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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 enroll 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 bye laws 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 endeavor 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.



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Events

October 7, 2023	Learning Session on Compliances to be made by IPs under IBC, 2016 (Active interactive with free exchange of views on the subject, during the seminar, was the highlight of the program.)
October 10, 2023,	MEDIATION CONCLAVE Leveraging Mediation for catalyzing ADR- The Mediation Act, 2023 (The Mediation Conclave conducted by our expert faculty who shared their knowledge enriching experiences with practical aspects)
October 14, 2023	Workshop on Mediation & IBC Framework: Trajectory and Prospects (The program was well appreciated by the participants who gained immensely with it. There were several take-away for the benefit of participants.)
October 20th-22nd, 2023	Master Class on Key Aspects of Insolvency Resolution Plan
October 21, 2023	“Insolvency and Bankruptcy Code” Milestone Achieved and Way Forward organized by insolvency professional agency of institute of cost accountants of India in association with insolvency and bankruptcy board of India and Nagpur chapter of the institute of cost accountants of India.
October 21, 2023	A Seminar on Insolvency and Bankruptcy Code was conducted by Insolvency Professional agency of Institute of cost accountants of India at G H Raisonni School of Business Management & G H Raisonni Law College, Nagpur on 21st October 2023 which received an overwhelming response from over 148 participants who benefitted from the knowledge sharing seminar.
27 October -31 October 2023	Executive Development Program on IBC – A Multifaceted Perspective

From MD Desk

Dear Reader,

This issue of 'Your Insight Journal' comes to you in the midst of the festive season in India. My colleagues at IPA of ICAI join me in wishing, all the members, IPs and other professionals active in the IBC ecosystem, a very happy Deepavali and a happy holiday season ahead. Holiday season, or not, an IP's work does not a break. After all, managing one's time and striking the right work-life balance is something an active IP has mastered!!

The profession of IPs, being still in infancy, is continuously evolving with numerous court rulings apart from regulatory changes and hence demands a high level of attention of IPs in the midst of managing assignments and related preoccupations.

Professional development happens through continuous professional education including updates on changes in code and relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow IPs. As our ancestors said, teaching is the best way of learning. I invite more and more members to contribute articles and opinions to the E-Journal on all aspects that IBC ecosystem and related domains that will enrich the knowledge base of the readers.

At IPA-ICAI, we strive to make our publications relevant, informative, interesting and lucid. This issue of the Insolvency Professional – Your Insight Journal' has interesting articles on valuation, a key factor in the IBC framework with a practical example and on the interplay of IBC and SEBI regulations, an important practical factor for practicing IPs. Wish you all happy reading.

**Managing Director
G.S.Narasimha Prasad**

PROFESSIONAL DEVELOPMENT INITIATIVES

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MEDIATION CONCLAVE





SEMINAR ON INSOLVENCY AND BANKRUPTCY CODE



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ARTICLES

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IBC, 2016: A Paradigm Shift in India's Insolvency Framework

Ar. Vikram Singh

Registered Valuer

Abstract: The Insolvency and Bankruptcy Code (IBC), 2016, represents a transformative step in India's corporate and financial landscape, introducing a cohesive and efficient insolvency resolution process. This article delves into the historical backdrop that necessitated the IBC, its pivotal features, and the paradigm shift it has instigated in addressing corporate distress. While the IBC has significantly impacted the ease of doing business and fostered a more disciplined credit culture in India, it has also faced its share of challenges, ranging from delayed resolutions to overburdened tribunals. The article further explores the implications and outcomes of the IBC, shedding light on its multifaceted influence on India's economic resilience and corporate ethics. As we look forward, the road ahead for the IBC is laden with opportunities for further refinement and global alignment. The journey of the IBC underscores India's commitment to creating a transparent, accountable, and resilient corporate ecosystem.

Introduction

India's corporate insolvency narrative has been one of evolution, introspection, and timely reform. Before 2016, the nation grappled with a disjointed insolvency regime, leading to prolonged resolutions, uncertainty for creditors, and a dampened investment climate. The fragmented legal landscape not only hampered the swift recovery of dues but also hindered the optimal use of resources tied up in distressed assets. However, recognizing the need for a cohesive framework to address these challenges, India introduced the Insolvency and Bankruptcy Code (IBC) in 2016. This groundbreaking legislation aimed to streamline the insolvency process, shift the balance of power in favor of creditors, and create an environment conducive to timely resolutions and business rejuvenation. It marked the beginning of a new chapter in India's journey towards establishing an efficient, transparent, and reliable insolvency ecosystem.

Historical Context

India's journey through its insolvency framework before 2016 was akin to navigating a maze, characterized by multiple laws and fragmented proceedings. The Sick Industrial Companies Act (SICA) of 1985 focused on reviving industrial entities but often led to prolonged distress. The Recovery of Debt Due to Banks and Financial Institutions Act (RDDBFI) of 1993 aimed to aid banks and financial institutions, yet results were piecemeal. Meanwhile, individual insolvency was addressed under the dated Presidency Towns Insolvency Act of 1909 and Provincial Insolvency Act of 1920. These laws, while significant in their time, failed to provide a synchronized solution. Conflicting judgments, an emboldened 'debtor in possession' model, and dilatory processes became the norm. Recognizing these inefficiencies and the dire need for a unified approach, the stage was set for the revolutionary Insolvency and Bankruptcy Code in 2016.

Key Features of IBC, 2016

The Insolvency and Bankruptcy Code (IBC), 2016, was introduced as a holistic framework, addressing the shortcomings of the previous insolvency regime. Here are its pivotal features:

- 1. Time-Bound Resolution:** One of the IBC's most distinctive features is its emphasis on time-bound processes. The Code mandates a 180-day timeline for concluding insolvency proceedings, with a possible extension of 90 days, ensuring speedy resolutions and minimizing value erosion.
- 2. Creditor-Driven Approach:** IBC shifts the balance from a debtor-centric process to a creditor-driven one. The Committee of Creditors (CoC), primarily consisting of financial creditors, holds significant decision-making powers.

3. **Insolvency Professionals:** IBC introduces the concept of Insolvency Professionals (IPs) – regulated and licensed intermediaries who oversee the resolution process, ensuring an unbiased and efficient approach.
4. **Moratorium:** Upon the initiation of the resolution process, a moratorium is placed, prohibiting lawsuits, asset transfers, or enforcement of security interests against the debtor, protecting the entity from further distress.
5. **Distinguishing Creditors:** The Code categorizes creditors into "financial" and "operational" groups, ensuring specific rights and priorities for each group during the resolution process.
6. **Information Utilities:** These are specialized agencies that collate and disseminate financial information related to debtors, facilitating informed decision-making.
7. **Fast Track Insolvency Resolution:** For certain categories of entities, such as startups and small companies, the IBC proposes an expedited insolvency process, to be concluded within 90 days.
8. **Cross-Border Insolvency:** The Code has provisions for dealing with international insolvency scenarios, recognizing the increasing interconnectedness of global economies.
9. **Liquidation Waterfall:** In case of liquidation, the IBC prescribes a clear order of priority for the distribution of assets, safeguarding the interests of various stakeholders.
10. **Penal Provisions:** To deter malfeasance and ensure compliance, the Code incorporates stringent penalties and punishment provisions for any contraventions.

The Paradigm Shift Explained

The Insolvency and Bankruptcy Code, 2016, brought forth a transformative change in India's insolvency landscape. But what does this shift truly entail?

