THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

JULY'2021

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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CHAIRMAN'S MESSAGE

It is about five years since the introduction of Insolvency Resolution Framework under Insolvency and Bankruptcy Code 2016 in India and apart from being one of the major financial reforms it has been an evolving resolution mechanism with six amendments having taken place already. While its objectives have been the maximization of the value of the assets and promoting entrepreneurship, the significance of the quantum of recovery of the dues of financial creditors should not be undermined especially as it involves public money. It has been the experience of the Financial Creditors that while the hair cuts have been as high as 95-96%, in a very few exceptional cases, the recovery also has been of similar order. The hair cuts of this magnitude are not only undesirable but also unsustainable. Hence an average recovery of 42-43% leaves much unsaid. It has been a difficult proposition for the Committee of Creditors to balance the interests of all the stake-holders often leading to opting for resolution instead of liquidation. The major cause/culprit of lower recoveries has been the delays – first in deciding to initiate the process under IBC Framework and then its admission by NCLT. It is learnt that 33% of the Companies are defunct at the time of initiation of resolution process under IBC. Similarly 73% of the liquidated companies are defunct at the time of liquidation. Such delays result in Transfer of Assets and Diversion of Funds by the dishonest Corporate Debtors before the possession changes hand from the Corporate Debtors to the Committee of Creditors. There is an urgent need to enhance the efficiency on these counts. Bankers/CoC has to play an important role in this regard and to serve its own interests and that of others.

It is quite disheartening to note that while the number of pending cases before NCLT constituents more than 40% of the total cases filed, a whopping 72% of these pending cases are more than 180 days old. It certainly calls for strengthening of the NCLTs by setting up more benches in different parts of the country and ensuring that all the NCLTs are adequately equipped with sufficient Members of the Bench and support staff that should have the requisite qualification, expertise, skill and experience. The dream as envisaged in the IBC 2016 of a time bound resolution of insolvency has so far proved to be an optical illusion. There are four important Pillars of the ecosystem created by IBC 2016; Insolvency Resolution Professional, Insolvency Professional Agency, NCLT/NCLAT and Insolvency & Bankruptcy Board of India. Apart from these four pillars, we have a Committee of Creditors and also National E-governance Services Ltd (an Information Utility). The delay is attributable to any of these entities. IBBI which exercises a regulatory oversight on Insolvency Professionals, Insolvency Professional Agencies and the

Information Utility can be in a better position to conduct a comprehensive review in association with the Ministry of Corporate Affairs. A comprehensive review of their functioning alone may lead to the gaps at different levels and stages in resolution of corporate insolvency.

It is imperative to enhance the level of efforts to capacity building of Insolvency Professionals and also the Representatives of Banks/Financial Institutions on the Committee of Creditors to obviate the delays and improve the quality of decisions. There is an urgent need to infuse professionalism of higher degree so as to enhance the efficiency, speed, cost-effectiveness of the Resolution Process to achieve the stated goals under IBC 2016.Pre-packaged Resolution Plan for MSME could prove to be a step in the right direction. However the Bankers should be watchful of the potential abuse or misuse of the shift from Creditors in Control model to Debtors in Possession Model during the intervening period. There is also scope to better balance the interests of the Operational Creditors while allocating the amount so realised.

There is a need to have fair distinction between the monitoring and regulatory jurisdiction over the Insolvency Professionals by the IPAs and IBBI. If it is feasible, the duality of monitoring and regulatory jurisdictions be avoided. Apart from preparation of Case Studies, there should be an institutionalised approach to carrying out research and its outcome be used as a feeder pipeline to bring about further refinement of the processes and procedures. IBC Framework needs to be made to live up to its reputation of being a major financial sector reform.

Dr. Jai Deo Sharma
Chairman

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MD'S MESSAGE

Dear Readers

The Insolvency and Bankruptcy Code (IBC) completed five years since this May. The law envisaged giving a quicker, time-bound alternative for the recovery of bad loans for banks and rescuing failing but viable businesses. Since its implementation, it has no doubt been an effective tool to recover loans. A Parliamentary panel has suggested having a benchmark for the "quantum of haircut" in an insolvency process amid instances of financial creditors taking steep haircuts on their exposure to stressed companies. Besides, the committee has pitched for measures to prevent protracted litigations with respect to an insolvency resolution process. India is considering several operational changes in the Insolvency and Bankruptcy Code (IBC), harnessing digital technology to help remove seemingly insurmountable obstacles of distance or time - and speed up the resolution of distressed companies.

IBBI has also introduced amendment, i.e. Insolvency and Bankruptcy Board of India (IBBI) (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2016 dated 14th July, 2021 which requires a Resolution Professional conducting CIRP to disclose all former names and registered office address(es) so changed in the two years preceding the commencement of insolvency along with the current name and registered office address of the Corporate Debtor, in all its communications and records. IBBI has further introduced Form 8 which needs to be duly filed by the Resolution Professional for matters ongoing or commencing on or after 14th July, 2021. The rationale behind introduction of the same, is that it not only claws back the value lost in such transactions increasing the possibility of reorganization of the Corporate Debtor through a resolution plan, but also dis incentivizes such transactions preventing stress to the Corporate Debtor.

Susanta Kumar Sahu
Managing Director

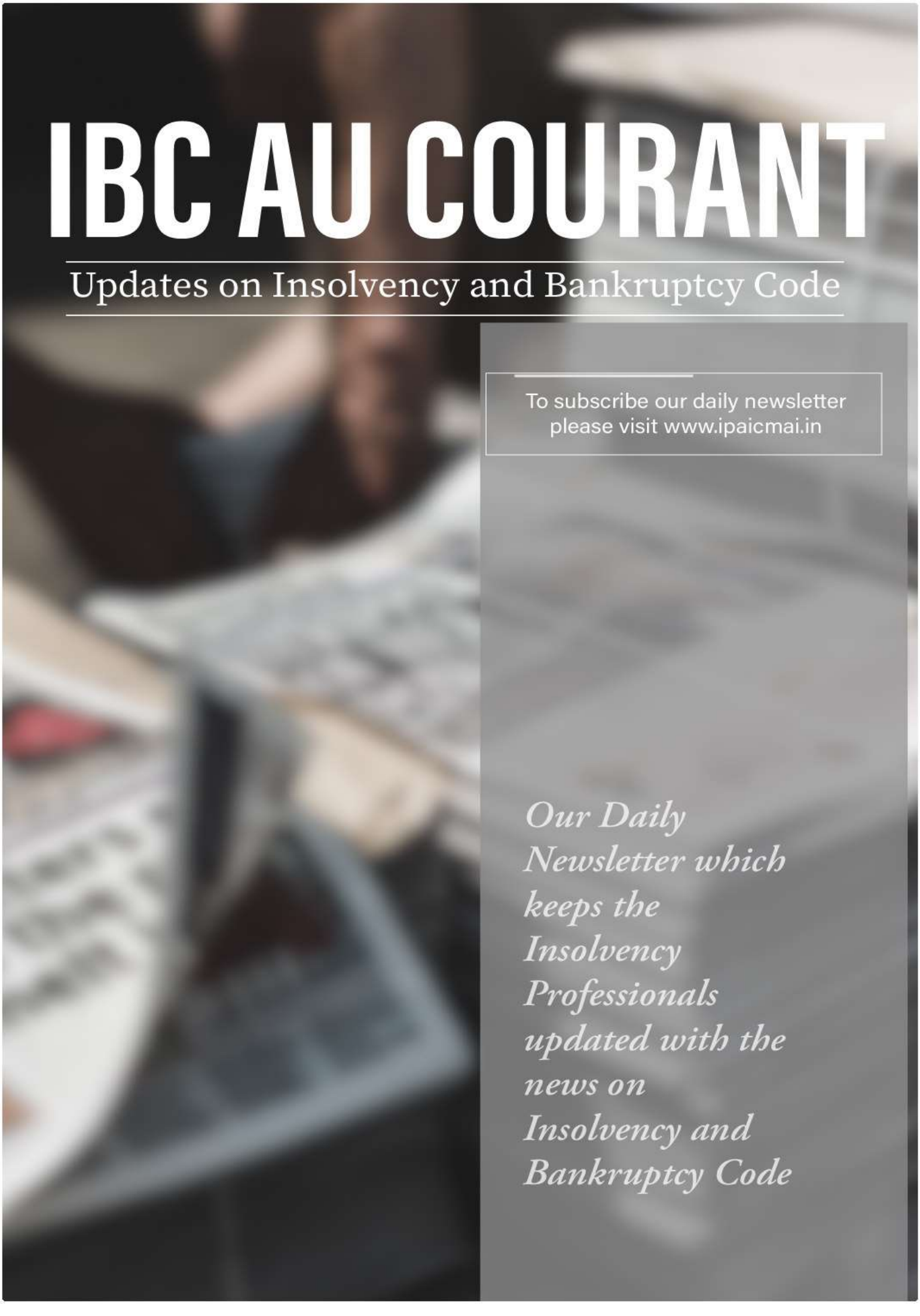
Professional Development Initiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

JULY '2021	
Date	**Events**
2nd July'21	Interactive Meet on Code of Conduct for Committee of Creditors
3rd July'21	Master class on Committee of Creditors
11th July'21	IP Conclave (5 Years Journey of IBC, 2016)
16th July'21	Master Class on Evaluation Matrix, Fair Value and Liquidation Value.
23rd July'21	45th Batch of PREC
24th July'21	Interactive Meet on Technologies for Insolvency Professionals (NeSL)

