April'21

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enrol and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavour to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting Round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

INDEX

CHAIRMAN MESSAGE

Asset Reconstruction Companies (ARCs) have their existence in India for about two decades – having come into being as a sequel to the legal framework provided by the enactment of Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. ARCs were required to be registered with the Reserve Bank of India with Net Owned Funds of Rs 2.0 crore, which was enhanced to Rs.100 crore during 2017. ARCs are also required to maintain a Capital Adequacy Ratio of 15% of their Risk Weighted Assets Value. The main objective of setting up ARCs was to help Banks and Financial Institutions clean up their Balance sheets by selling their Non-Performing Assets to ARCs at mutually agreed price. The functioning of ARCs was facilitated by the fact that they could buy the NPAs of the Banks and FIs by paying merely 5% of agreed price upfront and issue the Security Receipt (SR) for the balance amount redeemable after the specified period. Though the Banks/FIs were able to clean up their balance sheets, they still struggled to recycle the funds represented by SRs. The business activities of ARCs were hit by the change which required ARCs to pay 15% upfront and issue Security Receipt for the balance amount. This led to the serious liquidity problems for ARCs.

The introduction of Insolvency and Bankruptcy Code 2016 to facilitate the resolution of insolvency provided another platform to ARCs to effect recovery of their dues through NCLT. The ARCs were originally empowered to take over the management of the borrower company by conversion of the debt into equity only for the purpose of recovery of the underlying loan. ARCs were required to restore the control of the company to the Management on recovery of the dues. ARCs were therefore, a Debt Recovery Tool and not an Insolvency Resolution Tool. However SARFAESI Act was amended to provide that If any secured creditor jointly with other secured creditors or any ARC or FI or any assignee had converted its debt into equity of the Company and acquired controlling interest in the borrower Company, such secured creditor shall not be liable to restore the management of the borrower company to such borrower. So empowered, U V Asset Reconstruction Company Ltd submitted a resolution plan as a Resolution Applicant in the case of Aircel Ltd before NCLT which was accepted, as it did not suffer the disqualification provided under Section 29 A of IBC . But RBI issued a show cause notice to UVARCL seeking explanation for having violated the norms laid down under SARFAESI Act that ARCs cannot infuse equity into an insolvent company at the resolution stage. The Hon'ble HC of Delhi has however stayed the Show Cause Notice of RBI. The issue has brought to focus the policy gap arising

due to lack or inadequacy of guidelines on the participation of ARCs as Resolution Applicants under IBC.

It is in this backdrop, the expert committee set up by RBI under the Chairmanship of Shri Sudarshan Sen, former Executive Director, RBI is expected to undertake a comprehensive review of the working of ARCs in the existing financial ecosystem and recommend suitable measures for enabling ARCs to meet the growing requirements. The committee shall review the existing legal and regulatory framework applicable to ARCs and recommend measures to improve the efficacy of ARCs. The committee shall also review the role of ARCs in resolution of stressed assets including under IBC and give suggestions for improving the liquidity and trading of Security Receipts.

It is a matter of great pride for the IPA of ICAI that Shri P N Prasad, our Independent Director is a Member of the RBI Committee set up to undertake the review of the working of ARCs. He would welcome the suggestions from our members and other stake holders. Let us avail of the opportunity by submitting our suggestions for improving the efficacy of the overall corporate resolution mechanism.

Dr. Jai Deo Sharma
Chairman

MD MESSAGE

Dear Readers,

The month of April began with a positive high as the Central Government promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 to allow pre-packaged insolvency resolution process for corporate debtors classified as Micro, Small or Medium Enterprises (MSME) under the Micro, Small and Medium Enterprises Development Act, 2006. This Ordinance amends the Insolvency and Bankruptcy Code 2016 to allow the Central Government to notify such pre-packaged process for defaults up to Rupees One Crores. The aim behind this ordinance is to ensure "quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs".

It has been stated that considering the "unique nature of their businesses and simpler corporate structures" of MSMEs, it was felt that an urgent need for introducing a special scheme dedicated for them. As per the data released by the Central Government, six out of ten active Indian companies will be eligible for the new pre-packaged bankruptcy scheme that enables quicker debt resolution and which is approximately 60% of 1.3 million active companies in the country fit in the definition of micro, small and medium enterprises that are incorporated.

However, unfortunately, just when the economy was ready to open up along with the businesses were opening up to full functions, we all were hit by the second and more dangerous wave of Covid-2019 which brought along devastation more severe than the last year. With a huge spike in the number of cases and associated deaths, India managed to top the list of countries with the highest number of cases being recorded every day. In view of the severity of the situation, the judiciary went back to operating virtually and most of the states of India declared curfews and lockdowns.

As we fight yet another war against this deadly virus, we urge you to avoid stepping outside if not necessary and by keeping ourselves safe can break this chain of infection.

Hoping that all this shall pass soon!

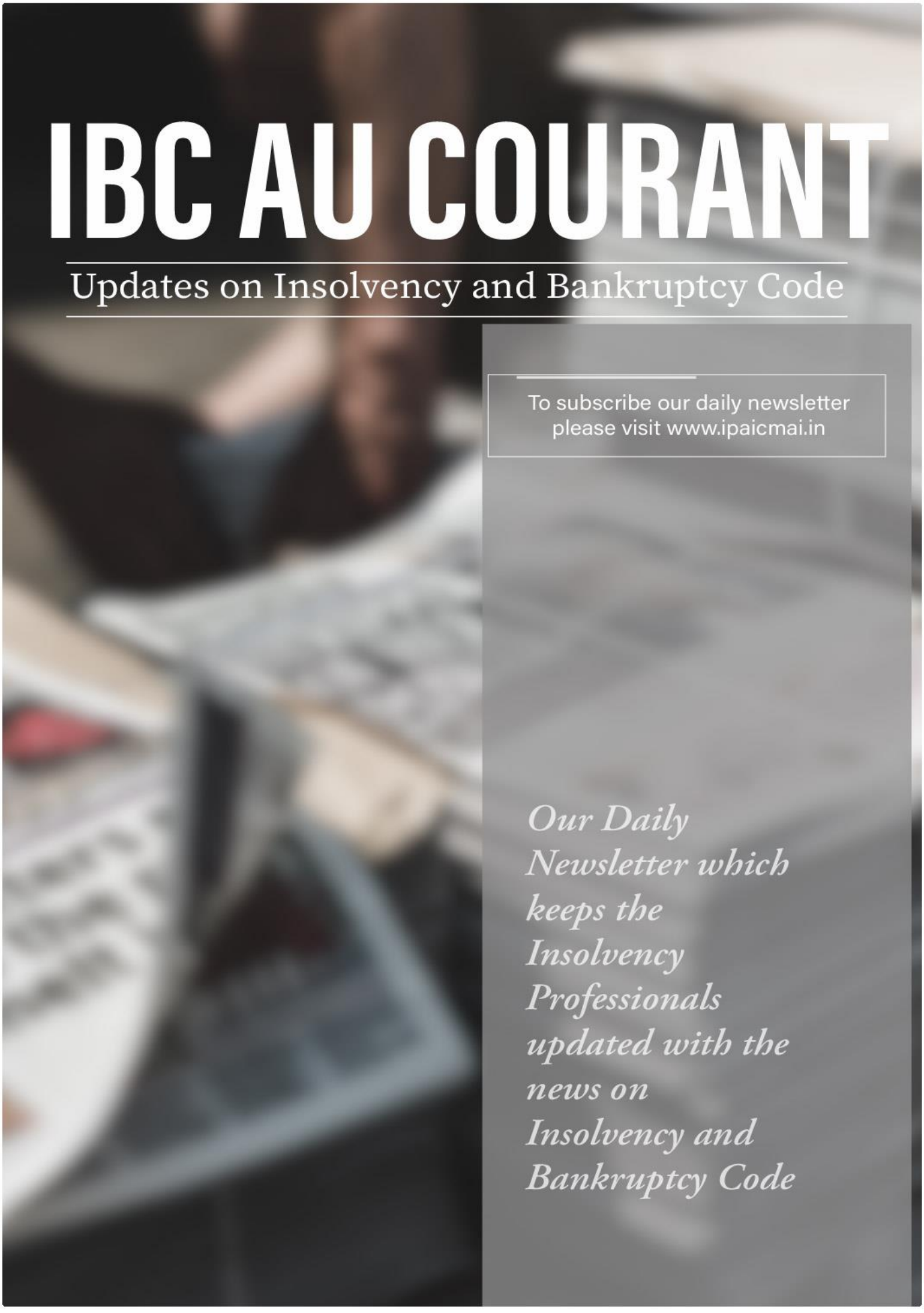
Susanta Kumar Sahu
Managing Director

Professional Development Intiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

April'21	
Date	Events
8th April'21	Webinar on "The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021
10th April'21	Master Class on Ethics for Insolvency Professionals
17th April'21	Sensitization Program on the Essence of Professional Misconduct
24th April'21	Master class on pre-packaged Insolvency resolution process for MSME's
26th April'21	Pre-registration Educational course (online course)



IBC AU COURANT

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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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DECODING OF PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS FOR MSME

CMA J K Budhiraja

FCMA, FCS, IP

Pre-packaged Insolvency Resolution Process (PPIRP) is another reform carried out by Government after Insolvency and Bankruptcy Code 2016 to ease the financial distress of Micro, Small and Medium Enterprises (MSME) whose businesses have been impacted NOT ONLY by COVID-19 pandemic but by other reasons also. As compared to CIRP, PPIRP is quicker, more flexible, cost effective, time effective, and less disruptive to businesses. Maximum overall period allowed for PPIRP is 120 days with a timeline of 90 days for submission of Resolution Plan to Adjudicating Authority by Resolution Professional after approval of Committee of Creditors

Introduction and Background

The pre-packaged insolvency resolution process **("PPIRP")** for micro, small and medium enterprises (MSMEs) is based on the recommendations of a sub-committee of Insolvency Law Committee (ILC) constituted under the chairmanship of Dr. M.S. Sahoo, Chairman, IBBI on 24.6.2020 to prepare a detailed scheme for implementing pre-pack and prearranged insolvency resolution process. The sub-committee has designed a pre-pack framework within the basic structure of the Insolvency and Bankruptcy Code, 2016, for the Indian market as detailed in their report of October, 2020. Government invited public comments latest by 22.1.2021 and after incorporating the public comments, the Government notified "*Pre-packaged Insolvency Resolution Process (PPIRP*" by an Ordinance dated 4th April, 2021.

To facilitate implementation of PPIRP, the Ministry of Corporate Affairs (MCA) and Insolvency and Bankruptcy Board of India (IBBI) notified on 9th April, 2021 "*The Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021"* and "*The Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations 2021"* respectively.

COVID-19 outbreaks worldwide created a havoc and many businesses all around the world, in India as well, were impacted severely that also impacted India's economy and GDP estimates by various agencies viz. World Bank, International Monetary Fund, Asian Development Bank.

The Government of India has taken several measures to mitigate the pains of business and announced several measures to provide immediate relief to businesses emanating from COVID-19. Government increased the threshold of default for filing of an insolvency application from Rs. 1 lakh to Rs. 1 crore to prevent MSME from being pushed into insolvency proceedings. Reserve Bank of India (RBI) permitted lending institutions to extend the moratorium on term loan instalments by six months and time for resolution under prudential framework by 180 days.

This Article provides brief provisions of PPIRP as contained in Ordinance issued by the Government, Rules and Regulations referred above and also some extempore questions which came in my mind and given in the form of FAQs.

Pre-packaged Insolvency Resolution Process (PPIRP)

Ordinance dated 4th April, 2021 promulgated by President of India has inserted certain definitions, amended some definitions, introduced new Chapter IIIA containing Section 54A to Section 54P to facilitate Pre-Packaged Insolvency Resolution Process.

Objective of PPIRP

The ***main objective of PPIRP*** is to provide an efficient alternative insolvency resolution framework for corporate persons classified as MSMEs under section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006; ***for ensuring quicker, cost-effective and value maximising outcomes for all the stakeholders***, which is least disruptive to the continuity of MSMEs businesses and which preserves jobs.

Meaning of Pre-Package Insolvency Resolution Process (PPIRP)

Pre-packaged is a restructuring plan which is agreed to by the corporate debtor and its creditors prior to the insolvency filing, and then sanctioned by the court (NCLT) on an expedited basis. It is a mix of informal (*out-of-court*) and formal (*judicial*) insolvency proceedings.

Pre-packaged Insolvency Resolution Process in other Countries/ Economies

PPIRP has different nomenclature in other countries / economies such as pre-packaged insolvency resolution, pre-arranged insolvency resolution and pre-plan sale in the USA, pre-pack sale in the UK, scheme of arrangement in Singapore, etc. In the UK context, it generally refers to a pre-agreed business sale by an insolvency practitioner which does not require prior court and/or creditor sanction.

Special Features of PPIRP as compared to normal CIRP

Pre-pack or Pre-packaged Insolvency Resolution Process have many special features which are different from the normal Corporate Insolvency Resolution Process (CIRP). These features would facilitate timely implementation of PPIRP having shorter Resolution Times Frame. Main Features are:

i. Applicability and Default Amount

Applicability of both CIRP & PPIRP is based on default committed by Corporate Debtor in payment of debts owed by Corporate Debtors to its creditors. *However, PPIRP is applicable ONLY to those Corporate Debtors who are classified as Micro, Small and Medium Enterprises (MSME)* of section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006.

I. **Minimum Default Amount for initiation of CIRP is Rs. 1 crore** with effect from 24th March, 2020 vide Notification number S.O. 1205(E) dated 24th March 2020.

II. **Minimum Default Amount for initiation of PPIRP is Rs. 10 lakhs** vide Notification number S.O. 1543(E) dated 9th April, 2021.

Vide notification number S.O.1702 (E), dated the 1st June, 2020 (effective from 1.7.2020), definition for MSME has been revised and is as follows:

Revised MSME Classification			
Sr. No.	**Enterprises**	**Investment in and Turnover**	**Limit**
(a)	**Micro Enterprises**	Investment in plant and machinery or equipment; **AND**	does not exceed one crore rupees **(<Rs. 1 crore)**
		Turnover	does not exceed five crore rupees **(<Rs. 5 crore)**
(b)	**Small Enterprise**	Investment in plant and machinery or equipment; **AND**	does not exceed one crore rupees **(<Rs. 10 crore)**
		Turnover	does not exceed five crore rupees **(<Rs. 50 crore)**
(c)	**Medium Enterprise**	Investment in plant and machinery or equipment; **AND**	does not exceed one crore rupees **(<Rs. 50 crore)**
		Turnover	does not exceed five crore rupees **(<Rs. 250 crore)**

ii. Time Period for completion of Insolvency Process

PPIRP is to be completed within 120 days as compared to Normal CIRP in 180 days with one-time extension upto 90 days. Total Time Frame for CIRP has been amended to 330 days by IBC Amendment Act 2019 (w.e.f. 16.08.2019), that includes any extension granted by Adjudicating Authority and the time taken in legal proceedings.

