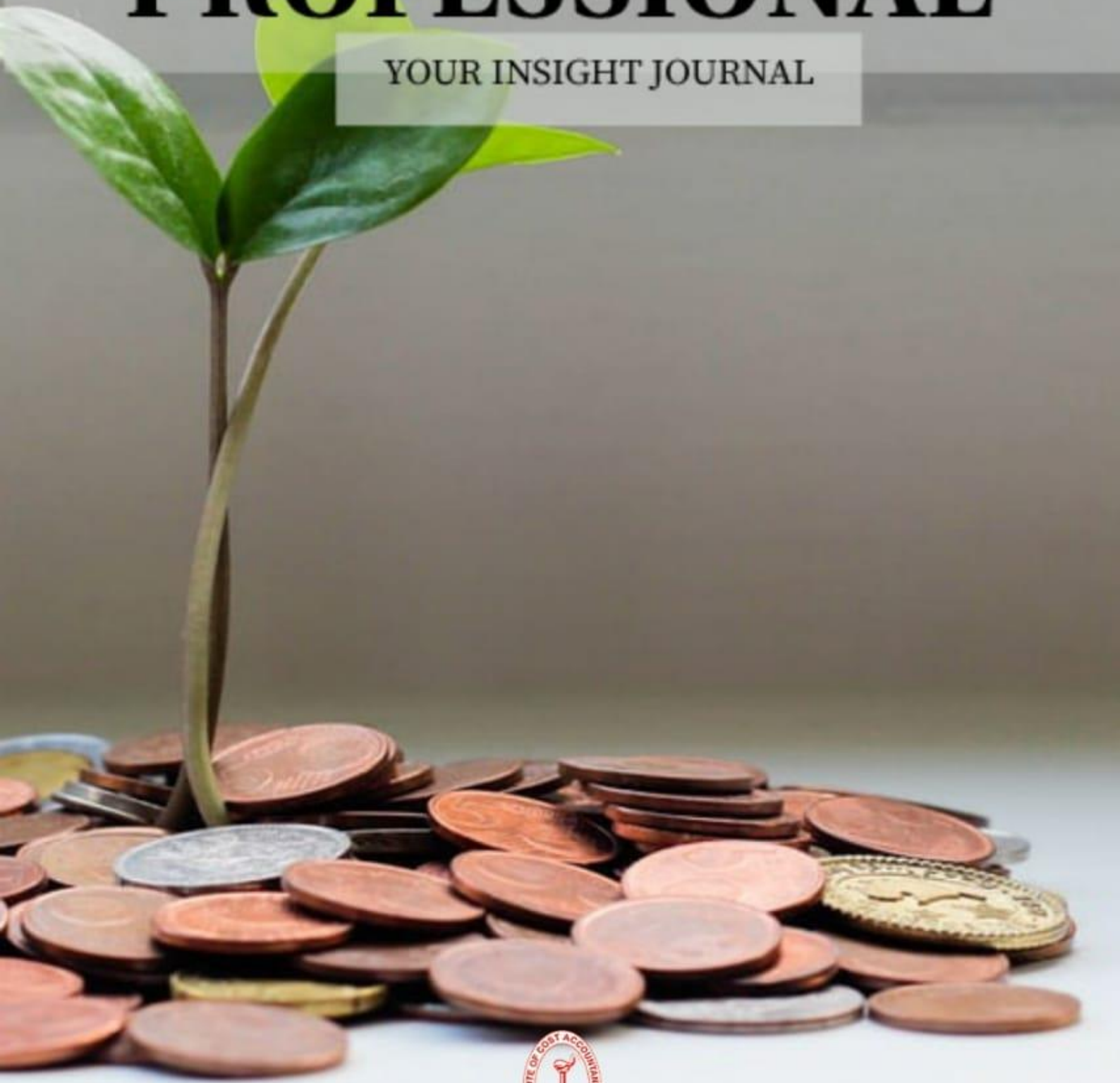
JUNE,2020

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

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CEO MESSAGE

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 suspends the applicability of Section 7, 9 and 10 of the Insolvency and Bankruptcy Code for 6 months to protect corporate entities defaulting on payment obligations during the Covid-19 pandemic. The global spread of Coronavirus (Covid-19) pandemic and consequent lockdowns has adversely impacted businesses in varied sectors across the economy. To overcome a highly distressed market scenario and address the credit exposures of various businesses, the Indian Government has introduced various economic relief packages and legal and regulatory measures, the latest being the amendments to the Insolvency and Bankruptcy Code, 2016 (IBC)

In what may bring about major reform and efficiency in the insolvency regime in India, the Insolvency and Bankruptcy Board of India (IBBI) has proposed to limit the number of cases an insolvency professional can handle to five as it noted that few insolvency professionals (IP) are handling too many cases. In a recent discussion paper, the board noted the "skewed" work allocation and has come up with a matrix for allocation of cases.

"Keeping in mind the provisions of the Companies Act, 2013, the skewed work allocation amongst the IPs and the observations of the Supreme Court or Adjudicating Authority, and given the expansive and intense responsibilities of an IP in corporate processes, it is proposed to issue necessary guidelines to IPs advising them to limit the maximum number of assignments handled by them, to five, at a given point of time."