FORTHCOMING PROGRAMS '2021	
	Events
August 2021	Interactive Meet on Report of Standing Committee
August 2021	Certificate Course on Soft Skill Development of Insolvency Professionals
August 2021	Interactive Meet on Delay in Statutory Requirements during CIRP
September 2021	Master class on Liquidation
September 2021	Master Class on Emerging Scenarios under IBC
September 2021	Interactive Meet on Disciplinary Orders of IBBI



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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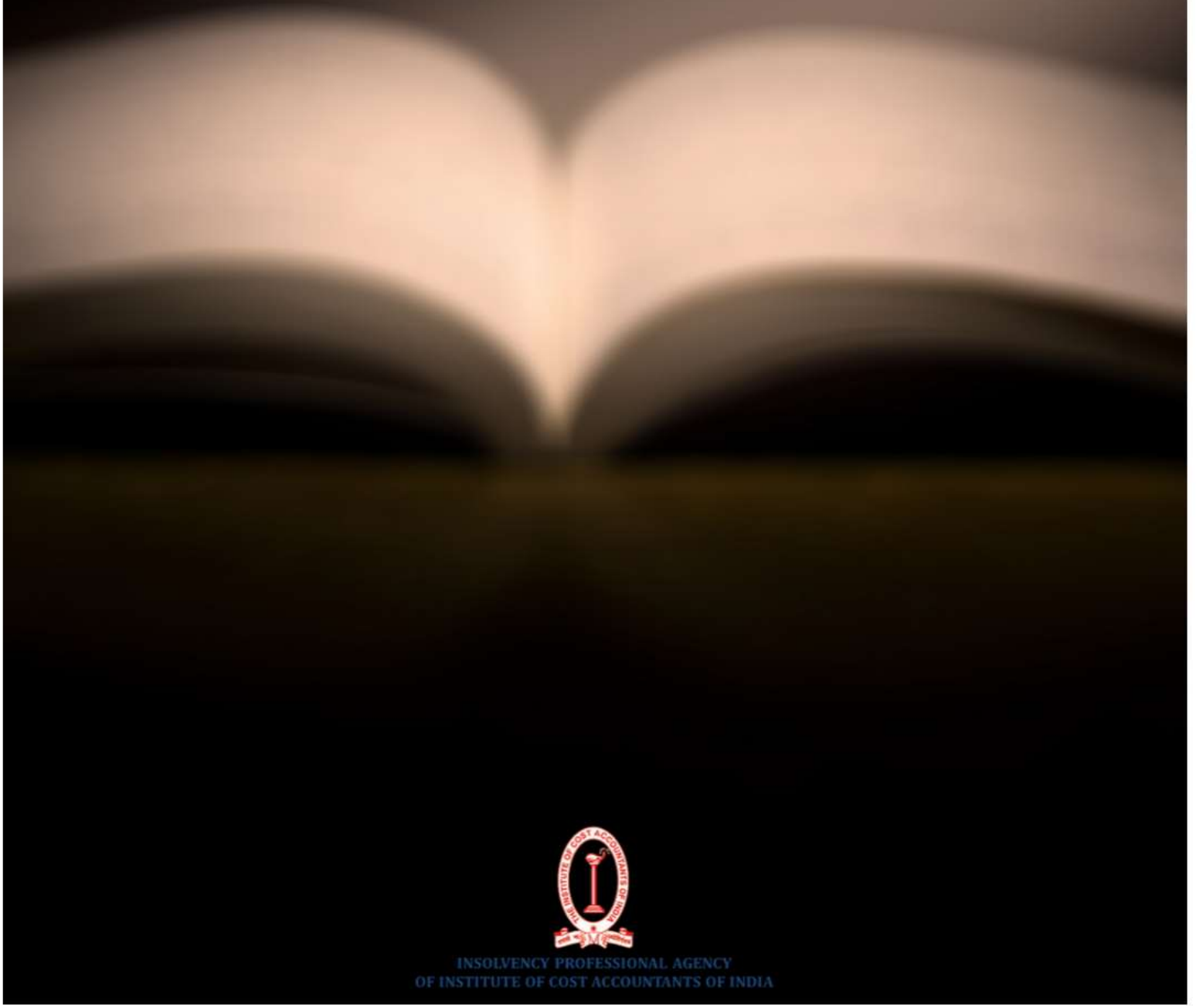
Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code

ARTICLES



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

UNIT-HOLDERS NOT AT PAR WITH CREDITORS AND HOMEBUYERS

Mr. Susanta Kumar Sahu

Managing Director-IPA ICAI

Home buyers under the Bankruptcy Code are treated as creditors till the ownership rights in the immovable property are transferred to them, but they do not take the risks and are not entitled to benefit of profits or suffer losses, as are taken by the unitholders who invest in the mutual funds without any guarantee of returns and know that the investment, including the principal, are subject to market risks. To equate the unitholders with either the creditors or the home buyers will be unsound and incongruous

The above-mentioned observations were pronounced by the Hon'ble Supreme Court on 14.07.2021, in the matter of *Franklin Templeton Trustee Services Private Limited and Another vs. Amruta Garg and Others* (Civil Appeals No.498-501 of 2021) ("the order"). Vide the order the Apex Court clear the cloud over the position of unit-holders with the creditors and homebuyers under Insolvency Bankruptcy Code 2016.

The unit and unit-holders of the mutual funds are defined in the SEBI Mutual Fund Regulations 1996. Regulation 2(z) defines "unit" means the interest of the unit-holders in a scheme, which consists of each unit representing one undivided share in the assets of a scheme; Regulation 2(z)(i) defines "unit holder" means a person holding unit in a scheme of a mutual fund.

Before diving into the reasoning given in the order, it would be imperative to first understand the controversy which leads to the scenario of clarifying the position of unit-holders, creditors and homebuyers as discussed in the order. The reasoning of the above-mentioned observation would be discussed in length at the later stage.

Controversy at a glance

The controversy began in the first wave of Covid-19. The Covid-19 crisis created a worry among investors which leads to a wave of redemptions from six schemes managed by the Franklin Templeton Mutual Fund ('the trustees") with assets of around ₹26,000 crores. The schemes were known to invest in relatively risky debt to get high returns. The schemes

initially borrowed money to meet the redemptions, but prove to be insufficient. Finally, on April 23, 2020, six debt schemes were frozen and eventually wind up.

The decision of the trustees was challenged by the investors which leads to a series of litigation and finally stopped before the Apex Court. The Apex Court in past ordered the trustees to refund the investors' money and honour the redemptions.

In continuation, the order in discussion interprets in length the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 ("the Regulation") with the SEBI Act 1992 to balance the rights and liabilities of trustees, SEBI, and the unit-holders. However, the Respondents challenged the constitutional validity of the Regulation on the following grounds:

i. The Regulation 39(2)(a) is unspecified and suffers from the vice of excessive delegation as it does not give any indication of the type of events which would be relevant for winding up of the scheme. It gives unbridled power to the trustees to wind up a scheme which, in the opinion of the trustees, should be wound up.
ii. SEBI has been invested with the power to issue directions for winding up a mutual fund scheme only when it is in the interest of the unitholders.
iii. SEBI has not prescribed/issued guidelines or policy regarding formation of opinion by the trustees to wind up the scheme.
iv. The opinion of the trustees is given paramount and is supreme. Even SEBI accepts that it has no role and cannot examine and set aside the decision of the trustees. Thus, SEBI, as per its own contention and submission, being bound by the opinion of the trustees, cannot interfere even when it is necessary to do so in the interest of unit-holders or when the trustees have acted in their own vested interest
v. There is no provision for appeal or internal challenge against the decision of the trustees who may in a given case form a wrong opinion regarding winding up of the scheme.
vi. Regulation 39(2)(a) suffers from manifest arbitrariness in the absence of any prescription regulating the exercise of the power by the trustees.
vii. The trustees are required to give notice disclosing circumstances leading to winding up of the scheme to SEBI, this requirement is meaningless and superficial as SEBI cannot go into the question and circumstances to be satisfied as to existence of an event warranting the extreme action of winding up.
viii. Regulation 41(2)(b) is manifestly arbitrary as it states that the sale proceeds under clause (a) shall be first discharged for such liabilities as are due and payable under the scheme and only the balance amount shall be paid to the unit-holders in proportion to their respective interests in the assets of the scheme as on the date of the decision for winding up was taken. Regulation 41 does not prescribe any mechanism or manner in which the

authorised person or the AMC can ascertain the liabilities which are due and payable under the scheme. Secondly, the unit-holders have been placed below the creditors of the scheme and would therefore receive only the leftover. This undermines the paramount place and position of the unit-holders. Further, the SEBI has failed to protect the interest of the unit-holders who are not only financial creditors but, as explicitly provided in Regulation 18(12), their money is held in the mutual fund in trust and for their benefit. Reliance is placed upon Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others14 where the home buyers have been held to be financial creditors under the Indian Bankruptcy Code. Principle of *pari passu* should be made applicable.

ix. Regulation 42 is also manifestly arbitrary as SEBI is to perform only ministerial functions, much less than the functions of a regulator. Conspicuously, during the winding up process, SEBI has been given a minimalistic role which is contrary to the paramount object of the Act.