Please note, in PPIRP, there is no provision of extension of time beyond 120 days which may raise a question whether time period spent for the pending legal proceedings with Supreme Court or NCLAT and NCLT will be excluded in reckoning the time period of 120 days. Keeping in view the present scenario in respect of CIRP and Liquidation under IBC 2016, where time period spent in legal proceedings is excluded, this may also be followed in PPIRP.

iii. ***Conditions for initiating Pre-packaged [Section 54A]***

The following conditions are applicable ONLY to PPIRP and not to CIRP:

- ✓ Corporate Debtor must be classified as MSME **[Section 54A (1)]** and has committed a default **(Section 54A (2): *Rs. 10 Lakhs*** *vide S.O. 1543(E) dated 9th April, 2021*;
- ✓ Corporate Debtor has not undergone pre-packaged insolvency resolution process or completed CIRP during the period of ***three years*** preceding the initiation date **[Section 54A(2)(a)];**
- ✓ Corporate Debtor is not undergoing a CIRP **[Section 54A(2)(b)]**;
- ✓ No order of liquidation against the said Corporate Debtor is passed by Adjudicating Authority **[Section 54A(2)(c)]**;
- ✓ Corporate Debtor is eligible to submit a resolution plan under section 29A **[Section 54A(2)(d)]**; *(It may be noted that (Section 240A is related to exemption to MSME and applies to PPIRP and hence, Section 29A(c) and (h) shall not apply)*
- ✓ Financial Creditors having at least 10% of total financial debt, have to propose name of Resolution Professional **[Regulation 14 of PPIRP]**. **Written Consent** of Resolution Professional will be in **Form P1 of PPIRP Regulations**.
- ✓ Financial Creditors of the Corporate Debtor **(*not being its related parties*)**, representing not less than 66% in value of the financial debt, have approved the name of Resolution Professional **(Terms of Appointment in Form P3 of PPIRP Regulations]** and filing of an application for Pre-pack proposal **[Form P4 of PPIRP Regulations]**;
- ✓ Majority of Directors / Partners to declare (**in Form P6 – PPIRP Regulation 16**): that, *PPIRP shall be initiated within 90 days; initiation of application is not to defraud any person; and name of the Insolvency Professional proposed & approved by Financial Creditors will be appointed as Resolution Professional* **[Section 54A(2)(f)].**

- ✓ In case of a company, the members of Corporate Debtor have passed the Special Resolution or in case of LLP ¾ of total number of partners approved the Resolution, to initiate PPIRP **[Section 54A(2)(g)].**
- ✓ Prior to approval, the Financial Creditors shall be provided with ***(a) Declaration; (b) Special Resolution; and (c) Base Resolution Plan*** **[Section 54A (3)]**
- ✓ The Corporate Debtor shall file an application for initiating PPIRP within 90 days from the date of approval received from the Financial Creditors.

iv. ***Formal & Informal process:*** Pre-admission of application under PPIRP by Adjudicating Authority (NCLT) shall be the informal process. Post admission of the Pre-pack application by the NCLT- shall be Formal with effect from the date of commencement of PPIRP. There is no such informal discussion before admission of application by NCLT in case of CIRP.

Note:
(a) Corporate Debtor being MSME must commit a minimum amount of default of INR 10 Lakhs.
(b) Reference to Financial Creditor shall be understood as unrelated Financial Creditors.
(c) *If Corporate Debtor does not have financial debt or all the Financial Creditors are related - Unrelated Operational Creditors shall substitute such Financial Creditors. In this case Committee of Creditors shall consist of (a) 10 largest Operational Creditors (OC) in value or in case less than 10, with those OCs; (b) a representative of Worker; and (c) a representative of employees.*

v. ***Management of Affairs of Corporate Debtor***

Major change is made in case of PPIRP**. Instead of Creditors in possession applicable to CIRP, *Debtor in possession with creditors in control model of management is adopted in case of PPIRP*.** The management of the affairs of the Corporate Debtor **shall continue to be vested** in the Board of Directors **(BOD)** of the Corporate Debtor, **and BOD will not be suspended.** ***However, there is default Rule given below.***

vi. ***Resolution Professional to be a Monitor; and not CEO of Corporate Debtor***

If (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or (b) there has been gross mismanagement of the affairs of the corporate debtor, the Committee of Creditors by a vote of 66% in value can decide to vest the management of affairs of Corporate Debtor with the Resolution Professional after seeking the approval of NCLT. [Section 54J(2)]

As per Section 17, in case of CIRP, the management of Affairs of the Corporate Debtor are vested in Resolution Professional and all powers of Board of Directors are being exercised by him/her. However, there is a major change in PPIRP, Resolution Professional **will monitor management of the affairs** of the corporate debtor and **will inform** the committee of creditors in the **event of breach of any of the obligations** of the Board of Directors or partners, as the case may be, of the corporate debtor.

vii. No Newspaper Public Announcement; Claims from Creditors are not invited through Public Announcement in PPIRP

Though Public Announcement (**Form P9 of PPIRP Regulations**) is required to be made by Resolution Professional ***within two days*** of the commencement of the process but this will be intimation of PPIRP, to be published on the websites of the corporate debtor (if any) and the IBBI. Further, in PPIRP, list of Claims will be sent by Resolution Professional to every creditor, listed in **Form P2 of PPIRP Regulations**. Please note the list of claims will be submitted by Corporate Debtor to the resolution professional in **Form P10 of PPIRP Regulations**. in **Form P9**.

viii. Constitution of the CD and first CoC meeting

In PPIRP, Committee of Creditors (CoC) is to be constituted by Resolution Professional within 7 days of the pre-packaged insolvency commencement date, and **first CoC meeting** is also to be conducted in 7 days of PPIRP. In case of CIRP, CoC is to be constituted within 23 days of the CIRP commencement date, and **first CoC meeting** is to be held within 30 days of CIRP.

ix. Submission of Resolution Plan

In case of PPIRP, the Base Resolution Plan prepared by the Corporate Debtor (CD) is to be presented to the Resolution Professional **within 2 days of the PPIRP commencement date**. CoC can approve the Base Resolution Plan for submission to NCLT **if such plan does not impair any claims** owed by the CD to the Operational Creditors (OCs). However, in case of CIRP, there is no concept of Base Resolution and Corporate Debtor is eligible to submit the Resolution Plan **only if it qualifies under Section 29A** of IBC 2016 and all the

Resolution Plans received by Resolution Professional as per the provisions of IBC 2016 will be put up to Committee of Creditors for approval, voted by the CoC simultaneously.

x. Termination of PPIRP, Liquidation of the CD and Initiation of CIRP

Resolution Professional to submit Resolution Plan approved by COC within 90 days from the commencement date of PPIRP to Adjudicating Authority (AA). If Resolution Plan is not approved by CoC within this time, Resolution Professional is to file application with AA **for termination of PPIRP**.

Further, where Adjudicating Authority **rejects the Resolution Plan** being not in conformance to provisions of PPIRP, it shall order **termination of PPIRP and pass a liquidation order** in respect of the corporate debtor.

The committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan, by 66% of voting shares, may resolve to initiate CIRP in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II [Section 54-O].

Will PPIRP applicable to all MSME?

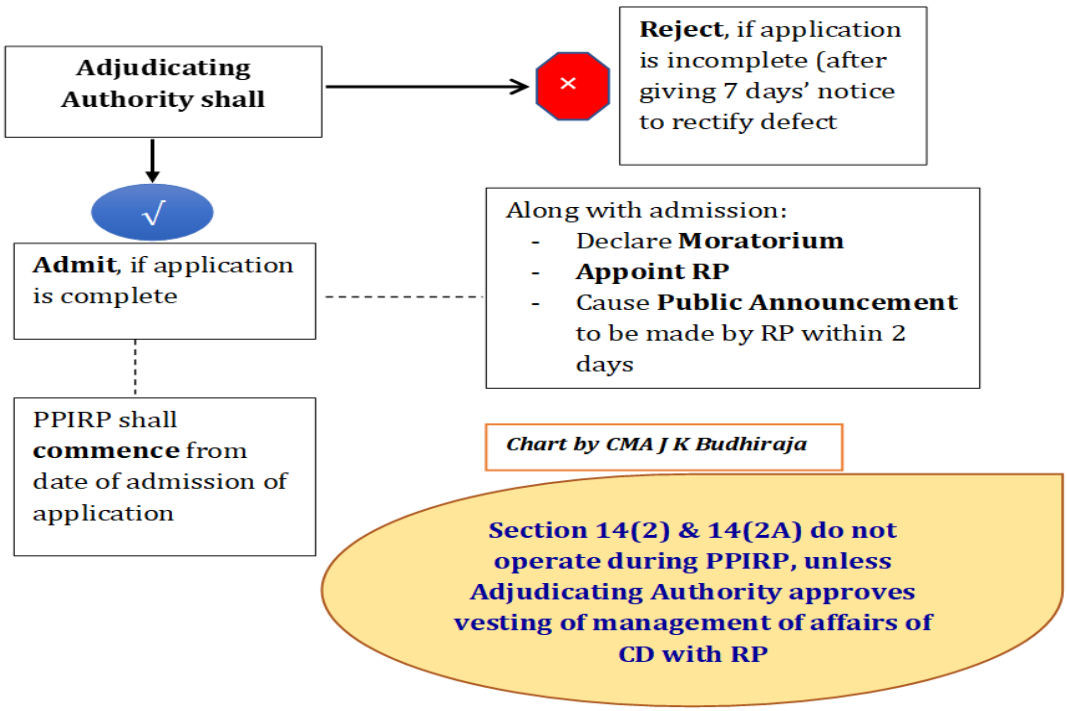
Form-1: Application by Corporate Applicant to Initiate Pre-Packaged Insolvency Resolution Process under Chapter III-A of the Code *vide* **Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021, mandates,** attaching a copy of **Udyam Registration Number, as per Notification No. 2119(E)** dated 26.06.2020 of Ministry of Micro, Small and Medium Enterprises. Therefore, a large number of MSMEs in India will not be able eligible under this Scheme unless they themselves register on the MSME portal ***https://udyamregistration.gov.in/Government-India/Ministry-MSME-registration.htm***

According to National Sample Survey 73rd Round (2015-2016), there are an estimated 6.3 crore MSMEs that exist in India. However, as per the data available with Udyam Registration (MSME registration) website only 26.42 lakh MSMEs have registered till date. This essentially means that the unregistered MSMEs which exceed the registered MSMEs by a large number cannot

take recourse under the pre-packaged regime for insolvency resolution. [**Source: *Moneycontrol dated April 12, 2021***].

Application for Initiation of PPIRP [Section 11A]

1. Application shall be in ***Form 1 of Insolvency & Bankruptcy (PPIRP) Rules, 2021***; and a copy thereof is required to be served to IBBI before filing with Adjudicating Authority.
2. **Application to be filed by the Corporate Applicant** – only where the Corporate Debtor meets the eligibility and conditions for initiation of PPIRP.
3. **Documents to be attached** with the applications are:
   - ✓ Declaration - **Form P6**
   - ✓ **Special Resolution**
   - ✓ **Approval** of Financial Creditors for initiation of PPIRP- **Form P4**
   - ✓ Written Consent of proposed Resolution Professional - **Form P1**
   - ✓ Report of Resolution Professional for eligibility of Corporate Debtor and Base Resolution Plan **[FORM P8]**
   - ✓ Declaration by Corporate Debtor for existence of Avoidance transactions **[Form P7]**
   - ✓ Information relating to books of account of Corporate Debtor
   - ✓ Name of the Authorised Representative, if any **[Form P5]**
   - ✓ Latest & Updated Udyam Registration Certificate, or, Proof of being classified as MSME



Disposal of applications under section 54C and under section 7 or section 9 or section 10

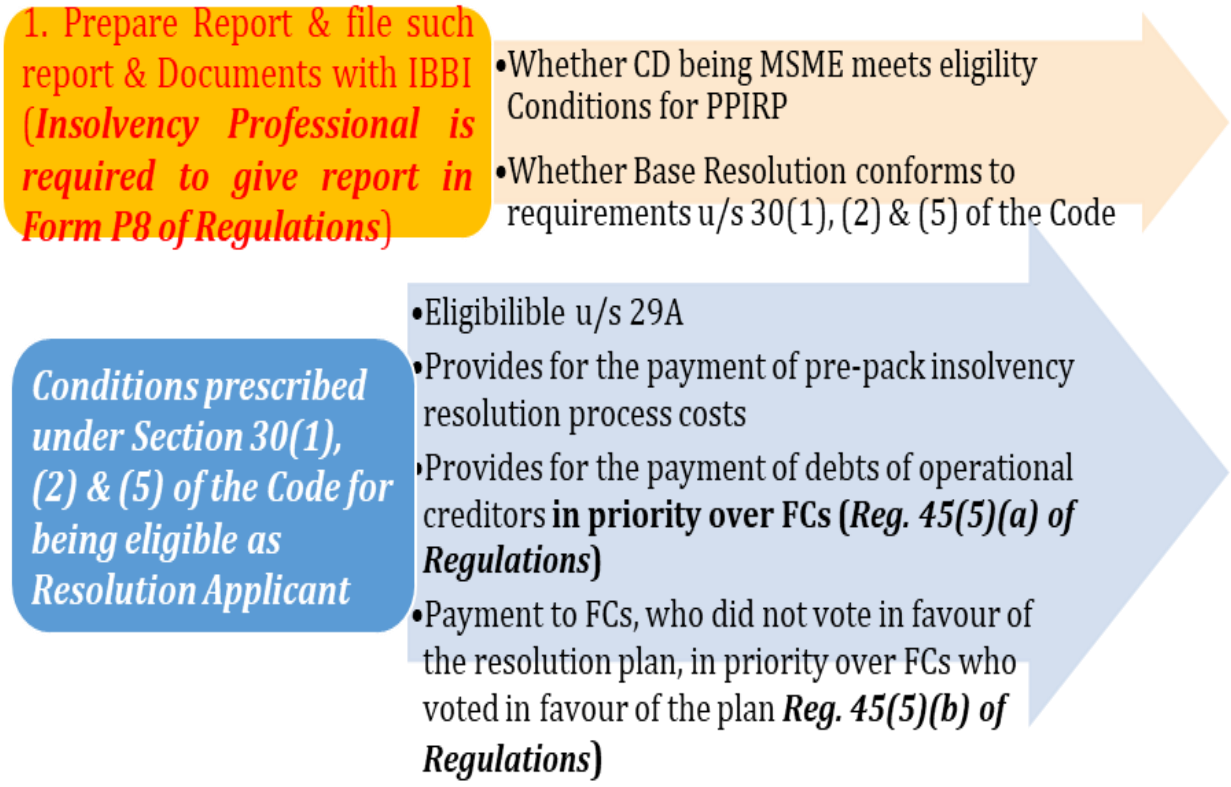
Where **PPIRP** application is pending before AA, it shall **FIRST** *admit or reject* PPIRP application **BEFORE** ***considering any application*** filed for CIRP u/s 7, 9 or 10