1. **From Fragmentation to Consolidation:** Before the IBC, insolvency procedures were scattered across various legislations, leading to jurisdictional overlaps and often, conflicting verdicts. The IBC centralized these scattered procedures under a single umbrella, streamlining the resolution process and reducing ambiguity.
2. **Debtor-Centric to Creditor-Centric:** The older regime often leaned in favor of debtors, allowing them to maintain control over assets even during distress. IBC pivoted this approach, emphasizing creditors' rights, especially with the establishment of the Committee of Creditors (CoC) which plays a pivotal role in decision-making.
3. **Proactive Timelines:** Whereas earlier insolvency proceedings were notoriously lengthy and cumbersome, IBC introduced tight, proactive timelines, stressing the importance of preserving the value of distressed assets.
4. **Empowerment of Professionals:** The introduction of licensed Insolvency Professionals ensured that the resolution process was guided by trained and neutral experts, thereby enhancing the efficiency and credibility of the proceedings.
5. **Transparent Mechanisms:** With provisions for Information Utilities and clear categorization of creditors, IBC underscored the importance of transparency in insolvency resolutions.
6. **Emphasis on Maximization of Value:** IBC's design focused on maximizing the value of the debtor's assets, ensuring that stakeholders, especially creditors, could recover the maximum possible value from distressed entities.
7. **Balanced Treatment:** While giving primacy to creditor rights, the IBC also ensures that the rights and interests of the debtor are not unduly compromised, striking a delicate balance between resolution and fairness.

8. **Global Best Practices:** The IBC drew inspiration from international insolvency norms, aligning India's procedures with global best practices and thus enhancing investor confidence.
9. **Evolving Jurisprudence:** Since its implementation, numerous rulings have shaped IBC's interpretation, ensuring that the Code remains responsive to emerging challenges and nuances.

Implications and Outcomes

The Insolvency and Bankruptcy Code (IBC), 2016, with its transformative framework, has led to several significant implications and outcomes for India's financial and corporate ecosystems:

1. **Reinvigorated Credit Culture:** With a structured and timely resolution process, the IBC has enhanced the confidence of creditors, both domestic and international. Lenders are now more assured of the recovery mechanism in place, fostering a more disciplined credit culture.
2. **Asset Revitalization:** Previously, non-performing assets (NPAs) would languish without productive use. The IBC has streamlined their swift resolution, ensuring that such assets are either revived or reallocated, promoting optimal resource utilization.
3. **Improved Ease of Doing Business:** One of the most tangible outcomes has been India's significant jump in the World Bank's Ease of Doing Business ranking, particularly in the "Resolving Insolvency" metric. The IBC has played a pivotal role in this improvement.
4. **Attractive Investment Destination:** With a clearer and predictable insolvency framework in place, India has become a more attractive destination for foreign investments. Investors are more likely to invest when they have clarity on exit mechanisms.
5. **Protection of Stakeholder Interests:** By clearly defining the rights and priorities of various stakeholders, the IBC ensures that all parties, from operational creditors to employees, receive fair treatment in insolvency scenarios.
6. **Shift in Business Ethics:** The IBC's rigorous provisions have compelled companies to reevaluate their governance and financial prudence. There's an increased emphasis on maintaining healthy balance sheets and ethical business practices.
7. **Stimulus for Ancillary Industries:** The demand for insolvency professionals, legal consultants, and information utilities has surged, leading to growth opportunities in these sectors and contributing to job creation.
8. **Refinement in Banking Practices:** Banks and financial institutions have become more prudent in their lending practices, equipped with a robust mechanism to handle potential defaults. This has contributed to the strengthening of the financial sector.
9. **Legal Evolution:** The IBC has enriched India's insolvency jurisprudence. Numerous cases and judgments have set precedents, refining the interpretation and application of the Code.
10. **Economic Resilience:** By effectively addressing corporate distress, the IBC has contributed to the overall resilience and robustness of the Indian economy, especially in challenging times.

Challenges and Criticisms

The Insolvency and Bankruptcy Code, 2016, though groundbreaking in its intent, has not been without challenges and criticisms. As with any transformative legal framework, the IBC has faced its share of hurdles and detractors:

1. **Timely Resolutions:** While the IBC emphasizes time-bound processes, many cases have extended beyond the stipulated 180-270 days. Legal tussles, lack of clarity in certain provisions, and infrastructure bottlenecks have sometimes hampered swift resolutions.

2. **Overburdened Tribunals:** The National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) have witnessed a surge in cases, leading to capacity constraints and thereby causing delays.
3. **Operational Creditors' Concerns:** Some argue that the IBC is skewed in favor of financial creditors, often at the expense of operational creditors who might receive lower recoveries or face delays.
4. **Haircuts and Valuations:** Financial institutions often have to accept significant haircuts on their dues. While this can be part and parcel of insolvency proceedings, the extent of some of these haircuts has drawn criticism.
5. **Litigation and Judicial Interventions:** Many resolutions under the IBC have been challenged in courts, leading to protracted legal battles and undermining the Code's intent of time-bound processes.
6. **Lack of Clarity in Certain Provisions:** As with any nascent legislation, certain provisions of the IBC have been ambiguous, leading to multiple interpretations and consequent litigation.
7. **Cross-border Insolvencies:** While the IBC has provisions for cross-border insolvencies, its compatibility with international norms and its effectiveness in handling complex global insolvency scenarios remains a topic of debate.
8. **Insolvency Professionals' Capacities:** The variability in the quality of insolvency professionals and their varied interpretations of the Code have sometimes affected the smoothness of resolution processes.
9. **Lack of Comprehensive Data:** The absence of consolidated data platforms detailing insolvency proceedings, outcomes, and related metrics has made it challenging to analyze the IBC's effectiveness comprehensively.
10. **Stakeholder Awareness:** Many stakeholders, especially among smaller businesses and operational creditors, remain unaware of their rights and the nuances of the IBC, leading to missed opportunities and unintended missteps.

The Road Ahead

The Insolvency and Bankruptcy Code, 2016, has initiated a fresh chapter in India's insolvency regime. While the journey has seen commendable achievements, the evolving nature of business, finance, and global integration necessitates a forward-looking approach. Here's a glimpse into the potential road ahead for the IBC:

1. **Continual Revisions:** Law is dynamic, and so are business environments. Periodic revisions and amendments in line with global best practices and domestic experiences will ensure the IBC remains relevant and effective.
2. **Enhanced Infrastructure:** Strengthening the infrastructure of adjudicating authorities, like NCLT and NCLAT, by increasing their numbers and enhancing their resources, can help in timely disposal of cases.
3. **Stakeholder Education:** Conducting workshops, seminars, and awareness campaigns can inform stakeholders about their rights, duties, and the intricacies of the IBC. A well-informed ecosystem can lead to smoother resolution processes.
4. **Digitization and Data Management:** Implementing comprehensive digital platforms that consolidate data on insolvency proceedings can aid in transparent, data-driven decision-making and research.

5. **Cross-border Insolvency Protocols:** Enhancing provisions for international insolvency cases, by perhaps entering into bilateral or multilateral agreements, can provide a clear framework for complex global cases.
6. **Empowering Insolvency Professionals:** A continuous training and certification regime can ensure that Insolvency Professionals remain updated with the latest in insolvency law, finance, and management.
7. **Robust Monitoring Mechanisms:** Establishing independent monitoring bodies can ensure that the IBC's provisions are uniformly and fairly enforced, deterring potential misuse.
8. **Engaging with Global Forums:** Actively participating in international insolvency and bankruptcy forums can provide insights into global trends, challenges, and best practices.
9. **Incorporating Technology:** Leveraging technologies like Artificial Intelligence and Machine Learning in the resolution process can lead to more efficient and informed decisions, especially in large and complex cases.
10. **Feedback Mechanism:** Establishing a structured feedback mechanism where stakeholders can share their experiences, challenges, and suggestions can offer valuable insights for refining the IBC.

Conclusion

The Insolvency and Bankruptcy Code, 2016, stands as a testament to India's commitment to creating a robust, transparent, and efficient insolvency regime. By overhauling antiquated systems and aligning with global best practices, the IBC promises a brighter landscape for creditors, businesses, and the economy at large. Challenges have arisen and criticisms have been voiced, but these are teething issues in the larger narrative of progress. As with any transformative legislation, the real success of the IBC will be measured not just by its immediate outcomes, but by its adaptability and resilience in the face of evolving business dynamics. For India, the IBC isn't just a piece of legislation—it's a vision of a more accountable, transparent, and resilient corporate future. As the journey unfolds, continuous introspection, adaptation, and stakeholder engagement will be the guiding lights towards realizing this vision to its fullest potential.

