and observed that,

"clause (a)(ii) of Section 237 does not lay down the circumstances that are to be proved and the materials on which a Court could act, but that does not mean that mere allegations are sufficient. A Court can act only on the materials placed before it and the materials should at least be such as to satisfy the Court that a deeper probe into the company's affairs is desirable in the interests of the company itself. No investigation could be ordered merely because a

shareholder feels aggrieved about the manner in which the company's business is being carried on."

The judicial ruling of the Hon'ble Supreme Court in Rohtas Industries Ltd, v. S.D. Agarwal [(1969) 13 SCR 108] is of relevance for the present study, as the apex court opined upon the nature of investigative powers under the concerned provisions of law and that the scheme of these Sections makes it clear that unless proper grounds exist for investigation of the affairs of a company, such investigation will not be lightly undertaken. The rationale behind such an approach is that an investigation may seriously damage a company's reputation and should not be ordered without proper material gathered in the manner provided in the Act. The power of investigation has been conferred, with a belief that a reasonable standard of care will be exercised which can only be exercised by an expert and not an ordinary person.

Moreover, in Binod Kumar Kasera vs Nandlall & Sons Tea Industries (P) Ltd. & Ors. [(2010) 153 Comp. Cas. 184 (CLB)], the CLB held that where the facts are disclosed on the basis of the records, like the balance sheet of the company, an investigation would not be ordered. Hence, there must exist at least a prima facie evidence that the affairs of the company are being run in a fraudulent and unlawful way so as to defraud its creditors or is contrary to the interest of the company itself which would lead to the conclusion that an investigation would be necessary. Mere allegation of a disgruntled shareholder would not be a sufficient ground to order an investigation.

It is averred that the adjudicating authority under Section 213 of the Act shall exercise its power sparingly and only in circumstances which warrants so. The position of law stated herein above was followed by the National Company Law Tribunal, the adjudicating authority herein, in the case of S.Z. Zairudeen v. KRK Properties Pvt. Ltd., 2018 SCC Online NCLT 30188. In the noted case, the authority, while rejecting petition seeking investigation u/s. 213, observed to the effect that whenever a case is filed invoking the provisions of the Section 213 (a) of the act, the parties to litigation shall prima facie substantiate the averments/allegations made therein. It was held that an enquiry cannot be ordered for failure of the company to adhere

Section 12 of the Companies Act, 2013, as the Registrar of Companies is the appropriate authority in the said cases.

CIRCUMSTANCIAL AND INCLUSIVE JUDICIAL APPROACH

Though the adjudicating authorities, appellate court and the apex court, in certain cases, have clearly enumerated and adopted narrow approach, whenever a power u/s. 213 is invoked and have inclined to dismiss the same in absence of clinching material on record, still there have been cases, wherein, the courts have adopted liberal approach.

In PR Ramakrishnan v. V.R. Textiles Ltd. [C.P. No. 37 of 1991], the Company Law Board had held that the cases of dishonesty, lack of probity, malafide for personal gain on the part of the management would warrant investigation into the affairs of the company.

Similarly, in Incab Industries Ltd., In re [(1996) 10 SCL 390 (CLB)], CLB gave a notice to the circumstances mentioned in the Section urging investigation, and believed the following circumstances to be sufficient enough for making a prima facie case for investigation: Diversion of funds and project money, laxity in collection of loans, payment of commission without justification, wasteful expenses, etc.

In T. Kannan v Shapre Info tech India Ltd, [(2014) 186 Comp Cas 193 (Mad)] an investigation was ordered by CLB. Further, the adjudicating authority, while passing the order, observed that the existence of following circumstances are sufficient enough for making a prima facie case for investigation: failure to list shares in the Stock Exchange and/or give notices to shareholders, failure to comply with earlier orders of the court to furnish documents to the chartered accountant appointed by the court for formation of opinion regarding accounts, total non-cooperation by promoters and senior management and apparently conducting business in a manner oppressive to its members.

The courts have considered duly imparting of relevant financial information to shareholders as a crucial obligation of a company. In Hindustan Co-operative Insurance Society Ltd., In re [(1961) 31 Comp. Cas. 193 (Cal.)], wherein the shareholders were left completely in the dark, as no annual general meeting was being called since years, and no information was shared

regarding the manner in which the affairs of the company were being conducted, directors dealt with the company's money in any fashion they liked and apparently prejudicial to the interest of the company, the court considered these acts to be oppressive and warranting investigation in to the affairs of the company.

Recently, the Hon'ble National Company Law Appellate Tribunal in the case R.S. India Wind Energy Pvt. Ltd. v. PTC Energy, 2016 SCC Online NCLAT 10, observed that the provisions of the Section 213 require the adjudicating authority to form an opinion in regard to ingredients as enumerated in clause (i), (ii) and (iii) of clause (b) of the said section. It is worthwhile to mention herein that the adjudicating authority is not required to form opinion objectively, and is only required to satisfy itself on the basis on material on record that the case concerned requires ordering of investigation. It was held that detailed evidence, collection and scrutiny thereof, is not the responsibility of the authority at the initial stages and that it has to be undertaken by the inspector during the investigation.

