AUGUST'21

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

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CHAIRMAN MESSAGE

Liquidation in common parlance is the process of bringing a business to an end and distributing its assets to the claimants. It would usually be resorted to when a company cannot pay its obligations. The liquidation can be voluntary or involuntary. In a voluntary liquidation, the Directors and the Shareholders of the Company decide to voluntarily wind up and dissolve the company if it is considered that there is no justifiable reason for the company to continue its operations. Even the Debt-free and profit making company can decide to go for voluntary liquidation. But if a company is forced to liquidate by the orders of the court or at the behest of the creditors who had remained unpaid, it is an Involuntary process of liquidation.

Section 33 of IBC 2016 provides the process for initiation of liquidation where the Adjudication Authority (NCLT) does not receive a resolution plan before the expiry of the period specified for the completion of the Corporate Insolvency Resolution Process under Section 12 or the Fast Track CIRP under Section 56. Under such conditions, the Adjudicating Authority shall pass an order requiring the Corporate Debtor to be liquidated The Adjudicating Authority can also pass an order to liquidate a company even earlier than the expiry of the permitted time for completion of the CIRP, if the Resolution Plan is yet to be confirmed by the Adjudicating Authority and the Committee of Creditors decides to liquidate the Company. Another eventuality for an involuntary liquidation is when the Company contravenes the Resolution Plan approved by the Adjudicating Authority. If such a contravention affects the interests of any party prejudicially, such a person can make an application to the Adjudicating Authority for passing an order for liquidation of the defaulting company.

While amending the IBBI(Corporate Insolvency Resolution Process) Regulations 2016 on 25.07.2019, Regulation 39 C has been introduced, providing that the CoC while approving a resolution plan or deciding to liquidate a corporate debtor, may recommend the liquidator to first explore the sale of a corporate debtor as a going concern or sale of business as a going concern. Such an arrangement would ensure the survival of the corporate debtor despite liquidation though its assets or business may be sold fully or partly in one go or in piecemeal. It may also protect the interests of the employees and some other stake-holders. When liquidation as a going concern takes place, the purchaser takes over the assets without any encumbrance or charge - free from the action of the creditors. The assets with claims, limitations, licenses, permits or business authorisation remain with the surviving entity.

NCLAT has recently allowed the sale of the corporate debtor as a going concern thereby making it clear that it is not disproportional to the IBC 2016 and dissolution need not be the only outcome of the liquidation.

NCLAT, Principal Bench's Order dated 24.08.2021 has upheld the validity of a Going Concern Sale during liquidation by dismissing the order of NCLT, Principal Bench in the case of Invest Asset Securitization and Reconstruction Private Limited. The sale as a going concern helps in realising higher value, preservation of value and rescuing a viable business. The Hon'ble Supreme Court has also held the validity of the sale as a going concern in liquidation while ruling that liquidation should be the last resort only if Resolution Plan is not upto the mark and even in liquidation, the liquidator can sell the business of the Corporate Debtor as a going concern. This has opened a new vista in the field of Corporate Debt Resolution.

Dr. Jai Deo Sharma
Chairman

PROFESSIONAL DEVELOPMENT INITIATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

AUGUST’21	
1ST Aug’21	Learning Sessions for Insolvency Professionals
8th-14th Aug’21	46th Batch of Pre-Registration Educational Course
12th-14th Aug’21	Master Class on Liquidation
23rd-29th Aug’21	47th Batch of Pre-Registration Educational Course
27th-29th Aug’21	Certificate Course on Soft Skill Development of Insolvency Professionals

IBC AU COURANT

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ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

PERSONAL GUARANTOR UNDER INSOLVENCY AND BANKRUPTACY CODE 2016

Mr Lakkaraju Srinivas
Advocate & Insolvency Professional

The notification relating to the Personal Guarantor has been issued in November 2019, and the Provisions of Part III of the Code would come into effect from 1 December 2019. As a result, several writ petitions filed challenging the constitutional validity of the notification. All objections have been put to rest and Apex court finally

in the matter of Lalith Kumar Jain Vs Union of India has upheld the constitutional validity of the notification

The Insolvency and Bankruptcy Code, 2016, came into effect in August 2016 but for Part III of the Code that related to insolvency and bankruptcy of individuals including personal guarantors to the corporate debtor has come into effect only in November 2019. In the Indian Context, generally the Personal Guarantors will be Directors or family members of the Directors of the Company and they provide the guarantee in order to meet the working capital requirements of the Company. If an individual is not a Guarantor to the Corporate Debtor, then these Provisions are not applicable. Further as per provisions of the code, it is applicable only to those Guarantors where the Guarantee has been invoked by the Creditor and whereas the guarantor has neither paid the money in full or in part within 14 days of demand made by the Creditor .