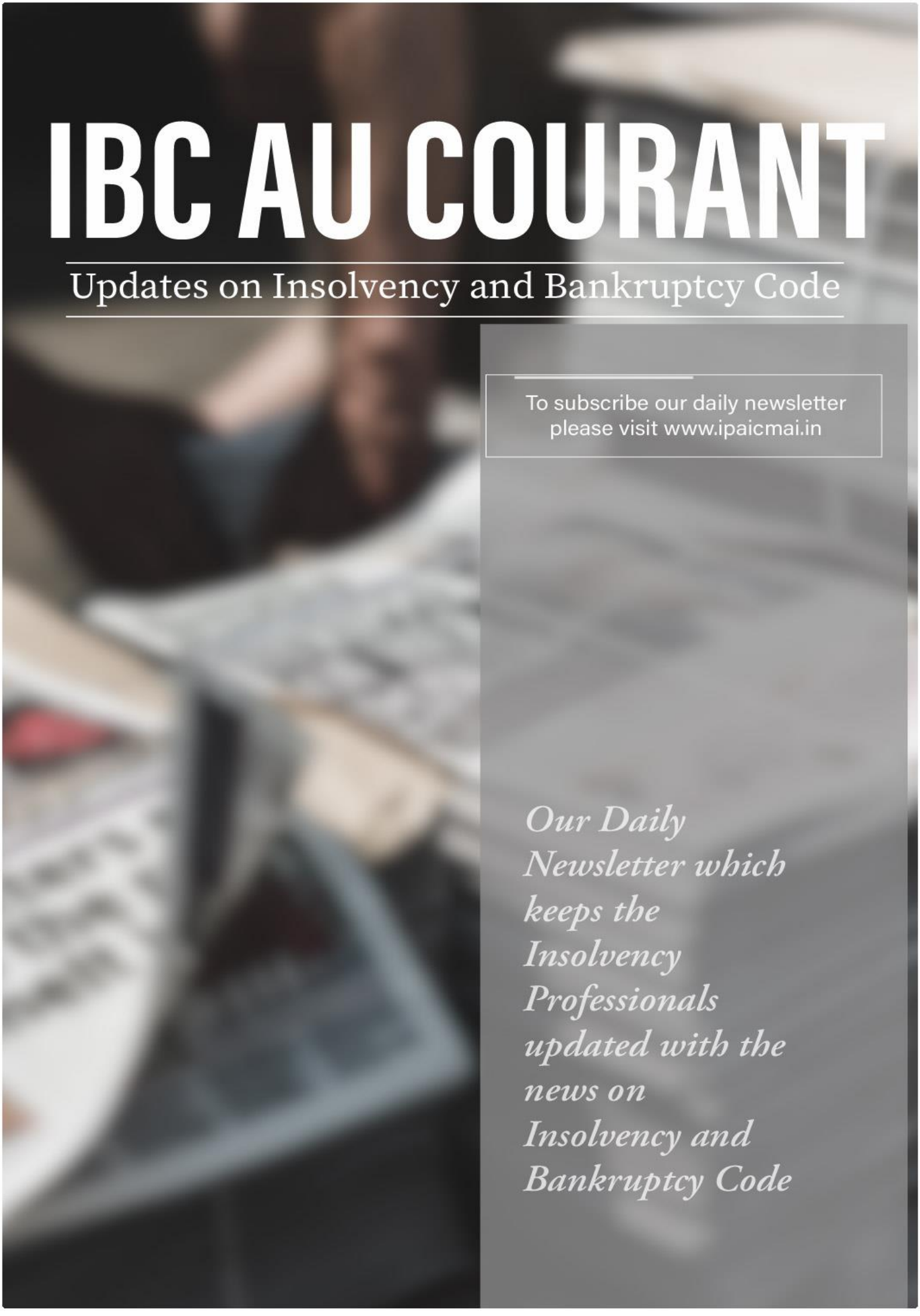
The Insolvency and Bankruptcy Code (Second Amendment) Ordinance, 2018 has brought relief to the Micro Small and Medium Enterprises (MSME) by relaxing the applicability of the provisions of Section 29A as regards submission of a resolution plan in case of such entities their favour. It is one of the most significant amendments under the Insolvency and Bankruptcy Code and has a wide impact on the whole insolvency resolution regime. The draft Special insolvency resolution framework bill for MSMEs recommends a 90-day timeline instead of the existing 330 days - for completion of the process. It permits promoters of a defaulting MSME to submit resolution plans. "It is imperative that the regulatory measures are supported by the necessary infrastructure and an effective system

PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute
of Cost Accountants of India

EVENTS CONDUCTED

JUNE,2020	
Date	**Event**
5th June, 2020	Webinar on "Australia Insolvency Reforms Due to COVID-19"
6th June, 2020	Panel Discussion on Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020
10th June – 14th June, 2020	Online Certificate course on "Skill development of Insolvency Professionals"
15th June, 2020– 19th June, 2020	Online Certificate course on "Effective CIRP Management"
22nd June,2020	Online Stakeholders Meet on MSME Insolvency Framework



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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


ARTICLES
Insolvency Professional Agency of Institute of Cost Accountants of India

IBC (AMENDMENT) ORDINANCE, 2020: IMPLICATIONS AND AMBIGUITIES

Ms. Megha Mittal, Associate
Vinod Kothari & Company

To mitigate the impact of the disruption caused by the outbreak of COVID-19 on the companies in India, and especially those companies which were already facing liquidity crisis, several relaxations and reforms were proposed by the Central Government. Amidst all apprehensions as to how the proposals/ announcements will be imbibed in the law, the proposed amendments have been rolled out on 5th June, 2020, by way of the Insolvency and Bankruptcy (Amendment) Ordinance, 2020 ("Ordinance")

The Ordinance has introduced two major changes- first, the much-talked-about suspension on filing of application for initiation of corporate insolvency resolution process, and second, the relaxations with respect to wrongful trading under section 66 (2) of the Insolvency and Bankruptcy Code, 2016 ("Code"). While the Ordinance comes as a breather for stressed companies, no specific reliefs have been introduced for MSMEs. In this article, the author analyses the amendments brought by way of the Ordinance, and attempts to throw light upon the loopholes that have come to the fore.

Suspension on fresh filings- A Blanket Ban

The newly inserted section 10A selectively suspends fresh filing of applications by financial and operational creditors as well as the corporate persons themselves, for a period of six months which may be extended up to a year. Provisions of section 10A are ad-verbatim produced below-

" 10A. Notwithstanding anything contained in section 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation- For removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the sections before 25th March, 2020"

From the above, the defining elements of the 'suspension' can be enlisted as below-

- Firstly, the tenet behind such suspension is to protect companies experiencing distress during the unprecedented situation; and as such, initiation of insolvency proceedings shall not be suspended for defaults committed prior to the nation-wide lockdown imposed with effect from 25th March, 2020;

- The 'suspension' on filing applications is an umbrella suspension, and covers application by financial and operational creditor as well as the corporate person itself;
- Such suspension shall remain in force for a period of six months from the date of notification, and may be extended upto a year. For brevity, we shall refer to this period as 'disruption period '; and
- No filing shall ever be made for a default occurred during the Disruption Period.

An indefinite abatement- understanding the impact

While the suspension/ abatement for defaults seems viable as the primary aim of the Code is to ensure protection of companies during such unprecedented times, suspension on filings 'ever' gives an impression of an indefinite abatement for defaults occurred during the Disruption Period; and as such seems to be contrast with the objectives of the Code. As much as the Ordinance intends to take into account practical difficulties faced due to the ongoing crisis, an indefinite abatement may lead to interpretational issues, and counter-productive results.

Hence, in order to understand the applicability of such abatement, we may consider four specific situations-

Situation 1: The default originates before the Disruption Period, and is either cured during such period, or continues thereafter

Explanation to section 10A makes it evidently clear that the instant suspension shall not be applicable for default occurred prior to the Disruption Period- the reason being that such default cannot be associated with crisis, and as such the creditor shall be eligible to exercise its rights without any barriers.

Situation 2: Default originates as well as is cured during the Disruption Period

The very tenet behind the insertion of section 10A was to provide for such situations, that is, where the default has occurred during the Disruption Period as well as cured- hence, abatement will be applicable.

Situation 3: Default originates after the Disruption Period

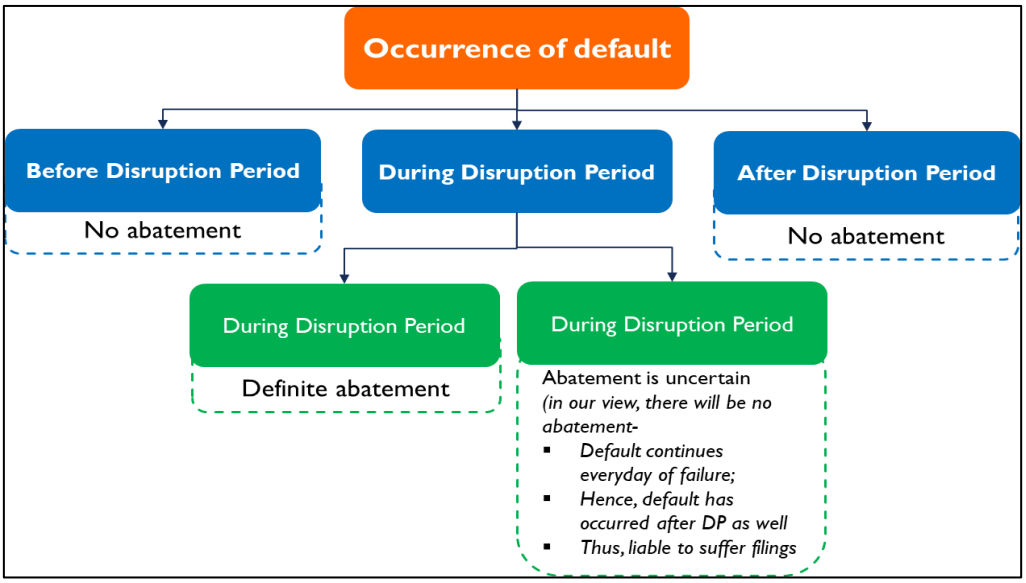
The provisions of section 10A clearly specify that the suspension shall pertain to only such defaults which have occurred in the Disruption Period, as only such defaults shall be deemed to have occurred due to the COVID crisis. Hence, without any second questions, it is clear that any default that occurs after the Disruption Period shall be outside the scope of such suspension- thus, abatement shall not be applicable.