However, in Barium Chemicals Ltd. v. Company Law Board, [(1966) 36 Comp Cas 639 (SC)] & Shankar Sundaram v. Amalgamations Ltd. [(2002) 111 Comp Case 252 (Mad)] the Hon'ble Supreme Court and High Court were of opinion that, an investigation under S. 237 (of the erstwhile Act) can be directed upon the subjective satisfaction of the existence of circumstances as enumerated in the said section. This means that if the CLB comes to the conclusion that circumstances as mentioned in Section 237 do not exist, or that it is not possible to form such an opinion of the existence of such circumstances on the basis of available facts and allegations made by the applicant, then no investigation will be warranted.

An interesting finding was seen in an order of the Delhi High Court in the noted case of Amaan Sachdev & Ors. V. Fahed Abdulrahman Ali Alkhamiri [CO.A.(SB) 39/2013], that if the substances upon which the application seeking investigation is preferred are those facts which were already known to the parties through the statutory filings of the company, no further information would come out from the investigation, hence no action for investigation ought to be order.

CONCLUSION

It can be safely concluded by stating that every power has to be exercised judiciously and in a purposeful manner. Similarly, the force put forth by the Section 213 of the Companies Act, 2013 is to instil a sense of respect towards adherence of law, in the business community. After an in-depth analysis of various judicial pronouncements, it can be averred that the legislative intent behind enacting Section 213 was to prevent scrupulous business methods and practices, but definitely not to cause a sense of worry in well-structured, managed and law-abiding companies of the nation. The prima facie proof element in the aforesaid section enables the authority to filter out vexatious litigations aimed primarily to cause unjust loss to companies. The judicial trend clearly embodies the principle that an investigation into affairs of a company cannot be taken as a matter of course, but only in cases where there is a prima facie basis to sustain allegations of fraud, misconduct, mismanagement etc.

It is imperative for the adjudicating authority, while ordering for the investigation or otherwise, to disclose the basis and circumstances which has warranted such a decision. It is pertinent to mention herein the prolonged investigative recourse being adopted by the inspectors under Section 213, which ultimately leads to detriment of the innocent companies, shall be avoided. The Indian Judicial System has often reprimanded frivolous and vexatious usage of Section 213 and curbed misuse of the said provision of law. However, it is not possible to ensure proper checks and balances in each and every case seeking investigation into affairs of a company, especially wherein the order for investigation has been passed and is being used by the agencies as a tool of harassment against the concerned company. Thus, no such order shall be passed without affording the company an opportunity to present its case or justify the averments of the petition being filed against it under Section 213.

PERFORMANCE ANALYSIS OF MONNET ISPAT & ENERGY LIMITED PRE, DURING AND POST CIRP

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The CIRP of Monnet Ispat Energy Limited was initiated on July 23, 2017, under the provisions of the Code and CIRP concluded in October, 2018. This is one of the first case of resolution where it creates value for all the stakeholders and also put idle assets to profitable use. This paper is a case study on the resolution of Monnet Ispat and Energy Limited under IBC and provides an analysis of the operational and Financial performance of the company Pre, During and Post CIRP.

The Perspective

Since the enactment of the Insolvency and Bankruptcy Code, 2016, over 275 distressed companies have successfully been resolved under this legislation. It has provided a framework and structure that ensures time-bound and effective resolution of viable but distressed businesses. A large number of companies have been liquidated under the IBC which is helping in unlocking essential capital which would have remained otherwise been blocked and can now be put to more productive and efficient use.

The credit culture in India has seen a drastic positive change post the enactment of the Code. The success of the insolvency resolution process rests majorly on the shoulders of the Insolvency Professional, who plays a pivotal role in the entire process by navigating the company through various Corporate Insolvency Resolution Processes.

This paper is a case study on the resolution of Monnet Ispat and Energy Limited and contains a detailed analysis of the operational and financial performance of the company in the 'pre', 'during' and 'post-CIRP' phases. It also makes an attempt to explore the future possibilities and opportunities for the company.

Company Profile

Monnet Ispat and Energy Limited (MIEL) is one of the major steel manufacturers in India manufacturing steel and other allied products. The process flow at MIEL was built with the inherent flexibility of combining the primary iron making (through sinter, pellet & hot metal) and steel making route using blend of hot metal and direct reduced iron based on the market scenario. It was incorporated on 1st February 1990.

MIEL was part of the *'dirty dozen'*- a list of the 12 largest defaulters released by the Reserve Bank of India, constituting 25% of the total non-performing assets in the country. These were the first few cases that were referred to be resolved under the Insolvency and Bankruptcy Code, 2016 (IBC). Accordingly, IBC proceedings were initiated against the company in July, 2017. In August 2018, MIEL was jointly acquired by a consortium of AION Investments Pvt. Ltd. and JSW Steel Limited through the Corporate Insolvency Resolution Process, after which it was renamed as 'JSW Ispat Special Products Limited'. The company is listed both at the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE).