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SEBI Regulations on Listed Companies undergoing CIRP under IBC, 2016

ABSTRACT OF THE ARTICLE:

The Government of India has enacted the Insolvency and Bankruptcy code in the year 2016, to facilitate restructuring and to provide resolutions under the process of insolvency and bankruptcy of Companies registered under the Companies Act, partnership and individuals which/who are in financial distress. For the Listed Companies whose governance is monitored by SEBI through LODR Regulations, any scheme of arrangement for restructuring was required to be preapproved by Stock Exchanges, before filing it before any Tribunal or Court. After the enactment of IBC, 2016, once the scheme under the Resolution Plan is approved by NCLT, the Corporate Debtor need not undergo the process specified by SEBI Regulations. Now, SEBI Regulations are amended to eliminate duplication of compliance in order to complete the Resolution Process within the specified timelines, under the IBC, 2016.

SEBI Regulations on Listed Companies undergoing CIRP under IBC, 2016

Preamble:

The enactment of Insolvency and Bankruptcy Code, 2016, facilitated early resolution for the stressed companies, by way of restructuring, reorganization and delisting by way of adoption of Resolution Plan. The code also empowers to find resolution for the partnership firms and individuals which/who are under financial stress. To meet the point of resolution with ease within the stipulated time and to avoid duplication of process, SEBI has amended LODR Regulations which regulate the governance of Listed Companies. The amendments in SEBI(LODR) Regulations with respect to the Listed Companies under Corporate Insolvency Resolution Process (CIRP) are discussed hereunder:

SCOPE OF IBC:

The code enables early resolution with a time bound process for the Companies, Partnership Firms and Individuals with the ultimate goal of reaching of maximisation of wealth, professional management and meeting the requirements of all stakeholders in a balanced manner. In case, such a resolution could not be reached, the Code provides for Liquidation in case of Companies and Bankruptcy for Partnership Firms and Individuals to pay off the creditors and the other stakeholders. Finally, when all the assets are sold off and all the stakeholders are settled, the code provides for dissolution of the Companies and Partnership Firms and Bankruptcy for individuals.

WHAT IS CIRP:

Corporate Insolvency Resolution Process is the process initiated by the Adjudicating Authority i.e., National Company Law Tribunal (NCLT), by admitting the petition u/s 7 or 9 or 10 of the IBC, 2016. Financial Creditors of the Companies, when there is default in the loan commitments, initiates Insolvency Petition u/s 7 of the IBC, 2016, against the companies under the said code. Similarly, insolvency process is initiated by Operational Creditors u/s 9 and by the Companies themselves for voluntary liquidation u/s 10 of the said code.

Under this process, the management of the Company is vested with the Insolvency Professional who is appointed by NCLT at the time of admission. The authority of Board of Directors will stand suspended on the admission of the Company under CIRP. There will be moratorium during the CIRP period against any other legal proceedings.

ROLE OF RESOLUTION PROFESSIONAL:

On the admission of CIRP by NCLT, an Insolvency Professional/Insolvency Professional entity is appointed as Interim Resolution Professional (IRP). He/ She or an Insolvency Professional Entity will take over the management of the Corporate Debtor from the Board of Directors. The employees of the Corporate Debtor will report to the IRP and the suspended directors are required to cooperate with the IRP in managing the affairs of the Corporate Debtor. The IRP will invite claims from all the creditors and collate the same. He will convene the First Committee of Creditors (COC), after constituting it based on the claims received from the creditors. He/ she/ Insolvency Professional Entity will seek Resolution Plans from the Prospective Resolution Applicants. On the approval of the Resolution Plan by the Committee of Creditors (COC), the same will be filed with NCLT for its approval.

ROLE OF COMMITTEE OF CREDITORS:

The COC constituted by IRP, will take on record the claims collated by IRP. It will appoint Resolution Professional (RP) in the place of IRP and will supervise the work of RP in finalising the appropriate Resolution Plan, after inviting such Resolution Plans from the Prospective Resolution Applicants by the RP and getting approval of such Resolution Plan by NCLT. COC plays the role of Board of Directors. COC will approve the CIRP expenditures, and each member of the COC will contribute towards the CIRP expenditures, proportionately based on their claims.

IBC Vs SEBI(LODR):

While IBC, 2016 provides for resolutions for the stressed companies, by way of reorganisation, restructuring and delisting, the SEBI(LODR) Regulations provides for disclosures and compliances for better governance of Corporates which are listed.

On admission of the Listed Companies under CIRP by NCLT, IRP appointed by NCLT is required to comply with the provisions of the applicable laws, when managing the Corporate Debtor. Accordingly, he/ she / insolvency professional entity, will follow the SEBI(LODR) Regulations in the case of listed companies undergoing CIRP in its governance. When NCLT approves the resolution plan under the IBC, 2016, involving restructuring, reorganization and delisting in the case of listed companies, such plan needs to be disclosed to SEBI. Now, amendments were made in SEBI(LODR) Regulations for prompt disclosures of the events happening under IBC, 2016, while excluding such events from the normal process specified in SEBI Regulations.

Supreme Court in the case of Innovative Industries Limited vs ICICI Bank Limited, held that IBC, 2016 super cedes any other Law and once moratorium is declared u/s 14 of the IBC, 2016, SEBI has no power against the Corporate Debtor.

In Shobha Limited vs Pan card clubs Limited, NCLT, Mumbai declared that Investor Protection is dealt by SEBI, whereas IBC, 2016 deals with the interest of the creditors. Hence investors cannot proceed against the Corporate Debtor when it is under CIRP.

CLARIFICATION FROM MCA ON IBC Vs COMPANIES ACT:

Ministry of Corporate Affairs has clarified that when NCLT approves a resolution involving restructuring, reorganisation and delisting, the requirement under the Company law, to get the approval by the shareholders of the Corporate Debtor is not required. In normal course, when there is restructuring of companies through the process of merger, demerger, amalgamation, delisting, acquisition etc, the approval of the shareholders of the Company is required under the Companies Act. Vide its Circular dated 25.10.2027, MCA clarified that the process of shareholders' approval under the Companies Act, 2013 is no more required for the Resolution Plan which is approved by NCLT.

AMENDMENT IN SEBI(LODR):

With the changing environment on the enactment of IBC,2016, the responsibility of governance of the listed companies is changed. The management is vested with IRP/RP/ Insolvency Resolution Entity, on the admission of the Companies under CIRP. Further, any reorganization of the Company under the Resolution Plan as approved by NCLT is required to be completed within the stipulated time. In the normal course of time, it will involve various approvals by regulatory authority. Hence, SEBI issued a discussion paper on 28 March 2018 to amend the SEBI Regulations to meet with the changing environment.

SEBI, based on the discussion paper to facilitate support to IBC, 2016 and to eliminate duplication of governance process, amended the following regulations on 31 May 2018:

1. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
2. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
3. SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.

The Resolution Plan as approved by NCLT, may result in change in the shareholding pattern, very frequently exceeding the 75% ceiling on the shareholding of promoters, change in the nature of promoters' shareholding and delisting of shares, the implications of which are discussed below:

1.ACQUISITION BEYOND 75%:

When NCLT approves a Resolution Plan involving restructuring, reorganization and/or delisting of a Listed Company, it may result in holding shares beyond the threshold of 75%. Under SEBI(LODR) Regulations, a promoter of the said company cannot hold more than the threshold limit of 75%. But when it is approved by NCLT, it does not require any approval from SEBI, however, requires disclosure. This is as per the amendment made in the Take Over Regulations on 31.05.2018 which complemented the earlier amendment in August 2017. SEBI by its amendment, has exempted such acquisition of shares beyond 75% as per the Resolution Plan as approved by NCLT under section 31 of IBC, 2016. SEBI has mandated that the Corporate Debtor maintain public shareholding at least at 5% level, in order to get admission into Stock Exchange after the completion of CIRP.

2.CLARITY ON PROMOTERS' SHAREHOLDING:

If reclassification of the existing promoter is made as per the Resolution Plan as approved by NCLT, Regulation 31A of the SEBI(LODR) Regulations would not apply, subject to the conditions that the control of the Corporate Debtor will not be with the present promoter and the rationale of such reclassification is disclosed to SEBI within one day of the approval of such Resolution Plan. The latest amendment in SEBI(LODR) Regulations, 2015, enables the classification of erstwhile promoters' shareholding as part of public shareholding, however, during the normal course, such reclassification does not entitle the promoters from diluting their holdings.