Situation 4: Default originates during the disruption period, and continues beyond such period.

While the above three cases were based on basic interpretation of the Ordinance/Code, the loophole essentially lies in this fourth situation, wherein the default has occurred during the disruption period and continues thereafter, that is beyond the disruption period. A plain reading of the proviso to section 10A gives an impression that by virtue of the fact that such default occurred during the Disruption Period, it shall be entitled to abatement forever.

However, the author begs to differ from the above interpretation. At the very outset, such an interpretation would be highly counter-intuitive- a blanket and 'forever' protection would rather actually incentivize a debtor to accelerate default so as to bring it during Disruption Period and avail a permanent abatement. Besides the fact that such cannot be the intent of law, it must be noted that a default continues to exist everyday of failure. As such, where the default has not been made good during the Disruption Period, and continues thereafter, it can be easily said the default has occurred after the Disruption- hence, going by such principle, abatement would not be applicable.

The above four situations, may be summarised as follows :



Relaxations w.r.t. Wrongful Trading

Along with the suspension of filings, the Ordinance also provided for relaxations with respect to 'wrongful trading'. By way of insertion of section 66(3), the Ordinance provides that-

"66(3) notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A."

Section 66 (2) of the Code essentially pertains to the liabilities of the directors to act diligently and towards the interests of the creditors and shareholders, where the directors are of the view that the company is on the verge of insolvency. Where the directors act in breach of such duty, they shall be liable for 'wrongful trading' and may be subject to actions under section 66 (2). By way of the instant relaxation, it is sought to encourage the directors for running the business during the Disruption Period as may be necessary for keeping the company a going concern.

Hence, in a situation where during the Disruption Period, the directors are aware that the company is unable to meet its obligations and is on the penultimate verge of insolvency, and still continue the operations of the Company, if in future the company goes into insolvency proceedings for a default occurred other than during Disruption Period, the resolution professional shall not be entitled to take any action, under section 66 (2), against the directors for defaults pertaining to the Disruption Period.

It may be noted, with a view to give company directors greater confidence to use their best endeavours to continue to trade during this pandemic emergency, without the threat of personal liability should the company ultimately fall into insolvency, similar provisions have been introduced in the United Kingdom to temporarily suspend the wrongful trading provisions retrospectively from 01.03.2020 for three months.

Having said so, it must be noted that such relaxation only pertains to wrongful trading and not fraudulent actions/ trading under section 66 (1). The intent of the Code cannot be to justify, promote or excuse any fraudulent act irrespective of whether such act was done during the Disruption Period.

Irrelevance of 'Disruption Period' for PUFE transactions

Another aspect here is whether such relaxation shall also be applicable for look-back period in case of other preferential, undervalued or extortionate transactions under the Code ("PUFE Transactions").

The concept of "look-back period" in case of PUFE transactions is of utmost relevance for the purpose of the Code, and as such it becomes important to understand whether the disruption period should be excluded from the 'look-back period'. It must be noted that PUFE Transactions are essentially transactions entered into to benefit other parties, at the cost of the corporate debtor, and in turn, the creditors and shareholders. Thus, excluding disruption period from the look-back zone would lead to high risks of misutilisation of such leeway; and as such, the author is of the view that section 66 (3) shall be limited to wrongful trading under section 66 (2) only.

Ambiguities in the Ordinance

Having discussed the provisions introduced, we shall now throw some light on several questions that remain unanswered-

(i) Fate of Personal Guarantors to Corporate Debtors-

Corporate and personal guarantees have been a significant feature of the Code, and their stance vis-à-vis the principal borrower, that is, the Corporate Debtor, has been clarified in light of several rulings of the Adjudicating Authority, Appellate Tribunal as well as the Hon'ble Supreme Court. Now, in view of the suspension introduced via the Ordinance, while it is evidently clear that action against corporate guarantors would also stand suspended- there has been no clarification or mention with respect to personal guarantors. In such situation, it may so happen that the burden of insolvency proceedings shifts to personal guarantors, thus creating a dis-balance in the existing set-up under the insolvency framework in India.

(ii)Treatment of default in tranches-

While section 10A specifies that no application can be filed for default occurring during the Disruption Period, there has been no clarification w.r.t. such default, a tranche of which may have occurred prior to the Disruption Period.

For instance, say, default of Rs. 75 lakhs occurred in January 2020 and the remaining default of Rs. 35 Lakh default occurred on 01.04.2020, that is during the Disruption Period, can application be filed stating that part of the default occurred in Jan'20? In this case, it can be contended that since threshold is raised to Rs. 1 crore , the application for Rs. 75 lakhs cannot be filed in this case. However, in another situation, where a part of default (prior to Disruption Period) exceeds Rs. 1 crore, the application may be filed for such tranche of default.

(iii) Implications upon Limitation

An important, yet unanswered question here is that what would be the impact of the Disruption Period on 'limitation'. In this context, we may recall the suo-moto order of the Hon'ble Supreme Court which provides for exclusion of lockdown period for the purpose of determining limitation. However, unless explicitly provided for, the same cannot be implied as extended to include the Disruption Period also. Sans any clarification in this regard, if it is assumed that the Disruption Period shall not be excluded while determining limitation, it would be highly prejudicial to the interests of creditors, as they would be disabled from taking recourse under the Code, and yet suffer wearing of the Limitation Period.

In this pretext, a specific clarification/ notification may be needed to provide for exclusion of the Disruption Period for the purpose of determining limitation.

Concluding Remarks

Notably, pursuant to RBI moratorium, the Ordinance may not be of much relevance in applications by financial creditors, though the abatement might be useful in cases where the borrower has not availed the moratorium; although the probability that such borrowers will commit default is minimal. However, the abatement would be relevant with respect to applications by Operational Creditors as majority filings would be by operational creditors. Operational creditors mostly are MSMEs – so it remains arguable as to whether the Ordinance helps MSMEs or harms them.

HOMEBUYERS – A ROLLER COASTER JOURNEY

Mr. Sunil Kumar Gupta
Insolvency Professional

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

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

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

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

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

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

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

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

"a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".