Company's Operations and Distribution Profile

MIEL has two steel manufacturing plants at Raigarh and Raipur, Chattisgarh. The plant at Raipur has a steel production unit with a capacity of 0.25 MTPA, a sponge iron manufacturing unit with a capacity of 0.30 MTPA and a ferro alloy unit with a capacity of 0.044 MTPA. The manufacturing facility at Raigarh is much larger and is consecrated with state-of-the-art technology. It has an integrated steel manufacturing plant with a capacity of 1.0 MTPA, with the ability to scale up

1.5 MTPA. It also has pellet plant with a production capacity of 2.20 MTPA, expandable to 2.50 MTPA.

MIEL has an expanded product range that caters to the automobile, infrastructure, construction, equipment & machinery manufacturing, shipping & railways, and electrical equipment industries. The company primarily caters to the vast markets of northern and eastern India because of the proximity of its manufacturing units to these locations. The company, under its new management, is also exploring opportunities of collaboration with original equipment manufacturers (OEMs) with increased focus on exports. Let us now take a look at the product range of the company.

Product range of the company

Sponge Iron and Pellets: Sponge iron is often referred to as direct reduced iron or metalized iron and is formed through the reduction of iron ore to metallic iron through a reaction with carbon. It is used in the iron and steel industry as a substitute for scrap in induction and electrical arc furnaces and is a raw material for steelmaking. MEIL had entered into this sector in the early nineties and has now become the second largest sponge iron manufacturer in India. It has a 0.56 MTPA sponge iron production facility at Raigarh and a 0.30 MTPA facility at Raipur. On the other hand, pellets are primarily used in making sponge iron.

Billets: Billets are used in multiple applications like boilers, power transmission, railways, etc. MEIL produces mild steel and special steel billets of 280x370 mm for heavy forgings and rail applications; 220 mm sq for various grades like low, medium carbon and micro alloy forgings; 130 mm diameter for seamless pipe industry; and 140 mm sq for cast products of cold heading, free-cutting and high carbon steels. Billets are manufactured at both Raipur and Raigarh Plants.

TMT, Structural Steel and Special Bars: MEIL produces TMT bars with diameters up to 32 mm. It also manufactures structural steel, catering to the infrastructure and construction industry and special bars for use in the automotive sector. Majority of these products are manufactured at the Raigarh plant which is one the most cost-effective and competitive steel making facilities in India.

Synopsis of the CIRP of Monnet Ispat Energy Limited

The CIRP process of Monnet Ispat Energy Limited was initiated on July 23, 2017, under the provisions of the Code. Pursuant to the initiation of CIRP, a resolution plan for the company was submitted by sole joint bidders- JSW Steel Limited and AION Capital Partners Limited. AION Capital, a fund that specializes in distressed asset buyouts, is the lead partner with 76.9% shareholding in the consortium and gave JSW Steel a shareholding of 23.1%, which was treated as an investment in a joint venture. This enabled the incomes earned or losses incurred from the joint venture to be adjusted in the value of investment. Therefore, Monnet Ispat's incomes and assets have not been consolidated in JSW Steel's financial statements.

When the consortium took over, the plant was completely shut and the JV had a clear revival strategy. They decided to move away from producing low margin commodity steel to investing heavily on the infrastructure and convert it to produce alloy steel which would yield a higher margin.

Pursuant to resolution plan, JSW steel has invested in MIEL in the following manner:

a) Investment in Creixent Special Steels Limited ("CSSL")[1]

The Company has invested ₹4.80 crores in the Equity Shares of CSSL, at par, constituting 48% (Forty-Eight per cent) of the total issued and paid-up equity share capital of CSSL. In addition, The Company has invested ₹4.80 crores in the Equity Shares of CSSL, at par, constituting 48%

[1] Jointly controlled entity of JSW Steel Limited with 48% shareholding

the Company has also invested an amount of ₹370.27 crores in the Redeemable Preference Shares of different series issued by CSSL.

Further, AION invested a sum of ₹191.50 crores into CSSL through a combination of Equity Shares and listed non-convertible debentures. AION's investment in CSSL comprises of (a) ₹5.20 crores in the Equity Shares of CSSL, at par, constituting 52% (Fifty-Two per cent.) of the total issued and paid-up equity share capital of CSSL; and (b) ₹186.30 crores in the form of listed Non-Convertible Debentures.

b) Investment by CSSL into Milloret Steel Limited ("MSL") and Merger of MSL into MIEL

CSSL has invested the amount received from the Company and AION in MSL by subscribing to 22.59 crore Equity Shares and 34.05 crore Compulsory Convertible Preference Shares ("CCPS") of MSL, at par. Moreover, AION has directly and through its subsidiaries invested a sum of ₹308.58 crores in Equity Shares and CCPS issued by MSL. Pursuant to the merger of MSL into MIEL, MIEL will issue 1 equity share and 1 CCPS of face value of ₹ 10 each respectively for every one equity share and CCPS of face value of ₹ 10 held in MSL.