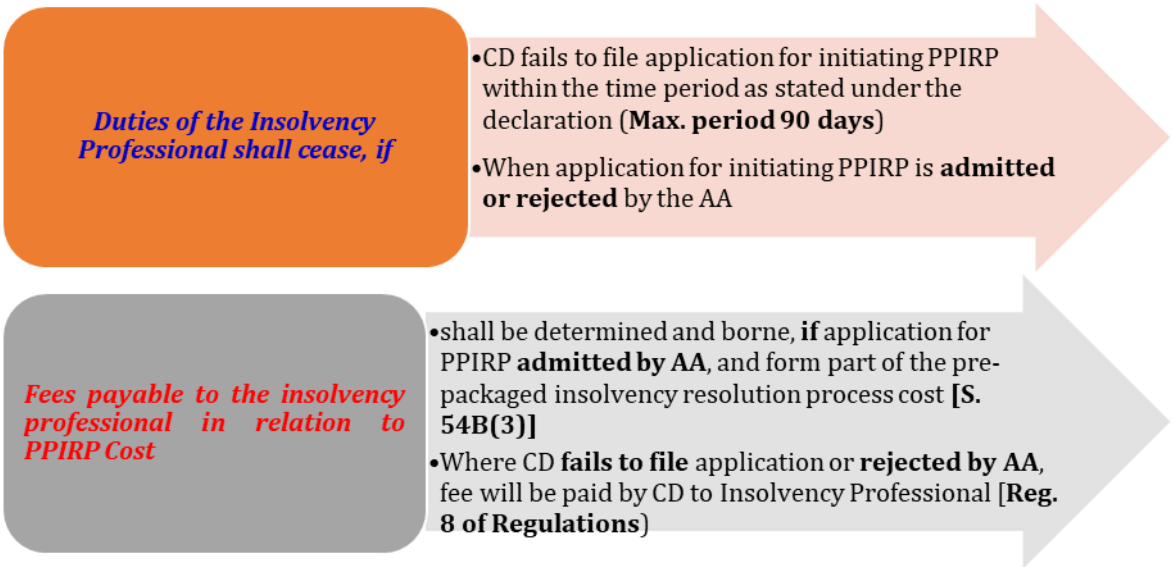
Where **PPIRP** application is **filed within 14 days of filing CIRP application** u/s 7, 9 or 10, which is pending before AA, it shall **FIRST** dispose of the PPIRP application

Where **PPIRP** application is filed **AFTER 14 days of filing CIRP** application u/s 7, 9 or 10, which is pending before AA, it shall **FIRST** dispose of the CIRP application u/s 7, 9 or 10

The provisions of this section shall not apply where an application under section 7 or section 9 or section 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

Duties of resolution professional before initiation of pre-packaged insolvency resolution process [Section 54B]





Duties and powers of resolution professional during pre-packaged insolvency resolution process [Section 54F] and Role of Resolution Professional

The resolution professional shall conduct the pre-packaged insolvency resolution process of a corporate debtor during the pre-packaged insolvency resolution process period and shall perform the following duties:	
Claims	- **Confirm** the list of claims **(Form P10)** submitted by CD - **Inform** the Creditors regarding their claims - **Maintain** updated list of claims
Monitor	- **monitor** management of the affairs of the corporate debtor - **Reg. 50**
Public Announcement	- To **publish** Public Announcement **(Form P9)** on the website of CD & IBBI with 2 days of IPPCD and - **sent** to every creditor in the list of creditors **(Form P2)** and Information Utilities **(IUs)**
Committee of Creditors (CoC)	- **Constitute CoC within 7 days** - **Convene,** & **attend** all the CoC Meetings - **act as Chairperson** of meetings of CoC **(Reg. 33)** - **Inform CoC** in the event of breach of any of the obligations of the Directors or Partners of the CD
Information Memorandum (IM)	**Prepare** Information Memorandum **on the basis of Preliminary IM** submitted by CD
Avoidance or Fraudulent Transactions or	**File application** for avoidance of transactions under Chapter III or fraudulent or wrongful trading under **Chapter VI - Reg. 41**

Wrongful Trading	
Appointment of Professionals	- **Appointment** of Professionals - **Reg. 10** - Person who is not registered with the regulator of the profession concerned **shall not be appointed**.
Registered Valuers	- Appoint **two Registered Valuers** within **three days** of RP's appointment - **Reg. 38** to determine the fair value and the liquidation value of CD - There is no provision for appointment of third valuer
Separate Bank Account	- **Operation of a separate bank account** for meeting Resolution Professional fee and expenses incurred for conducting PPIRP - CD shall **maintain such account** with such amount as advised by CoC
Invitation for Resolution Plan	- **Publish Invitation** for Resolution Plans **(Form P11)- Reg.43** - **on the website** of CD & IBBI - **not later than 21 days** from the pre-packaged insolvency commencement date
Present Resolution Plan to CoC	**Present** the resolution plans (**which confirm** to S.30 (1), (2) & (5) to the CoC for its evaluation
File Resolution Plan with AA	- **for Approval** of Resolution Plan; or - **Termination** of PPIRP; or - **Initiation of CIRP**

Approval of Resolution Plan

S. 54K

CD to submit BRP within 2 days of PPICD to RP → Resolution Professional to present to CoC → CoC to provide opportunity to CD to revise BRP prior to approval

CoC to approve BRP for submission to AA if it does not impair any claim owed by CD to OCs

× 1. If CoC does not approve BRP; **OR** 2. BRP impairs any claim owed by CD to OCs → RP to invite prospective RAs to compete with BRP

RP to publish on websites of CD (if any) and IBBI, brief particulars of invitation for R. Plan in **Form P11** not later than 21 days **(Reg. 43)**

Both Resolution Plans: BRP and R. Plan received through invitation **should conform** to requirements of Code and Regulations, and evaluated on the basis of evaluation criteria

Reg. 47

CoC to approve R. Plan if it is significantly better than BRP [Reg. 47(1)]

If no R. Plan is received that conforms to requirements of Code and Regulations, CoC to approve BRP [Reg. 47(2)]

RP to disclose the scores of Resolution Plans and BRP to submitters & Invite them to improve their R. Plans [Reg. 47(3)]

Chart by CMA & IP J K

Process of Improvement of R. Plan [Reg. 47(4):

(a) Submitter of RP having lower score, to have an option to improve its resolution plan by at least a tick size;
(b) then the submitter of the other RP shall have an option to improve its RP by at least a tick size;
(c) then the submitter under clause (a) shall have an option to improve its RP by at least a tick size;
(d) then the submitter under clause (b) shall have an option to improve its RP by at least a tick size, and

the process of improvement shall continue till either of the submitters fails to use the option within the time specified in the invitation for resolution plans.

"tick size" means minimum improvement over another resolution plan in terms of score, as approved by CoC and disclosed in the invitation for resolution plans.

Example:

Illustration 1

On the basis for evaluation, resolution plans 'A' and 'B' have scores of 105 and 108, respectively. Resolution applicant of 'A' may wish to improve 'A' over 'B'. It must improve 'A' such that the score of 'A' exceeds that of 'B' at least by tick size. If tick size is 5, resolution applicant of 'A' must improve 'A' such that the score of 'A' is at least 108 + 5 = 113

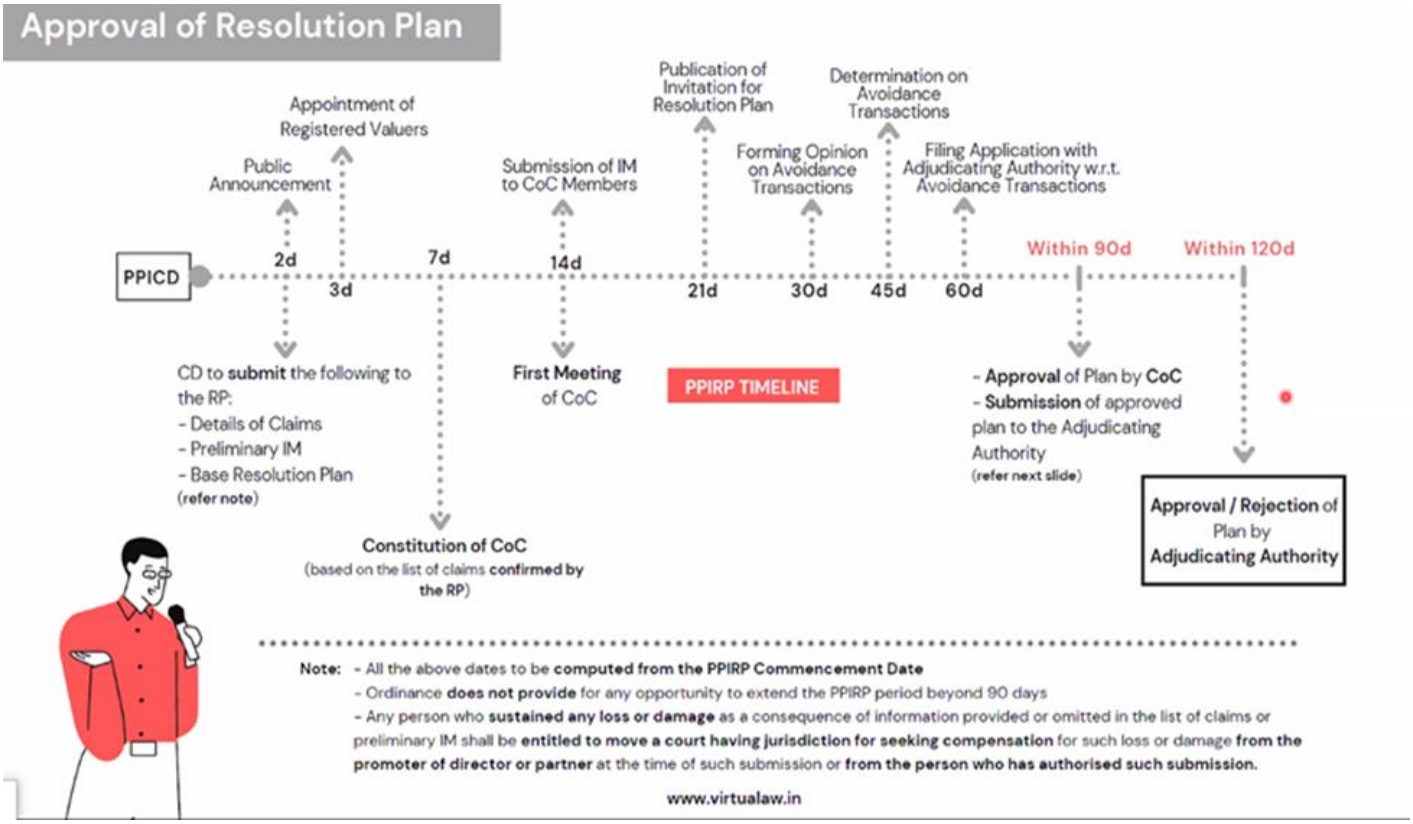
Illustration 2

In the example under Illustration 1, if tick size is 5 per cent., resolution applicant of 'A' must improve 'A' such that the score of 'A' is at least 108 X 1.05 = 113.4.

The resolution plan having higher score on completion of process of improvement under sub-regulation (4) shall be considered by CoC for approval. [Reg. 47(3)]

Abbreviation:
BRP: Base Resolution Plan; CoC: Committee of Creditors; CD: Corporate Debtor; PPICD: Pre-pack commencement Date; RA: Resolution Applicant; RP: Resolution Professional; R. Plan: Resolution Plan; Reg.: IBBI (PPIRP) Regulations, 2021 dated 9.4.2021

Timelines under PPIRP



Some Frequently Asked Questions

Q 1. Will the Base Resolution Plan face the Swiss Challenge Method for acceptance of H1 bid applicable in PPIRP?

There is no clear-cut name of Swiss Challenge Method mentioned either in the IBC (Amendment) Act, 2021 promulgated by President of India on 4th April, 2021 or in the PPIRP Regulations 2021 issued by IBBI. However, the Base Resolution Plan needs to be improved as per the methodology suggested in Reg. 42: Scoring and improvement of resolution plans of the said Regulations, which is similar to Swiss Challenge Method.

Q 2. Is Notice under Section 8 of IBC 2016 required to be issued by the Operational Creditor in PPIRP?

This is not applicable since the application for PPIRP is to be initiated by Corporate Debtor and Operational Creditor cannot initiate PPIRP. So, there is no question of Notice under Section 8 of the Code.

Q 3. In one of the eligibility criteria for submission of Base Resolution Plan, it is mentioned that CD should be eligible to submit a resolution plan under section 29A. However, Section 240A inserted by Insolvency and Bankruptcy Amendment Act, 2018 with effect from 6th June, 2018 exempts MSME?

Section 240A provides that the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises. However, Section 29A have other clauses than (c) and (h), other clauses are related to *undischarged insolvent, wilful defaulter as per RBI, convicted for any offence, disqualified to act as a director under Companies Act, 2013, prohibited by the SEBI, promoter of a company where there are PUFE transactions, and connected person not eligible* to be Resolution Applicant. Accordingly, other clauses of Section 29A will be applicable to Corporate Debtor of MSME who submits Resolution Plan as Resolution Applicant. Further, Supreme Court ***in the matter of Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr*** has also closed the back-door entry of defaulting promoters by using a special provision of compromise or arrangement by them during the liquidation phase of the insolvency proceeding.

Q 4. When will a period of 90 days for submission of approved Resolution Plan to Adjudicating Authority commence?

Section 54D provides that the resolution professional shall submit the resolution plan, as approved by the committee of creditors, to the Adjudicating Authority within a period of 90 days ***from the pre-packaged insolvency commencement date***.

Q 5. Can PPIRP be initiated by a company, when the company is not at default to any creditor? However, the management foresees certain events in future which would lead to default.

No. Section 54A (2) specifically states that an application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, ***who commits a default*** in payment of debts and also subject to other conditions.