3. CLARITY ON DELISTING:

SEBI Delisting Regulations, requires the following Process:

- a. making a public announcement.
- b. making an offer to public shareholders.
- c. opening an escrow account for depositing the consideration payable; and
- d. determining the offer price through a book building process.

However, for the Listed Companies under CIRP, where NCLT has agreed with a delisting process under a

Resolution Plan under Section 31 of IBC, 2016, vide Amendment dated 31.05.2018, SEBI has made the Delisting Regulations not applicable with a condition that there should be a mechanism of delisting and a specific provision for exit option for the existing public shareholders in the Resolution Plan.

The exit option for the public shareholders, if any in Resolution Plan under the IBC, 2016, should provide for price which should be not less than the liquidation value as per Regulation 35 after the payment of creditors u/s 53 of the IBC,2016.

Whenever the promoters get an exit opportunity in a Resolution Plan at a price and similar option should also be made available to the public shareholders as well under the said Resolution Plan.

Regulation 30(2A) provides that application for listing of the delisted equity shares of the Corporate Debtor, which has undergone CIRP under the IBC, 2016, whereas, under SEBI Delisting Regulations stipulate 5 years cooling period for shares delisted under Chapter III or IV- and 10-years cooling period for the shares delisted under Chapter V for listing again of the delisted equity shares made under SEBI Regulations.

SUMMARY OF OTHER CHANGES TO THE LODR REGULATIONS:

SEBI has amended a number of other provisions in LODR Regulations to facilitate successful Resolution under the IBC, 2016. They are:

- a) The LODR Regulations on the composition and roles of Board of Directors and Committees are not applicable to the Corporate Debtor who undergoes CIRP. Under the IBC, 2016, these roles are performed by the IRP/RP under the supervision of the Committee of Creditors.
- b) The matters relating to (i) material related party transaction, (ii) material subsidiary and (iii) transfer/lease of more than 20% in material subsidiary will be disclosed to SEBI by the IRP/RP under the IBC, 2016 and shareholders' approval for such events under the Companies Act, is not required for the Listed Companies undergoing CIRP.
- c) The Scheme of Arrangement of the Corporate Debtor under CIRP under the Resolution Plan as approved by NCLT requires disclosure by RP to SEBI and does not require any pre- approval from the Stock Exchange.
- d) Section 29A controls the involvement of the promoters in a Resolution Plan and any Resolution Plan approved by NCLT, reclassifying the promoter shareholders as public shareholders requires only disclosure to SEBI by RP and the provisions of SEBI(LODR) Regulations and the Companies Act do not apply on such reclassification by NCLT under IBC, 2016.

DISCLOSURES UNDER AMENDED LODR:

Based on the amendment to SEBI(LODR) Regulations, the following additional requirements of disclosures are to be made by the Listed Company to SEBI:

1. Filing of Application u/s 10 of the IBC, 2016, by the Listed Company for CIRP.
2. Filing of Application u/s 7 and 9 by the Creditors for CIRP.
3. Defaulted amounts as per the applications u/s 7,9 and 10 to NCLT.
4. Receipt of Demand Notice u/s 8(1) of IBC, 2016, demanding the defaulted amount from the Operational Creditor.

On admission of CIRP of the Listed Company by NCLT, the following disclosures are required under the amended provisions of Regulation 30 of SEBI(LODR) Regulations:

1. Public Announcement as ordered by NCLT on admission under CIRP.
2. Invitation of claims by the IRP.

3. CoC's confirmation of the appointment of IRP.
4. Notice of the CoC's Meetings.
5. Notice of Information Memorandum as prepared by RP.
6. Number of Bids received by RP.
7. Notice of Filing of Resolution Plan with NCLT.
8. Event of the approval of the Resolution Plan by NCLT.
9. Other Material information like delisting etc without disclosing any commercial secret.

Amendment in ICDR Regulations w.r.t IBC:

Any Resolution Plan approved by NCLT involving any preferential issue of equity shares or convertible preference shares/debentures is not required to comply with the conditions set in Chapter VII of the ICDR Regulations except lock in provisions, pursuant to the amendment dated 14.08.2017 in ICDR Regulations.

WHAT FURTHER IS EXPECTED FROM SEBI:

SEBI Discussion Paper provided temporary trading suspension of the shares of the Listed Company under CIRP to avoid insider trading and market manipulation. The shareholders of the Listed Company may tend to sell their holdings in the market, having come to know about the CIRP. This will unnecessarily erode the market capitalisation of the Corporate Debtor, which may result in lower valuation of its assets. But this discussion is incomplete, and the amendment is yet to be made as this requires further study.

Similarly, restoring the 25% public shareholding within an extended time frame requires consideration of SEBI. Keeping the public shareholding below the threshold limit of 25%, for a long period will not help in the maximisation of wealth to all the stakeholders. As per the Securities contract (Regulation) Rules, when the threshold limit falls below 10% due to CIRP, the time prescribed to bring back a minimum of 10% is 18 months and to 25% within 3 years from the date of such fall. High concentration of shareholders within the promoters may help in the manipulation of the market price of the shares.

REFERENCES:

1. Insolvency and Bankruptcy Code, 2016.
2. SEBI Regulations.
3. SEBI Circular no. CFD/DIL3/CIR/2017/21
4. IBBI Regulations and Notifications.
5. Discussion Paper of SEBI on CIRP of Listed Companies-March 2018.
6. MCA Notifications on IBC,2016.

Agencies to Enforce Criminal Law (inclusive):

- The Directorate of Enforcement (ED) for PMLA & FEMA; Central Bureau of Investigation (CBI); Criminal Investigation Department (CID).
- Serious Fraud Investigation Office (SFIO), Ministry of Corporate Affairs.
- The Central Economic Intelligence Bureau (CEIB) for various economic offences and COFEPOSA
- The Central Bureau of Narcotics (CBN) for drug related offences
- The Directorate General of Anti-Evasion (DGA) for central excise related crimes
- The Directorate General of Revenue Intelligence (for customs, excise and service tax related offences)
- The SEBI for protection of interest of investors and securities related offenses
- The Directorate General of Income-tax (Investigation)
- The Competition Commission of India for anti-competitive trade practices

ADJUSTMENT IN MARKET VALUE OF P&M OF AN OLD & ONGOING CONTINUOUS PROCESS PLANT AND TO REDUCE THE CHANCES OF NON-PERFORMING ASSET DURING FUTURE LIFE