The joint bid proposed to infuse ₹3,700 crore in the company. The company's liquidation value has been pegged at ₹2,365 crore.

JSW-Aion's resolution plan also proposed transfer of Monnet Ispat's non-core assets into a new company to be sold later. Some of the assets like the company's Raipur unit, Hahahaddhi iron ore mine, investment in Orissa Sponge Iron & Steel Ltd., corporate office, coal washery at Patherdih and Angul along with non-current investments are among those assets that may be divested to a new company, which will be sold at fair market value at a later stage. The Gaitra and Guma-Pausari limestone mine is proposed to be continued for the benefit of JSW-AION.

Performance Analysis

A. Operational Analysis

Production (MT)

Particulars	FY 18	FY 19	FY 20	Growth in FY 19 (%)	Growth in FY 20 (%)
Sponge Iron	6,11,314	7,22,371	8,29,228	18%	15%
Billets	1,45,357	1,57,430	2,12,266	8%	35%
Structural Steel/ TMT	1,11,150	1,08,945	1,34,561	-2%	24%
Ferro Alloys	29,004	28,358	24,722	-2%	-13%
Pellets	-	5,37,920	16,61,150	-	209%
Pig Iron	-	73,700	2,21,141	-	200%

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

MIEL was acquired by JSW in the year 2018. Since then, there has been a consistent and progressive growth in the production figures due to better capacity utilization. Production of billets saw a growth of 35% in FY 20. There was also a significant growth of 209% and 200% in the production of pellets and pig iron respectively. However, there was a drop in the production of ferro alloys. The company was able to achieve such impressive growth in the FY 20 despite the Raipur plant being shut down from 21st June 2019 to 2nd March 2020, for modifications and general maintenance. However, the production of pellet and sponge iron

continued during the above-mentioned period. Post its reopening on 2nd March 2020, the company again had to suspend all manufacturing operations across all its locations with effect from 25th March, due to the nation-wide lockdown.

Sales (MT)

Particulars	**FY 18**	**FY 19**	**FY 20**	**Growth in FY 19 (%)**	**Growth in FY 20 (%)**
Sponge Iron	4,58,332	5,80,240	6,99,354	27%	21%
Billets	32,861	32,442	76,580	-1%	136%
Structural Steel/ TMT	1,00,699	98,098	1,26,318	-3%	29%
Ferro Alloys	24,896	25,173	22,813	1%	-9%
Pellets	0	81,647	7,74,078	-	848%
Pig Iron	1,877	7,761	34,431	313%	344%

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

The sales also saw a similar growth trend to that of the production. JSW was able to harness the synergies of the existing customer base of JSW Steel to on-board more customers and

penetrate deeper into the market. As a result, the sale of pellets saw an outstanding growth of more than 800% while the sale of pig iron grew by more than 300%.

Energy Conservation

Along with an increased focus on streamlining the operations for better organizational effectiveness, the new management also took initiatives in the area of energy conservation. Due to consecutive losses faced by MIEL before the initiation of CIRP, no major investment could be made in energy conservation. However, under the new management, marginal investments were made to adopt energy efficient LED lighting systems at both the plants. At the Raipur plant, steps have been taken to reduce the energy consumption of major equipment's by adopting technologies like cora coating of cooling water pump casings and impeller. Similarly, plans have been designed for implementing variable frequency drive at the Raigarh plant. Such efforts will help the company to reduce their power consumption and increase production efficiency in the long run.

B. Financial Analysis

The performance of MIEL, pre, during and post CIRP can be adjudged by measuring the impact of the Corporate insolvency resolution process 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.

Particulars	2017-18	2018-19	2019-2020
Turnover (in crores)	1,419.09	1,879.41	2,638.16
Net Profit Ratio (%)	-123.97%	-189.01%	-19%
EBITDA Margin (%)	-15%	-151%	-1%
Interest Coverage ratio (Times)	-0.47	-6.98	-0.94
Basic EPS	-87.63	-96.92	-10.48
Current Ratio	0.165	1.179	0.939
Net Cash Flow from Operating activities (in Crore)	16.24	193.79	196.51
Return on Assets	-21%	-76%	-10%
Return on Capital Employed	-245%	-83%	-7%
Asset Turnover Ratio	6.14	0.50	0.76
Net Profit / Sales (a)	-1.24	-1.89	-0.19
Sales / Average total assets (b)	0.13	0.29	0.56

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

Pre and During CIRP

The performance of the company improved significantly in 2018-19 (during the period of CIRP) as compared to pre CIRP in terms of turnover, cash flow from operating activities. The turnover of the company increased by 34.27% and sales and production volume (in MT) increased by

27% and 18% respectively. Further, net cash flow from operating activities increased from ₹ 16.24 crores in FY 17-18 to ₹ 193.79 crores in FY 18-19 as a result of better management control and operational efficiency which arrested the progressive decline in key performance indicators witnessed in the period prior to CIRP.