In November 2019, the government notified that Part III of the Code would come into effect from 1 December 2019. Before this notification, there were a series of different and conflicting views by tribunals; this notification was challenged before various High Courts that led to a rather anomalous situation. It is finally in Lalit Kumar Jain v. Union of India that the Supreme Court transferred all the cases to itself in order to avoid these conflicting views and put this issue to rest finally. The court has held that the notification was valid and not ultra vires. It is important to trace the rationale and reason behind the challenges.

The challenges primarily rest on the fact that the said notification was in excess of authority, and not what was prescribed under Section 1(3) of the Code and that the government could not have notified selectively certain parts relating to personal guarantors only. As per the Code, the Government can notify the provisions of the Code in a stage wise manner but not specifically bring into force certain parts of the provision selectively against the particular person. The provision states that different provisions may be notified at a different date. Hence the impugned notification is null and void.

The petitioners also highlighted the fact that under the impugned notification, on the ground that the Section 95 of the Code is meant for the initiation of Insolvency resolution Process against the Individuals but not against the Personal Guarantors and there is no distinction

between the procedure to be followed in terms of whether it is a financial creditor or an operational creditor, a classification that was thought necessary in case of corporate debtors. Hence the impugned notification is arbitrary and illogical.

It was argued that, the liability of the guarantor is always coextensive with that of the debtor as stated under Section 128 of the Indian Contract. Hence it is contended that once resolution plan is approved it is binding upon all the stake holders involved in the resolution plan and it will extinct of all claims against the Principal debtor and the successful resolution applicant will start life on fresh slate. Hence initiation of Proceedings against the Personal Guarantor is illogical and arbitrary.

It is contended that initiation of Insolvency resolution Process against the corporate debtor as well as Personal Guarantors would violate the rule of double dip and will lead to unjust enrichment of the creditor by recovering the debt from both corporate debtor as well as Personal Guarantor.

Further it was argued that without bringing into the force the Provisions of section 243 of the code which is meant for repelling of the Provisions of the Personal Insolvency, bringing the impugned notification meant for Resolution of Insolvency of Personal Guarantor is arbitrary and unjust.

After giving due regard to the plethora of precedents on the subject matter of delegated and conditional legislations and the power of the executive in this regard, the court held that the proviso of Section 1(3) was not being violated. It disagreed with the challenges made by the petitioners primarily because of the scheme and the purpose of the Code. After analysing the dates on which the provisions came into effect, the court held that from the manner adopted by the Central government in notifying various provisions, it was clear that it was done to fulfil the purpose of the Code and for dealing with the priorities at hand.

The reason behind the same was that the Insolvency Proceedings relating to Individuals is regulated under the code by Part –III. Before amendment was made in 2018, all individuals whether it is individual, or Partner or firm or Personal Guarantor to Corporate debtor were categorised under one umbrella. As a result it is very difficult for the Central Govt to selectively bring into force the provisions of Part III only in respect of Personal Guarantor to Corporate debtor. Hence the need for amendment was felt by the Central Govt and accordingly three categories of individuals were subcategorised under section 2 (e) ,(f) and (g) and brought into effect the Provisions of the code selectively to Personal Guarantor to Corporate debtor .

The inter-relatedness of the personal guarantors with the corporate debtor was posing difficulties in implementation of the resolution process against the corporate debtor. Precisely for this reason, the amended Section 60 of the Code contained provisions for resolution of insolvency and bankruptcy of the corporate debtor and the personal guarantor by the same

forum, and held that in view of their intrinsic connection to the corporate debtor, the adjudicating authority for him is NCLT.

Section 243, which contemplates the repealing of all the personal insolvency laws, has not come into force but it would not be necessary due to the presence of Section 238, which gives the Code an overriding effect over all other laws in cases of conflict as has been settled in an earlier judgment, SBI v. V Ramakrishnan.

The court had given enough reasons to treat personal guarantors differently from other individuals and that Section 31 of the Code gives finality to the resolution plan approved by the Committee of Creditors, which is binding on the corporate debtor and the personal guarantor. In fact the provisions relating to moratorium are also wider in case of the personal guarantors' assets. Therefore, after the resolution plan is finalised under Section 31, it does not discharge the personal guarantor of their liability as the resolution plan is a result of an involuntary process i.e., insolvency or bankruptcy of the corporate debtor, which will not result in extinguishment of the security. Any involuntary act of the Principal Debtor leading into loss of security would not absolve the liability of the Guarantor. The court however recognised that the extent of the liability depends on the terms of the guarantee contract itself. The release or discharge of the corporate debtor by the Creditor is an involuntary process i.e by either operation of law or insolvency or liquidation of the corporate debtor does not ipso facto discharge the liability of the Corporate Guarantor

This also clarifies the court's position on the double dip and double proof doctrines where it would allow the creditor to recover the amount due by proving against either or both the debtor and the guarantor to the extent of the amount due to him only. Essentially, the common law rule prevents double dividend out of the same set of assets. The court, therefore, gave due regard to the principles of common law and contract while arriving at the conclusion.