Now question is whether Homebuyers are FC or OC-

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

Various petitions (more than 150) were filed in Apex Court against said amendment. However, in the case of Pioneer Urban Land and Infrastructure Limited Vs. Union of India & Ors. [WP(C) No.43/2019 and other petitions], the Apex Court dismissed all such petitions filed by builders/ developers and uphold the constitutional validity of status of allottees as FCs. In its judgement, Apex Court held that the constitutional validity of the amendment will be decided on the background of the fact that the legislature must be given free play in the joints when it comes to economic legislation. For a clear understanding, the Apex Court then went ahead to examine the recommendations made by the Insolvency Committee Report wherein it was stated that the delay in completion of under-construction apartments has become a common phenomenon. Committee further agreed that amounts raised under home buyer contracts are a significant amount, which contributes to the financing of the construction of an asset in the future. Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. Thus, the Court observed that the legislative judgment in economic choices must be given a certain degree of deference by the courts. The deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code.The allottees/home buyers were included in the main provision, i.e. section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen."

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

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

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

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

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

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

ASSET RECONSTRUCTION COMPANIES AND THEIR ROLE UNDER IBC

Mr. Satish Kumar Gupta
Insolvency Professional

After the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, many ARCs were formed which have played significant role in the resolution of non-performing and stressed assets. ARCs have also continuously evolved and adapted their business models as per needs of highly competitive market in line with dynamic regulations including Insolvency and Bankruptcy Code, 2016.

Background

Asset reconstruction companies (ARCs) have played an important role in the of recovery and resolution of non-performing assets. Set up under SARFAESI Act, 2002, ARCs were meant to enforce security of a lender without intervention of a court. From an agency model of buying NPAs to becoming now an alternative source of capital as well as for facilitating resolution of stressed assets, ARCs have come to play an encompassing role in stressed asset space. ARCs have also adapted their business models in line with ever evolving RBI regulations, framework of resolution and Insolvency and Bankruptcy Code, 2016 (IBC).

ARCs acquire NPAs financial asset from banks through Special Purpose Vehicle in the form of a trust. The SPV funds its acquisition by issuing SRs to Qualified Institutional Buyers (QIB) investors. ARCs act as both principal and agent as ARCs are required to invest and hold an amount not less than 15% of SRs issued by the trust set up for the purpose of securitization under each scheme.

The SRs represent a receipt or other security, issued by an ARC to any QIB pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right title or interest in the financial asset involved in securitization. SRs are redeemed only out of realization from financial assets held under the Trust and carry no fixed returns. SRs are tradable/sold in the secondary market.

The SRs issued by ARCs are predominantly backed by financial assets and cannot be characterized either as a debt or an equity instrument, since they combine the features of both. However, these are recognized as securities under Securities Contracts (Regulation) Act, 1956. The investment in SRs is restricted to QIBs only.

Foreign Investment in SRs - The limit of Foreign Institutional Investment (FII) investment in SRs has been enhanced from 49% to 74% of the paid up value of each tranche of scheme of

Security Receipts issued by ARC. Further, the individual limit of 10% for investment of a single FII in each tranche of SRs issued by ARCs has been dispensed with. Foreign investor mostly therefore secure category II FPI registration and invest in SRs issued by ARCs.

Though IBC has attracted lot of attention in recent years, recovery under SARFAESI continues to be preferred route for enforcing security by banks. As per report on *Trend and Progress on Banking in India 2018-19*[1] issued by RBI in 2019, the scheduled commercial banks realized Rs 41,876 crore through SARFAESI channel second to amount of Rs 70,819 crore realized under IBC in year 2018-19.

As per report on *Trend and Progress on Banking in India 2018-19*[1] issued by RBI in 2019, financial assets securitized by ARCs since enactment of SARFAESI Act, 2002 with SR issuance aggregating to Rs 146,409 crore, out of which banks had subscribed to SRs of Rs 101,733 crore (69.5%), ARCs - Rs 27,480 crore (18.7%), FIIs - Rs 1,735 crore (1.2%) and QIBs - 15,521 crore (10.6%). SRs of Rs 12,906 crore (8.8%) have been completely redeemed as of June 2019. Details of financial assets securitized by ARCs till June 2019 are as follows:

Item	Jun-16	Jun-17	Jun-18	Jun-19
1. Book Value of Assets Acquired	2,37,653	2,62,733	3,30,563	3,88,069
2. Security Receipt issued by SCs/RCs	79,020	93,918	1,20,308	1,46,409
3. Security Receipts Subscribed to by				
(a) Banks	65,119	77,653	95,951	1,01,733
(b) SCs/RCs	11,406	14,159	20,165	27,480
(c) FIIs	326	326	505	1,735
(d) Others (Qualified Institutional Buyers)	2,170	1,779	3,686	15,521
4. Amount of Security Receipts Completely Redeemed	7,200	7,355	8,830	12,906
5. Security Receipts Outstanding	64,117	78,312	98,118	1,14,615

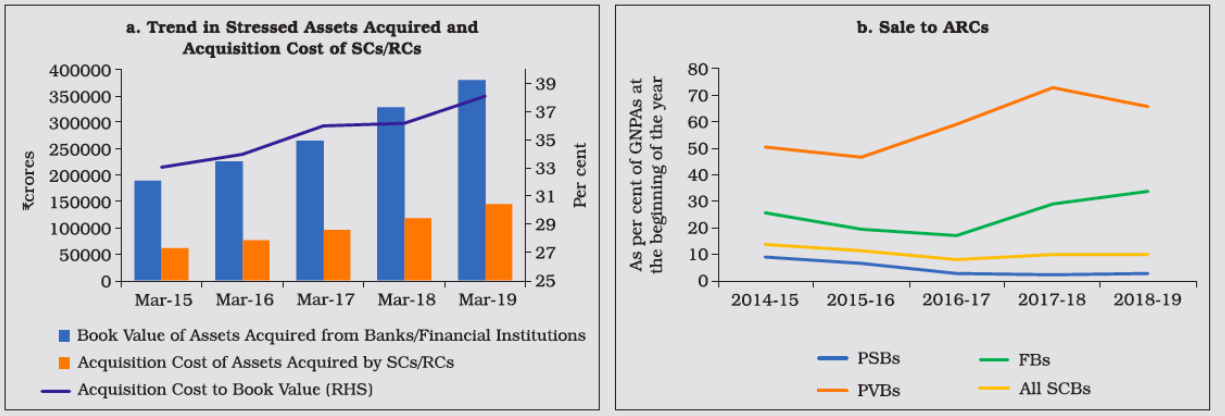
Source: Quarterly statements submitted by ARCs

The share of subscriptions by banks to security receipts (SRs) issued by ARCs declined to 69.5 per cent by end-June 2019 from 79.8 per cent a year ago with diversification of investor

base in SRs. Accordingly, the share of subscription of QIBs increased from Rs 3,686 crore in June 2018 to Rs 15,521 crore in June 2019 showing increase of Rs 11,835 crore.

As cases referred for recovery through legal mechanism shot up, cleaning up of balance sheets via sale of stressed assets to ARCs decelerated on a y-o-y basis and declined as a proportion to GNPAs at the beginning of 2018-19. However, the acquisition cost of ARCs as a proportion to the book value of assets increased further, indicating that banks had to incur lesser haircuts on account of these sales. Lower haircut is also on account of sale of recent NPAs by banks. Stressed assets sale to ARCs have been robust as follows:

Chart IV.16: Stressed Asset Sales to ARCs



Source: Quarterly statements submitted by ARCs and off-site returns (domestic operations), RBI

As per RBI guidelines, ARCs have been provided a lot of flexibility in restructuring and turnaround of assets acquired. ARCs are allowed to invest in equity in excess of 26%[2] in one entity, provided ARCs having (i) minimum net owned fund of Rs 100 crore, and (ii) more than half of their board is independent. Further, ARCs can utilize a part of funds raised under a scheme from the QIBs for restructuring of financial assets acquired under the relative scheme subject to following conditions:

1. ARCs with acquired assets in excess of Rs. 500 crore can float the fund under a scheme which envisages the utilization of part of funds raised from QIBs in terms of Section 7(2) of the SARFAESI Act, 2002, for restructuring of financial assets acquired out of such funds.
2. The extent of funds that shall be utilized for reconstruction purpose should not be more than 25% of the funds raised under the scheme in terms of Section 7(2) of the SARFAESI Act, 2002.