Q 6. Will there be any extension in time period of 120 days allowed to complete the PPIRP?

As of now there is no provision for granting extension beyond 120 days to complete the PPIRP.

Q 7. Why should MSME adopt PPIRP instead of CIRP which allow more time upto 330 days as compared to 120 days in PPIRP?

As compared to CIRP, prepack is **quicker, more flexible, cost effective, time effective, and less disruptive to business**. In view of benefits attached to PPIRP, I am of the view that MSMEs, if are eligible under the Scheme should opt for PPIRP in place of CIRP.

Q 8. Is migration from PPIRP to CIRP possible? What will happen to PPIRP and cost incurred on PPIRP?

Yes, it is possible as per Section 54-O of the Code but it shall be with the approval of Committee of Creditors and Adjudicating Authority. If at any time after commencement of PPIRP but before approval of Resolution Plan, the Committee of Creditors with voting share of 66% resolves to initiate CIRP against the Corporate Debtor, the Resolution Professional shall intimate to Adjudicating Authority the decision of CoC for initiating CIRP against the Corporate Debtor. Adjudicating Authority shall, **by order -** ***Terminate the PPIRP - Appoint RP under PPIRP as Interim Resolution Professional for the CIRP - Declare that PPIRP costs shall be included in IRP Costs***.

Q 9. Notification number S.O. 1543(E) issued by the Government on 9th April, 2021 specifies ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor. Notification number S.O. 1205(E) issued by the Government on 24th March, 2020 specifies one crore rupees as the minimum amount of default for initiating CIRP. Does it mean that PPIRP can be initiating for the default less than Rs. 1 crore and CIRP for default of Rs. 1 crore and above?

No. These notifications only specify the **MINIMUM DEFAULT amount**, which means that the application below this default amount cannot be initiated under these schemes. For example,

if there is a default of Rs. 10 crore in payment of operational debt by an MSME, application can be initiated by Operational Creditor under section 8 & 9 of the Code for CIRP not for PPIRP, *as Operational Creditor is not eligible to file the application under PPIRP, i.e. PPIRP can be initiative only by Corporate Debtor being MSME who is eligible under the provision of PPIRP*. Therefore, if Corporate Debtor being MSME likes to initiate PPIRP, it can be done by following the procedure mentioned in the Ordinance on PPIRP issued by Government on 4th April 2021.

Conclusion

PPIRP will prove to be innovative and will ease out the stress of MSMEs and prevent them from rigorous of CIRP, as during PPIRP period, management of affairs will continue to be vested with them and they will be able to retain the control of their businesses by following the provisions of PPIRP. This reform may improve India's rank in ease of doing business in terms of 'resolving insolvency' in the World Bank Group's Doing Business Report.

References:

1. *The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021*
2. *The Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021*
3. *The Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021*
4. *Presentation made by Shri Prakul Thadi, VirtuaLaw at IICA webinar dated 11th April 2021*

GUARANTOR'S LIABILITY UNDER IBC

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Under Indian Contract Act 1872, the guarantor has certain rights, like the right to be discharged of its liability under the guarantee in case debts are paid or discharge of the Principal Debtor/Borrower ("PD"), and the right to subrogation against the PD once the guarantor has paid debts on behalf of PD. Whether such rights are available to the guarantor under IBC or not? The said article will deliberate / discuss the guarantor position under IBC based on various case laws. Further, it will examine whether a lender may initiate CIRP simultaneously against the principal debtor and guarantor under IBC?"

This article deals with followings:

Can CIRP proceeding be initiated against principal debtor and guarantor simultaneously?

Is right of subrogation available to guarantor under IBC?

Whether guarantor be discharged from its liability under IBC?

Initiation of CIRP if principal borrower is non corporate person and guarantor is a corporate person

In financial transaction of granting loans to the corporates, banks and financial institutions obtain a guarantee from either the promoter or the holding/group companies of such corporate. As per such contract of guarantee, a guarantor undertakes to perform the contractual obligations on behalf of or towards discharge of the liability of the principal debtor ("**PD**") towards a creditor, in the event that such PD has defaulted in performing its contractual obligation or discharging its liability.

Section 128 of the Indian Contract Act, 1872 which reads as under stipulates that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. However, the onus is on the surety to establish that, the contract of guarantee provided for anything to diminish the liability of the surety under the contract of guarantee excepting the liability of the surety being co-extensive as that of the principal debtor or company.

Now question is ***can lender initiate Corporate Insolvency Process (CIRP) against Principal debtor and/ or guarantor under IBC simultaneously****?*

Section 60 (2) of the IBC states, "Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or (liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor) shall be filed before such National Company Law Tribunal.

{Above amendments were inserted by Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 which came into force w.e.f. 01.12.2016.}

Insolvency Law Committee in its Report dated February 2020 under Para 7.3 noted and observed,

"*while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower. Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them*."

Judicial bodies have often tried to settle this contentious issue, but contradicting judgments have kept the issue still alive.

The said question was arouse in the matter of *Dr. Vishnu Kumar Agarwal Vs M/s Piramal Enterprises Limited*[1] before the Hon'ble National Company Law Appellate Tribunal, Hyderabad Bench ("**NCLAT**") wherein the Hon'ble Tribunal observed and held in Para 32 of the judgment, "*There is no bar in the Insolvency and Bankruptcy Code, 2016 for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor (s). However, once for the same set of claim application under Section 7 by the financial creditor is admitted against one 'Corporate Debtor' i.e., 'Principal Borrower' or 'Corporate Guarantor', second application by the same financial creditor for the same set of claim and default cannot be admitted against the other 'Corporate Debtor' i.e., 'Principal Borrower' or 'Corporate*

Guarantor'. Though there is no provision to file joint application under Section 7 of the Insolvency and Bankruptcy Code, 2016 by the Financial Creditors, no application can be filed by the Financial Creditor against two or more "Corporate Debtors" on the ground of joint liability ('Principal Borrower' and on 'Corporate Guarantor' or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor' till it is shown that the 'Corporate Debtors' combinedly are joint venture company."

In another judgement in the matter of *State Bank of India Vs Athena Energy Ventures Private Limited* where Athena Energy Ventures, a finance company, guaranteed a SBI loan of ₹2,769-crore given to its subsidiary, Athena Chhattisgarh Power, the NCLAT *has allowed the simultaneous insolvency proceedings against the principal borrower and the corporate guarantor*. The order was in contradiction with the order passed earlier by the NCLAT in the case of *Vishnu Kumar Agarwal Vs Piramal Enterprise,* where it held that once the CIRP is initiated, simultaneously other proceeding shall not be allowed. In the present case, the NCLAT, while allowing the simultaneous proceedings, said that the liability of the Principal Borrower and the Guarantor is co-extensive as per Section 128 of the Indian Contract Act.

In the said judgment, NCLAT relied heavily on the judgment of honourable Supreme Court in the case of *State Bank of India v. V. Ramakrishnan and Others,* that in a contract of guarantee, a creditor can proceed against the assets of either the corporate debtor, or the guarantor, or both, in no particular sequence, and therefore, any moratorium which bars legal proceedings against the corporate debtor would not restrict a creditor from proceeding against the guarantor.

***Another question will arise that is Guarantor bound by the resolution plan passed with regard to the corporate debtor*?**

Section 31(1) of the IBC provides that a resolution plan approved by the NCLT shall be binding *inter-alia* on the corporate debtor as well as its guarantors.

The Calcutta High Court in the case of Gouri Shankar Jain v. Punjab National Bank and Ors (W.P. No. 10147(W) of 2019) has clarified that the resolution plan of a corporate debtor, which reduces the liability of the corporate debtor, does not in any way alter the right of a

creditor to claim the remaining amount from the guarantor. The said court relied on the judgement delivered by Supreme Court in the case of Maharashtra State Electricity Board v. Official Liquidator *High Court, Ernakulum and Anr.* (1982 Vol 3 SCC 258), wherein it was held that –

"*Under section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability".*

The Calcutta High Court thus held that the discharge of the liabilities of a corporate debtor under a resolution plan, being through operation of law, will not discharge the guarantor of its liability to the creditors.

NCLT, Mumbai bench observed in the case of *IDBI Bank Ltd. v. EPC Constructions India Limited*, that the very purpose of the contract of guarantee is the recovery of that amount from the guarantor which the corporate debtor is unable to repay, and thus, when a resolution plan only provides for part payment to a creditor, the statutory right of the creditor would be defeated if it cannot recover the remaining amount from the guarantor. However, the guarantors would not be liable to pay the debts of the corporate debtor unless and until the resolution plan expressly provided that the guarantees would continue even after the approval of the resolution plan.

The honourable Supreme Court observed in the case of State Bank of India vs. Ramakrishnan and Ors (2018 Volume 17 SCC 394) that if the resolution plan of the corporate debtor provides for payments to be made by the guarantor, the guarantor cannot escape such liability. It was further held that Section 133 of the Contract Act will not come to the rescue of the guarantor in this regard.

Can CIRP is maintainable against a guarantor who is a corporate person where principal debtor / borrower is non corporate entity?

In the case of *Laxmi Pat Surana v. Union Bank of India, the Supreme Court held on 26 March 2021 that-*

Para 21"……. it must follow that the lender would be a financial creditor within the meaning of the Code. The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in Section 3(8) of the Code"

Para 22 "Thus understood, it is not possible to countenance the argument of the appellant that as the principal borrower is not a corporate person, the financial creditor could not have invoked remedy under Section 7 of the Code against the corporate person who had merely offered guarantee for such loan account. That action can still proceed against the guarantor being a corporate debtor, consequent to the default committed by the principal borrower. There is no reason to limit the width of Section 7 of the Code despite law permitting initiation of CIRP against the corporate debtor, if and when default is committed by the principal borrower. For, the liability and obligation of the guarantor to pay the outstanding dues would get triggered coextensively."

Therefore, CIRP under Section 7 of IBC can be initiated by the financial creditor against a corporate person concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default, even if the principal borrower is not a 'corporate person.

Guarantor's right to subrogation

The right of subrogation is an equitable and natural right of the guarantor against the Corporate Debtor on whose behalf he has paid the money. There is an implied promise, in every contract of guarantee, by the PD to indemnify the guarantor for any sum rightfully paid by the latter under the guarantee. However, under the IBC, the guarantor does not possess this right to proceed against the corporate debtor once the guarantor has paid the corporate debtor's debts

to the creditors because discharge of Corporate Debtor's liability is through the operation of law as the same is stemming from the proceeding under the Insolvency and Bankruptcy Code. In the case of *Lalit Mishra & Ors.* **v.** *Sharon Bio Medicine Ltd. & Ors.*, the NCLAT discussed the issue of subrogation when the promoters, who were also the personal guarantors, sought to claim the right of subrogation under section 133 and 140 of the Contract Act. The NCLAT held in para 9 that –" *the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, inter alia, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code" In para 10, it was held that, "The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The 'I&B Code' seeks to protect creditors of the 'Corporate Debtor' by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes."*

Concluding view:

CIRP proceeding can be initiated simultaneously against PD and guarantor, however there are contradictory judgment by NCLAT. The Guarantor position is very catchy because discharge of the corporate debtor as a result of the resolution plan does not discharge the guarantor. The guarantor has no right to recover the amounts paid to the creditors from the corporate debtor. This is in direct contravention with the guarantor's subrogation and indemnification rights under Sections 140 and 145 of the Contract Act. This is due to "non-obstante clause of the IBC". *The liability of the guarantors is co-extensive with the borrower and the IB Code is not a recovery suit. Therefore, any right available to the surety under the Law of Contract will not be applicable in the case of an approved resolution plan.*

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PRE-PACK INSOLVENCY RESOLUTION PROCESS AND ITS CHALLENGES

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The article is dedicated on the latest amendment made in Insolvency and Bankruptcy Code, 2016 ie Prepack Insolvency Resolution Process (PPIRP) by adding a new Chapter – IIIA from Section 54A to 54P via ordinance dated 04.04.2021 along with IBBI (PPRIP) Regulation, 2021 and IBBI (PPIRP) Rules 2021. The amendment has been made by the Government in order to further facilitate the ease of doing business specially for the Micro, Small and Medium Enterprises (MSMEs) who have been affected by the pandemic covid 19. The proposed PPIRP is cost effective, flexible, less time consuming, lower litigations and most importantly provides for the "debtor in control" mechanism. We can expect more resolutions happening in PPIRP than the liquidations as was the case under CIRP and is much desired scheme for the MSMEs as it provides scope for them to come out of the financial stress . The main focus in this article is to discuss about the anticipated challenges that may be faced by the Corporates, Financial creditors and the Resolution Professional while pursuing the procedure of PPRIP including strained timelines, declarations to be given by the corporate applicant, avoidance transactions, convincing the financial creditor on the insolvency resolution terms with or without impairing the dues of Operational Creditors and the disclosures need to be made by the management of the Corporate Debtor

Introduction of Insolvency and Bankruptcy Code

The Insolvency and bankruptcy Code (IBC) came into the enforcement on 01st day of December 2016, before this insolvency of corporates and individuals used to be regulated by various overlapping Acts and institutional framework which did not aid lenders in effective and timely recovery or restructuring of defaulted assets and was causing undue strain on the Indian credit system. The IBC provides the single stop of resolving the insolvency of Corporate Person and Individuals. The provisions relating to insolvency and liquidation of corporate persons came into force on December 1, 2016, while those of insolvency resolution and bankruptcy of personal guarantors to corporate debtors (CDs) came into effect on December 1, 2019. In addition to objects of resolving the insolvency, speedy recovery of debts and reviving the businesses, the IBC has another object to provide for ease of doing business in India to all stakeholder and for this purpose government is making various timely modifications and amendment in the Code from time to time including IBC(Second Amendment) Bill, 2019 introduced with the purpose to give the highest priority in repayment to last mile funding to

corporate debtors to prevent insolvency, in case the company goes into CIRP or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors etc. The bill was passed with the purpose of conclusion of cases, greater flexibility for corporate restructuring for maximizing value of assets, protecting primacy of secured creditors and removing voting deadlock of homebuyers, etc.

Achievements of Insolvency and Bankruptcy Code

With the enactment and amendments under the IBC, it successfully achieved many achievements. The best achievement is that 15,662 applications involving a debt of Rs.5,17,073 Crores have been settled even before it reached the stage of admission of the application under CIRP as on Nov 2020 as per the quarterly report of March 20 published by the IBBI. This shows the effectiveness of the IBC. A total of 4,139 cases were admitted into Corporate Insolvency Resolution Process (CIRP) out of which 601 cases have been closed by appeal/review/withdrawn. 378 cases have been withdrawn under Section 12A, 317 cases have resulted into Resolution and 1,126 cases have been ordered for liquidation. Resultants India has come to 63rd position in 2019 from 77th position in 2018 in World Bank "Doing Business Report 2020". In the Resolving Insolvency Index, India's ranking jumped 56 places to 52 in 2019 from 108 in 2018, Recovery rate increased from 26.5% in 2018 to 71.6% in 2019 and Time taken in recovery improved from 4.3 years in 2018 to 1.6 years in 2019.