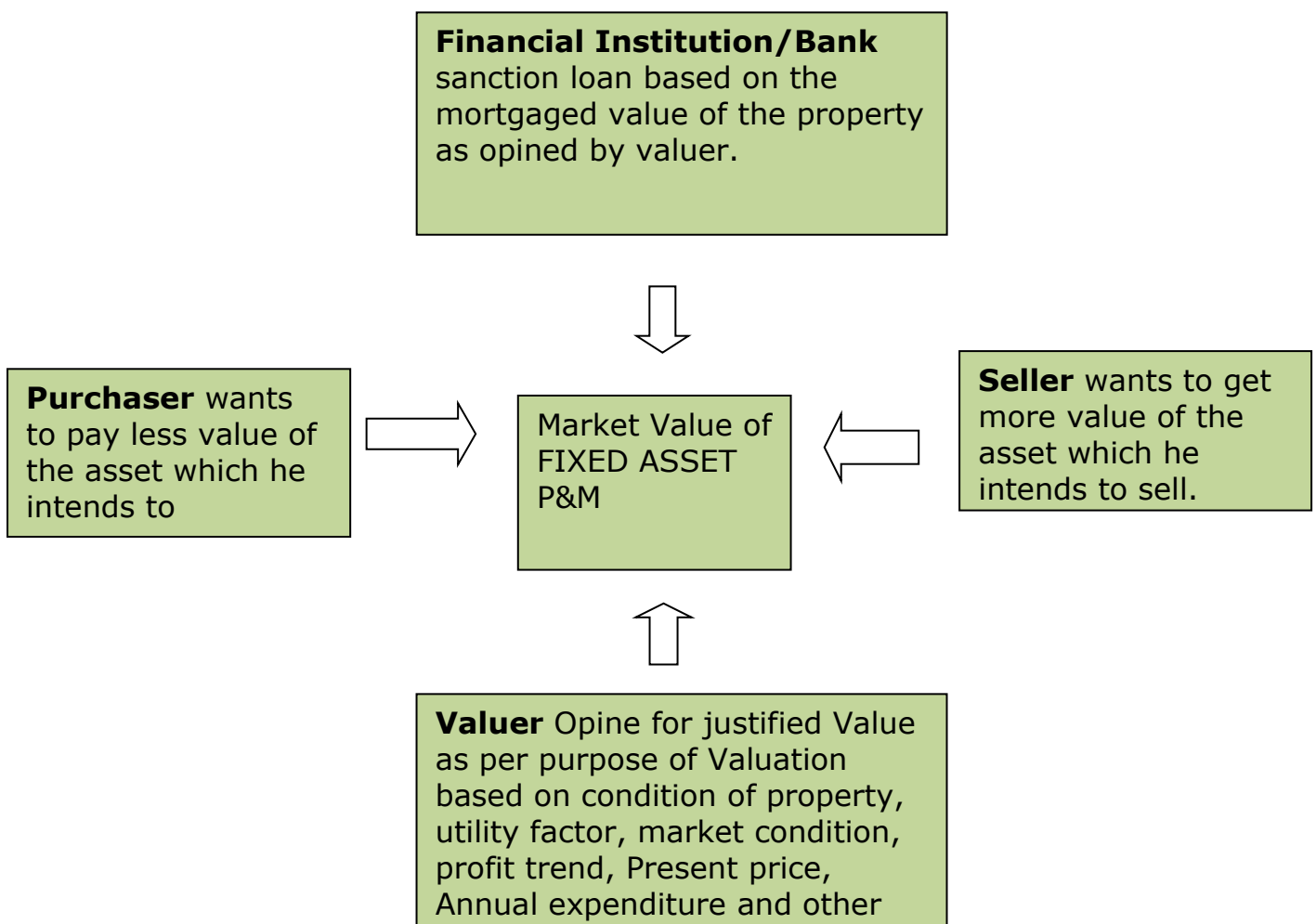
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Abstract: This topic is written to have an impartial & unbiased Valuation Report of an Old & Ongoing Continuous Process Plant & Machinery which is for sale so that the purchaser of the plant and machinery do not face extra than the normal expenses and losses in running the old plant.

Adjustment in Market Value to be done in such plant where Physical/ Chronological Age of Plant and Machinery is more than its useful life. Adjustment means deduction of present value of the same historical average total Outflow (Extra Expenditure & Loss) per year which is assumed to be incurred up to expected future life also as the plant and Machinery remains same.

The data of extra average historical expenses and losses incurred in the last ten/five years to be obtained from present owner so that present value deduction can be calculated accordingly.

Loans by financial institutions/banks may be granted based on adjusted market value and it will be easy for the debtor to repay the lower loan amount and interest. On the other hand, the seller cannot disagree with the fact of reducing the market value as the historical evidence will be the proof and the chances to become a Non-Performing Asset during its future life will be less.



The Market Value of a 'Rolling Mill' which is a Hot Rolling Mill Plant which is used for Conversion of Alloy Steel Billet to Wire Rod of different diameter in the form of coil is being discussed as under.

Existing Rolling Mill

- 1.The existing Rolling Mill (Rod Mill Plant & Machinery) was purchased by the party "A" in the year 1993.
- 2.The Capitalised cost of Plant & Machinery of the Rolling Mill unit was Rs 200 Crores.
- 3.Production capacity as per manufacturer Specification 5000 MT/Month Actual Average Production as of 2023 is 4500MT/Month.
- 4.The Rolling Mill is running all three shifts in a day with proper maintenance, parts replacement / repairing and production continues as per desired product quality maintaining process control, but breakdown failure also occurs which causes extra expenditure and production loss.
- 5.Due to breakdown time loss, production loss and expenditure incurred, delay in delivery of product and ultimately downward profit trend, the owner decided to dispose the old rolling mill plant and machineries in 2023 and to purchase a new rolling mill plant and machineries.
- 7.Purchaser Party 'B' who wants to set -up a Rolling Mill unit and desires to purchase the existing old Rolling Mill from party 'A' and approaches bank/financial institution for loan.
- 8.Bank/Financial Institution after verifying the required documents, appoints a valuer for valuation report of the old Rolling Mill.

Inspection of existing old Rolling mill by Registered Valuer:

After physical inspection of Rolling Mill Machineries, Valuer finds the related data as follows:

- Physical/Chronological Age of Rolling Mill =30Years
- Effective Age of the Rolling Mill =10Years
- Future life of the Rolling Mill =10Years
- Useful life of the Rolling Mill =20Years
- Replacement Cost New of similar Rolling Mill =Rs.400Crores
- Considered Salvage Value =10%

Depreciation calculation of Asset

1. Physical Depreciation (PD)= (Effective Age/Useful life) *(100-10)/100
=

$$(10/20) *90/100 = 0.45 =45 \%$$

2. Functional Obsolescence (FO), if inequality factor is 0.7.
= $(1-(4500/5000)^{0.7}) *100 = 7 \%$

3. Economic Obsolescence (EO) = NIL

Hence Depreciation Factor =PD+FO+EO =52 %

Depreciated Replacement Cost (DRC)

1. Hence Depreciated Replacement Cost of Rolling Mill P&M
= $400*(100-52)/100=Rs.192Crores$

Market Value: As per Market Value definition it is clear that both the parties i.e., purchaser and seller should exchange their hand at an arm's length transaction, prudently, knowledgably and without any compulsion as on date of valuation. That means both the parties should have correct knowledge about the history of the asset and the future life and the benefit which can be availed by owning the asset.

As a valuer who is appointed to opine for the estimated Market Value of the asset as on the date of valuation, he should therefore be given the detailed history of the asset for last 10/5 years as available for proper valuation.

HISTORY FOR CALCULATION OF ASSET COST OUT FLOW

S.N.	Year	A Parts repla ced	B parts repa ired	C Dam aged parts sold	D=A+B- C Net Expense	E Loss Breakd own time		F Loss Breakd own Materi al in proces s	G Scrap material in process sold)	H=E+F- G Net Loss	I=D+H Net cash outflow
		Rs, (Crs)	Rs. (Crs)	Rs. (Crs)	Rs. (Crs)	Rs. (Crs)		Rs. (Crs)	Rs. (Crs)	Rs. (Crs)	Rs. (Crs)
1	2013-14	1.2	1.02	0.06	2.16	1.5		0.5	0.05	1.95	4.11
2	2014-15	1.1	1.05	0.05	2.095	0.9		0.6	0.06	1.44	3.535
3	2015-16	1.3	1.07	0.06	2.305	1.1		0.8	0.08	1.82	4.125
4	2016-17	1.4	1.08	0.07	2.41	1.2		0.3	0.03	1.47	3.88
5	2017-18	1.3	1.1	0.06	2.335	1.3		0.8	0.08	2.02	4.355
6	2018-19	1.2	1.2	0.06	2.34	1.4		0.9	0.09	2.21	4.55
7	2019-20	1.5	1.35	0.07	2.775	1.1		0.4	0.04	1.46	4.235
8	2020-21	1.1	1.4	0.05	2.445	1.4		0.6	0.06	1.94	4.385
9	2021-22	1.6	1.6	0.08	3.12	1.2		0.4	0.04	1.56	4.68
10	2022-23	1.4	1.75	0.07	3.08	1.3		0.9	0.09	2.11	5.19
	TOTAL	13.1	12.6	0.65	25.065	12.4		6.2	0.62	17.98	43.045

CALCULATION FOR MARKET VALUE ADJUSTMENT:

Average total out flow (Expenditure & Loss)) per year =43.045/10
=4.3045 Crores /Year

This may please be noted that an Average Expenditure including losses of Rs 4.3045 Crores /Year as per history of the asset is to be incurred to run the Rolling Mill beyond its useful life if the actual age or chronological age is more than useful life.