In June 2019, RBI[3] permitted ARCs to acquire financial assets from other ARCs, which was so far allowed only for the purpose of debt aggregation to further relax regulations.

In January 2020, FPI investments in SRs which were currently exempted from the short-term investment limit was also extended to debt instruments issued by ARCs.

Role played by ARCs under IBC

ARCs play the following major roles in the resolution of stressed assets and participate in corporate insolvency process under IBC:

1) Acquire and hold stressed assets in its book by way of trust structure for the benefit of SR holders/investors and thereafter pursue resolution through IBC; and

2) As a resolution applicant pursuant to changes in IBC in Section 29A

On ARC acquiring debt in a stressed company, ARC may initiate insolvency proceedings against the Corporate debtor. ARC may acquire debt in single or multiple trusts as per its or investors' requirement. On initiation of Corporate Insolvency Resolution Process(CIRP), ARC becomes a member of Committee of Creditors (CoC) to pursue the resolution process. However, during the pendency of CIRP, moratorium is imposed upon creditors rights, including rights under SARFAESI Act. ARC during this period can continue to aggregate debt from various creditors. SRs are also traded amongst various investors in the secondary market and, of late, many transactions of SRs sale have been reported among distressed debt investors.

As per Section 29A of IBC, an ARC can act as a resolution applicant to submit a resolution plan. ARC can submit resolution plan itself or with other investors jointly as a consortium or partnership. Further, as per Section 29A, expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

ARC as partner of bidder or Resolution Applicant provides flexibility to investors as:

1) No further fresh security to be created with assignment of existing debt to ARC
2) Restructuring of existing debt into various instruments such as non-convertible debentures, OCDs, equity, etc.
3) Lower stamp duty on assignment of debt
4) Enhanced enforcement rights of ARCs compared to that of AIFs

5) ARCs can pursue piece-meal sale/monetization of assets of the Corporate Debtor on approval of resolution plan over a period of time and pay lenders from sale proceeds

With banks currently sitting on large NPAs and stressed assets against which significant provisions have been made, banks can undertake consortium sale of stressed assets for its expeditious resolution. For instance, as per reports, in January 2020, Edelweiss ARC[5] (EARC) along with a distressed debt fund managed by Goldman Sachs acquired debt of more than 80% of Bilt Graphic Paper Products Limited (BGPL) from its lenders. Edelweiss and GS together have also infused Rs 300 crore as priority debt in the company in 2017, which was used for company's working capital needs. Kotak Mahindra Bank has approached NCLT for admitting BGPL under IBC. With 80% debt aggregated by EARC, it will be easier for lenders to pursue resolution.

Loan sales may be resorted to by lenders for any reasons ranging from strategic sales to rebalance their exposures or as a means to achieve resolution of stressed assets by extinguishing the exposures. Recently RBI has released *Draft Comprehensive Framework for Sale of Loan Exposures* [4] on June 8, 2020. Some of the relevant extracts from the report are as follows:

1. Lenders shall sell stressed assets to transferees other than ARCs only on cash basis.

2. The loan sale contract shall clearly specify that in the event an inter-creditor agreement (ICA) is required to be signed in terms of the Prudential Framework, the transferee, regardless of the nature of the entity, shall sign the ICA as and when required.

3. Sale of stressed assets to asset reconstruction companies: Lenders are free to receive cash or bonds or debentures or SRs or pass-through certificates (PTCs) as sale consideration for the financial assets sold to ARC. Bonds/debentures/SRs/PTCs received by lenders as sale consideration towards sale of financial assets to ARC shall be classified as investments in the books of the lenders.

4. A lender offering stressed assets for sale shall offer the first right of refusal to an ARC which has already acquired the highest and at the same time a significant share (~25-30%) of the total exposure of all lenders to said stressed borrower, for acquiring the asset by matching the highest bid.

5. Price Discovery: In order to bring down the vintage of NPAs sold by lenders as well as to enable faster debt aggregation by ARCs, lenders shall put in place board approved policy on

adoption of an auction based method for price discovery. In particular, once bids are received, the lender shall first invite the ARC, if any, or in the absence of such an ARC, any other financial institution, if any, which has already acquired highest significant stake to match the highest bid.

As may be observed, ARCs have been provided special dispensation to acquire assets on cash basis as compared to other investors in RBI's draft guidelines for sale of Loan Exposures. In addition, it is also proposed to deregulate the price discovery process in the case of sale of stressed assets.

ARCs have participated in the submission of bids for a number of companies undergoing CIRP in IBC such as Jaypee Infra Limited, Jet Airways Limited, Reliance Communications Ltd, etc. Major accounts resolved with ARC playing major role as Resolution Applicant or in partnership with investor are as follows:

1. Alok Industries Limited[6]

Reliance Industries Limited (RIL), in partnership with J M Financial ARC Ltd (JMFARC), was the sole bidder for Alok Industries Limited that was facing claims of Rs 29,500 crore from financial creditors. The Ahmedabad bench of NCLT had approved the joint bid by RIL and JMFARC in March 2019. The lenders of Alok Industries Limited have received Rs 5,052 crore from RIL and JMFARC as part of the resolution plan.

2. Uttam Value Steels Limited and Uttam Galva Metallics Limited[7]

A consortium of US-based distressed assets investor CarVal Investors and Asset Reconstruction Company of India Ltd (Arcil) emerged as the successful bidder to acquire Uttam Value Steels Ltd and Uttam Galva Metallics Ltd. The consortium of lenders, led by State Bank of India (SBI), had a total exposure of around Rs 6,100 crore to the two companies. NCLT has given its approval for the Rs 2,400-crore resolution package.

3. Aircel Limited[8]

The resolution plan for bankrupt telecom company Aircel has been approved by NCLT. The telecom company had filed for voluntary insolvency in February 2018, citing liquidity concerns and inability to service debt. The total debt of Aircel stood at Rs 58,670 crore. The Resolution plan is expected to fetch financial creditors Rs 6,630 crore from UV Asset Reconstruction Company (UVARC), as per approval granted by the Mumbai bench of the National Company Law Tribunal (NCLT). Initially, lenders will hold 24% and UVARC will hold 76% in the reconstructed company as per resolution plan.

Smaller ARCs have also been active player in IBC as resolution applicant. In December 2019, Rare Asset Reconstruction Company Limited successfully bid as Resolution Applicant for Aparant Iron & Steel Pvt. Ltd, a pig iron manufacturing company based in Goa. As a part of resolution plan, Rare ARC proposed to take over the debt of the sole secured financial creditor of the company by way of assignment of debt for 100% cash of Rs 60 crore. The plan further proposed that after equity infusion, Rare ARC was to buyback the equity of the existing shareholders at a nominal value so that entire shareholding of the Corporate Debtor shall lie with the Resolution Applicant.