During and Post CIRP

The results of financial year 2019-20 are a testimony to the overall improvement the company which has been achieved in a short period of time. There was an increase in revenue by 40.37% over a period of one year due to ramp up in production activities. However, the increase was offset by major planned shutdown undertaken to convert its steel melting shop and rolling mills to enable production of special steels. This was done by strengthening the equipment and providing higher levels of automation. This resulted in addition to product basket with a variety of cast product sizes and an upgraded bar mill that can cater to various sectors like automobile, railways and general engineering. Nevertheless, production activities have picked up in post CIRP period which is in tandem with the objective of the code to keep the company as a going concern and make it profitable.

The company's performance in terms of key financial ratios also improved in the post CIRP period. The Current ratio which measures whether the company has enough cash to meet its short-term obligations and pay its creditors on due date has improved in FY 2019-20. The company's EBITDA loss significantly narrowed from loss of ₹2829 crores to loss of just ₹19.92 crores in the FY 2019-20.

The Interest Coverage Ratio which measures how many times a company can cover its current interest payment with its available earnings, improved in 2019-20.

Performance in FY 2020-21

The company announced its Q3 FY 2020-21 results on January 19, 2021 and based on the filings with stock exchanges the company has achieved a turnover of ₹ 2,710.64 crores for the nine months ended 31st December 2020 which is higher than the annual turnover of ₹2,638.16

crores made by the company in FY 2019-20. Further the company also reported net profit of ₹116.58 crores for the nine months ended 31st December 2020.

Future Outlook

With new resources added to the enterprise, the company has re-launched the business with renewed vigour and a gamut of possibilities.

JSW steel has initiated substantial capex plan of ₹ 48,715 crores to increase the consolidated capacity to 24 MTPA. With the plan in place JSW has already made three acquisitions namely, Bhushan Power and Steel Limited, Vardhaman Industries Limited, Asian Colour Coated Ispat Limited through IBC route to strengthen its portfolio and achieve the target set. These acquisitions have increased the capacity to 18 MTPA and current acquisition will add 1.5 MTPA to it. JSW steel has in the past turned around many distressed assets and later merged them with the company. Even in a press conference[2], post this acquisition, JSW chairman has confirmed that JSW steel will be merging Monnet Ispat with itself after successful turnaround.

The Company can leverage on JSW Steel's technical knowhow, training and marketing skills and vast experience. Besides, MIEL benefits from the larger organization's economies of scale and utilizes its centralized raw materials procurement and marketing. MSL is planning to export special steel cast products to global potential customers, including JSW Steel Italy Piombino S.P.A.

Conclusion

Although it has merely been two years since the resolution, the new management under JSW and AION Capital has done a good job to turnaround the operations- the results of which are clearly visible. During the insolvency proceedings, a total claim of ₹11,478 crores was admitted, out of which over ₹11,014 crores belonged to the financial creditors. The remaining amount

[2] https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/jsw-steel-eyes-turnaround-of-monnet-ispat-in-a-year/articleshow/65119679.cms?from=mdr

was due to operational and other creditors. Through the resolution, the financial creditors were able to realize approximately ₹2,812 crores (26% of admitted claims). The remaining amount was allocated towards capital expenditure, working capital and transaction-related expenses. Operational creditors did not receive anything against their claims of ₹443.38 crores. Despite the realization being on the lower side, Monnet Ispat was one of the cases that resulted in value creation for all the stakeholders by increase in capacity utilization and significant improvement in operational and financial performance of the company.

With the steel prices being on a downward slope because of increase in exports from Chinese steel makers and the sluggish growth in the global economy because of the pandemic, the company now faces a double-edged sword. However, it remains to be seen whether MIEL will succumb to the externalities or will capitalize on its synergies to emerge even stronger than before.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Naresh Kumar Dhingra v. Indian Overseas Bank - [2020] 116 taxmann.com 637 (NCL-AT)**

Where financial debt payable by corporate debtor to financial creditor was not disputed, admission of CIRP could not be challenged on ground that date of default shown in application under section 7 was wrong.

The appellant, a director of the corporate debtor, filed instant appeal against order passed by the Adjudicating Authority whereby application under section 7 filed by the respondent was admitted. The appellant contended that date of default as shown was wrong as in terms of subsequent development date of default went to some other date.

Held that since there was debt payable by the corporate debtor and they had not disputed it and records being complete, the Adjudicating Authority rightly admitted application under section 7, therefore, instant appeal was to be dismissed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

- **Raj Shipping Agencies v. Barge Madhwa - [2020] 116 taxmann.com 707 (Bombay)**

Admiralty jurisdiction assists insolvency resolution; action in rem can be filed before/during moratorium/liquidation.