This amount is in addition to normal and fast-moving items due to fast wear and tear e.g. Normal consumables e.g. Greases, Lubricating oil, Gear oil, Cooling oil etc. and First Moving items such as Oil seals, O-rings, Seal Kits, different types of Guide Rollers, Exit/Entry guides, stripper nozzles, Guide roller bearings, Hilum pads for Coupling Heads, Coble cutting shearing blades, Disc knife, Rolls, Bearings, Fork lift spares etc. and so on.

As per history of the Asset, the Major Spare parts which are Replaced by new one and also Reconditioned/Reclaimed are:

- 3 Hi Rolling stand like Tension bolt & Nut, Chock, Eccentric Sleeves, Eccentric Sleeve Labyrinth, Roll Neck Labyrinth, Coupling Head Roll end, Coupling Head Pinion end, Drive Spindle, Gearbox, Electric Motor, Drop Guides, Tilting Table, Tilting Table Rollers etc.
- 2 Hi Rolling stand (Intermediate and Finishing Mill Housings, Chocks, Geared Coupling and Spindles, Main Links, Eccentric Link and Sleeves)
- Tungsten carbide Ring Roll Stand (Finishing Mill)
- Vertical Mill Stand (Finishing Mill)
- LDO Furnace (Spare parts)
- Overhead crane

- Controlled cooling loop conveyor Rollers, Sprockets & Chain
- Blower fan
- Coil collecting Head Spares
- Garret coiler Spares
- Coil Hanger movable
- Coil compacter etc.

This Additional Expenditure for Spare parts may be due to:

- Fatigue failure of parts
- Vibration
- Work Hardening
- Internal Stress development and cracks
- Wear and Tear

1. Due to the above reasons the Vital parts get cracks, breaks and get damaged or not usable.
2. If Average expenditure of 4.3045 Crores /Year is required for running the Mill for further Future life of 10 years, then the total Expenditure Amount at the end of 10 years @ 8% interest rate will be equal to

$$= \frac{4.3045 * ((1+r)^n - 1)}{r} = 62.3574 \text{ Crores}$$

Therefore, Present Value of the amount 10 years earlier i.e., in the year 2023

$$= 62.3574 / (1.08)^{10} \\ = 28.88 \text{ Crores}$$

So, to find out the Market Value of the Rolling Mill an adjustment of deduction of Rs 28.88 Crores to be done from the Depreciated Value of Rs 192 Crores and therefore Market Value of the Rolling Mill in year 2023 will be equal to Rs (192-28.88) = Rs 163.12 Crores.

Notes:

- 1) As the history of the asset indicates the average yearly expenditure and losses occurring every year since last 10 years to keep the mill in running condition and future life of the mill is opined by valuer as further 10 years, so it is assumed that the same average expenditure and losses will occur in the next 10 years of future life also if it is in running condition.
- 2) The average yearly expenditure and losses occurring every year since last 10 years don't include cost of consumables or cost of fast-moving new parts replaced or cost of used parts repaired/reclaimed.
- 3) Normal shutdown for Roll pass change, shut down for mill cleaning, shut down for non-availability of billet or mill lay off is not considered in production losses.
- 4) The numerical data considered are not actual but it is assumed.
- 5) As per Market Value concept, both the party's buyer and seller should be acted knowledgeably, prudently and without compulsion.
- 6) The purchaser of the Rolling Mill plant and Machinery should know the History details of the mill as it is an old mill and moreover the physical age has crossed its useful life. He should have through knowledge about the yearly operating cost, maintenance cost, yearly production output, demand of the product, market trend and yearly losses, Yearly Quality production produced and passed by Quality Control Department and Percentage of Rejection occurred and how much profit per year can be earned by owning the said plant and machinery.
- 7) It is Purchaser's Responsibility and duty to repay the loan amount to the Bank /Financial Institution after purchasing the said plant after taking loan. The Purchaser's mind should be clear about the Machinery asset which he is going to purchase otherwise latter on if the Gross profit is less than what he was expecting or face loss in the business, he can't repay the amount to the Bank/Financial Institution and ultimately the asset becomes an NPA. So, considering all these facts, adjustment in market Value is to be done based on historical data.

- 8) If the Market Value is correctly adjusted as per the Historical Analysis, the Loan amount will be less and accordingly the Interest amount will also be less and therefore Net Earnings will be more.
- 9) No purchaser will agree to bear the additional average recurring expenditure & losses (Excluding normal expenditure for fast moving items for fast wear and tear of spare parts) to be incurred each year up to the future life. The future life has been estimated by the valuer and the plant and machinery is expected to run throughout the future life without any additional Expenditure and losses except normal expenditure of fast-moving items for fast wear and tear.
- 10) Seller can't disagree on the fact of deduction of the Present Value of the average recurring expenditure & losses (Excluding normal expenditure) to be incurred each year up to the future life for adjustment of Market Value because Historical Evidence is the proof.

Opinion: Adjustment in Market Value to be done for old and ongoing continuous process plant if the Physical/ Chronological Age of the Plant and Machinery is more than its useful life. Adjustment in Market value means Market value less present value as on date of valuation for the same historical average total Outflow (Extra Expenditure & Loss) per year which is assumed to be incurred up to expected future life.

References:

- 1.The author is having working experience in a Steel Plant & Rod Mill Division and this article has been written based on the previous experience in Rod Mill.
- 2.The author wishes to apply the previous experience on the valuation subject.
- 3.No other reference from any other article or website has been considered.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 66 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR WRONGFUL TRADING

Gluckrich Capital (P.) Ltd. v. State of West Bengal [2023] 151 taxmann.com 136/ 179 SCL 44 / 239 COMP CASE 843 (SC)

Section 66 does not provide a remedy against third party and civil remedies which may be available in law, are independent of section 66 and it was for RP or successful resolution applicant (SRA) to take such civil remedies against third party, for recovery of dues payable to corporate debtor, which might be available in law.

During pendency of insolvency proceedings before the NCLT, an order was passed directing RP not to proceed with approval of resolution plan. Meanwhile, the financial creditor lodged FIR against respondents, who were suspended directors of the corporate debtor. Thereafter, respondents filed a writ before High Court challenging FIR lodged against them. The High Court, by interim order, extended transit anticipatory bail granted to respondents. The applicant-unsecured financial creditor of the corporate debtor filed a petition before the Supreme Court challenging interim order of High Court on ground that he was an interested party and had right to challenge extension of anticipatory transit bail granted to respondents. The Supreme Court held that the applicant was neither informant nor a party to proceedings pending before the High Court and was totally unconnected with FIR lodged by the financial creditors and, therefore, the applicant had no locus in matter and special leave petition filed by the applicant was dismissed. The Applicant filed instant application before the Supreme Court seeking clarification of said order to effect that said order shall not come in way of the applicant, persuading RP to consider initiation of proceedings for recovery under section 66.

Held that remedy against third party is not available under section 66, and civil remedies which may be available in law, are independent of section 66, thus, it was for RP or successful resolution applicant(SRA) to take such civil remedies against third party, for recovery of dues payable to the corporate debtor, which might be available in law and application filed by the applicant for clarification was wholly misconceived and same was to be dismissed.

Case Review : Smt. Sudipa Nath v. Union of India [2023] 148 taxmann.com 33/177 SCL 259 (Tripura), approved

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

Mars Remedies (P.) Ltd. v. BDH Industries Ltd. [2023] 151 taxmann.com 137 (SC)

Where appeal against order initiating CIRP against corporate debtor was pending before Supreme Court, subsequent CIRP order passed by NCLT on application of another financial creditor having attained finality was to be allowed to proceed further.