ARCs have also played important role in resolution restructuring/settlement under the RBI's Prudential Framework for resolution of stressed assets issued on June 7, 2019. Aditya Birla Asset Reconstruction Company Limited (ABRCL) acquired part of the debt that RattanIndia Power Limited (RIPL) owed its lenders for a 1,350 MW thermal power plant in Amaravati. As per settlement, the existing lenders assigned the existing principal debt of about Rs 6,574 crore to a set of new investors and lenders, led by foreign funds like Goldman Sachs and Varde Partners (through ABRCL) for Rs 4,050 crore. The OTS process with existing management was done through an open, transparent through a global Swiss challenge auction process.

As may be observed form above, ARCs have played significant and mature role in resolution of stressed assets under IBC by adapting their business model and aligning with ongoing ever evolving regulatory changes. ARCs are expected to enhance their role in the resolution of stressed assets by co-investing with various investors to meet their expectations and by leveraging on the unique advantages available with ARC structure. ARCs have to be innovative, well capitalized and possess turnaround capabilities to capitalize on opportunities provided in the current scenario.

1.Report on Trend and Progress of Banking in India for the year ended June 30, 2019 submitted to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949 by RBI on December 24, 2019

2.RBI notification No. RBI/2017-18/101 DNBR.PD(ARC)CC. No.04/26.03.001/2017-18 dated November 23, 2017regarding conversion of debt into equity – review

3.RBI notification No. RBI/DNBR/2018-19/227 DNBR.PD(ARC) CC.No. 07/26.03.001/2018-19 dated June 28, 2019 regarding permission to acquire financial assets from other ARCs

4.Draft Comprehensive Framework for Sale of Loan Exposures and Securitization of Standard Assets released by RBI on June 8, 2020

5.https://economictimes.indiatimes.com/markets/stocks/news/edelweiss-arc-goldman-co-tighten-grip-on-bilt-graphic/articleshow/73237474.cms

6.https://www.financialexpress.com/industry/lenders-receive-money-for-alok-industries-resolution-from-ril-and-jmfarc/1941668/

7.https://www.livemint.com/companies/news/nclt-nods-carval-s-rs2-300-cr-bid-for-uttam-value-steel-uttam-galva-metallics-11588597788297.html

8.https://www.financialexpress.com/industry/aircel-resolution-lenders-likely-to-get-rs-6630-crore-against-rs-58670-crore/1997256/

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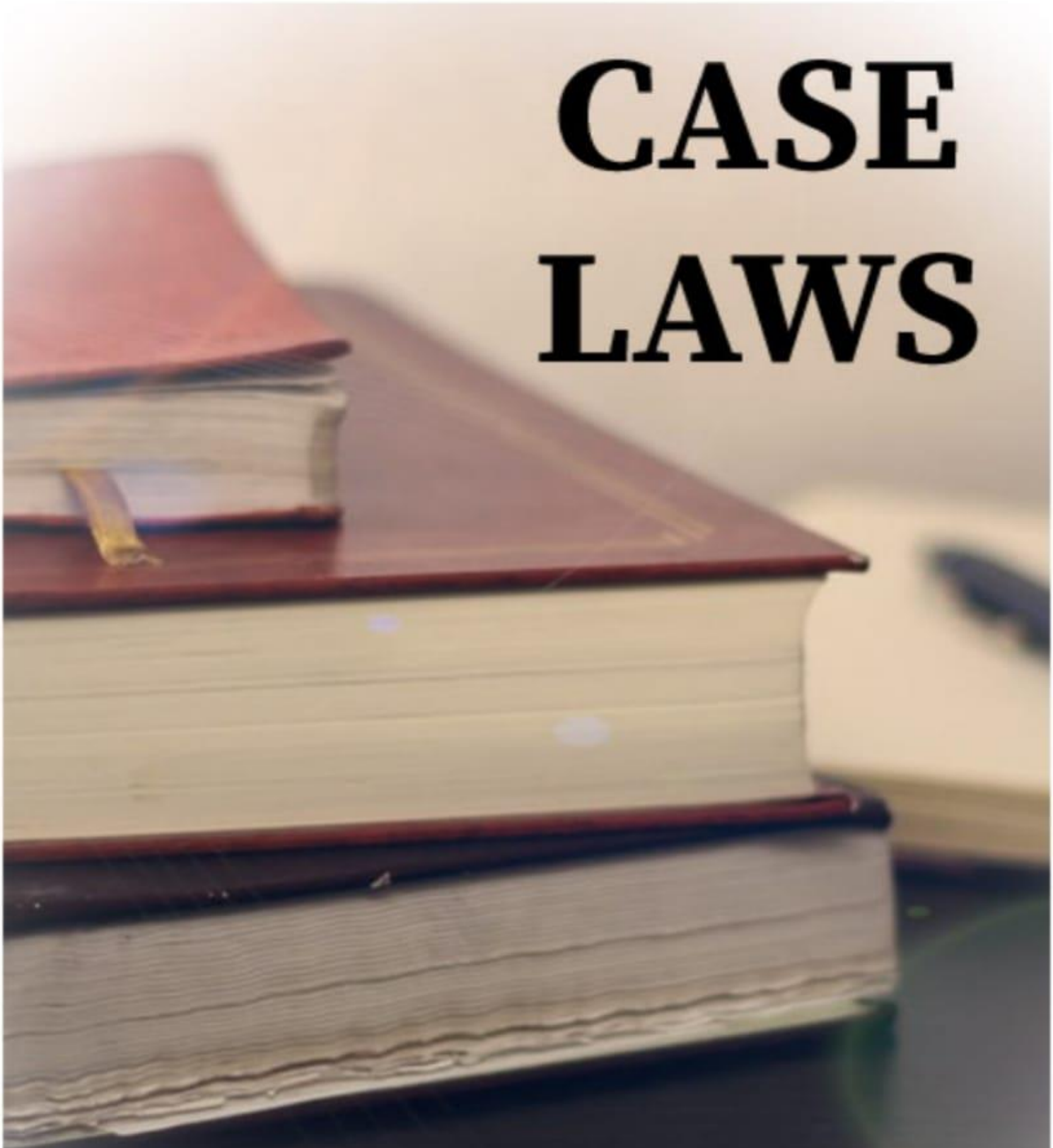
CASE LAWS



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SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

✓ **Kotak Mahindra Bank Ltd. v. Amtek Auto Ltd. - [2019] 110 taxmann.com 209 (NCL-AT)**

Where while approved resolution plan was taken up by RP, no favourable response was received from successful resolution applicant and since CIRP period of 270 days were over, Tribunal passed order of liquidation of corporate debtor, question of claim of appellant bank and operational creditor was not required to be determined by RP.

CIRP was initiated against the corporate debtor. Appellant-bank and appellant-operational creditor filed its respective claims pursuant to public announcement, before the RP. However, the RP admitted claim of the operational creditor but did not disclose contents of the resolution plan to it. On the other hand the RP, rejected claim of the appellant bank. The Tribunal having not granted any relief to both the applicants, instant appeal was preferred by the appellant bank and the operational creditor. It was noted that while approved resolution plan was taken up by the RP, no favourable response was received by the successful resolution applicant and since, CIRP period of 270 days were over, Tribunal passed order of liquidation of the corporate debtor.

Held that since in the impugned order the Tribunal had ordered for liquidation of the corporate debtor, question of claim of the appellants was not required to be determined by the RP, which they could claim before liquidator.