Admiralty suits were filed and orders of arrest were obtained from the High Court in all or most of the suits in question. The High Court, however, admitted Company Petition against GOL Offshore, the owner of Defendant Vessels in Admiralty Suit and Commercial Admiralty Suit. Further, the Court ordered GOL Offshore to be wound-up. When Admiralty suit was listed and taken up for directions/orders, the Official Liquidator of GOL Offshore (Company in liquidation), objected to the suit proceeding further without obtaining leave under section 446 of the Companies Act, 1956. In response to the objection, it was submitted on behalf of the plaintiff

that no leave under section 446 was required to be obtained. The National Company Law Tribunal, in the meanwhile, was pleased to admit a petition under section 7 of the IBC against the owner of the defendant vessels in different Admiralty suits. Consequently, a moratorium under section 14 of the IBC was also declared by the said order. The moratorium period came to be extended from time-to-time. It was submitted on behalf of the plaintiffs that an order of moratorium under section 14 of the IBC had no bearing whatsoever upon admiralty proceedings, which are prosecuted in rem. Issues as to the effect of other provisions of the IBC, on rights under the Admiralty such as those with respect to statutory dues, crew wages etc. also came to be raised.

Held that exercise of Admiralty jurisdiction is beneficial and assist rather than hinder insolvency resolution; thus, an action in rem under Admiralty Act can be filed and ship be arrested before moratorium under IBC comes into force or during moratorium period or even when corporate debtor is ordered to be liquidated. Exercise of Admiralty jurisdiction protects ship and, in turn, security of a mortgagee who is a financial creditor, action in rem will not proceed till moratorium is in place. Action in rem will proceed in accordance with Admiralty Act and priorities for payment out of sale proceeds will also be determined in accordance with said Act; section 53 of IBC will not apply.

SECTION 7 - CORPORATE INSOLVENCY AND RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR

- **Gautam Sinha v. UV Asset Reconstruction Co. Ltd. - [2020] 116 taxmann.com 748 (NCL-AT)**

Statement recorded by auditor regarding pending litigation can not be read as an acknowledgement of debt by corporate debtor under section 18 of Limitation Act, 1963.

The respondent No. 2 bank sanctioned various loan facilities to the corporate debtor in year 2006. As per respondent No. 2 bank, there was default in repayment of loan facilities on 31-12-2013 and the corporate debtor was declared NPA on 30-03-2014. Application filed under section 7 by the financial creditor on 31-10-2018, was opposed by the corporate debtor on ground of being barred by limitation. The Adjudicating Authority relying upon balance sheet of the corporate debtor, held that there was acknowledgement of debt and, thus, claim was within limitation period. Accordingly application filed under section 7 was admitted.

Held that in view of fact that the corporate debtor did not acknowledge its liability to pay alleged outstanding debt, in such a case, mere statement recorded by the auditor in balance sheet regarding pending litigation could not read as an acknowledgement of debt under section 18 of Limitation Act, 1963. Therefore, application filed under section 7 was barred by limitation, consequently, impugned order passed by the Adjudicating Authority was to be set aside.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION FILED BY FINANCIAL CREDITOR

- **Laxmi Ventures (India) Ltd. v. State Bank of India - [2020] 116 taxmann.com 749 (NCL-AT)**

In case of CIRP, if any shareholder of corporate debtor has any dispute with other shareholder, it will be open to him to move before appropriate forum but he can not intervene in application filed under section 7.

The 'State Bank of India' moved an application under Section 7 for initiation of 'Corporate Insolvency Resolution Process' against 'Laxmi Ventures (India) Limited' - Corporate Debtor. Before the admission of the CIRP application the 'Corporate Debtor' settled the matter with 'State Bank of India' and when the matter was brought to the notice of the Adjudicating

Authority, an intervention application was filed by one Mr. Sunil Agarwal who claimed to be 50% shareholders of the 'Corporate Debtor'. The Adjudicating Authority rejected the intervention application. On appeal.

Held that in case of CIRP, if any shareholder of the corporate debtor has any dispute with other shareholder, it will be open to him to move before appropriate forum but he can not intervene in application filed under section 7 against the corporate debtor.

SECTION 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

❖ **Savan Godiwala v. Apalla Siva Kumar - [2020] 116 taxmann.com 750 (NCL-AT)**

Gratuity Fund does not form part of liquidation asset; question of distribution of Gratuity Fund in order of priority does not arise; where Gratuity Fund was proposed but no such fund was created, Adjudicating Authority erred in directing Liquidator to make provision for payment of Gratuity to workers.

Held that the Liquidator holds Liquidation Estate in fiduciary for benefit of all creditors and he has no domain to deal with any other property of the corporate debtor, which is not part of the Liquidation Estate. Provident fund, pension fund and gratuity fund, do not come within purview of the 'liquidation estate' under section 53 and can't be utilised, attached or distributed by the liquidator, to satisfy claim of other creditors. Further, since Gratuity Fund does not form part of the liquidation asset, question of distribution of Gratuity Fund in order of priority, provided under Section 53(1) does not arise. Where annual cash flow statement showed that Gratuity Fund was proposed but no such fund was created, the Adjudicating Authority erred in directing the Liquidator to make provision for payment of Gratuity to workers, as per their entitlement.

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

Where following admission of CIRP, operational creditor and corporate debtor settled matter and CoC had not yet been constitute, application under section 9 was to be dismissed as withdrawn.