The respondent-financial creditor filed an application under section 7 against the corporate debtor for initiation of CIRP. The NCLT dismissed said application, however NCLAT allowed said application and the corporate debtor came up with appeal before the instant Court. In the meantime, another financial creditor-intervenor independently filed an application for initiation of CIRP against the corporate debtor and same was dismissed by the NCLT, however order of NCLT was reversed by NCLAT, and order passed by NCLAT attained finality. However, the instant Court passed an interim order staying further proceedings in CIRP application of the respondent and said appeal was yet to be heard finally. In view of stay granted by the instant Court, the NCLT passed an order stating that subsequent CIRP application of the intervenor could not be considered, however granted opportunity

to the intervenor to avail remedy of restoring its CIRP application subject to outcome of main appeal before the instant Court. The intervenor filed instant application for appropriate directions. The corporate debtor contended that there could not be two CIRPs simultaneously going against the same debtor - It was noted that CIRP application filed by the intervenor had attained finality and there was no impediment for same to proceed further.

Held that it was understandable if CIRP initiated by the respondent was on track and if not, at least other CIRP should have been allowed to proceed, therefore, the corporate debtor could not be allowed to take benefit of best of both worlds and the intervenor was to be allowed to move an application for restoration of its CIRP application before NCLT.

SECTION 33 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

Arun Agarwal, Suspended Director of Surya-jyothi Spinning Mills Ltd. v. Ram Ratan Kanoongo [2023] 151 taxmann.com 188 (NCLAT - Chennai)

Where Adjudicating Authority directed liquidation of corporate debtor on ground that CIRP period had already expired but corporate guarantor of corporate debtor was willing to fund an OTS even during liquidation process, Adjudicating Authority was to proceed with execution of such settlement within 14 days time peremptorily, failing which, order of liquidation was to be proceeded with as more than sufficient time was granted by Adjudicating Authority to corporate debtor to settle matter.

The bank-financial creditor initiated CIRP proceedings against the corporate debtor by filing section 7 application. The Resolution plan was received by CoC but was dismissed as it was a conditional plan. Subsequently, CoC received an OTS proposal by one of the corporate guarantors of the corporate debtor. During CoC meeting, the bank informed that OTS proposal was under active consideration and directed RP to seek extension of 60 days of CIRP period. The Adjudicating Authority directed liquidation dismissing application for extension on ground that there were no resolution plan pending before RP and CoC and that CIRP period had already expired. It was noted that the corporate guarantor was ready and willing to fund any settlement even during liquidation process.

Held that keeping in view, spirit and intent of Code, the Adjudicating Authority was to proceed with execution of such settlement within 14 days time peremptorily, failing which, the instant Tribunal found no ground to interfere with order of liquidation as more than sufficient time was granted by the Adjudicating Authority to the corporate debtor to settle matter.

Case Review : State Bank of India v. Suryajyoti Spinning Mills Ltd. [2023] 150 taxmann.com 542 (NCLT - Hyd.), affirmed.

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

Puissant Towers India (P.) Ltd. v. Neueon Towers Ltd. [2023] 151 taxmann.com 213 (NCLAT - Chennai)

Where CoC approved a resolution plan with 98.70 per cent majority but Adjudicating Authority dismissed resolution plan on ground that one of resolution co-applicant was an ARC and, therefore, resolution plan could not have been submitted without approval of RBI as per section 10(2) of SARFAESI Act, 2002, since section 238 of IBC will prevail over provisions of SARFAESI Act, Adjudicating Authority could not have placed reliance on section 10(2) of the SARFAESI Act, 2002 and, thus, order of Adjudicating Authority dismissing resolution plan was to be set aside.

CoC approved a resolution plan with 98.70 per cent majority. Resolution Professional filed an application before the Adjudicating Authority for approval of the resolution plan but same was dismissed on ground that one of the resolution co-applicants was an ARC and, therefore, the resolution plan could not have been submitted without prior approval of RBI as per section 10(2) of the SARFAESI Act, 2002. The appellant submitted that ARC did not require prior approval of RBI for participating as a resolution co-applicant under IBC, provided any of activities undertaken by ARC as part of resolution plan submitted by it was not prohibited under the SARFAESI Act.

Held that section 238 of IBC will prevail over provisions of SARFAESI Act, 2002 if it is inconsistent with any provisions of the Code, therefore, the Adjudicating Authority ought not to have placed reliance on section 10(2) of SARFAESI Act, 2002 and liquidation order of the Adjudicating Authority was to be set aside and matter was to be remanded back to Adjudicating Authority for approval of resolution plan,

Case Review : IDBI Bank Ltd. v. Neueon Towers Ltd. [2023] 150 taxmann.com 543 (NCLT - Hyd.), set aside.

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

KK Ropeways Ltd. v. Billion Smiles Hospitality (P.) Ltd. - [2023] 151 taxmann.com 223 (NCLAT - Chennai)

Where CIRP application was filed by operational creditor against corporate debtor based an arbitral award for recovery of lease rentals, said award having been assailed by corporate debtor vide an appeal prior to filing of CIRP application, debt of operational creditor was disputed and order of NCLT dismissing such CIRP application was free from any legal errors.

The corporate debtor undertook to occupy space under a complex owned by the appellant/operational creditor and both entered into a lease agreement, wherein, the corporate debtor was obligated to pay lease rentals and charges to the appellant. The corporate debtor defaulted in payment of said rentals and charges. The appellant by virtue of arbitration clause in said agreement, sought recovery of lease rentals and outstanding amount from the corporate debtor. The Arbitral Tribunal passed an arbitral award in favour of the appellant. The appellant filed a section 9 application against the corporate debtor before the NCLT. The NCLT vide impugned order, dismissed same and concluded that the appellant had filed same for implementing said award of sum awarded by the Arbitral Tribunal. The appellant being affected by said order filed instant appeal and contended that said award was in nature of an operational debt which entitled the appellant to file such an application. It was noted that the corporate debtor preferred an appeal before the High Court assailing said award for being passed ex parte, prior to filing of section 9 application.

Held that since arbitration award was challenged, the operational debt in the instant appeal was to be considered to be under dispute and impugned order was free from any legal errors.

Case Review : K.K. Ropeways Ltd. v. Billion Smiles Hospitality (P.) Ltd. [2023] 150 taxmann.com 541 (NCLT - Beng.), affirmed. (NCLT - Kol.) affirmed

SECTION 238 - OVERRIDING EFFECT OF CODE

GVK Energy Ltd. v. Axis Bank Ltd. [2023] 151 taxmann.com 302 (NCLAT - Chennai)

Corporate debtor could not seek umbrage under RBI Directions 2019, to avoid, evade and supplant its obligation as I&B Code would have an overriding effect and RBI Circular could not come in way of a financial creditor to prefer an application under section 7.

The financial creditor along with other lenders (together referred as senior lenders) sanctioned loans to the

corporate debtor for setting up of a thermal power plant. An amendment agreement was entered into between senior lenders and the corporate debtor, under which the corporate debtor undertook to repay facilities availed in quarterly instalments. Pursuant to RBI directions 2019 an inter-creditor agreement (ICA) was entered by some consortium lenders including the financial creditor to afford a scaffold, for a possible resolution. A loan recall notice was issued by the financial creditor because of default committed by the corporate debtor in making payments and its account was classified as NPA. The financial creditor filed an application under section 7 against the corporate debtor and same was admitted vide impugned order. Dissatisfied by the impugned order, the corporate debtor filed instant appeal contending that in view of ICA entered by lenders pursuant to RBI directions, no lender could initiate any legal action against the corporate debtor and application under section 7 was filed in a premature manner.

Held that the corporate debtor could not seek umbrage under ICA entered as per RBI directions to avoid, evade and supplant its obligation as the I&B Code would have an overriding effect. Further, RBI circular could not come in way of a financial creditor to prefer an application under section 7, therefore, impugned order did not suffer from any material irregularity or patent illegality in eyes of law.

Case Review : Axis Bank Ltd. v. GVK Power (Goindwal Sahib) Ltd. [2023] 151 taxmann.com 301 (NCLT - Hyd.), affirmed

SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY

Proud Securities and Credits (P.) Ltd. v. Urrshila Kerkar [2023] 151 taxmann.com 528 (Delhi)

Where suit filed against defendant could not be proceeded in light of proceedings initiated against defendant under section 95, since plaintiff had solitary remedy of filing claim in proceeding instituted under Code, application of plaintiff for refund of court fee deposited for said suit was to be allowed.