For this article, we would be concentrating only on challenge enumerated at point viii.

Observation and reasoning of the Court

The Apex Court refer to Regulation 38 and 38 A of the Regulation and observed that unlike creditors and homebuyers, unit-holders are not entitled to fixed return or even protection of the principal amount. Regulations 38 states that no guaranteed return shall be provided in a scheme unless-

a) such returns are fully guaranteed by the sponsor or the asset management company;
b) a statement indicating the name of the person who will guarantee the return, is made in the offer document;
c) the manner in which the guarantee is to be met has been stated in the offer document.

Also, Regulation 38A provides for a capital protection oriented scheme which may be launched, subject to the following:

a) the units of the scheme are rated by a registered credit rating agency from the viewpoint of the ability of its portfolio structure to attain protection of the capital invested therein;
b) the scheme is close ended; and
c) there is compliance with such other requirements as may be specified by the Board in this behalf.

In the observation of the Court, creditors are entitled to fixed return as per mutually agreed contracts. Their rate of return is in the nature of interest and not profit or loss. Creditors are not risk takers as is the case with the unit-holders. In this sense, unit-holders are somewhat at par with the shareholders of a company.

The waterfall mechanism under the Companies Act, or the Indian Bankruptcy Code, gives primacy to the dues of the creditors over the shareholders. Identical is the position of the unit-holders. In opinion of the Court, the argument that the unit-holders should be treated *pari passu* with the creditors is farfetched. Similarly, the contention that unit-holders are identically placed as homebuyers under the Indian Bankruptcy Code is equally frail and a weak argument. Home buyers pay money to the builder and enter into a contract for purchase of immovable property. Home buyers are not risk or partakers in gains or losses like investors in a mutual fund. Home buyers under the Bankruptcy Code are treated as creditors till the ownership rights in the immovable property are transferred to them, but they do not take the risks and are not entitled to benefit of profits or suffer losses, as are taken by the unit-holders who invest in the mutual funds without any guarantee of returns and know that the investment, including the principal, are subject to market risks. To equate the unitholders with either the creditors or the home buyers will be unsound and incongruous. Therefore, the Court held that the Regulations rightly draw the distinction between creditors and the unit-holders. The unit holders are investors who take the risk and, therefore, entitled to profits and gains. Having taken the calculated risk, they must also bear the losses, if any. Further, section 3(12) of Indian Bankruptcy Code defines "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. The Court observed that the expression 'due and payable' with reference to the liabilities is significant. The words 'due and payable' have to be interpreted with reference to the context in which the words appear. In the context, in question they refer to the present liabilities which may be in *praesenti or in futuro*. There must be an existing obligation though the appointed date of payment may not have arrived. Also, the word 'payable', in this context, means capable of being paid, suitable to be paid and legally enforceable. It would exclude liabilities that are time barred or those not payable in facts or in law. In case of any dispute a summary but thorough inquiry may be made to ascertain whether the liability is due and payable. In the opinion of the Court, the liabilities which are not due and payable would not get preferential treatment, thereby reducing the amounts payable to the unit-holders.

Conclusion

The order creates balance among the rights of unit-holders, creditors, and homebuyers in the difficult time when the economy is in flux. The order would provide insight to the investors to weigh the pros and cons before investing their hard-earned money and to make an informed decision. The protection discussed in the order concerning the Regulations should be made pre-requisite norms by the Board to promote and protect the interest of the unit-holders.

HAVE RESOLUTION PLANS RESCUED INSOLVENCY?

Mr. Gopinath P

IP & Chartered Accountants

The article principally discusses about the criticality of the Resolution Plan, its challenges, benefits, factors leading to liquidation and areas to be addressed to make the resolution plan attractive by presenting some of the IBC cases.

Introduction

Globally India's Ranking in Ease of Doing Business is at 63rd Position in 2020 from being at 130th in the year 2016. One of the parameters for evaluating Ease of Doing Business is resolving insolvency. Against this parameter, India stands at 52nd from the 136th Position (out of 190 Countries) in the year 2016. In last 4 years, India is showing a notable improvement in Ease of Doing Business among other countries and soon it is expected to hit in the list of top 50 countries. While the parameters of the Global Ranking could be debated upon, it is critical to examine if ease of exit of business through resolving insolvency has improved in the country.

Reforms in Insolvency Resolution in India through introduction of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) has created a notable framework by laying a platform for revival through resolution in a time bound manner, promoting entrepreneurship by reviving a going concern, balancing the interest of stakeholders, boosting credit availability and ease of recovery in the country with tight regulatory framework.

The Insolvency and Bankruptcy Code, 2016 ("the Code") aims to resolve the trouble of the stressed Corporate Debtors by moving them into a Corporate Insolvency Resolution Process (CIRP) and transferring them as going concern to persons/entities termed as Resolution Applicants who will be willing to take over their management & assets by way of submitting a Resolution Plan. The Resolution Amount will be utilized to settle the liabilities of the Corporate Debtor. The key element of the code is cutting down the time involved in resolving insolvency to Maximum of 330 days.

Look Back on cases under the IBC

Since the inception of provisions relating to CIRP, a total of 4,139 CIRP have commenced till end of December 2020. Out of these cases, 979 have been closed on appeal, review, settled

and withdrawn, 1126 have been ordered for liquidation and 317 have been revived in approval of Resolution Plans and the balance 1717 cases are still in CIRP Process.

- **Year wise Distribution of CIRP's as on 31st December 2020.**

Year	CIRP at Beginning (A)	Admitted (B)	Closed (C)	Ongoing CIRP (A + B – C)
2016 - 17	-	37	1	36
2017 - 18	36	706	204	538
2018 - 19	538	1,152	630	1,060
2019 - 20	1060	1,961	1,193	1,828
2020 – 21 (Apr-Dec)	1828	283	394	1717
Total	**-**	**4,139**	**2,422**	**1,717**

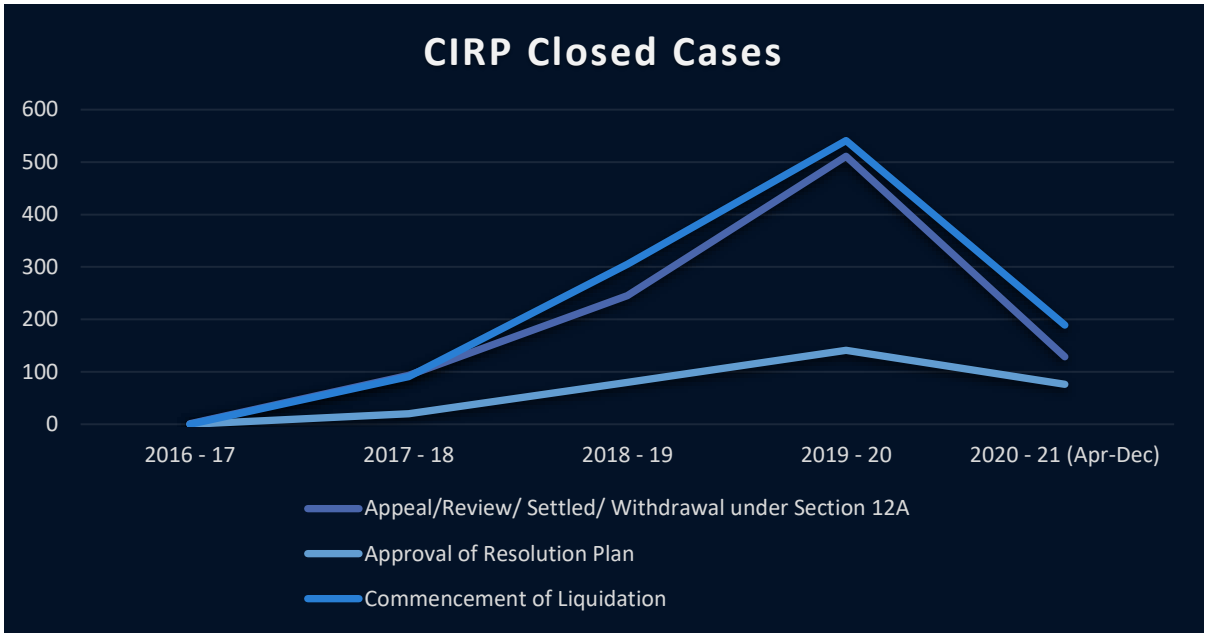
The 2,422 CIRP cases were closed by way of following:

Year	1. Appeal/Review/ Settled/ Withdrawn		2. Approval of Resolution Plan		3. Commencement of Liquidation		Total Closed
	No.	% of Closed	No.	% of Closed	No.	% of Closed	
2016 - 17	1	100%	0	0%	0	0%	1
2017 - 18	93	45%	20	10%	91	45%	204
2018 - 19	245	39%	80	13%	305	48%	630
2019 - 20	511	43%	141	12%	541	45%	1,193
2020 - 21 (Apr-Dec)	129	33%	76	19%	189	48%	394
%Total	**979**	**40%**	**317**	**13%**	**1,126**	**47%**	**2,422**

- **Sector wise Distribution of CIRP's as on 31st December 2020.**

S. No.	Sector	Admitted	Ongoing CIRP	Total Closed	Closure by					
					Appeal/Review/ Settled/ Withdrawn		*Approval of Resolution Plan*		*Commencement of Liquidation*	
					No.	*% of Closed*	*No.*	*% of Closed*	*No.*	*% of Closed*
1	Manufacturing	1,703	688	1,015	357	35%	161	16%	497	49%
2	Real Estate, Renting & Business Activities	816	339	477	248	52%	41	9%	188	39%
3	Construction	439	194	245	133	54%	28	11%	84	34%
4	Wholesale & Retail Trade	408	167	241	87	36%	17	7%	137	57%
5	Hotels & Restaurants	95	33	62	29	47%	12	19%	21	34%
6	Electricity & Others	128	72	56	18	32%	13	23%	25	45%
7	Transport, Storage & Communications	123	46	77	26	34%	9	12%	42	55%
8	Others	427	178	249	81	33%	36	14%	132	53%
	Total	**4,139**	**1,717**	**2,422**	**979**	**40%**	**317**	**13%**	**1,126**	**47%**

- **Graphical Representation of CIRP Closed Cases.**



Reference: The above data are obtained from Insolvency and Bankruptcy Board of India News Letter

While reviewing the year wise trend of cases, it will be observed that during the year 2018-19 & 2019-20 the number of cases admissions into CIRP has increased to 1.6 times & 1.7 times respectively reflecting an early acceptance of IBC as an effective debt resolution mechanism across the stakeholders. However, in subsequent year, due to the pandemic, the number of cases has been drastically reduced on account of suspension notification issued.