SECTION 5(20) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL CREDITOR

✓ **Tanya Bhatnagar v. Mohamed Hesham Amin Basha Mashaa'l - [2019] 110 taxmann.com 211 (NCL-AT)**

In absence of any relationship of operational creditor and corporate debtor, section 9 application filed by respondent in capacity of operational creditor was not maintainable and, thus, impugned order passed against appellant was to be rejected.

The Adjudicating Authority passed an order whereby the application of section 9 filed by the respondent in capacity of an operational creditor against the appellant was admitted. Against said order the appellant raised a plea that the respondent had no arrangement or agreement with the appellant wherein it was shown as corporate debtor.

Held that in absence of any relationship of the operational creditor and the corporate debtor between the respondent and the appellant, section 9 application was not maintainable, thus, impugned order passed by the Adjudicating Authority was to be set aside.

SECTION 238 - OVERRIDING EFFECT OF CODE

✓ **Vineet Khosla Shareholders and (Ex) Director Margra Industries Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. - [2019] 110 taxmann.com 217 (NCL-AT)**

In terms of section 238, provisions of IBC will override anything inconsistent therewith contained in any other law for time being in force.

Held that provisions of IBC will have effect, notwithstanding anything inconsistent therewith contained in any other law for time being in force.

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

✓ **Vineet Khosla Shareholders and (Ex) Director Margra Industries Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. - [2019] 110 taxmann.com 217 (NCL-AT)**

Adjudicating Authority at stage of admission of application under section 7 is not require to consider as to whether or not it would be possible to keep corporate debtor as a going concern.

Bank granted financial assistance of Rs. 389 lakhs to the corporate debtor. The corporate debtor failed to repay. The Bank assigned its rights pertaining to financial assets of the corporate debtor in favour of the applicant who filed CIRP petition. The Adjudicating Authority admitted said petition. The corporate debtor raised a dispute that applicant had already sold part of assets of the corporate debtor taking direction of DRT, and thus, the corporate debtor could no more be kept as a going concern and so, the I&B Code could not be invoked.

Held that at stage of admission of application under section 7 the Adjudicating Authority need not to enter into such dispute and requirement is to give limited notice and consideration would be to see whether or not satisfaction by the Adjudicating Authority could be reflected on basis of section 7(5). Further in view of aforesaid, instant appeal against the impugned order passed by the Adjudicating Authority admitting CIRP petition was to be dismissed.

Case Review: *Edelweiss Asset Reconstruction Co. Ltd. v. Margra Industries Ltd. [2019] 110 taxmann.com 216 (NCLT - New Delhi), affirmed*

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

II. SECTION 3(6) - CLAIM

III. SECTION 238A - LIMITATION PERIOD

✓ **GupShup Technology India (P.) Ltd. v. Interpid Online Retail (P.) Ltd. - [2019] 110 taxmann.com 221 (NCL-AT)**

I. Where corporate debtor failed to produce any letter or email to suggest that prior to issuance of demand notice, a dispute was raised about SMS services provided by operational creditor; it could be said that there was no pre-existing dispute.

II. Even when debt amount was disputed, same being more than Rs. 1 lakh, CIRP application was to be considered and same could not be rejected.

III. Where CIRP application was filed within three years from date of commencement of Code, same would be maintainable.

I. The appellant provided text SMS services to the respondent through internet. The respondent-corporate debtor availed said services through SMS Dashboard. The corporate debtor had its own dedicated user name and password for log in, however, the respondent in an email sought details of email logs and other supporting documents in order to verify invoices. The respondent defaulted in making payment towards invoices, as a result of which its services were discontinued. The respondent acknowledged debt and stated that there was delay in infusion of funds from its investors and that was the reason for non-payment of outstanding dues. When the appellant issued a demand notice, the respondent in its reply raised allegations for the first time, however, the corporate debtor failed to produce any letter or email to suggest that a dispute was raised prior to issuance of the demand notice.

Held that it could be said that there was no pre-existing dispute and thus, CIRP application could not be rejected.

II. Held that section 3(6) defines 'claim' to mean a right to payment even if it is disputed; The I&B Code gets triggered at moment when default of Rs. 1 lakh or more occurs and even when the respondent disputed debt amount, in view of fact that it was more than Rs. 1 lakh, application under section 9 could not be rejected.

III. Held that application filed by the operational creditor under section 9 within three years from date when right to apply accrued under the I&B Code, which came into force since 1-12-2016, was maintainable and not barred by limitation.

Case Review *:* Gupshup Technology India (P.) Ltd. v. Interpid Online Retail (P.) Ltd. [2019] 110 taxmann.com 220 (NCLT - Bengaluru), reversed.

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

✓ **Asset Reconstruction Co. (India) Ltd. v. R. Venkatakrishnan - [2019] 110 taxmann.com 223 (NCL-AT)**

Since essential supplies included electricity, it could not be disconnect during CIRP; further, not earlier charges but current charges only would be payable.

Pursuant to initiation of CIRP against the corporate debtors, the State Electricity Board disconnected electricity owing to non-payment of dues during CIRP. The Adjudicating Authority directed the RP to deposit amount equivalent to dues payable to the Electricity Board and likewise directed the Electricity Board to forthwith restore power.

Held that since essential supplies includes electricity, it was not open to the Electricity Board to disconnect electricity during CIRP. RP should not have paid any dues of earlier period for restoration of electricity and the Adjudicating Authority should have ordered for restoration of same with direction to pay dues of current charges of CIRP. Further, 'Resolution Plan' having been approved by the Adjudicating Authority under section 31, it was not open to the Adjudicating Authority to pass order subsequently to release huge amount in favour of the Electricity Board.

Case Review : S.Venkatakrishnan v. Kerala State Electricity Board [2019] 110 taxmann.com 222 (NCLT - Chennai), reversed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- ✓ **Committee of Creditors of Amtek Auto Ltd. v. Dinkar T. Venkatasubramanian - [2019] 110 taxmann.com 278 (NCL-AT)**

Where resolution plan approved by Adjudicating Authority is contravened by concerned corporate debtor, any person other than corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to Adjudicating Authority for a liquidation of corporate debtor.

The application under section 7 against the corporate debtor was admitted.Thereafter, the RP filed application under section 31 before the Adjudicating Authority and the Adjudicating Authority approved the resolution plan of 'L'. It was alleged that 'L' failed to implement resolution plan. Even the performance guarantee and the escrow account and other terms and conditions which were approved pursuant to the resolution plan were not acted upon. At this stage, the CoC/financial creditors filed an application under section 60(5) read with section 74(3) before the Adjudicating Authority with prayer to declare that resolution applicant 'L' and its promoters upon whom the resolution plan was binding under section 31, have knowingly contravened the terms of the resolution plan having failed to implement the same. Further prayer was made to reinstate the CoC and the RP to ensure that the corporate debtor remain as a going concerns. According to 'L', it discovered blatant discrepancies in the condition of machineries, valuations and representations made in the information memorandum and valuation reports, from which the 'L', became aware that the information contained in the information memorandum was incorrect, false and reflecting inflated values and information. However, the application filed by successful resolution applicant, namely, 'L' for declaration that the corporate insolvency resolution process in respect of corporate debtor was vitiated by misrepresentation/fraud/mistake of fact had also been disallowed by the Adjudicating Authority by common impugned order. Similar plea had been taken by 'L' before instant Appellate Tribunal in its appeal wherein it was alleged that on knowing the aforesaid

fact it immediately wrote a letter stating that in view of the developments regarding discovery of serious irregularities in the information shared with the appellant CoC during the bidding process it was necessary that a meeting be held with the 'Committee of Creditors', to find a way to discuss and agree to a suitable 'Resolution Plan' where the true valuation of 'Corporate Debtor' is reflected. The Adjudicating Authority taking into consideration all the aforesaid facts and submissions made by the parties, rejected the prayer made by the 'Committee of Creditors'/'Financial Creditors' and disposed of their application.