A summary suit was filed by the plaintiff against the defendant. However, said suit could not be proceeded with further in light of proceedings, which came to be initiated against the defendants under section 95. The plaintiff filed instant application for refund of Court fee deposited for said summary suit.

Held that plaintiff would have solitary remedy of filing claim by participating in proceedings initiated under the IBC and take part in collective statutory settlement process that would ensue against defendants, therefore, application of plaintiff was to be allowed and registry was to be directed to refund court fees of plaintiff

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

N.K. Kurian v. Kosamattom Finance Ltd. [2023] 151 taxmann.com 530 (NCLAT - Chennai)

Where financial creditor initiated CIRP proceedings against corporate debtor which was resisted by corporate debtor on ground that repayments made to financial creditor were not fully accounted for, since exact quantum of amount to be paid by a party is not decisive one in an application filed under section 7 and undisputed debt sum payable by corporate debtor in instant case was more than 1 crore, application filed by financial creditor was rightly admitted.

The Adjudicating Authority admitted application filed by the financial creditor under section 7 and initiated CIRP against the corporate debtor. The financial creditor had granted debt of Rs. 10 crores to the corporate debtor and subsequently, a total amount of Rs. 23,58,34,018 was claimed to be in default. The corporate debtor submitted that repayments made by it were not fully reflected in bank statement produced by the financial creditor before the Adjudicating Authority and, hence, application filed by the financial creditor was to be dismissed. It was noted that there was no dispute as to loan availed but according to the financial creditor, the corporate debtor had paid only a sum of Rs. 9,99,976.40, which was given credit to but the corporate debtor submitted that a sum of Rs. 11,00,000 paid by it was not given credit to.

Held that exact quantum of amount to be paid by a party is not decisive one in an application filed under section 7. Since debt sum payable by the corporate debtor was more than 1 crore, the application filed by the financial creditor was rightly admitted subject to conditions that the application was complete in all respects.

Case Review : Mangomeadows Agricultural Pleasure Land (P.) Ltd. v. Kosamattam Finance Ltd. [2023] 151 taxmann.com 529 (NCLT - Kochi) affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Go Airlines India Ltd. v. SMBC Aviation Capital Ltd. [2023] 153 taxmann.com 256 (Delhi)

Where CoC had approved GoAir's revival scheme and resultantly GoAir had petitioned DGCA for reinstatement of airlines operations, but pursuant to independent writ petitions by lessors of aircrafts Single Judge by interim order restrained GoAir from removing, replacing, taking out any parts or spares etc., from any of aircraft till conclusive adjudication of writ, in view of fact that order of Single Judge was interim, no severe prejudice would be inflicted upon it in event matter was relegated to Single Judge for final disposal of writ petitions and, thus, appeal of GoAir against order of Single Judge could not be entertained

Go Air operates as a licensed commercial airlines in India using aircrafts leased to them. Following certain defaults in payment of lease rent by GoAir, an application under section 10 of IBC was filed. Lessor of aircrafts also filed an independent applications with DGCA seeking cancellation of aircraft registration in terms of rule 30(7) of the Aircraft Rules 1937. In the meantime, NCLT admitted GoAir's section 10 application and IRP was appointed. Since, moratorium under section 14 had triggered, DGCA decided to keep lessors applications for de-registration in abeyance. Aggrieved therewith, lessors filed petitions before the writ Court for directions to DGCA to cancel aircraft registration as per the Aircraft Rules. The Single Judge had on a prima facie basis observed that IRP was not required to take control of aircraft. The Single Judge by interim order restrained GoAir and its representatives under provisions of IBC from removing replacing taking out any parts or spares etc. from any of aircraft till conclusive adjudication of writ. GoAir filed an appeal on ground that CoC had approved its revival scheme and resultantly it had petitioned the DGCA for reinstatement of airlines operations, of which they expected an

immediate approval and in event such approval was granted, directions in interim order by the Single Judge would prevent GoAir's renewed functioning. It was noted that the Single Judge's views were currently tentative and a degree of finality would be achieved only after writ petitions were conclusively heard and decided, and, thus it would be appropriate for parties to present all their arguments before the Single Judge for final determination of writ petitions. Further no severe prejudice would be inflicted upon GoAir in event matter was relegated to the Single Judge for final disposal of writ petitions, especially in light of fact that the DGCA would require a minimum 15 days to decide on re-commencement of GoAir flights.

Held that appeal of GoAir could not be entertained and the Single Judge was requested to endeavor to decide writ petitions as expeditiously as possible

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Go Airlines India Ltd. v. SMBC Aviation Capital Ltd. [2023] 153 taxmann.com 261 (SC)

SLP dismissed against High Court ruling by which it restrained Go Air and its IRP/representatives to take control of leased aircraft.

Go Air operated as a licensed commercial airlines in India using aircrafts leased to them. Following certain defaults in payment of lease rent by Go Air, an application under section 10 was filed. In a parallel development, lessor's of aircraft issued notices for termination of lease agreements. Thereafter, lessor's filed an independent applications with the DGCA seeking cancellation of aircraft registration in terms of rule 30(7) of the Aircraft Rules, 1937. In meantime, the NCLT admitted Go Air's section 10 application thereby initiating CIRP. The DGCA, thus, decided to keep lessor's applications for de-registration in abeyance. Aggrieved therewith, lessor's filed petition before the writ Court for directions to the DGCA to cancel aircraft registration as per Aircraft Rules. The Single Judge by impugned interim order had held that since said aircrafts were lessor's assets, Go Air and its representatives were restrained from removing, replacing, taking out any parts or spares etc. from any of aircraft till conclusive adjudication of writ. Go Air filed an appeal on ground that CoC had approved Go Air's revival scheme and resultantly Go Air had petitioned the DGCA for reinstatement of airlines operations, of which they expected an immediate approval and in event such approval was granted, directions in impugned interim judgment would prevent Go Air's renewed functioning.

Held that since proceedings under Article 226 of Constitution were pending before the Single Judge and proceedings were argued on day-to-day basis, jurisdictional issues which were sought to be raised in the instant proceedings could be addressed before the High Court and thus, instant petition against the High Court ruling was to be dismissed.

Case Review : SLP against order of Delhi High Court in Go Airlines v. SMBC Aviation Capital Ltd. [2023] 153 taxmann.com 256 (Delhi) dismissed.

Malavika Hedge v. IndusInd Bank Ltd. - [2023] 153 taxmann.com 363 (NCLAT - Chennai)

Where corporate debtor challenged NCLT's order admitting CIRP application filed by bank on ground that said application being hit by section 10A NCLT had committed a patent error in accepting revised date of default submitted by bank for taking it out from purview of section 10A, in view of fact that, there were arguable points involved in instant appeal, formal notice was to be issued to bank enabling it to file its reply within two weeks and, till next date of hearing, operation of impugned order would remain stayed.

On account of the corporate debtor's failure to repay loan amount, respondent bank filed an application under section 7 to initiate Corporate Insolvency Resolution Process (CIRP) against the corporate debtor. The NCLT proceeded to admit said application. Against NCLT's order, the corporate debtor filed an appeal alleging that date of default (30-4-2020) occurred during period from 25-3-2020 to 25-3-2021, i.e. during COVID-19 pandemic-related insolvency moratorium imposed by the Central Government and, thus, said application was hit by section 10A. The corporate debtor further alleged that the NCLT had committed a patent error in accepting revised date of default submitted by the financial creditor which indicated date of default as 28-2-2020, for taking it out from purview of section 10A.

Held that there were arguable points involved in instant appeal, formal notice was to be issued to bank who was already on caveat, enabling it to file its reply within two weeks i.e. up to 25-8-2023 and rejoinder, if any, be filed by the corporate debtor within two weeks thereafter i.e. up to 14-9-2023 and in meanwhile, till next date of hearing, operation of impugned order would remain stayed.

Case Review : IndusInd Bank Ltd. v. Coffee Day Global Ltd. [2023] 152 taxmann.com 708 (NCLT - Beng.) stayed.

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