Difficulties in existing regime for insolvency resolution system in India

Despite of the various amendment and achievement of IBC, it has some inherent flaws including it created an unbearable burden on the adjudicating authorities due to which the proposed time bounded and speedy insolvency resolution process became lengthy and costly. Further, due to wake of novel corona virus financial position of the industry became unstable and it became difficult to find the Resolution Applicant. To shield the corporates from the COVID-19 out break the Central Government suspended initiation of fresh insolvency proceedings and the suspension ended on 24.03.2021. The Government considered that COVID-19 pandemic has

impacted businesses, financial markets and economies in India, and in addition to the large corporates the pandemic has impacted the business operations of micro, small and medium enterprises (MSMEs) and exposed many of them to financial distress.

Introduction of Pre-Pack Insolvency Resolution Process

MSME's are the backbone of Indian Economy and engine of Economic growth of industries and of the country as a whole. They are typically more labour intensive than large corporates and provide tremendous employment potential at a very low capital cost and share a major portion of industrial production and exports of India. The Government is taking all possible measures to mitigate the distress caused by the pandemic, including increasing the minimum amount of default for initiation of corporate insolvency resolution process to one crore rupees, and suspending filing of applications for initiation of corporate insolvency resolution process in respect of the defaults arising during the period of one year. Government considered the urgency to address the specific requirements of MSMEs relating to the resolution of their insolvency, due to the unique nature of their businesses and simpler corporate structures and with intent to provide an efficient alternative insolvency resolution process for them under IBC for ensuring quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses the government introduced a pre-packaged insolvency resolution process (PPIRP) for corporate persons classified as MSMEs by an ordinance dated 04.04.2021.

The Prepack insolvency Resolution Process is a well adopted and tested practice around the globe and has emerged as an innovative corporate rescue method that incorporates the virtues of both Judicial and Non-Judicial insolvency proceedings. It is sort of hybrid framework, as it empowers stakeholders to resolve the stress of a CD as a going concern, with the minimum assistance of the State (courts). It is considered fast, cost efficient, and effective in resolution of stress, much before value of the enterprise deteriorates, with the least business disruptions as it allows the business to be run by the corporates itself and without attracting the stigma of insolvency attached with the formal insolvency process. After considering the prevailing

economical and market condition in India Government introduced PPIRP with various provisions for resolving the insolvency of MSME Corporates in a very cost effective and effective time bound manner by introducing a new Chapter III-A with section 54A to 54P and regulations and rules in this respect.

Provisions of Pre-Pack Insolvency Resolution Process

The Chapter III-A IBC, read with IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021 and Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021 regulates the PPIRP as follows:

- Application for initiating the PPIRP may be made by the Corporate debtor itself which has committed default of making the payment of debtor for the Rs.10/- lacs or more.
- It should not have undergone PPIRP or completed CIRP during the period of 3years preceding the initiation date or it is not undergoing a CIRP or under Liquidation process and are eligible to submit a resolution plan under section 29A of the Code.
- Non-related FCs representing not less than 66% in value of the financial debt due to such creditors, have approved such initiation of PPIRP proposal and name of the IP.
- The application should have been filed within 90 days from the date of approval of the Non-related FC without any intend to defraud any person.
- The CD is also required to take the approval from its members by passing a special resolution in case of company, and in case of Partnership firm or LLP approval of at least three-fourth of the total number of partners, for the purpose of filing of an application for initiation of PPIRP.

But before the above process, a lot of pre-consultation exercise is required to be completed by the corporate debtor, financial creditors and the resolution professional. This pre consultation exercise includes making a base resolution plan which shall be in compliance with the IBC and shall be approved by the Financial creditors primarily. This entire exercise requires lot of permutation and combination which a Resolution professional can provide to the corporate debtor even before approaching the Financial Creditors. This pre-consultation exercise is of

immense importance as it becomes the base for the rest of the PPIR Process as which basically will be a sort of compliance activity, of course subject to many other provisions as mentioned in the said ordinance.

The duties of the IP begin from the day of recommendation which shall include the preparation of a report confirming whether the corporate debtor meets the requirements of filing the application, and the base resolution plan as prepared and provided by the CD itself confirms to the requirements of the Code. IP's duties are divided into two parts – pre PPIRP and post admission into PPIRP.

Now, without going into the procedural part of the Pre pack Insolvency Resolution Process, we would like to deal with the main practical challenges expected during the implementation of the PPIRP.

Practical Challenges in PPIRP

1. **Declaration u/s 54A(2)(f) read with Regulation 16(1) to be filed in Form P6 - Along with application being filed with the AA for initiation of PPIRP**: The CD shall file *a declaration regarding the existence of any avoidance of transactions, fraudulent or wrongful trading.* The relevant para of the above declaration is reproduced as under :

"*(f) the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia, —*

(i) that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

(ii) ***that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and***

(iii) the name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e);

2. **Declaration u/s 54C(3)(c) read with Regulation 16(2) to be filed in Form P7 - A declaration regarding the existence of any avoidance of transactions, fraudulent**

or wrongful trading is also required to be filed with the application for initiating PPIRP. The relevant para of the above declaration is reproduced as under :

"Sec 54C. (3) (c)- A declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, in such form as may be specified; "

Now, the intention of the corporate debtor may be clear with no mala-fide intention in presentation of its books of accounts but it would be very difficult to give a declaration that there will be no entry which is not for defrauding the creditors, or entries with respect to avoidance of transactions or fraudulent or wrongful trading etc. In fact, when we look at the nature of preferential transactions, which is described under section 43 of IBC 2016, there will always be some entries where the related party transactions are bound to be there specially in the MSME sector and for such class of corporate debtors, the compliance level of various statutes is quite low due to their lack of knowledge and dependence on support of highly paid professionals which all corporate debtors cannot afford. On the top of it, there are penal provisions for any mis-declaration as provided under section 77A. The relevant para is as under:

"Sec 77A - Punishment for offences related to pre-packaged insolvency resolution process. (1) Where— (a) a corporate debtor provides any information the application under section 54C which is false in material particulars, ***knowing it to be false or omits any material fact, knowing it to be material****; or (b) a corporate debtor provides any information in the list of claims or the preliminary information memorandum submitted under sub-section (1) of section 54G which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material; or (c) any person who* ***knowingly and wilfully authorised or permitted the furnishing of such information*** *under sub-clauses (a) and (b), such corporate debtor or person, as the case may be, shall be* ***punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both****. (2) If a director or partner of the corporate debtor, as the*

case may be, deliberately contravenes the provisions of Chapter III-A, such person shall be punishable with imprisonment for not less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both."

So, the directors to the best of their knowledge may give such declaration but there is always a possibility that such transactions may be there. We can also see from our past experience during CIRP proceedings that there would be hardly any corporate debtor against which application under Sec 43, 45, 50 and 66 have not been filed. Under such circumstances, it would be very difficult to give such a declaration which could, instead of giving him relief under PPIRP, might result into heavy penalties or even imprisonment.

The only way to overcome this difficulty is that if such transactions can be proved that there is no transaction prejudicial to the interest of any creditor and all related party transactions are at Arm's length, then such a declaration can be provided. Otherwise, this requirement could become a non-starter for any corporate debtor to initiate PPIRP.

3. **Timelines**

Sec 54D(2) requires that the Resolution plan shall be submitted within 90 days of the commencement of PPIRP. During this period, the entire PPIRP exercise should be completed which is a very challenging task. There are many likewise challenging task in between timelines like issue of public announcement within 2 days, verification and finalisation of claim in 7 days, constitution of COC in 14 days, holding of COC meeting in 21 days and filing of application for avoidance transactions within 30/45/60 days and many more activities such as finalisation of Information Memorandum, filing of Report with AA, inviting applicants for Resolution plans, etc. As such there is no problem in meeting of all these timelines if we have done lot of home work during the Pre-PPIRP period and most of the activities required to be completed during the PPIRP period can be prepared in advance. The main delay happens due to the legal process as is happening during the CIRP process. Lot of applications are filed by the various stakeholders

which halts the progress of the CIRP. We have seen in the past that most of the cases under CIRP are not completed during the stipulated period of 180 days or even in the extended period of 270/330 days. Thus, meeting the strained timelines would be a big challenge and some drastic changes are required in our legal system by avoiding certain type of frivolous applications which are just made to gain time or to derail the process and also by strengthening the courts.

4. Impairment of Operational Creditors:

Section 54K(4) provides that if the Base Resolution Plan submitted by the CD is not impairing the dues of the Operational Creditors , then the Financial Creditors can consider the Base Resolution plan. However, if there is an impairment to the operational creditors, then as per Sec 54K(5)(b), the Resolution plan put up by the CD will be subject to competition from the other Resolution Applicants. Now, it is difficult to propose any plan without impairment and additionally, why a Financial Creditor should take all the pains for the haircut. Thus, it would be better that if there could be a provision that during the pre-PPIRP, if the haircut to the operational creditors have been approved by the 66% of the such class of creditors, then such impairment should be allowed and should not be subject to any competition from other Resolution Applicants. This would be a big relief and would go a long way in achieving the desired results by the Government in this PPIRP scheme.

5. Challenges to the Resolution Professional

It was assumed that the Resolution Professional will be playing a very limited role of just complying with the law. However, it would be a very challenging role of the RP under PPIRP specially during the Pre-PPIRP stage as lot of activities are to be completed during this period and only a very well experienced person handling such assignments can only plan the PPIRP. The RP is required to play a very different role as a consultant to Corporate Debtor, looking into its business model, Planning for its revival, formulating a scheme for the value maximisation from all stakeholders, discussing with the financial creditors and also with the other creditors

who are the backbone of any enterprise i.e., the suppliers, etc. So, this exercise is altogether different from CIRP and this provides the opportunity to the Resolution Professional to face this challenge and this also make a point for their fees/remuneration.

6. Challenges to the Corporate Debtor.

The corporate debtor is a very important part of PPIRP process and the entire game is to be played by CD only. It has to first of all change his mind set of availing the opportunity under PPIRP and not prolonging the financial sickness. Therefore, as soon as he is facing a financial crisis in the company, it should immediately hire advice from a good consultant to know about PPIRP, how it can be availed in the best interest of all the stakeholders and to come out of the financial stress. If someone takes a timely action, it would definitely be out of woods and can plan for a healthy future.

However, as if we have seen in the CIRP process, there have been a number of timely amendments based on practical exposure to smoothen and simplify the process and have covered a large distance in the last 4 years. Similarly, we shall expect lot of changes on the basis of the practical inputs to make PPIRP also a good scheme for the MSMEs.

ISSUES & CHALLENGES IN RESOLUTION OF RAJ OIL MILLS LIMITED

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Advent of Insolvency and Bankruptcy Code, 2016 was an epoch-making event since it was not merely consolidation of various credit recovery and insolvency laws, but also a mandatorily time bound, value maximisation, and business resolution process with debtor out of control. Having grappled with failed or ineffective credit recovery legislations for over three decades, the country was waiting to see the eventual result of the legislation before it could pronounce success of the new law. This article chronicles resounding and speedy success of the corporate insolvency resolution process of Raj Oil Mills Limited under IBC, and the lessons learnt. This would encourage steps for perpetuating such successes

India's very first credit recovery legislation in the form of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was meant for revival of the NPAs in the industrial sector. It had two laudable objectives viz. (i) expeditious revival of potentially viable sick units, and; (ii) expeditious closure of unviable units. However, the moratorium implied in Section 22(1) of SICA had no mandatory timelines, and this was misused to reduce SICA to tool for thwarting credit recovery ad-infinitum. Mercifully, SICA was repealed with the advent of Insolvency and Bankruptcy Code, 2016 (IBC) in December 2016.

Though relatively more effective, the subsequent two legislations viz. Recovery of Debts Act, 1993 (RDA) and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) have also been ineffective in credit recovery due lack of mandatory timelines and serious inadequacies in the operations of Debt Recovery Tribunals.

IBC's advent was epoch-making since it was mandatorily time-bound, and involved keeping the debtor out of possession of the defaulting company. Hence while the IBC came as a panacea for the creditors, it was also seen as an opportunity by some managements to catalyze deep restructuring through IBC and retain the control like in the case of Raj Oil Mills Limited (Raj Oil) for which the promoters filed for CIRP in June 2017.

Raj Oil had been NPA since 2012. Its Jaipur unit had been sold off under SARFAESI Act by Edelweiss ARC which had acquired loan asset of Karur Vaisya Bank under 5:95 structure. The other major lenders were SVC Bank, SIDBI, SIICOM and IFCI Factors. The company's unit at Manor, 97 km from Mumbai was operational, but the debts of the banks were not being serviced. Credit recovery attempts through asset sale under RDA and SARFAESI were on but there was uncertainty about the time and quantum of recovery.

From the start of CIRP of Raj Oil on July 10, 2017 to October 13, 2017 when the Resolution Professional (RP) took over the CIRP from the Interim Resolution Professional (IRP), voluminous work had been done on about 2000 creditors (including 1483 fixed deposit holders). Some of the serious irregularities committed by the company management highlighted in the IRP's handing over document to the RP were as under:

- The fixed assets as per the fixed assets register, the books of account and the list of assets given by the company for valuation purpose did not match and were subject to reconciliation.
- No supporting documents were available for the capital work-in-progress of Rs. 19.95 crore since FY-2013.
- Collection of the information relating to financial and operational payments for the previous two years was in progress. Claims of financial and operational creditors were subject to review after receipt of further documents and reconciliation
- The company had issued 7,00,000 GDRs at US$11.084 each representing 3,50,00,000 equity shares on July 26, 2012. The GDR proceeds of US$ 7.76 million (Rs. 43 crore) had been transferred from Geneva to company promoters' account in Hong Kong in July 2012, and the same had remained in the company's balance sheet as long-term loans and advances without any detail or document.

Thus, the RP was faced with a situation where the Information Memorandum (IM) was tentative and contained assets and liability figures which were all subject to reconciliation. Without

reconciling the figures, the IM could not be released for the prospective resolution applicants (PRAs). The reconciliation seemed unlikely in foreseeable future in the company which had not also held AGM since 2016 following judicial intervention.