The sectoral analysis indicate manufacturing and real estate sectors are the hugely affected sectors and struggling in distress with over 61% of cases attributable to these sectors alone. It is observed that more of companies in wholesale and retail Sector have been resolved by way of Liquidation only.

On reviewing the progress towards the essence of IBC, being revival, it will be observed that only 317 cases out of 2,422 closed cases (i.e., 13%) have been revived by way of approval of Resolution Plan which is significantly lower figure when compared to liquidation which is 47%.

This number warrants a close analysis to examine if productive assets are potentially being liquidated given the fact that we cannot afford to destroy such assets. We are conscious of the fact that a good number of early cases represent the hard-core legacy sub-standard assets.

On other hand, in terms of realisation, it was observed that realisation value for creditors from the approved resolution plans in the 317 cases is Rs. 2.01 lakh crore, which is 39.37% of total admitted claims (i.e., Rs. 5.11 lakh crore) which is 181.70% of the liquidation value of these 317 cases (i.e., Rs. 1.11 Lakh crore). The realisation as a percentage of the claims,

unfortunately, is also a reflection of the quality of the assets that had been funded by the system.

It is relevant to state at this juncture that RBI had directed 12 large corporate accounts for CIRP in the year 2017 when IBC was notified. It was estimated that out of the total bad loans of Indian banks, these 12 accounts accounted for 25% of the total exposure of the banking system. While we examine the outcome of the process today, banks have recovered 56% of their dues from 9 Corporate Debtor for which resolution plan has been approved.

Name of CD	Claims of FCs Dealt Under Resolution (in Crores)			Realisation as a percentage of Liquidation Value	Successful Resolution Applicant
	Amount Admitted	Amount Realised	Realisation as % of Claims		
Completed					
Essar Steel India Limited	49,473	41,018	83%	267%	Arcelor Mittal India Pvt. Ltd.
Bhushan Steel Limited	56,022	35,571	63%	253%	Bamnipal Steel Ltd. Subsidiary of Tata Steel
Bhushan Power & Steel Limited	47,158	19,350	41%	209%	JSW Limited
Alok Industries Limited	29,523	5,052	17%	115%	Reliance Industries Limited, JM Financial Asset Reconstruction Company Ltd., JMFARC - March 2018 Trust
Jaypee Infratech Limited	23,176	23,223	100%	131%	NBCC (India) Limited
Electrosteel Steels Limited	13,175	5,320	40%	183%	Vedanta Ltd.
Amtek Auto Limited	12,641	2,615	21%	170%	Deccan Value Investors L.P. and DVI PE (Mauritius) Ltd.

Monnet Ispat & Energy Limited	11,015	2,892	26%	123%	Consortium of JSW and AION Investments Pvt. Ltd.
Jyoti Structures Limited	7,365	3,691	50%	387%	Group of HNIs led by Mr. Sharad Sanghi.
Total	2,49,548	1,38,732	56%		
Under Process					
Era Infra Engineering Limited	Under CIRP				
Lanco Infratech Limited	Under Liquidation				
ABG Shipyard Limited	Under Liquidation				

It is interesting to note that out of 12 cases, 9 cases have been revived through resolution plan while two is undergoing liquidation and another is still in CIRP. Though the lenders have taken a substantial haircut, the realisations were far higher than the liquidation value of the company. This not only assisted in recovery to the stakeholders which in turn boosting the credit availability but promoting the continuance of business and job opportunities across the organisations for the overall economic growth of the country.

It highlights the need of revival of the stressed organisations through Resolution plan where productive assets and business are available for acquisition through a transparent price discovery mechanism. Revival through Resolution Plan can be a win-win situation for all the stakeholders in terms of recovery, enabling the business to continue as a going concern, and Job continuance of employees.

Resolution Plan

Against this background, it is critical to examine the importance of the Resolution Plans in the context of Code. Resolution Plan means a plan proposed by resolution applicant for resolution of the Corporate Debtor as a going concern in accordance with IBC, 2016. It is an action plan for revival of Corporate Debtor undergoing insolvency and prevents value destruction of the company by going into liquidation.

More of Liquidation than Resolution

While the primary objective of the Code being revival, the existing data reflects that during last four years of IBC, 2016, majority of cases have ended up in liquidation rather than Resolution which goes against the grain of the Code. A study of this failure of revival through Resolution Plan highlights multiple factors which need to be focused and alternative to be placed.

Factors leading to Liquidation:

1. The economic value in most of these Corporate Debtors had already eroded before they were admitted into CIRP.
2. Lack of awareness to the potential interested applicants regarding acquisition opportunities of productive businesses through submission of Resolution Plans.
3. Nature of underlying business and assets are not attracting the cluster of potential interested applicants.
4. The lack of convergence of the recovery expectation of creditors and potential business value as determined by the Resolution Applicant.
5. Resolution Plan offered at very low amount due to perceived deterioration in the value of the Corporate Debtor.
6. Resolution Plan is not approved by CoC or Adjudicating Authority as it does not comply with relevant provisions of IBC or eligibility under Section 29A to submit the plan.

Areas to be addressed:

a. Challenges faced by Resolution Applicants

Despite the Code aiming to preserve the value of the Corporate Debtor, the reality falls short of the expectations and what it should have ideally been.

The time taken for approval and implementation of the Resolution Plan makes the Resolution applicant exhausted in the process. The facts such as approval hierarchy structure of the financial institutions, applications filed by creditors post approval of Resolution Plan and statutory authorities approvals & abiding to the Resolution Plan puts the time bound process for a toss

There are quite number of cases where even after approval of Resolution Plan the Resolution applicant faces challenges in implementing the plan by way of past statutory liabilities or claims of operational creditors which were not covered in Resolution Plan which are hindering the implementation of the Resolution plan. This requires a need to create awareness on statutory authorities and operational creditors on the CIRP such as filing of claim for prior period dues. A good part of these have been addressed by amendments to the Code or judicial pronouncements but given the nascent stage in which the Code is this is to be largely expected.

b. Acquisition at rock bottom prices

In most of the cases the resolution plans of the Corporate Debtor have been for values that are lesser than its Liquidation value and Lenders could not recover fair amount of their outstanding dues. One of the potential reasons behind lower of Corporate Debtor is upon of Initiation of CIRP the value of the Corporate Debtor sharply deteriorates due to various factors such as change of management, loss of goodwill, poor creditors relationship and substandard performance. In the recent times it was observed that on account of this the Resolution plan provides proposals at rock bottom prices which is way lower than liquidation value of the Corporate Debtor. In certain cases, the focus on future economic benefit is weighted more than the intrinsic value of the Corporate Debtor. This extends the gap of realisation with recovery to Creditors with chasm getting wider.

c. Flexibility on Resolution Plan

The present convention exists in the code is that the Resolution Plan is to be submitted for the entire business and operations under one plan. In reality, the prospective applicants will be interested in particular business units or assets against the entire businesses.

It indicates the need for amendment in the code to enable the prospective applicants to take over the separate business units or assets which in turn make multiple applicants to submit multiple resolution plans. This would result in a maximisation of value to the stakeholders.

d. Turnaround Time of Adjudicating Authorities:

One of the pillars for effective implementation of the Code is Adjudicating Authority. The turnaround time of Adjudicating Authority plays a major role in addressing the objective being time bound process.

Delay in Adjudicating Authority processes would directly impact the IBC proceeding in terms of delay in admission of cases, maintaining as a going concern, approval of Resolution Plan and other adjudication aspects. In fact, the Standing Committee on Finance observed that NCLT judicial members shall be at least Hon'ble High Court judges to ensure better judicial & procedural experience & wisdom and the quality of judgement has to be improved.

e. Valuation Challenge

Incompleteness in the scope of valuation casts a cloud over the true valuation of the Corporate Debtor. There is an inherent incongruence between Code and Regulation in defining the scope of Liquidation estate and valuation that has resulted in difference of understanding the term assets.