By holding that the implementation of the Code is perfectly legal and the approval of the resolution plan does not ipso facto result in discharge of the guarantor's liability, the court has put the creditors in a comfortable position to claim the dues from the personal guarantors without also simultaneously proceeding against the corporate debtor. It also acts as a note of caution for the personal guarantors to prudentially and critically analyse the guarantees so given on behalf of the companies.

By enactment of this provision, several benefits will accrue on the Creditors like, they need not go to various forums to recover their debt and it also ensure the completion of the Process within the time bound manner under the control of a specialised Professional. Further it will improve the repayment culture of the borrowers and improve the discipline in repayment of debts among the borrowers

Further the Government has justified its stand in favour of notification issued in November 2019 by arguing that by invoking the Provisions of the Code relating to the Personal Guarantors, there is a greater likelihood that Guarantors would arrange for payment of the debt to the Creditors in order to obtain quick discharge thereby it reduces the amount of haircut generally Creditors would take for early settlement of the debt as a result the purpose of the Code such as maximising the value of debt, Promoting entrepreneurship, would be achieved.

Disclaimer: The entire contents of this article have been prepared based on relevant provisions and as per the information existing at the time of the preparation. Although care has been taken to ensure the accuracy, completeness, and reliability of the information provided, I assume no responsibility therefore. Users of this information are expected to refer to the relevant existing provisions of applicable Laws. The user of the information agrees that the information is not professional advice and is subject to change without notice. We assume no responsibility for the consequences of use of such information. This is only a knowledge sharing initiative and the author does not intend to solicit any business or profession.

STAKEHOLDERS’ CONSULTATION COMMITTEE UNDER IBC 2016

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The liquidator shall constitute a stakeholders’ consultation committee within 60 days from the liquidation commencement date. The consultation with stakeholders during liquidation process though crucial not binding on the liquidator. This article is intended to understand the manner the SCC is to be constituted and other regulations pertaining to SCC while carrying out the process of liquidation.

When once liquidation is ordered by Adjudicating Authority the IBC code shifts the control of corporate debtor to Liquidator for the purpose of liquidating it and distributing the proceeds.

Regulation 31A has been inserted in the liquidation regulations vide notification dated 25.07.2019 stipulating that the liquidator shall constitute a stakeholders’ consultation committee within 60 days from the liquidation commencement date.

The stakeholders’ consultation committee (SCC) is beneficial to the stakeholders particularly to creditors who want to have some say in liquidation process besides it will be of some comfort to liquidator as he can seek guidance from stakeholders in running the liquidation process. In this article we will discuss briefly the manner in which stakeholders consultation committee is to be formed and other relevant regulations relating to SCC.

The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32 including assignment of not readily realizable assets under regulation 31A read with Liquidation regulation 37A. However other matters also being discussed in stake holders consultation committee meetings in practice.

The SCC unlike Committee of Creditors will have representation from all the stakeholders like secured and unsecured financial creditors, workmen and employees, other operational creditors, the government and the shareholders.

Secured creditors who have relinquished security interest under section 52 are entitled to a maximum 4 representatives in the SCC depending on percentage of amount of claims on liquidation value and unsecured financial creditors are represented by maximum 2 members. Workmen and employees together can have 1 representative and government by 1 representative. Operational creditors (other than workmen, employees and Government) are

represented by maximum 2 members and shareholders by 1 representative. Thus maximum representatives in SCC can be 11 members.

As per regulation 31A (2) of the liquidation regulations the composition of the Stakeholders' consultation committee shall be as shown in the table below:

Class of Stakeholders	Description	Number of Representatives
Secured financial creditors, who have relinquished their security interests under section 52	Where claims of such creditors admitted during the liquidation process is less than 50% of liquidation value	Number of creditors in the category, subject to a maximum of 2
	Where claims of such creditors admitted during the liquidation process is at least 50% of liquidation value	Number of creditors in the category, subject to a maximum of 4
Unsecured financial creditors	Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value	Number of creditors in the category, subject to a maximum of 1
	Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	Number of creditors in the category, subject to a maximum of 2
Workmen and employees	1	1
Governments	1	1
Operational creditors other than Workmen, employees and Governments	Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value	Number of creditors in the category, subject to a maximum of 1
	Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	Number of creditors in the category, subject to a maximum of 2
Shareholders or partners, if any		1

Voting in the SCC meetings: The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting. The advice of the consultation committee shall not be binding on the liquidator. However where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the The liquidator may facilitate the stakeholders of each class to nominate their representatives for inclusion in the consultation committee. Thus at present there is no specific criteria for nominating the representative(s) by stakeholders.
In case the stakeholders fail to nominate their representative(s), regulation 31A(4) of the Liquidation Regulations enables the liquidator to choose the required number of stakeholders with highest claim amount in that class as member of SCC.