Visit to production facilities

When visit was undertaken company's plant at Manor on the third day after take over by the RP, it was observed that the capital work in progress figuring in the company's books as Rs. 19.95 crore since FY-2013 did not exist. The operating part of the plant was very old reflecting absence of capital expenditure as declared in the red herring prospectus for the company's IPO in July 2009. The blow moulding, solvent extraction and refinery units which had been set up from the IPO proceeds were inoperative. The main operating facility i.e., the packing division whose production capacity was 2000 tonnes per month of edible oils such as groundnut oil, sunflower oil, sesame oil, mustard oil and coconut oil was operating at around 20% capacity. The company's finance and accounts functions were being handled by a consultant in the absence of CFO and in the absence of a company secretary, the compliances were incomplete. The silver lining, however, was that the unit was operating and clocking sales of about Rs. 4 - 5 crore per month with an average gross profit margin (sales minus direct costs) of about 20%. At that level of operations, the cash cycle of the company was around 20 days and hence it did not require external working capital. Despite gross mismanagement, market for the company's 76 edible / hair oil brands including Guinea, Cocoraj, Tilraj, and Mustraj etc. was intact.

Role of Resolution Professional

Sections 17, 18 and 20 of IBC dictate that IRP is obligated to **make every endeavour** to protect and preserve the value of the property, keep the corporate debtor as a going concern, and update / collate the figures of assets, liabilities, claims, guarantees, material litigations / investigations, etc. Section 23(2), enjoins that the RP "shall exercise powers and perform duties as are vested or conferred on the IRP". Further, section 23 requires the RP to implement the CIRP backed by duties prescribed in section 25 which enjoin that it **shall be the duty of the RP** to preserve and protect the assets of the corporate debtor.

Thus, apart from continuing the residual work of the IRP, the RP's main function is implementing CIRP and ensuring maximisation of value when the company goes to the preferred PRA. In other words, the RP has to act like an investment banker who must comprehend the business, the company's value, how the business could create synergy with the PRAs, identify and catalyse competition among PRAs and finally hand over the company to the best PRA in terms of the IBC and regulations thereunder. Thus, for the RP, it was necessary to transcend the accounting roadblocks and make success of the CIRP for a cash cow which just needed sanitising the artificially bloated liabilities and its hand-over to a good management.

Reconciliation of accounts

To reconcile the accounting figures, Special Audit seemed the best way since it did not entail any compliance at a time particularly when the statutory audit was not possible due to time and legal constraints. The logic was that not all the corporate complications would have readymade answers in the law, and the best course would be to adopt a logical and compliant process to resolve a problem and request for its acceptance by the adjudicating authority if such a scenario is not embedded in the IBC. So, a reputed Audit Firm S.M.S.R. & Co. was engaged to undertake special audit of the accounts and reconcile the differences urgently. The two valuers confirmed and that the capital work-in-progress had not figured in their valuations since there was no capital work-in-progress in the company. With the accounting figures reconciled, a revised IM was prepared for inviting resolution plans from PRA.

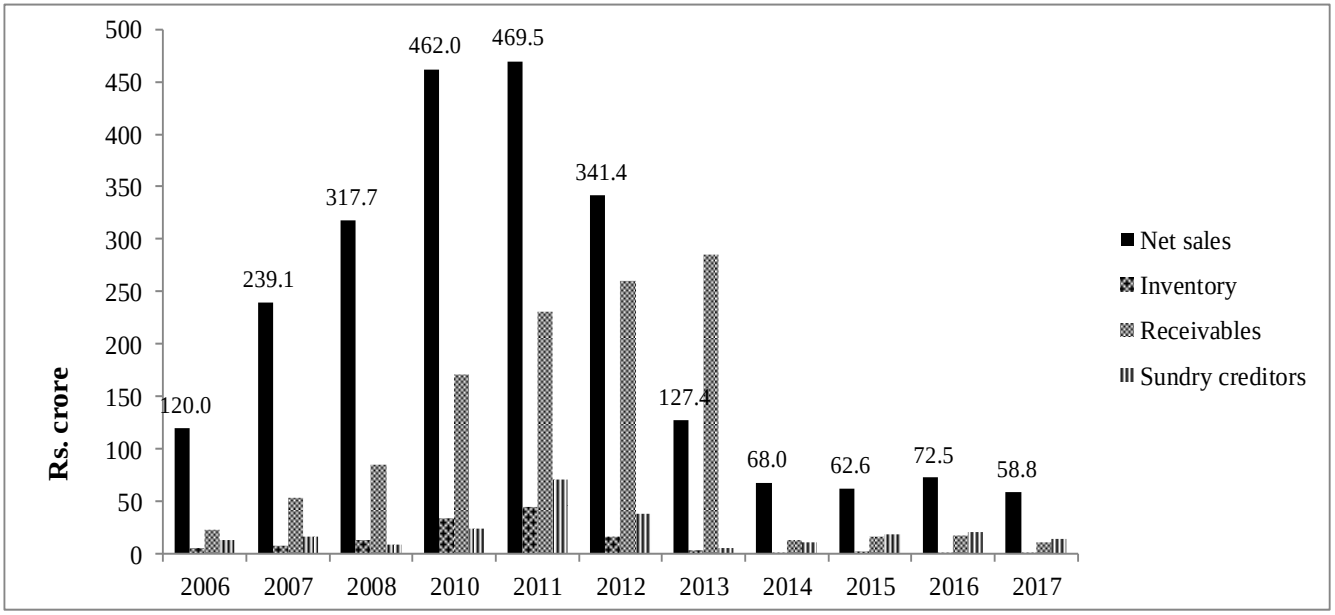
Information Memorandum

A look at the requirements of the IM in terms of CIRP regulations 36 showed that the design of the IM was meant to give clear answers to the PRAs on the assets and liabilities – current and contingent, the business prospects and the factors which had contributed to the insolvency. In other words, coming from an RP who is an "insider", the IM should pre-emptively answer the questions that the PRAs might have, and thus, hasten further due diligence so that the PRAs could gauge the company's value expeditiously and submit resolution plans in time. Hence,

consistent with CIRP regulation 36(2)(l) IM, both the positive and negative factors of the company were highlighted in the IM for the benefit of PRAs.

On the positive side, availability of the company's valuable brands was highlighted. In addition, analysis of the financial position and working results was included to show that the company enjoyed business viability but had been rendered sick due to fund diversion by the promoters who seemed to believe that the country's tardy credit recovery law would ensure their continuance ad-infinitum. For the same reason the promoters had first sought to register the company with BIFR and eventually filed for CIRP u/s 10 to be able to perpetuate their continuance post CIRP since section 29A did not exist at the time of CIRP application. The financial analysis was supplemented with bar charts so that the PRAs could quickly visualise and identify the causal factors. Since the company's compliance record was poor, secretarial and compliance audit was done with estimates of penalties to enable the PRAs to seek need-based reliefs in the resolution plans.

Fund diversion – Working capital



The bar chart shows that during FY-2007 to FY-2011, the company's sales clocked a compound average growth rate (CAGR) of 40.6%. While in isolation, this growth was impressive, when seen in conjunction with extraordinary growth of 78.3% in receivables ranging from 2.3 to 5.5 months of sales, this was not credible since as an RP, I had seen that the company's cash cycle

was only about 20 days. Although the company's financial distress was evident in the form of negative operating cash flow in FY-2011, the FIs / banks provided unsecured bills discounting facilities of Rs. 35.3 crore which all became NPA in the very next year i.e., FY-2012 when the company incurred net loss and had hugely negative cash flow with receivables constituting over 9 months of sales. Having drained out all the working capital funding by FY-2012, the company had no incentive to fudge the accounts further and in FY-2014 it wrote off receivables of Rs. 348.80 crore, creditors of Rs. 83.60 crore. No action was initiated against any debtor and no creditor took any action against the company for recovery showing that the parties concerned were fake. It was clear that the fraud had continued for years due to lack of credit analysis and monitoring by the banks / FIs. The analysis and access to internal documents revealed that the management's account fudging had started immediately after FY-2006 as a precursor to the IPO in July 2009 and it continued till it could draw working capital from banks and FIs.

Fund diversion – IPO proceeds

During the company's IPO of Rs. 114 crore (including share premium of Rs.104.50 crore) in July 2009, the committed capital expenditure as per draft red herring prospectus for capacity enhancement was Rs. 69.10 crore in five units. Due to the lack of any monitoring requirement for IPO proceeds of less than 500 crore in terms of SEBI guidelines, the profligate management was free to divert the IPO proceeds. As a result, no capex was incurred in three of the five units, and partly in two units which were never commissioned.

Fund diversion – GDR proceeds

Proceeds from the issue of 7,00,000 GDRs amounting to US$ 7.76 million (Rs. 43 crore) in July 2012 were transferred from Geneva to the promoter's account in Hong Kong in July 2012, and the same remained in the company's balance sheet as long-term loans and advances without any detail or document. This represented serious FEMA violation.

The fund diversion and violations had resulted clearly from the promoters' assumption about lack of cognizability of their crimes. Since the time for the CIRP was running out the CoC in the

meeting held on November 30, 2017 resolved against forensic audit for the time being so that resolution could be expedited.

Resolution plan

The IM which chronicled the analysis and reasons for insolvency was meant to enable the PRAs to decide on necessary debt/capital/ asset restructuring and seek reliefs against the violation of the erstwhile management. To maximise response from the PRAs, no EMD was stipulated. Seven parties submitted expression of interest which translated to resolution plans from three PRAs. As one of three resolution plans envisaged only take-over of the company's assets it was deemed non-compliant.

The remaining two resolution plans were discussed in three meetings of the CoC in November-December 2017. When risks underlying proposed fund infusion by the PRAs were highlighted in the committee of creditors meeting, the CoC put the PRAs to test and asked them to deposit 10% of their committed allocation for the creditors in an escrow account within a specified period. While one PRA, the consortium of Rubberwala Housing and Infrastructure Limited (RHIL) and Mukhi Industries Limited (MIL) could garner the 10% amount, the other PRA Dipti Vegoils Limited could barely remit the amount. In the e-voting, RHIL-MIL consortium emerged winner with over 78% of votes in favour of the resolution plan.

The application to NCLT u/s 30(6) for approval of the resolution plan was filed on January 17, 2018. The NCLT approval u/s 31(1) dated April 19, 2018 was received on May 2, 2018 and the company was handed over to the successful RA on May 3, 2021.

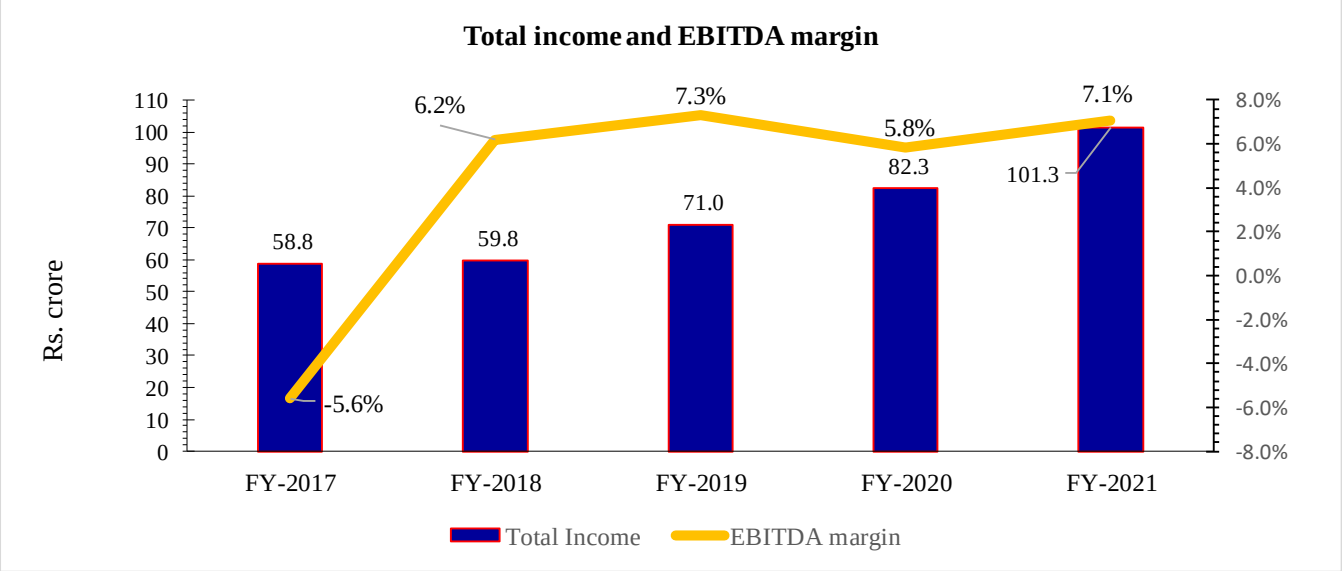
Value maximisation

Time bound resolution for maximization of value of assets is enshrined in the preamble of the IBC. Enterprise value of a company is the present value of the free cash flow to firm discounted at weighted average cost of capital. The value emanates from interplay of the company's assets and the human assets i.e., the management and organisation. IBC realises that a transparent process can lead to discovery of the new management which can maximise the value. Though

the fair market value of the assets of Raj Oil Mills Limited was Rs. 27 crore as estimated by the two valuers, the optimum value would depend upon the ability of the new management to leverage 76 brands of the company that had the operating history of five decades. Both the PRAs who competed had a background in edible oil business, and Raj Oil meant a strategic fit for them. This catalysed intense competition among them, and the winner i.e., consortium of Rubberwala Housing and Infrastructure Limited and Mukhi Industries Limited allocated Rs. 62.20 crore for the creditors apart from committing Rs. 12.6. crore for meeting estimated CIRP cost of Rs. 60 lakhs, capital expenditure and working capital infusion.

Current status

The company's operations have shown significant improvement post CIRP as may be seen in the figure below. In the post CIRP period after FY-2018 to FY-2021 (annualised), the company's total income and operating EBITDA clocked a 3-year CAGR of 19.2% and 24.5% respectively. The operating EBITDA margin was consistent with the edible oil industry trend.



In the post CIRP period (FY-2019 onwards), the growth in the income has resulted from significant increase in production from pre-CIRP period of 300 tonnes per month to 550 tonnes per month. Consistent with growth in operations, the company's staff strength has gone up from 200 (including contract labour) to about 230 now.

Post CIRP, the new management invested Rs. 36 crore in the company comprising equity capital of Rs. 11.20 crore and debt of Rs. 24.80 crore. Out of Rs. 62.20 crore committed to the

creditors; the company has already repaid Rs. 55 crore. To deleverage, the management has approached NCLT to permit conversion of the promoters' debt of Rs. 24.80 crore into equity as per SEBI guidelines. With defunct equipment operationalised, and further capital investment proposed for more products, the outlook for the company is bright. This is also reflected by a share price of Rs. 99.25 (of par value of Rs. 10/-) and market capitalisation of Rs. 36.72 crore as on May 20, 2021. This represents resounding success of the IBC.