The Code expects IRP/RP to take possession of all the assets both tangible and intangible but the regulation stipulates that valuation be done by physical verification of fixed assets and Inventory of the Corporate Debtor. This has potentially led to a situation wherein the valuers

are not willing to value the enterprise but only the assets. The Regulation appears to have lowered the weightage to the Corporate Debtors in Service Sector that has potentially led to sub-optimal valuation. In some cases, elements like Product/Service Quality, brand recall and Distribution capability may have better value than old machinery present. These aspects necessitate a holistic approach of valuation in place to overcome the limitation which includes enterprise valuation.

Need for Innovative Restructuring

The Resolution plan, as envisaged by law, envisages restructuring of Corporate Debtor by way of Merger, Acquisition or Demerger or for that matter does not restrict the scope of the resolution plan except that it should be in conformance of the laws of the land. The process for the same is set out in Section 230 to 232 of the Companies, Act 2013. Unfortunately, adequate weightage have not seen to be given on Innovative restructuring using combination of mergers, acquisitions and demerger facility involving multiple stakeholders considering the feasibility of outcome or future benefits that would accrue. Even the original restructuring, by the Reserve Bank of India, envisaged the Right to Recompense but that does not appear to be relevant in the current thought process. While it would be inappropriate for a new resolution applicant to pay for past poor the assets created from funding or creditor forbearance cannot be lost sight of.

Innovative Restructuring is possible when both the ability of Resolution Applicant to identify opportunity in such restructuring and Co-operation of multiple stakeholders is present with the assistance of professionals.

Role of Asset Reconstruction Companies (ARCs)

The ARCs being registered under the RBI and regulated under the SARFAESI Act have been taking over the stressed debts from Financial Institutions for the purposes of realisation. IBC entitles the financial institutions, either Banks or ARCs, to take action against default debtor in a time bound process. Having initiated action against the assigned stressed debts, the ARC have been prohibited by RBI from being a resolution applicant under the IBC. The ARC has thus been reduced to the role of asset realisation rather than potential agency to facilitate turnaround. RBI has recently formed a committee to examine the Roles of ARCs in the stressed debt Resolution segment and hopefully this issue will get addressed as the ARC can become a huge opportunity to consolidate stressed assets and examine opportunities for a resolution.

Carry Forward Income Tax losses in IBC

In terms of Section 79 of the Income Tax Act, 1961, in case of change in shareholding of a company where public are not substantially interested the carried forward losses cannot be set

off against the income or carried forward to subsequent years. To promote the revival of the Corporate Debtors, an amendment was made creating an exception to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the IBC, 2016.

This contributes a value addition to the Resolution Applicants by way of setting off the carried forward losses against the future profits to be earned or even creating opportunities for merger with profitable ones improving the return on investment. Strategical evaluation and planning would enable the Resolution Applicant to earn tax-free income as a bonus to revive the stressed units. At the time of determining the resolution amounts rather than valuing the tangible assets, the Resolution Applicants should factor in the benefit of carry forward of loss to be benefited in the future.

It is relevant to note that the tax benefits will be permitted during the liquidation including the submission of Compromise or Arrangement under Section 230 of the Companies Act, 2013. This would imply that there is a potential opportunity for clean slate opportunity through the medium of resolution plans.

Conclusion

The revival through Resolution Plan needs to be the core objective by taking efforts on creating awareness among prospective applicants to acquire potential businesses especially small and mid-size cases, speeding up the approval processes during the CIRP, removal of benchmarking the liquidation value, focusing on the price discovery mechanism for the company and not only for the tangible assets would boost the revival of stressed units at a higher rate. The Resolution Plan provides multiple add on benefits such as tax benefits, transfer of ownership, transfer of licenses etc through an order of the Adjudicating Authority.

Having said that, it will be incumbent upon the Resolution Applicant to evaluate strategically availing the benefits by examining the business structure, exposure, plan and requirements on a case-to-case basis.

It has been only 4 years since initiation of the code. Based on the track record, it is hard to conclude that aims of the code to resolve the troubles of the stressed businesses by moving them into a Corporate Insolvency Resolution Process, transferring them as going concern and to protect the interest of lenders has been fully achieved. Further, Last year had added more challenge to the Board, Lenders, Stressed Corporate Debtors and Resolution Professional in finding resolution. However, consistent amendments to the Code & Regulations, judicial pronouncements, finding of ways to increase the capacity of Court in handling cases and recent introduction of Prepacked Insolvency and Resolution process has brought hope to lenders and Corporate Debtors in distress. In view of the above, resolving insolvency in the country need to see more improvement in future.

GURU MANTRAS FOR TRAVERSING IP'S ROLE FOR BENEFICIAL OUTCOMES

Dr. S K Gupta

Managing Director-ICMAI RVO

To be a success in the area of Insolvency and Corporate Recovery you need to understand how numbers equal life, so how do you get in to it and what can you get out of it ?

The Perspective

A key component of an effective and efficient insolvency system is the role undertaken by the insolvency practitioners. IBC has created a new discipline of insolvency professionals who have a central role to perform in the insolvency process. In administering the resolution outcomes, the role of insolvency professional encompasses a wide range of functions and duties. Insolvency professional will be called upon to sort out difficult situations. In some cases, his main task will be to try to rescue a business. In other, he will have to sell the assets of the person or company who owes money (the debtor); collect money due to the debtor; agree creditors' claims (if there is enough money to go round); and distribute the money collected after paying costs. Insolvency professional's work involves dealing with many competing interests

A robust insolvency system seeks to achieve the appropriate balance between the debtor and its creditors, rehabilitation and liquidation, as among creditors, while preserving their negotiated right and ensuring that preferential transactions are appropriately managed and misfeasance is effectively addressed. Insolvency professionals must stay mindful that they have an important role in getting this balance correct and in effecting the insolvency proceeding in a timely manner and should arguably be a key driver of the process.

The success of IBC will depend on the quality of insolvency professionals

Insolvency specialists will typically work with collapsed or distressed businesses, supporting them through a formal administration and bankruptcy process, or, helping to turn them around and become profitable. Becoming an Insolvency Practitioner is a long and difficult process. The position demands a lot of hard work and adaptability, as no two cases will be the same. An Insolvency Practitioner deals with either corporate or personal insolvency and generally does all they can do in order to put an individual back on their feet or to rescue a business. It is an incredibly varied role and whether an Insolvency Practitioner is liquidating a company's assets or helping an individual navigate an Insolvency situation, there are certain / specific

characteristics and personality traits that make an individual traverse the IPs role for beneficial outcomes.

Taking the assignment is easy, but we have to be very careful with implementation. The responsibility of the IPs would be enormous. Once the application has been filed, and the board has been suspended, the IP has to take over the company and run it like a going concern and at the same time prepare a resolution plan, all within a tight schedule. The complexity of the majority of insolvency and restructuring assignment's demand that those who are involved in such actions are appropriately qualified. These qualifications should include a good knowledge of the law (not only insolvency law, but also relevant commercial, financial, labour and business law) as well as adequate experience in commercial and financial matters, including, to some degree, accounting. An individual should possess good interpersonal skills, an ability to communicate clearly and to reconcile the different positions of stakeholders. They need good management skills. They will be required to balance commercial reality with legal requirements in order to preserve the entitlements of stakeholders, such as creditors, as well as to recognize issues relating to the public interest, where appropriate. The support you give can help struggling businesses to bounce back, offering massive job satisfaction, and for those undergoing insolvency your efforts can help to ensure the process goes as smoothly as possible. Equally important to the knowledge and experience requirement are the personal qualities of those who seek to be insolvency professionals.

IP's skills set needs to be broad and comprehensive

Insolvency Professionals work is hard, Challenging, complex and sometimes upsetting. It's not backward looking as everything happens in real time decisions, advice and choices made actually count and can have a huge impact on the future of the company. Insolvency practitioners often augment their practical skills with a professional qualification. IPs need to have a rounded professional persona.

Credibility: Credibility is the first key component to being a trusted IP. It can be established when three behaviours are brought into play. These are confidence; creating an initial impact; being honest; and delivering as promised.

Confidence: People who seem in control and confident in what they say and do are more believable (and hence trustworthy) than those who appear to be hesitant and uncertain. Real confidence comes from experiencing sustained success,

Being honest: It may sound obvious, but nothing destroys credibility among clients and colleagues more quickly than dishonest behaviour. Dishonesty can take many forms - for example, misleading people, promising something and then doing something different or not practicing what we preach

Delivering as promised: As an Insolvency Professional in action there are multiple opportunities to deliver (or fail to deliver). Continued credibility rests on being able to deliver on an ongoing basis - on the small promises as well as the large.

Competence: Competence draws on key behaviours that IPs sometimes feel they already possess. While technical learning is very important here, so too is commercial astuteness and interpersonal skills. The three behaviours which build an image of competence are: knowledge; track record; expertise; and searching (non-manipulative) questions.

Knowledge: This is the amount Insolvency Professional knows (technically or theoretically) about the Insolvency and Bankruptcy law and procedures

Track record: In addition to possessing sound knowledge, if people believe that an IP has a successful record of successfully and efficiently managing Insolvency matters, this will build IPs competence in their eyes.

Expertise: This is the ability to apply one's knowledge and track record to a particular insolvency situation and produce credible and believable ideas, ways forward or solutions.