Held that where resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation of the corporate debtor. Further where the Tribunal is satisfied that there are circumstances suggesting that business of the corporate debtor is being conducted with an intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, the Tribunal after giving a reasonable opportunity of being heard to parties concerned, may request the Central Government to investigate into affairs of company.

Case Review : Corporation Bank v. Amtek Auto Ltd. [2019] 103 taxmann.com 369 (NCLT-Chandigarh), partly affirmed.

SECTION 238A - LIMITATION PERIOD

- ✓ **Sanghvi Movers Ltd. v. Tech Sharp Engineers (P.) Ltd. - [2019] 110 taxmann.com 338 /[2020] 218 COMP CASE 381 (NCL-AT)**

Where debt became due in 2013 and winding up petition was filed in 2015, CIRP petition filed within three years from date when right under section 9 of Code accrued to operational creditor was within period of limitation.

As the corporate debtor stopped payment, legal notice was issued on 6-5-2013 by the operational creditor, in reply to which the corporate debtor admitted dues. Due to non-payment, a winding up petition was filed on 4-7-2015. During pendency of said winding up petition, the I&B Code came into force, and winding up proceeding stood transferred to the Tribunal.

Held that since winding up petition had not reached finality and in meantime, the I&B Code came in force and demand notice was issued, there was continuous cause of action and, thus, claim was within period of limitation.

Case Review : Sanghvi Movers Ltd. v. Tech Sharp Engineers (P.) Ltd. [2019] 110 taxmann.com 337 (NCLT - Chennai), reversed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

✓ **Srei Infrastructure Finance Ltd. v. Sundresh Bhatt - [2019] 110 taxmann.com 340 (NCL-AT)**

Where corporate debtor was running its business from premises of its related entity, although said property did not belong to corporate debtor, in view of section 14, corporate debtor could not be ejected or disturbed from said premises, in question, during Moratorium

The applicant was a financial creditor of related entity of the corporate debtor, under moratorium. The applicant by evicting said related entity from its premises took physical possession of said premises. Since office of the corporate debtor was running from said premises, the Adjudicated Authority directed the applicant to return said property by restraining it from doing any further action. Therefore, the applicant filed instant application on ground that the immovable property, in question, did not belong to the corporate debtor and being a third party property, order of moratorium would not be applicable over said property.

Held that although said property did not belong to the corporate debtor, in view of section 14, the corporate debtor could not be ejected or disturbed from premises, in question, during moratorium.

Case Review : Andhra Bank v. Sterling Biotech Ltd. [2019] 110 taxmann.com 339 (NCLT - Mum.), affirmed.

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

✓ **Abhishek Jaiswal v. Raj Process Equipments & Systems (P.) Ltd. - [2019] 110 taxmann.com 383 (NCL-AT)**

Where no notice was issued either by operational creditor or by Adjudicating Authority before admission of CIRP application, ex-parte order passed by Adjudicating Authority was in violation of principles of natural justice.

No notice was issued either by the operational creditor or by the Adjudicating Authority before admission of CIRP application and ex-parte CIRP order was passed by the Adjudicating Authority.

Held that impugned CIRP order passed by the Adjudicating Authority, being in violation of principles of natural justice, was to be set aside.

Case Review : NCLT decision in Raj Process Equipments & Systems (P.) Ltd. v. Abhishek Jaiswal dated 6-3-2019, set aside.

SECTION 29A - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION APPLICANT

✓ **Quantum coal energy (P.) Ltd. v. Danalakshmi Paper Mills (P.) Ltd. - [2019] 110 taxmann.com 385 (NCL-AT)**

Where resignation was submitted by a Director of corporate debtor much before initiation of CIRP, resolution applicant, being related party to said ex-Director, would not be held ineligible.

Persons not eligible to be Appellant challenged the order of approval of the resolution plan on ground that one of the resolution applicants was related party to erstwhile Director of the corporate debtor and hence, said resolution applicant was ineligible under section 29A. However, it was found that said Director of the corporate debtor had submitted resignation much prior to initiation of CIRP and ceased to be a Director or shareholder of the corporate debtor.

Held that the resolution applicants could not be held ineligible as on date of submission of resolution plan.

Case Review : Agarwal Coal Corporation (P.) Ltd. v. Danalakshmi Paper Mills (P.) Ltd. [MA No. 170 (IB) 2019, dated 26-3-2019] affirmed.

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

✓ **C. Konguvel v. K. Gopinath - [2019] 110 taxmann.com 438 (NCL-AT)**

Where parties settled matter prior to constitution of Committee of Creditors, order admitting CIRP under section 7 was to be set aside.

An application under section 7 was filed by respondents - financial creditors against the corporate debtor which was admitted. The appellants submitted on a previous occasion that they were willing to settle the matter and that the COC had not been constituted. The instant Appellate Tribunal had passed interim orders directing the RP to not to constitute the CoC. The Appellants filed the Memorandum of Settlement. The respondents submitted that in terms of the settlement, part of the amount had already been received and rest of the amount had been deposited by the appellants with the NCLT.

Held that where parties had reached to a settlement prior to constitution of the Committee of Creditors, order passed by the Adjudicating Authority appointing IRP, and all other orders pursuant to CIRP order and action taken by the RP were to be set aside.

Case Review : K. Gopinath v. Dharani Developers (P). Ltd. [2009] 110 taxmann.com 437 (NCLT - Chennai), reversed.

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

✓ **Naresh Kumar Sharma v. Oriental Bank of Commerce - [2019] 110 taxmann.com 467 (NCL-AT)/[2019] 156 SCL 741 (NCL-AT)**

Where on corporate debtor's failure to repay, 'Cluster Monitoring Head' of financial creditor being head of recovery filed an application under section 7, said application was maintainable.

On corporate debtor's failure to repay, the financial creditor filed the instant application to initiate CIRP against the corporate debtor. The corporate debtor raised objection that instant application was not maintainable as it was not presented by any authorized person.

Held that since, instant application was submitted by 'cluster monitoring head' of financial creditor who was also clustering head of recovery, instant application at his instance was maintainable.

Case Review : Oriental Bank of Commerce v. Shekhar Resorts Ltd. [2019] 101 taxmann.com 507 (NCLT - New Delhi), affirmed.

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

✓ **Manoj Gaur v. Ajay Jugran - [2019] 110 taxmann.com 475 (NCL-AT)**

Where parties had reached settlement much prior to constitution of 'Committee of Creditors', application filed by financial creditor under section 7 was to be dismissed as withdrawn.

The financial creditor filed an application under section 7 to initiate CIRP against the corporate debtor. The Adjudicating Authority by the impugned order admitted said application and the RP was appointed. The CoC had not yet been constituted. The appellant, promoter of the corporate debtor, filed instant appeal challenging the order passed by the Adjudicating Authority stating that parties had reached settlement.

Held that in view of settlement arrived at between parties, financial creditor was allowed to withdraw said application under section 7.

***Case Review** : Ajay Jugran v. Gaursons Sports Wood (P.) Ltd. [2019] 110 taxmann.com 474 (NCLT - New Delhi), reversed*

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

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