Learnings from the CIRP

Raj Oil's resolution has proved that IBC's value maximisation objective is consistent with maximised credit recovery. Mathematically this can be represented as under:

Equity value = Max (V – D, 0)

Where,

V = Enterprise value which is the present value of the company's free cash flow to firm during its economic life (FCFF)

D = Debt

V – D is residual after debt serviced (full or part)

While the corporate debtor seeks to maximise "V – D" the creditor seeks to maximise "D". The successful resolution plan is one where both the creditors and corporate debtors converge on certain value of "D". Such convergence entails maximisation of "V". This clearly shows that maximised credit recovery is embedded in IBC's accent on resolution and value maximisation. This also shows that no cost is too much for speedy resolution.

Takeover under IBC is speedy unlike under Companies Act 2013 since the process is handled by an insolvency professional who becomes and insider by virtue of take-over of the entity. Preparation of a comprehensive IM by the RP with availability of proprietary information and data helps expedite the takeover. While it is important to decide on qualification criteria for the PRAs it is must be remembered that stringency of qualification criteria should not stifle

competition. The RP must act as a deal-maker who does not just follow the process perfunctorily but proactively identifies PRAs, and fosters competition for maximising the value of the business entity.

From the days of Raj Oil's CIRP the IBC and CIRP have seen substantive and positive amendments. It is necessary that the timelines of CIRP also apply to the adjudicating authorities so that the assets pass on to the efficient resolution applicant and augment the economy.

DEALING WITH AMBIGUITIES IN SALE OF THE CORPORATE DEBTOR AS A GOING CONCERN IN LIQUIDATION PROCESS

Mr. Ashok Kumar Gulla

Insolvency Professional

Sale of Corporate Debtor or business as going concern in Liquidation Process under Insolvency and Bankruptcy Code, 2016 is among the most challenging topic. Various amendments have been brought in the Code and liquidation and CIRP Regulations so as to provide another platform to the RP or Liquidator to attempt to sell the Company as going concern even if is under Liquidation. This is to align with the objective of the Code which is revival of Corporate Debtor and giving a new life to the business of Company. However, the sale of Corporate Debtor or business in liquidation has not been dealt in depth as it is under CIRP rising to various issues, litigations and queries which creates a hindrance in the successful sale under Liquidation Process. The Articles aims to bring out some of these issues and how they can be resolved making the process more simpler and transparent.

1. Background

- The Insolvency and Bankruptcy Code, 2016 (Code) enacted on 28th May 2016 is an Act that provides for resolution or revival of the Corporate Debtor through an approved resolution plan by members of Committee of Creditors under Sec 30 (4) and thereafter by Adjudicating Authority ("AA") under Sec 31(1) of the said Code. However, in case no resolution plans are received or approved, the AA may pass an order of Liquidation under Sec 33 (1) or 33 (2) of the Code.

- In the common parlance, liquidation in finance and economics is the process of bringing a business to an end and distributing its assets to claimants. As company operations end, the remaining assets are used to pay creditors and shareholders, based on the priority of their claims.

- However, with the various amendments made in the Code and regulations, the emphasis has been laid down to sell the Corporate Debtor as a going concern in liquidation so as to preserve its value and continuity of the business. However, neither the Code nor the regulation have defined elaborately "Liquidation", "Going Concern" and "Going Concern under Liquidation". This creates certain ambiguity for the Insolvency Professional who acts as the Liquidator and also other stakeholders in dealing with the Liquidation Process. One has to draw inference from other legal parlance.

- As per Companies Act, 1956; ***"Going Concern" means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource.***

- The concept of "going concern" as per clause 10 of Accounting Standard-I issued by the Institute of Chartered Accountants of India provides that "***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."***

- Thus, as against the common understanding of Liquidation being carried out when the activity is closed and assets are sold as piecemeal, sale of Corporate Debtor as going concern in liquidation is to retain the going concern status and not to sell the assets as a piecemeal as usually understood of liquidation process. Various ambiguities that are impacting the smooth conclusion of the Liquidation process are dealt in this artic[le.

2. Sale of Corporate Debtor as going concern in liquidation is latest development

- As per Reg 32 of IBBI (Liquidation Process) Regulations, 2016 dated 15th Dec. 2016; the Liquidator may (a) sell an asset on a standalone basis; or (b) sell (i) the assets in a slump sale,

(ii) a set of assets collectively, or (iii) the assets in parcels. Thus Liquidation process initially was intended as standalone, slump, collectively and in parcel sale for eventual dissolution of the Corporate Debtor. It was only through Corporate Insolvency Resolution Process ("CIRP") that sale of Corporate Debtor was intended through resolution plan as a going concern.

- Subsequent changes were brought in IBBI (Liquidation Regulation), 2016 on 2nd April 2018 and 20th Oct 2018 wherein Regulation 32 (e) and 32 (f) were included stating sale of the Corporate Debtor as going concern and business of the Corporate Debtor as a going concern respectively.

- Thereafter, the changes were also brought in IBBI (Insolvency Resolution Process for Corporate Persons) regulations, 2016 vide amendment dated 25th July 2019 incorporating Regulation 39 (c) for sale of Corporate Debtor as a going concern in liquidation. The Regulation sought for approval of CoC at the time of passing of resolution for either approving the resolution plan or of liquidation, as the case may be. Where the CoC is of the opinion that company or its business may be sold as going concern in case the Corporate Debtor goes into liquidation, it can recommend and pass resolution for Liquidator to first approach to sell under Regulation 32(e) and (f) of Liquidation Process Regulations.

- Simultaneously Regulation 2B was introduced in IBBI (Liquidation Process) Regulations, 2016 vide amendment dated 25.07.2019 opening another window for Corporate Debtor to be sold as going concern by way of inviting Compromise or Arrangement under Sec 230 of Companies Act, 2013. The process is time bound and is to be completed within 90 days of the order of liquidation before the Liquidator initiates the process of selling assets under Regulation 32 of Liquidation Process Regulations.

- In order to retain the status of going concern of Corporate Debtor and providing further clarity, Section 33(7) was incorporated clarifying that order for liquidation shall be deemed to be a notice of discharge to the officers, employees and workmen of Corporate Debtor, except when

the business of the Corporate Debtor is continued during the liquidation process by the liquidator.

- These changes have been made in Regulations to explore possibility of sale of Corporate Debtor as a going concern under liquidation, more so to prevent the business of a Company to be shut down and preventing the loss of employment. However, these changes have still not yielded any significant success stories because of many practical issues that are yet to be fully addressed. It requires clarity on various issues to derive benefit to various stakeholders for sale of the corporate debtor as a going concern under liquidation.

Sale as a going concern under Regulation 32 (e) and 32 (f) under Liquidation:

Sale of Corporate Debtor as going concern under regulation 32 (e) would not require the Company to be dissolved. It will be transferred along with the business, assets and liabilities, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests to the acquirer without any security interest, encumbrance, claim, counter claim. Whereas in case of Sale of business under regulation 32 (f), only the business is sold and Company shall still continue to remain in existent along with litigations that may be pending against the Company. The business may be sold by way of slump sale in liquidation. The Liquidator in this case will have to file for dissolution of Company. Moreover, Liquidator shall also have to identify the assets that may not form part of business and such assets, if any have to be sold separately. This may also result in delay in completion of liquidation if any of the assets continue to remain unsold.

The sale of the Corporate Debtor as a going concern or sale of the business of the Corporate Debtor as going concern, however, has not been dealt in depth as has been dealt in CIRP. It requires clarity on following issues so as to attract more participation of bidders and make it successful.

a) Treatment of existing legal cases and other liabilities pending against Corporate Debtor, whether they shall stand automatically withdrawn?

b) Regulation 32A "Sale as a going concern" states that the group of Assets or liabilities is to be identified by the CoC and in case CoC does not identify then the liquidator shall identify the group of Assets or liabilities which shall be sold under the Going Concern The question of transfer of liability does not arise as the liabilities have become claims, which are claims on the liquidation estate. In case the liabilities are also transferred with the assets it will have an impact of a Double Claim i.e. one on the Liquidation estate and other on the respective Asset transferred. If it is assumed that while sale of assets as a going concern the liabilities are also transferred and those liabilities are removed from the claims, then it will impact the priorities and equitable distribution as per the Section 53 of the IBC. **Hence, the language of Regulation 32A(3) needs to reviewed and revised so as to bring more transparency and clarity.**

c) **Implication of Section 79 of the Income Tax Act on "Carry forward and set off of losses in case of certain companies**":- Section 79 provides the right to carry forward of losses in case change of ownership to a Public Limited company and in case of Approval of Resolution Plan under Code. However, there are no rights to carry forward the losses is allowed in case of change of ownership in liquidation, how the relief shall be provided to the buyer in case of sale of CD as a Going Concern under liquidation. An amendment may be made in Section 79 of Income Tax Act to bring the sale of Company a going concern in Liquidation or under Section 230 of Companies Act under Regulation 2B of Liquidation Process Regulations.

d) As per the existing regulation, no specific prior approval is required for carrying on e- auction for sale of the Corporate Debtor or business of the Corporate Debtor as a going concern. There is no clarity on the procedure to be adopted once the Company is sold under E-Auction. Whether sale deed signed by the Liquidator will be adequate to conclude the transaction. The procedure

to be adopted for appointment of Directors by the Potential Bidder and issue of fresh equity is not clarified in the relevant laws. Whether Liquidator shall be required to file appropriate application for appointment of new Directors and issue of fresh equity with ROC. In case the Corporate Debtor is listed, whether any reporting similar in case of approved resolution plan under CIRP, shall be required to be made to SEBI and stock exchanges.

e) There is no provision in Liquidation for inviting plan from Bidders for acquiring company as going concern in Liquidation. The sale in Liquidation is "as is where basis" and whoever bid higher in the public e-auction becomes the Successful Bidder. However, where a Bidder desires to purchase a Company as a whole, it may be seeking various reliefs and concessions and there may be such other terms and conditions. Hence, such sale becomes contingent on approval of such reliefs and concessions for which Successful Bidder shall have to approach AA as Liquidator does not have any power to approve such reliefs and concessions and other terms as set out by Bidder unlike in CIRP where CoC is in the picture.

In case the Successful Bidder is not provided benefits of a Resolution Plan in sale of a Corporate Debtor as a Going Concern under Liquidation, the same shall defeat the purpose of law, as if no immunity is being provided by the Hon'ble NCLT then the parties interested in acquiring the Corporate Debtor as a going concern might not turn up.

Hence, similar to CIRP, a procedure has to be laid down in liquidation process regarding seeking approval of AA for sale of Company as going concern and such other approvals that may be needed to make the transaction successful.

3. Conclusion

While relying on Regulation 32 (e) of the IBBI (Liquidation Regulations), 2016, the Hon'ble Supreme Court in the matter of **Arcelor Mittal India Private Limited Vs. Satish Kumar**

Gupta & Ors. observed: "*The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.*"

Hon'ble NCLT, Mumbai Bench in its order dated 09.03.2021 in the matter of ***Gaurav Jain vs Sanjay Gupta, Liquidator of Topworth Pipes & Tubes Pvt Ltd,*** while approving the sale of Corporate Debtor as going concern in Liquidation also took note of the Supreme Court Judgement in Arcelor Mittal Case which also observed Regulation 32 of Liquidation Process Regulations that allows Liquidator to sell Corporate Debtor as going concern. The NCLT order also stated that even though there is no specific provision in the Code regarding "sale of Company as going concern", IBBI has formed the Liquidation Process Regulations under the Code and we have to take them as guiding principles in dealing with the case.

Similarly, Hon'ble NCLT, Hyderabad Bench while deciding on the application filed by Liquidator of Viswa Infrastructures Finance and Services Pvt Ltd seeking permission to sell Corporate Debtor as going concern observed in its order dated 18.01.2021 that "*the object of Code is not for liquidation for resolution. In the instant case, Section 60(5)(c) empowers the Adjudicating Authority to grant necessary reliefs even during liquidation. In the light of the discussion above the Tribunal deems it fit to accord permission to the Liquidator to sell the Corporate Debtor as a going concern for the purpose of achieving the object of the Code i.e. "maximization of value of assets of the Corporate Debtor".*

These judgements have clarified various issues being faced in the sale of the corporate debtor as a going concern in liquidation. The sale of Corporate Debtor as going concern under

liquidation is a welcome step for the stressed companies under Insolvency and Bankruptcy Code, 2016 giving one more opportunity to sell the Company maintaining the continuity of the business operations and ensuring the retention of employment. Though, there are many challenges related to such sale and how the transaction reach to its conclusion, the same can be resolved by bringing suitable amendments/modifications in Code and Regulations to make the process simpler, transparent and less litigated.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

- ✓ **Manoj K. Daga v. ISGEC Heavy Engineering Ltd. - [2020] 117 taxmann.com 249 /[2020] 161 SCL 437 (NCL-AT)**

Once moratorium had been applied, directors of corporate debtor acted wholly illegally in withdrawing monies from corporate debtor's bank accounts at back of IRP.

Respondent No. 1 filed application under section 9 against the corporate debtor. The Adjudicating Authority admitted said application and declared moratorium. On appeal filed by the appellant, director of the corporate debtor, the Appellate Tribunal passed an interim order directing IRP to not constitute CoC and ensure company remained a going concern. Subsequently, directors of the corporate debtor withdrew almost whole money lying with bank without knowledge of IRP.

Held that directors acted wholly illegally once moratorium had been applied, in going ahead and withdrawing monies from accounts at back of IRP. Further, since the appellant failed to return illegally withdrawn money in spite of affidavits and undertakings, appeal against impugned order was to be dismissed and IRP was to be permitted to move Adjudicating Authority or any authorities including police authorities to pursue matter with regard to money illegally withdrawn from accounts of the corporate debtor so as to trace money and get it back in company accounts.

Case Review : ISGEC Heavy Engineering Ltd. v. Shree Vishnu & Energy (P.) Ltd. [2020] 117 taxmann.com 248 (NCLT - Cuttack), affirmed.

I. SECTION 238 - OVERRIDING EFFECT OF CODE

II. SECTION 65 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR MALICIOUS PROCEEDINGS

- ✓ **Punjab National Bank v. Vindhya Cereals (P.) Ltd. - [2020] 117 taxmann.com 254 /[2020] 161 SCL 452 (NCL-AT)**

I. Financial creditor can proceed simultaneously under SARFAESI Act, 2002 as well as under I&B Code.

II. Filing of parallel proceedings under SARFAESI Act as well as under I&B Code does not attract proceedings under section 65.