Flexible and Patient: Just as no two cases will be the same for an Insolvency Practitioner, neither will two clients. Each comes with their own unique and individual challenges. Some clients will be easier to deal with than others. Some stressed businesses will have a more complex financial situation than others. Stress and frustration are inevitably part and parcel of an Insolvency Practitioner's lot in life. The best Insolvency Practitioners, however, know how to take this change in stride. They are patient and able to adapt to ever-changing circumstances.

Resilient and Hard-working: It takes a lot of perseverance to become an Insolvency Practitioner. Not only do you need to pass many exams, you also need to have a number of years of experience in order to gain and hold your licence. All of this indicates that an Insolvency Practitioner can't shy away from hard work. It is difficult to become an Insolvency Practitioner, and it is equally challenging to remain one. However, it can also be a very fulfilling position.

Communication skills : It is not enough to simply determine a practical course of action for a stakeholder; an Insolvency Practitioner also needs to be able to communicate this course of action to the stakeholder, explain why it is best for their particular needs, and resolve any pressing issues or concerns expressed by them. All of this needs to be done in layman's terms so that the stakeholders feel confident about their situation going forward. It has been said that the ability to communicate and relate to different people is one of the most important skills for an Insolvency Practitioner to possess.

Confident Personality: An outgoing and confident personality is a must, but this must be supported by a questioning mind and the ability to prioritize workload. Individuals must be able to demonstrate that they take a very pro-active approach to the assignment and be tenacious so as to find the information they are looking for to move cases on.

Showing vulnerability: People do not expect IPs to be right all the time in every matter. Thus projecting an aura of never being wrong is going too far. Occasionally saying, 'That's my mistake' or 'I'm sorry' can have a positive effect on developing a relationship.

Active listening: To demonstrate that they have developed real understanding, Insolvency Professionals must demonstrate that they have listened to, and absorbed, the messages that stakeholders and colleagues have communicated to them.

Emotional maturity: The assignment carried out by an Insolvency Professional may have some very emotional situations. So they have to learn to set aside the emotion but still be sympathetic towards stakeholders. The way you deal with termination of employees or assisting bankrupts who are at the point of losing their property, you gain through experience

Other Skills: An Insolvency Professional needs to possess and enhance certain other skills such as – Negotiation skills, financial modelling, Business valuation, due diligence, Commercial awareness handling operations of the stressed business entity, Professionalism, Diplomacy, Sensitivity, people management, Numerical skills, empathy, Logical thinking, Leadership, IT skills

Conclusion

The world of corporate recovery and insolvency is not all doom and gloom, and Professionals who choose to specialize in this highly emotive arena are often challenged and rewarded in equal measure. For every company that fails completely there is one that can be salvaged and put on the path to success again. The Insolvency Professionals need to possess and develop a myriad of skills for being able to effectively deal with stakeholders having diverging interests and to be able to find common ground between stakeholders with conflicting agendas.

LIQUIDATOR'S FEE

Mr. George Samuel

Cost Accountant & Insolvency Professional

There is some confusion in the literal meaning of liquidator's fee as contained in the provisions of the IB Code and Regulations. This article provides clarity on the subject based upon interpretation of Code and Regulations in the light of some real life cases.

The first reference to the fee payable to the liquidator can be said as given in Regulation 39D of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short, CIRP Regulations) where the Committee of Creditors (CoC), in consultation with the resolution professional, may fix the fee payable to the liquidator in different situations; regulation 39D is reproduced below:

39D. Fee of the liquidator (CIRP Regulations)

While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for –

a. the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;
b. the period, if any, used for sale under clauses (e) and (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and
c. the balance period of liquidation.

There is an option during CIRP to fix the fee, for the three probable situations as above, as agreed to between the CoC and the resolution professional. The fee so fixed can be more or less than the fee payable as per the table of fees provided in regulation 4 of the Liquidation Regulations. If, however, the CoC, in consultation with the resolution professional, fail to fix the fee payable to the liquidator in accordance with regulation 39D of the CIRP Regulations, the fee as provided in regulation 4 of the Liquidation Regulations will be applicable. The regulation 4 reads as follows:

4. Liquidator's fee. (Liquidation Regulations)

i. The fee payable to the liquidator shall be in accordance with the decision taken by the committee of creditors under regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

ii. In cases other than those covered under sub-regulation (1), the liquidator shall be entitled to a fee-

a. at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013); and

b. as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

LIQUIDATOR FEE TABLE

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised / distributed		
	in the first six months	in the next six months	thereafter
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5	3.75	1.88
On the next 9 crore	3.75	2.8	1.41
On the next 40 crore	2.5	1.88	0.94
On the next 50 crore	1.25	0.94	0.51
On further sums realized	0.25	0.19	0.1
On further sums realized	0.25	0.19	0.1
Amount Distributed to Stakeholders			
On the first 1 crore	2.5	1.88	0.94
On the next 9 crore	1.88	1.4	0.71
On the next 40 crore	1.25	0.94	0.47
On the next 50 crore	0.63	0.48	0.25

On further sums distributed	0.13	0.1	0.05

Clarification: For the purposes of clause (b), it is hereby clarified that where a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

(3) Where the fee is payable under clause (b) of sub-regulation (2), the liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed.

Clarification: Regulation 4 of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations.

The clauses of regulation 4 are analysed a bit closer to make an opinion on the same.

What will be the fee for period used, if any, for compromise or arrangement u/s 230 of the Companies Act, 2013 when the fee was not decided u/r 39D of CIRP Regulations?

The sub-clause 2 (a) talks about the fee payable for the period used for the compromise under section 230 of the Companies Act, 2013 that the liquidator will be paid fee at the same rate he was entitled during the CIRP phase. That is if the fee payable to the resolution professional was Rs.2 lakhs per month, the liquidator will be entitled @ Rs.2 lakhs per month during the period of compromise u/s 230 of Companies Act, 2013.

Another question is how the period used for the compromise u/s 230 shall be taken for the said purpose. Reasonably, the period commencing from an initiation of compromise by the liquidator or the period commencing from the receipt of a compromise proposal till the final order of the Adjudicating Authority approving or rejecting the compromise or arrangement proposal can be considered as the period of compromise. The time taken for compromise not exceeding 90 days will not be counted in liquidation period and the time taken beyond 90 days will be counted as part of the liquidation period.

What will be the fee for period used, if any, for sale as going concern u/r 32 (e) or (f) of the Liquidation Regulations when the said fee is not decided u/r 39D of CIRP Regulations?

The regulation 4 of Liquidation Regulations talks only on the fee for the period used for compromise under section 230 of Companies Act, 2013 and is silent on the fee payable for the period used towards the sale as a going concern when such fee was not decided u/r 39D of CIRP Regulations. Hence, if no fees are fixed between the CoC and the resolution professional the liquidator will be eligible for the table of fees u/r 4 for the period used other than the period used for compromise under regulation 4 (2) (a). That is, the liquidator will be eligible for the table of fee for the amount realised in "sale as going concern sale" if the attempt results in realisation, else no separate fees are payable for periods used as going concern sales. And the liquidation period for application of the table of fees will be commencing after a period of maximum of 90 days, if used for the compromise u/r 4 (2) (a).

There could also be a situation that a compromise application u/s 230 of the Companies Act, 2013 is received after a sale as a going concern is initiated. Such situations will pose legal issue as to what will be the legal choice for the liquidator besides the issue related to what will be the liquidators fee. Differing situations might be the case; as such the liquidator needs to consider a wholistic view having regard to the objective of IBC and it will be premature for the author to make any comments on the same.

Periods of liquidation period, first six months, next six months and thereafter for the purpose of calculation of fee to liquidator:

The going concern sales is a liquidation sale u/r 32 of Liquidation Regulations whereas the compromise u/s 230 of Companies Act, 2013 is in accordance with the said Act available during the liquidation phase under IB Code, 2016. The time taken for compromise (subject to a maximum of 90 days) is not counted in the liquidation period [under regulation 2B (2) of the Liquidation Regulations] unlike the going concern sale which is considered as part of the liquidation process period although the maximum period of one year of liquidation will be extended for a maximum of another 90 days when the going concern sale is attempted [proviso to regulation 44 (1) of the Liquidation Regulations]. However, the Liquidator Regulations do not provide that the period used for sale as going concern is to be excluded for fee calculation as per the table of fee u/r 4. Hence, the first six months will commence on the liquidation commencement date (LCD), unless the fee under regulation 39D of the CIRP Regulations fixed have a different intent.

What is the fee payable to the liquidator as per the table of fees under regulation 4 (b) of the Liquidation Regulations?

The fee payable shall be in accordance with regulation 39D of the CIRP Regulations. The CoC in consultation with the resolution professional may fix a fee for specified periods or a fee for the entire liquidation period or it could also be variable based on the full or partial percentage of the table of fees provided in regulation 4 (2) (b) of the Liquidation Regulations.

The fee payable u/r 4 (2) (b), that is fee payable when the fee was not been decided as per 4 (1) is:

- For the period of compromise as specified in regulation 4 (2) (a); and
- For remaining period u/r 4(2)(b), "as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under".

In regulation 4 (2) (b), there is a disconnect between the amount realised and the amount distributed as a coma precedes the conjunction, "and". So, amount realised and amount distributed are to be considered as independent among the phrases and the author is tempted to interpret the clause as two independent sentences as below.

a) The liquidator shall be entitled to a fee as a percentage of the amount realised net of other liquidation costs; and
b) The liquidator shall be entitled to a fee of the amount distributed.