- **Vishal Gupta v. Suntech Infra Solutions (P.) Ltd. - [2020] 116 taxmann.com 779 (NCL-AT)**

An application under section 9 was admitted in case of the corporate debtor. During pendency of the appeal against said order, a settlement was arrived at between parties. Thus, instant application was filed seeking withdrawal of petition filed under section 9.

Held that in view of fact that parties had settled matter and 'Committee of Creditors' had not been constituted, instant application was to be allowed and, consequently, petition filed under section 9 was to be dismissed as withdrawn.

Case Review : Suntech Infra Solutions (P.) Ltd. v. Shri Balaji Infradevelopers (P.) Ltd. [2020] 115 taxmann.com 418 (NCLT - New Delhi) set aside.

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

- **Ramchandra D. Choudhary v. Committee of Creditors of Maharashtra Shetkari Sugar Ltd. - [2020] 116 taxmann.com 783 (NCL-AT)**

Where RP sought exclusion of 145 days in computation of CIRP period on ground that RP could not function for said period due to non-cooperation of suspended Board of Director of the corporate debtor and RP also sought to implead managing director of the corporate debtor, the Adjudicating Authority was directed not to pass any order of liquidation till next hearing.

The Appellant - Resolution Professional raised a plea that he could not function for 145 days due to non-co-operation by the suspended Board of Directors of the corporate debtor. It was further stated that said period of 145 day was to be excluded as decided by the Committee of Creditors so that they could consider two resolution plans pending consideration and could save company from liquidation. The appellant also sought to implead the Managing Director of corporate debtor as respondent No. 2.

Held that it was appropriate to issue direction to the Adjudicating Authority not to pass any order of liquidation till the next date of hearing of appeal.

I. SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBTS

II. SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Aashish Mohan Gupta v. Hind Inn and Hotels Ltd. - [2020] 116 taxmann.com 792 (NCL-AT)**

I. Where as per work order awarded by corporate debtor to operational creditor, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period, since retention money was part of main bill raised towards services rendered by operational creditor to corporate debtor, it would fall under definition of operational debt.

The operational creditor was awarded civil work of construction of hotels by the corporate debtor. As per work order, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period of one year

from date of award of completion certificate and issue of defect liability certificate, to be issued by the corporate debtor to the operational creditor. The operational creditor filed application under section 9 submitting that the corporate debtor had not paid retention money after completion of defects liability period and even after issuance of demand notice. The appellant submitted that retention money did not fall within definition of the operational debt.

Held that since retention money was part of main bill raised towards services rendered by the operational creditor to the corporate debtor, it could not be treated as separate money. Further, since the operational creditor had rendered services and there was no dispute with regard to said services, it could not be accepted that said claims would not fall under definition of operational debt.

II. *Where cause of action for release of retention money i.e. operational debt commenced on 21-7-2015 when mail was sent by corporate debtor stating that operational creditor had attended to all concerns and rectified same, application under section 9 being filed on 27-4-2018 i.e. within a period of three years was not barred by limitation.*

As per work order awarded by the corporate debtor to the operational creditor, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period. Defect liability period was completed on 1-4-2015 and thereafter, the operational creditor had requested the corporate debtor to release money. The operational creditor filed application under section 9 as the corporate debtor failed to pay amounts due even after issuance of demand notice. The appellant submitted that application under section 9 filed on 27-4-2018 was barred by limitation.

Held that since cause of action for release of the retention money commenced on 21-7-2015 when mail was sent by the corporate debtor stating that the operational creditor had attended to all concerns and rectified same, instant application being filed within a period of three years was not barred by limitation.

Case Review : CTC Projects (P.) Ltd. v. Hind Inns and Hotels Ltd. [2020] 113 taxmann.com 285 (NCLT - Chd.) affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Anubhav Anilkumar Agarwal v. Bank of India - [2020] 116 taxmann.com 793 (NCL-AT)**

Where corporate debtor acknowledged financial debt and agreed to pay on a future date, period of limitation to initiate CIRP stands shifted to date on which corporate debtor agreed to pay.

The application filed under section 7 by the financial creditor-bank was admitted and CIRP was initiated against the corporate debtor. The appellant contended that date of default/NPA was 31-12-2014 whereas application was filed in year 2019, i.e. three years after occurrence of default; therefore, same was barred by limitation.

Held that date of default stands forwarded, if borrower acknowledges debt and agrees to pay on a future date in terms of Section 18 of the Limitation Act. Since in instant case, the corporate debtor by its letter dated 18-3-2016/20-3-2016 specifically stated that it will make an effort to save their bank account from getting NPA and citing good reputation and goodwill, the corporate debtor agreed to pay amount and acknowledged dues, period of limitation stood shifted to date on which the corporate debtor agreed to pay and thus, application under section 7 was not barred by limitation.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **G Eswara Rao v. Stressed Assets Stabilisation Fund - [2020] 116 taxmann.com 794 (NCL-AT)**

A decree passed by Debts Recovery Tribunal or any suit cannot shift forward date of default for purpose of computing period of limitation.