I. Held that financial creditor can proceed simultaneously under SARFAESI Act, 2002 as well as under I&B Code against corporate debtor as non-obstante clause of section 238 would prevail over any other law for time being in force.

II. The Adjudicating Authority rejected application under section 7 on ground that the financial creditor had filed parallel proceedings before the Adjudicating Authority, and also proceeded under SARFAESI Act, 2002 which amounted to forum shopping. Further, the Adjudicating Authority directed authorized signatory of bank i.e., Chief Manager of the financial creditor, to show cause why he should not be penalized under section 65.

Held that since the financial creditor can proceed simultaneously under SARFAESI Act, 2002 as well as under I&B Code, it could not be inferred that proceedings against the corporate debtor were fraudulent or malicious.

Case Review : Punjab National Bank v. Vindhya Cerals (P.) Ltd. [2020] 117 taxmann.com 253 (NCLT - Ahd.), set aside.

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

- ✓ **Techno Electric & Engineering Co. Ltd. v. McLeod Russel India Ltd. - [2020] 117 taxmann.com 258 /[2020] 161 SCL 357 (NCL-AT)**

Though statutory prescribed period of 14 days for passing of an order by Adjudicating Authority with regard to admission or otherwise of an application under section 7 has not been held to be 'mandatory' but such order is required to be passed with utmost expedition.

Held that though statutory prescribed period of 14 days for passing of an order by Adjudicating Authority with regard to admission or otherwise of an application under section 7 has not been held to be 'mandatory' but such order is required to be passed with utmost expedition.

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

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

- ✓ **Raj Kumar Garg v. Health Care At Home India (P.) Ltd - [2020] 117 taxmann.com 272 (NCL-AT)**

I. *Offer of payment of a part of claim with a condition attached having effect of operational creditor relinquishing its claim in respect of balance amount payable in law cannot be envisaged as a payment in compliance to statutory notice under section 8(1).*

II. *Where corporate debtor did not pay even admitted part of claim of operational creditor on account of supply of medicine and default was in excess of Rs. one lakh, CIRP against corporate debtor to be admitted.*

I. Held that payment of unpaid operational debt has to be unqualified and evidenced by electronic transfer from bank account of the corporate debtor to bank account of the operational creditor. Therefore, offer of payment of a part of claim with a condition attached having effect of the operational creditor relinquishing its claim in respect of balance amount payable in law cannot be envisaged as a payment in compliance to statutory notice under section 8(1)

II. Respondent, the operational creditor, supplied medicines and medical equipments to the corporate debtor. The corporate debtor made part payment of a few invoices but failed to clear outstanding amount. Cheques issued to clear outstanding debt was dishonored. Following issuance of demand notice, the corporate debtor disputed total debt claimed by the operational creditor and sought adjustment of certain amount on account of reverse sale.

Held that since no evidence of any amount lying outstanding on account of reverse sales, much less a cogent and credible proof, had been placed on record by the corporate debtor and even payment of admitted part of claim had not been received by the operational creditor, default being in excess of Rs. one lakh would warrant initiation of CIRP at instance of the operational creditor.

Case Review : Health Care At Home India (P.) Ltd. v. Satyam Drugs (P.) Ltd. [2020] 117 taxmann.com 271 (NCLT - Delhi), affirmed.

SECTION 238 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - OVERRIDING EFFECT OF CODE

- ✓ **Rakesh Kumar Gupta v. Mahesh Bansal - [2020] 117 taxmann.com 300 (NCL-AT)/[2020] 160 SCL 230 (NCL-AT)**

Pendency of actions under SARFAESI Act or actions under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filing an application under section 7 of I&B Code

Held that pendency of actions under SARFAESI Act or actions under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filing an application under section 7 specially in view of section 238 of IBC.

Case Review : Punjab National Bank v. Gupta Marriage Halls (P.) Ltd. [2020] 117 taxmann.com 299 (NCLT - Delhi), affirmed.

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

- ✓ **Shrawan Kumar Agrawal Consortium v. Rituraj Steel (P.) Ltd. - [2020] 117 taxmann.com 302 /[2020] 160 SCL 210 (NCL-AT)**

Directions of Adjudicating Authority for re-bidding for maximisation of value of corporate debtor, after approval of Resolution Plan by CoC with requisite majority, is not in consonance with law.

Held that the Adjudicating Authority is having limited power of judicial scrutiny under section 31, which has to remain within four corners of section 30(2) and same cannot, in any circumstances, trespass upon commercial wisdom of the CoC, therefore, directions of the Adjudicating Authority for re-bidding for maximisation of value of the corporate debtor, after approval of Resolution Plan by requisite majority, is not in consonance with law.

Case Review **:** Punjab National Bank v. City Mall Vikash (P.) Ltd. [2020] 117 taxmann.com 301 (NCLT - Kol.), set aside.

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

✓ **Chhatisgarh Distilleries Ltd. v. Dushyant Dave - [2020] 117 taxmann.com 385 (NCL-AT)**

Jurisdiction bestowed upon Appellate Authority is expressly circumscribed; it can examine challenge only in relation to grounds specified in section 61(3).

Held that Prescribed Authority viz. NCLT/NCLAT, have been endured with limited Jurisdiction as specified in the Code; and they are not to act as a Court of enquiry which exercises plenary powers. When Resolution Plan is filed before the Adjudicating Authority then Authority has to satisfy that the Resolution Plan approved by the Committee of Creditor fulfills requirements as specified in sub-section 2 of section 30; it cannot direct CoC to consider a second Resolution Plan submitted before the Authority although second Resolution Applicant is ready to invest more amount in comparison to first Resolution Applicant. The jurisdiction bestowed upon the

Appellate Authority is also expressly circumscribed; it can examine challenge only in relation to grounds specified in section 61(3).

Case Review : *Dushyant C. Dave v. Anand Distilleries (P.) Ltd. [2020] 117 taxmann.com 384 (NCLT - Mum.), affirmed.*

SECTION 238A - LIMITATION PERIOD

✓ **Hussan Kadri v. Edelweiss Asset Reconstruction Co. Ltd. - [2020] 117 taxmann.com 388 /[2020] 160 SCL 190 (NCL-AT)**

Where corporate debtor failed to repay loan taken from financial creditor and subsequently account was declared NPA on 30-9-2012, in view of fact that corporate debtor made OTS proposal and accordingly paid part of debt on 5-12-2015 and 31-3-2016, section 7 application filed on 16-8-2018 was within limitation period.

The Corporate debtor availed loan facilities from the financial creditor. Since the corporate debtor failed to repay loan, its' account was declared as NPA on 30-9-2012. Proposal for one time Settlement (OTs) was made by the corporate debtor on 26-3-2014 and part payment was made on 5-12-2015 and 31-3-2016. Since the corporate debtor failed to make payment as per OTS, application under section 7 was filed. The corporate debtor claimed that section 7 application was barred by limitation.

Held that in view of fact that the corporate debtor had made OTS proposal on 26-3-2014 and also made part payment on 5-12-2015 and 31-3-2016, application under section 7 having been filed on 16-8-2018 by financial creditor was clearly within period of limitation.

Case Review **:** Edelweiss Asset Reconstruction Co. Ltd. v. K.K. Kadri Paper Mills (P.) Ltd. [2020] 117 taxmann.com 387 (NCLT - Ahd.), affirmed

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

- ✓ **Amitabh Kumar Jha v. Bank of India - [2020] 117 taxmann.com 417 /[2020] 160 SCL 204 (NCL-AT)**

Statutory right across ambit of section 7 cannot be curtailed or made subservient to any 'Inter-Creditor Agreement' and thus, a financial creditor in its individual capacity can enforce its rights against corporate debtor in regard to financial debt.

The corporate debtor approached the financial creditor besides other lenders for financial assistance. The applicant, advanced loan to the corporate debtor with other lenders as members of consortium advancing different amounts. Since the corporate debtor failed to repay loan, the applicant filed an application under section 7. The corporate debtor opposed application on ground that consortium members had entered into an 'Inter-Creditor Agreement' in pursuance whereof no member of consortium could take any action in respect of default individually and only a collective action was envisaged.

Held Held that statutory right across ambit of section 7 cannot be curtailed or made subservient to any 'Inter-Creditor Agreement'. Further, what transpired among creditors in regard to 'Inter-Creditor Agreement' was a matter exclusively inter se creditors and debtor had no locus to meddle with internal arrangement and affairs of creditors in regard to their joint or individual interests. Since financing documents did not in any manner curtail or limit rights of the applicant in its individual capacity to enforce its rights against the corporate debtor in regard to financial debt which was payable in law and in respect whereof default was not disputed, CIRP against the corporate debtor was rightly admitted by Adjudicating Authority.

Case Review : Bank of India v. TD Toll Road (P.) Ltd. [2020] 114 taxmann.com 671 (NCLT - Mum.), affirmed.

SECTION 34 - CORPORATE LIQUIDATION PROCESS - LIQUIDATOR - APPOINTMENT, ETC.

✓ **Punjab National Bank v. Kiran Shah - [2020] 117 taxmann.com 427 (NCL-AT)**

After order of liquidation, CoC had no role to play as they were simply a claimant whose matters were to be determined by liquidator and hence could not move an application for removal of liquidator in absence of any provision under law.

In CIRP of the corporate debtor, CoC of which appellant bank was lead bank, decided to move application for liquidation of the corporate debtor, and same was filed by Resolution Professional. The Adjudicating Authority accepted said application and same Resolution Professional had been asked to continue as liquidator. Grievance of the appellant bank was that he was against appointment of the liquidator.

Held that after order of liquidation, CoC had no role to play as they were simply claimant whose matters were to be determined by the liquidator and hence could not move an application for removal of liquidator in absence of any provision under law, therefore, order passed by the Adjudicating Authority was not to be interfered with.

Case Review : Kiran Shah v. CoC of ORG Informatics Ltd . [2020] 115 taxmann.com 303, affirmed.

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

✓ **Parvesh Magoo v. IREO Grace Realtech (P.) Ltd. - [2020] 117 taxmann.com 461 /[2020] 162 SCL 797 (NCL-AT)**

Where real estate developer was to handover possession of apartment within 5 years from date of approval of building plan and fulfilment of pre-conditions imposed thereunder and last pre-condition i.e. fire safety scheme approval was granted on 27-11-2014, therefore, proposed date of handover of possession was 27-11-2019, however, before that, letter for handing over possession was issued to allottee, CIRP could not be initiated against developer.

The appellant was an allottee of flat in a project of the respondent-real estate developer. Since the respondent failed to handover possession of flat to the appellant on time, the appellant pursued matter with the respondent for cancellation of booking of said flat and refund of payment made by him. Since the respondent failed to pay same, an application was filed under section 7. It was noted that the respondent was to handover possession of flat within 5 years from date of approval of building plan and fulfillment of pre-conditions imposed thereunder. Building approval date was 23-7-2013 and last pre-condition was regarding fire safety scheme approval, which was granted only on 27-11-2014. Therefore, proposed date of handover of possession would be five years from 27-11-2014, i.e., 27-11-2019. However, before that letter for handing over possession was already issued to the appellant.

Held that the Tribunal was justified in rejecting application filed by the appellant to initiate CIRP against the respondent.

Case Review : *Parvesh Magoo v. IREO Grace Realtech (P.) Ltd. [2020] 117 taxmann.com 460 (NCLT - New Delhi), affirmed.*

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

- ✓ **Vishal Vijay Kalantri v. DBM Geotechnics & Construction (P.) Ltd. - [2020] 117 taxmann.com 462 /[2020] 160 SCL 584 (NCL-AT)**

'Committee of Creditors' having approved plan as submitted by resolution application by 99.68 per cent voting share, Adjudicating Authority or National Company Law Tribunal or this Appellate Tribunal could not sit in appeal on commercial wisdom of 'Committee of Creditors'.

Corporate insolvency resolution process of the corporate debtor was admitted and number of claims were filed by different 'financial creditors' and 'operational creditors', amounting to Rs. 3,000 crores. In view of said position, the appellant on behalf of 'Promoter' sought time to settle claim under section 12A. 'Committee of Creditors' decided that, if in case withdrawal is not approved by requisite percentage of votes by 'Committee of Creditors', then resolution plan received from 'APSEZL' be put to vote immediately thereafter. Resolution for withdrawal of 'corporate insolvency resolution process' under section 12A came to be rejected by members of 'Committee of Creditors' as same could not muster requisite 90 per cent voting share. Resolution Plan of 'APSEZL' was approved by 99.68 per cent voting share of 'Committee of Creditors'. The appellant in appeal wanted to highlight that there was a 'pre-existence of dispute', however, as more than one and a half year had passed and as matter remained pending since long, promoter would have settled matter with creditors, hence, issue whether there was a 'pre-existing dispute' or not could not have been determined at this stage. Further, the Adjudicating Authority had reserved judgment on application filed by the 'resolution professional' under sections 30 and 31, inter alia, seeking approval of the resolution plan.

Held that 'Committee of Creditors' having approved plan as submitted by 'APSEZL', Adjudicating Authority or National Company Law Tribunal or this Appellate Tribunal could not sit in appeal on commercial wisdom of 'Committee of Creditors' and accordingly appeal was to be dismissed.

Case Review : Dbm Geotechnics & Constructions (P.) Ltd. v. Dighi Port Ltd. [2018] 93 taxmann.com 7/147 SCL 315 (NCLT - Mum.), affirmed.

SECTION 18 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INTERIM RESOLUTION PROFESSIONAL - DUTIES OF

✓ **S. Rajendran v. Jonathan Mouralidarane - [2020] 117 taxmann.com 468 (NCL-AT)**

Resolution professional had no jurisdiction to determine claim of financial creditor and he could only collate claim, and if an aggrieved creditor moved before NCLT and NCLT concluded that certain amount was payable, Resolution Professional should not have come in appeal

The Resolution professional collated claim of the financial creditor and held claimed amount as nil. Against said determination, the financial creditor filed application before the Adjudicating Authority and total claim of the financial creditor was accepted. The resolution professional challenged said decision in instant appeal.

Held that Resolution Professional had no jurisdiction to determine claim as pleaded in appeal and he could only collate claim based on evidence and record of corporate debtor or as filed by financial creditor. If an aggrieved person moved before NCLT and NCLT after going through all records came to conclusion that certain amount was payable, Resolution professional should not have moved in appeal. Therefore, appeal filed by the resolution professional was to be dismissed.

Case Review : Jonathan Mouralidarance v. S. Rajendran [2020] 117 taxmann.com 466 (NCLT - Chennai), affirmed.

GUIDELINES FOR ARTICLES

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