Normally, all the amounts realised will be distributed and there is nothing specific or logical in the regulation to suggest that the liquidator will be entitled to get a fee on the amount of realisation plus the amount distributed. The entitlement of the fee on the amount distributed, as is implied from the regulations, will be for the distribution specified in Clarification to the clause 2 (b) of regulation 4, which states, "Where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him". Examples of such amount which cannot be said as realized but available for distributions are the bank balances, fixed deposits etc. The amounts realized perhaps include the invocation of bank guarantee, collection of debtors and other outstanding receivable which the liquidator makes effort in realising these amounts.

Although he is entitled to the fee on the amount realised net of other liquidation costs, he will be entitled to receive half of the said fees on realisation and remaining half will be eligible for receipt only on distributing the amount so realised.

On what realization amount, the rates specified in the table of fee will be applicable?

The amount payable is stated in regulation 4(2)(b) as a percentage of the amount realised "net of other liquidation costs". No clarification is given as to what the other liquidation costs means. Again, in the table of fees against realisation, a caption, "Amount of realisation (exclusive of liquidation costs)" is provided. Both the phrases provided within quotation marks do not convey a precise meaning; a safer and conservative view point is to exclude the liquidation costs other than the fee payable to the liquidator from the amount realised to arrive at the net realisation as "total amount realised" (less) "the liquidation costs other than the liquidator's fee" as regulation 4 deals with the "liquidator's fee".

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Reliance India Power Fund v. Raj Kumar Ralhan - [2020] 118 taxmann.com 150 /[2021] 164 SCL 34 (NCL-AT)**

Duty is cast on liquidator to institute or defend any Suit, prosecution or other legal proceedings and same would include conscious decision which a liquidator may take whether or not in given set of facts, he needs to defend proceedings.

The corporate debtor was undergoing liquidation proceedings. Before CIRP had started, the appellant had initiated arbitration proceedings against the corporate debtor, which was hit by moratorium when CIRP started. After liquidation order had been passed, the appellant wanted to proceed with arbitration proceedings, but the liquidator only caused appearance once and informed arbitrators regarding liquidation proceedings but thereafter, had not participated and arbitration proceedings were struck.

Held that duty is cast on the liquidator to institute or defend any suit, prosecution or other legal proceedings and same would include conscious decision which a liquidator may take whether or not in given set of facts, he needs to defend proceedings. Therefore, where the liquidator had taken a decision that he need not contest aforesaid arbitration proceedings, the appellant had no right to force liquidator to come and defend and surrender to action which the appellant claimed to have initiated.

Case Review *:* State Bank of India v. Su Kam Power Systems Ltd. [2020] 118 taxmann.com 149 (NCLT - New Delhi), affirmed.

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

- **Sirpur Paper Mills Ltd. v. I.K. Merchants (P.) Ltd. - [2020] 118 taxmann.com 168 (Calcutta)**

The petitioner/award debtor filed application for recalling order passed by the Court in Sirpur Paper Mills Ltd. v. I.K. Merchants (P.) Ltd. [2020] 113 taxmann.com 364 (Cal.) by which the petitioner/award debtor was disallowed from taking recourse to provisions of the I&B Code for delaying hearing of application filed under section 34 of the Arbitration and Conciliation Act, 1996.

Held that the Court in impugned order did not express any views on maintainability of section 34 application or on its merits, therefore application for recall of said order was to be dismissed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

- **Regional Provident Fund v. T.V. Balasubramanian - [2020] 118 taxmann.com 170/[2020] 161 SCL 101 (NCL-AT)**

Where attachment of property of corporate debtor was made by Recovery Officer, EPFO much before initiation of CIRP, but it was only recorded in register during CIRP, section 14 was not attracted.

The recovery Officer, EPFO in order to realize outstanding dues, attached immovable properties belonging to the corporate debtor, in exercise of powers vested in him under section 8(B) of the EPF Act, 1952, vide order dated 4-8-2017. Subsequently application under section 7 was admitted against the corporate debtor. The Adjudicating Authority set aside encumbrance certificate regarding property attached by the EPFO on ground that same was in violation of section 14.

Held that attachment of immovable property in question had already existed prior to initiation of CIRP of the corporate debtor and alleged encumbrance certificate which was issued during moratorium was only incorporation of earlier order in record, therefore impugned order of the Adjudicating Authority was to be set aside.

Case Review : T.V. Balasubramanian Resolution Professional v. Regional Provident Fund Commissioner [2020] 118 taxmann.com 169 (NCLT - Chennai) set aside.

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

- **Dr. Naveen Chaudhari v. Suraksha Asset Reconstruction Ltd. - [2020] 118 taxmann.com 206/[2020] 161 SCL 63 (NCL-AT)**

Where a bank assigned its debt relating to corporate debtor to respondent, respondent was to be treated as 'financial creditor'.

The corporate debtor availed loan from Kotak Bank. Said loan was declared NPA. Thereafter, loan was assigned to the respondent. The Adjudicating Authority admitted application under section 7 filed by the respondent against the corporate debtor. The corporate debtor claimed that there was restructuring of the loan and as the corporate debtor was not at fault while acting as per restructuring agreement, the Adjudicating Authority erred in admitting application under section 7.

Held that Kotak bank assigned its debt of account of the corporate debtor in favour of the respondent, therefore the respondent would step into shoes of the bank. Further, as regards execution of restructuring agreement and whether there was default in restructuring agreement

or not, would not be issues which would be necessary for the Adjudicating Authority to decide. Since amount was still outstanding which was more than the benchmark under section 4, there being debt due and default the Adjudicating Authority rightly admitted application under section 7 against the corporate debtor.

Case Review : Suraksha Asset Reconstruction Ltd. v. Noida Medicate Centre Ltd. [2020] 118 taxmann.com 205 (NCLT - Delhi) affirmed.

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

- **Vishal Vijay Kalantri v. DBM Geotechnics & Constructions (P.) Ltd. - [2020] 118 taxmann.com 230 /[2021] 163 SCL 1 (SC)**

Where resolution plan was approved by Committee of Creditors by 99.68 per cent voting share, NCLT and NCLAT could not sit in appeal on commercial wisdom of Committee of Creditors.

The petition for initiation of corporate insolvency resolution process against the corporate debtor was admitted by the NCLT. Settlement proposal of the appellant under section 12A for withdrawal of corporate insolvency resolution process was rejected by the members of Committee of Creditors by 99.68 per cent voting shares. On appeal, the NCL-AT held that the NCLT and NCL-AT could not sit in appeal on commercial wisdom of Committee of creditors.

Held that matter was not to be inferred and appeal was to be dismissed .

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

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

- **Aaj Finance & Credit Ltd. v. Keltech Infrastructure Ltd. - [2020] 118 taxmann.com 266 /[2021] 163 SCL 62 (NCL-AT)**

Where latest arrangement between appellant financial creditor and corporate debtor was builder buyer agreement converting loan given by financial creditor as consideration for flat agreed to be purchased by financial creditor and even possession had been offered as per period stipulated in agreement, there being no default on part of corporate debtor, application filed by appellant under section 7 had rightly been dismissed.

Memo of Understanding (MoU) was executed between parties as per which the appellant/financial creditor gave a loan to the respondent/corporate debtor for 12 months with monthly interest of 2 per cent. The respondent issued post dated cheques for next 12 months. According to the appellant, till July 2016 all post-dated cheques were honoured except three,

where-after other cheques were not deposited in bank. The appellant claimed that in view of this situation, it issued letters asking for repayment of loan, however, letters were returned as unserved/not replied, hence it sent notice which was also not replied. Thus, there being debt and default, the appellant filed CIRP application under section 7 which was dismissed as being premature. However, record showed that latest arrangement between parties was builder buyer agreement of October, 2016 converting loan as consideration for flat and even possession had been offered in March 2018, which could not be said to be beyond period stipulated in agreement and thus no default on part of corporate debtor stood established.

Held that there was no reason to admit petition under section 7.

Case Review : Aaj Finance & Credit Ltd. v. Keltech Infrastructure Ltd. [2020] 118 taxmann.com 265 (NCLT - New Delhi) (para 11) affirmed.

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

- **Sandeep Kumar Bhagat v. Punjab National Bank - [2020] 118 taxmann.com 298 (NCL-AT)**

Where respondent-bank accepted a part of loan amount agreed to be paid by appellant-company in terms of one time settlement arrived at between parties even during pendency of application filed under section 7, impugned order admitting said application was to be set aside and matter was to be remanded back with a direction to Adjudicating Authority to give one more opportunity to parties to consider renewal of one time settlement agreement.

The appellant-company took certain loan from the respondent-bank. On account of appellant's failure to repay said loan, a one time settlement was arrived at between parties. Since the appellant could not make payments as per terms of one time settlement, an application was filed under section 7 which was allowed. Against said order, instant appeal was filed. It was noted that in Form 2 filed along with application under section 7, proposed IRP had not given any declaration that no disciplinary proceeding was pending against him and, thus, the Adjudicating Authority while admitting application, had not taken into consideration statutory provisions of section 7(5)(a). It was also found that the respondent-bank had accepted a part of loan amount agreed to be paid in one time settlement even during pendency of application filed under section 7.

Held that in aforesaid circumstances, it was appropriate to set aside impugned order admitting CIRP application and matter was to be remanded back to the Adjudicating Authority with a direction to give one more opportunity to parties to consider renewal of one time settlement agreement.