The corporate debtor availed loan from the financial creditor during period 1994 to 1996. In year 2004, account of the corporate debtor was declared as NPA and case was filed before Debt Recovery Tribunal (DRT). DRT passed a decree in favour of the financial creditor on 17-8-2018. Thereafter, the financial creditor filed an application under section 7 before NCLT against the corporate debtor.

Held that a decree passed by Debts Recovery Tribunal or any suit cannot shift forward date of default. As filing of Balance Sheet/Annual Return being mandatory under section 92(4) of Companies Act, 2013, failing of which attracts penal action under sections 92(5) & (6), Balance Sheet/Annual Return of the 'corporate debtor' could not be treated to be an acknowledgement under section 18 of Limitation Act, 1963. In absence of any acknowledgement under section 18 of Limitation Act, 1963, date of default/NPA was prior to 2004 and thus, application under section 7 filed after year 2018 was barred by limitation.

Case Review : Stressed Assets Stabilisation Fund v. Sartha Synthetics & Industries Ltd. [2020] 115 taxmann.com 419 (NCLT - Hyd.), Set aside.

SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN SUBMISSION OF

- **Maharashtra State Electricity Transmission Co. Ltd. v. Sri City (P.) Ltd. - [2020] 116 taxmann.com 795 (NCL-AT)**

Where appellant had entered into a bulk power transmission agreement (BPTA) with corporate debtor and subsequently, CIRP was admitted against corporate debtor, termination of such BPTA with appellant in resolution plan of corporate debtor could not be interfered.

The appellant had entered into a Bulk Power Transmission agreement (BPTA) with the corporate debtor for allocation of certain transmission capacity rights through transmission network of the appellant for a period of 25 years. Subsequently, CIRP was initiated against the corporate debtor at instant of a company. The appellant filed claim with RP. Subsequently, a resolution plan was accepted by the CoC and same was approved by the Adjudicating Authority. Appellant filed instant appeal contending that in resolution plan long term BPTAA between the appellant and the corporate debtor was illegally terminated.

Held that since the CoC in its wisdom accepted resolution plan which terminated long term BPTA with the appellant, same did no require any interference.

Case Review : Indian Opportunities III Pte. Ltd. & Vista ITCL (India) Ltd. v. Sai Wardha Power Generation Ltd. [2019] 111 taxmann.com 421 (NCLT - Hyd.) affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Ritu Murli Manohar Goyal v. SVG Fashions Ltd. - [2020] 116 taxmann.com 888 /[2021] 163 SCL 357 (NCL-AT)**

Where default had occurred in year 2013 and application for triggering of Corporate Insolvency Resolution Process was filed before NCLT in year 2018 i.e. well after prescribed period of three

years in terms of provisions of residuary clause engrafted under Article 137 of Limitation Act, 1963, application filed by operational creditor under section 9 was barred by limitation.

The operational creditor had filed an application under section 9 and same was admitted by the NCLT. The appellant who was a shareholder and director of the corporate debtor challenged impugned order primarily on ground that the claim was barred by limitation and initiation of Corporate Insolvency Resolution Process could not be sustained. It was found that default had occurred on 7-10-2013 and application for triggering of Corporate Insolvency Resolution Process was filed before NCLT on 20-4-2018 i.e. well after prescribed period of three years in terms of provisions of residuary clause engrafted under Article 137 of the Limitation Act, 1963.

Held that the application filed by the operational creditor under section 9 was barred by limitation. In respect of invoices raised in year 2013 prescribed period of limitation of three years expired in year 2016 and issuance of cheques by the corporate debtor in year 2017 would not be construed as an acknowledgement in writing within prescribed period of limitation in terms of section 18 of the Limitation Act, 1963. Thus, operational debt in respect whereof the operational creditor sought triggering of Corporate Insolvency Resolution Process was neither due nor payable in law on date when such Corporate Insolvency Resolution Process was sought to be initiated by the operational creditor. Hence, impugned order admitting petition under section 9 was to be set aside.

Case Review : *SVG Fashions Ltd. v. Arpita Filaments (P.) Ltd. [2020] 115 taxmann.com 423 (NCLT - Ahd.) set aside.*

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **Dhirendra Kumar v. Randstand India (P.) Ltd. - [2020] 116 taxmann.com 906 (NCL-AT)**

Appellate Tribunal is not empowered to condone delay in filing appeal beyond 15 days after expiry of period of 30 days.

The appellant, Managing Director of the corporate debtor, filed instant appeal against order of the Adjudicating Authority admitting application filed under section 9. Since the appellant filed instant appeal with a delay of 360 days, an application for condonation of delay was also filed along.

Held that proviso to sub-section (2) of section 61 does not empower the appellate Tribunal to condone delay beyond 15 days after expiry of period of 30 days, even if it is satisfied that there is sufficient cause shown for not filing appeal. Therefore, delay of 360 days in filing appeal could not be condoned and consequently, instant appeal was to be dismissed being barred by limitation.

Case Review : Randstand India (P) Ltd. v. Comson Bio Technologies Ltd. [2020] 115 taxmann.com 427 (NCLT - BENG)

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