Case Review : Punjab National Bank v. Shree Sai Smelters (India) Ltd. [2020] 117 taxmann.com 676 (NCLT - Gowahati) set aside.

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

- **Power2SME (P.) Ltd. v. Allied Strips Ltd. - [2020] 118 taxmann.com 308 /[2020] 161 SCL 185 (NCL-AT)**

Where CoC with object of keeping corporate debtor as a going concern held various meetings with resolution applicant to maximise value of assets and then took a commercial decision to accept Resolution Plan submitted by successful resolution applicant, Resolution Plan already accepted could not have been disturbed.

The Adjudicating Authority approved 'Resolution Plan' submitted by the resolution applicant 'GPG'. The appellant submitted that in resolution plan so approved, financial creditors were proposed to be paid 13.69 per cent of their admitted claim by the RP (Resolution Professional), however, operational creditors were proposed to be paid only 0.46 per cent, thus, operational creditors were discriminated. The appellant claimed that it deserved similar treatment as secured financial creditors as it was a secured operational creditor on basis of hypothecation deed. The appellant claimed that it had been supplying goods on credit to the corporate debtor when corporate debtor was in distress and in process, agreement was executed creating charge. It was noted that the appellant had already got back goods and hypothecation deed relied upon was subsequent to first and second charge which was already existing in favour of banks and hence, appellant could not have sought parity with secured financial creditors. It was found that financial creditors had themselves given up huge claims, in spite of being secured financial creditors so as to accept receipt of 13.69 percent of their claims and workers and employees were provided 23.83 percent of their claims and in circumstances, operational creditors could get only 0.46 percent.

Held that CoC with object of keeping the corporate debtor a going concern held various meetings with GPG to maximise value of assets and then took a commercial decision to accept Resolution Plan of the resolution applicant GPG, therefore the resolution plan already accepted could not have been disturbed.

Case Review : Oriental Bank of Commerce v. Allied Strips Ltd. [2020] 117 taxmann.com 771 (NCLT - New Delhi), affirmed.

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

- **Bank of India v. IRIS Electro Optics (P.) Ltd. - [2020] 118 taxmann.com 312 (NCL-AT)**

Where Adjudicating Authority had not decided issue as to whether CIRP had been initiated fraudulently by related party by filing application under section 7 against corporate debtor, matter was to be considered afresh.

The Adjudicating Authority by order declined to recall order of admission of CIRP or replacing the 'Resolution Professional' of the respondent-corporate debtor by another person. The appellant bank submitted that it being a secured creditor did not trigger any CIRP against the corporate debtor and it had brought to notice of the Adjudicating Authority that initiation of CIRP was at instance of a 'related party' on date of filing of application as also on date of admission of such application with intent to defraud the appellant being sole secured financial creditor of the corporate debtor. Further, the Adjudicating Authority had also recorded findings and made observations that provisions of the 'I&B Code' had been blatantly infracted by the 'Interim Resolution Professional' by excluding the appellant from purview of 'Committee of Creditors'.

Held that it was not prudent on part of the Adjudicating Authority to defer consideration of pivotal issue having significant impact on CIRP initiated at instance of an alleged 'related party' jeopardising legal interests of the appellant, who happened to be sole secured financial creditor. Even though the Adjudicating Authority appears to have passed direction for fresh determination of voting share of the financial creditors, however, such determination was to detriment of the appellant in as much as voting share was directed to be assigned to alleged related party, thereby considerably reducing voting share of the appellant. Therefore, impugned order was to be set aside and the Adjudicating Authority was to be directed to accord fresh consideration to issue whether CIRP had been initiated fraudulently by related party by filing application under section 7 against the corporate debtor.

Case Review : IRIS Electro Optics (P.) Ltd. v. Bank of India [2020] 117 taxmann.com 967 (NCLT - Hyd.) set aside.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P.) Ltd. - [2020] 118 taxmann.com 323 (SC)**

Limitation period for CIRP application is three years from date of default, hence, application made by financial creditor under section 7 in month of March 2018, seeking initiation of CIRP in respect of corporate debtor with specific assertion of date of default as 8-7-2011, having

been filed much later than period of three years from date of default as stated in application was to be rejected as being barred by limitation.

Bank sanctioned financial facilities to the corporate debtor. Said facilities were secured by equitable mortgage of immovable properties of the corporate debtor. The corporate debtor failed to repay thus, the financial creditor being assignee of loans and advances disbursed by creditor bank, filed application under section 7 to initiate CIRP against the corporate debtor. The corporate debtor raised objection that claim was barred by limitation. However, the NCLAT held that right to apply under section 7 accrued to the financial creditor only on 1-12-2016 when the Code came into force; and that mortgage security having been provided by the corporate debtor, period of limitation for recovery of mortgaged property was twelve years, hence application was within limitation. The appellant submitted that date of default being specifically mentioned as 8-7-2011, the application filed by the financial creditor in month of March 2018 was barred by limitation. However, respondents argued that liability in relation to debt in question having been consistently acknowledged by the corporate debtor in its balance sheets and annual reports, fresh period of limitation was available from date of every such acknowledgement and hence, the application was within time.

Held that limitation period for application under section 7 is three years as provided by article 137 of the Limitation Act, which commences from date of default and is extendable only by application of section 5 of Limitation Act, if any case for condonation of delay is made out. The question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of period of limitation, relevant facts are required to be pleaded and requisite evidence is required to be adduced. Where financial creditor never came out with any pleading other than stating date of default as 8-7-2011 in application, no case for extension of period of limitation was available to be examined. There is nothing in the Code to indicate that period of limitation for purpose of an application under section 7 is to commence from date of commencement of Code itself, similarly, nothing provided in Limitation Act could be taken as basis to support proposition. Date of Code's coming into force on 1-12-2016 is wholly irrelevant to triggering of any limitation period for purposes of the Code. The Appellate Tribunal had been in error in applying period of limitation provided for mortgage liability for purpose of limitation applicable to application in question. Therefore, application made by the financial creditor under section 7 in month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of date of default as 8-7-2011, having been filed much later than period of three years from date of default as stated in application was to be rejected as being barred by limitation.

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

- **Abhijit Guhathakurta v. Royale Partners Investment Fund Ltd. - [2020] 118 taxmann.com 336 /[2020] 161 SCL 541 (NCL-AT)**

  Where NCLT approved 'Resolution Plan' and Resolution applicant was required to pay 'upfront consideration' to 'Financial Creditors' within 30 business days but same was not done, Monitoring Agency was justified in filing application before NCLT and NCLT was also justified in directing Resolution applicant to make payment within a week.

The resolution Plan as approved by the Adjudicating Authority stated that the resolution applicant was required to pay 'upfront consideration' of Rs. 420 crore to the financial creditors within 30 business days and that till date of payment of upfront consideration, any cash which would accrue to the corporate debtor company would only be paid to the financial creditors and not to the resolution applicant. Further, said order pin-pointedly granted liberty to Monitoring Agency to move application, if required, in connection with implementation of resolution plan. Subsequently, the resolution applicant sought for certain information. Without prejudice to fact that supplying of information was not a condition to implementation of resolution plan, Monitoring Agency furnished all information sought by the resolution applicant in good faith.

Held that the resolution applicant's plea that it was not supplied with detailed information of the corporate debtor was correctly not accepted by the NCLT. On non-payment of 'upfront consideration' within period of 30 days, application by the Monitoring Committee before the NCLT was perfectly maintainable. Contra plea of the resolution applicant that cash which accrued to the corporate debtor company would be paid to the resolution applicant, was legally untenable. Whether NCLT's decision directing resolution applicant to make payment of upfront amount and to issue non-convertible debentures in favour of financial creditors within a week was free from any legal flaws.

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

- **Excel Infra Logistics (P.) Ltd. v. Karnani Solvex (P.) Ltd. - [2020] 118 taxmann.com 340 /[2021] 163 SCL 35 (NCL-AT)**

Where operational creditor, providing services related to storage, transportation and delivery of cargo, used to provide stock report regularly to corporate debtor and corporate debtor had never raised dispute and only when appellant demanded his payment, respondent raised 6 years old dispute without any evidence, corporate debtor having failed to prove pre-existing dispute, CIRP application was to be admitted.

The appellant-operational creditor had provided respondent-corporate debtor services related to storage, transportation and delivery of cargo. The appellant used to provide godown wise stock report to the respondent regularly and the respondent had never raised dispute. When in 2019, the appellant had demanded his payment related to invoices of 2017/2018, the respondent raised dispute of 2013 in respect of 115 MTs cargo and asked to return same. However, the respondent showed no evidence to prove that the respondent raised dispute earlier when the appellant intimated him that 75 MTs was lost due to moisture and 30 MTs was lying in rejected condition. At that time, the respondent had also not taken any prompt action to lift or dispose of material. Even NCLT in its order observed that dispute raised by the corporate debtor in respect of 115 MTs cargo was time barred by the law of limitation. The respondent seemed to have accepted said order as he had not filed any appeal against said order.

Held that respondent had not been able to prove that there was any pre-existing dispute, therefore application under section 9 preferred by appellant was fit to be admitted.

Case Review : Excel Infra Logistics (P.) Ltd. v. Karnani Solvex (P.) Ltd. [2020] 117 taxmann.com 816 (NCLT - Jaipur) set aside.

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The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

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