However IBBI has now proposed vide discussion paper dated 27.08.2021 an amendment to the liquidation regulations with regard to selection of SCC representatives and once the amendment if made the criterion of majority in value of claims by those present and voting may be adopted for nomination of representative(s) of each class of stakeholders.

Stakeholder means those entitled to distribution of proceeds under section 53 as defined in section 2(k) of IBBI (Liquidation process regulations 2016.
From the above it can be observed that

1. SCC cannot have a secured creditor if such secured creditor does not relinquish his security interest.
2. In between employees and workmen there is no separate representation though they are different classes.
3. Related parties appear are not excluded from being members in SCC.
4. While shareholders can be represented by one member, there is no provision to make part of the consultative committee the directors or ex-management personnel.
5. The Provident Fund/Pension Fund dues are as excluded from the meaning of the 'liquidation estate, the EPF dues do not fall under the ambit of the waterfall mechanism stipulated under Section 53 of the I & B Code. Thus Employees provident fund organisation (EPFO) does not fall within the meaning of stakeholder as defined under Section 2(k) of the IBBI (Liquidation Process) Regulations, 2016 and hence need not be made as member in SCC.

Other guidelines with regard to stakeholders are as under:

1. **List of stakeholders:** After issue of public announcement as provided under regulation 12, liquidator to prepare a list of stakeholders along with details of each stake holder, whether secured or unsecured and file before AA as per regulation 31 (2) within forty five days from the last date for receipt of the claims. Subsequently if there is any

modification required to be made, the liquidator to apply to AA and shall modify in the manner as directed by AA.

2. **Modification in the list of stakeholders:** Regulation 31(3): The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.

3. **Rights of stakeholders: Regulation 31A(5) :** Representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator

4. **Consultation with stakeholders. Regulation 8:** The stakeholders consulted under section 35(2) shall extend all assistance and cooperation to the liquidator to complete the liquidation of the corporate debtor. The liquidator shall maintain the particulars of any consultation with the stakeholders made under this Regulation, as specified in Form A of Schedule II

5. **Minutes of consultation with stakeholders**: This is to be submitted after each meeting. Number of days within which to be submitted not prescribed. However in practice it is being submitted along with progress report.

6. **Meetings of the stakeholders' consultation committee: Regulation 31 A (6)** The liquidator shall convene a meeting of the consultation committee when he considers it necessary and shall convene a meeting of the consultation committee when a request is received from at least fifty-one percent of representatives in the consultation committee. The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting. Thus, it is left to the discretion of the liquidator to conduct SCC meetings.
7. reasons for the same in writing.

8. **Role of SCC**: At present the role of SCC is only to the extent of advising on matters related to sale and hence stakeholders cannot participate effectively in the liquidation process.

Hence IBBI proposed an amendment to the liquidation regulations and released a discussion paper on 27.08.2021 for expanding and deepening the scope of stake-holders consultation committee by proposing amendment as under:

"It is proposed to provide in the Liquidation Regulations that the liquidator shall consult SCC for all significant matters related to liquidation process, including appointment of professionals (and their remuneration), and sale of assets (including major aspects such as fixation of reserve price, manner of sale, etc.)"

The expanded role of SCC after amendment in terms of appointment of professionals, sale of assets including consultation on major aspects such as fixation of reserve price, manner of sale etc., will enhance the stakeholders' confidence besides facilitate supervision and monitoring by SCC.

Conclusion:

The consultation with stakeholders during liquidation process is crucial though not binding on the liquidator. The discussion with stakeholders in the SCC meetings will ensure more transparency of the liquidation process and safeguard the interest of the stakeholders.

...

Source: *IBC Code 2016 and Liquidation regulations. Discussion paper issued by IBBI on 27.08.2021.*

Disclaimer*: The content of this article is intended only for general information purpose. Any conclusions or opinions are based on the individual facts and circumstances of a particular matter and therefore may not apply in other matters. Specialist advice should be sought about specific circumstances.*

BAFNA PHARMACEUTICALS- REVIVAL STORY, AIDED BY MSME PROVISIONS UNDER IBC

Mr. R Dharmarajan
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This article, is to highlight the successful turnaround story of listed entity, Bafna Pharmaceuticals, which was under CIRP in 2018. The key challenge in this CIRP is that, Bafna being a MSME, where the erstwhile promoters were allowed to directly file a Resolution Plan, without going into the EOI, and how a MSME CD was allowed to retain their business without being put to compete with other bidders. The stand taken by RP and CoC was approved by NCLT and later by NCLAT, which further pronounced that there is no need for MSME to bid with others and endorsed by SC as well. Read on to find out more.

Business

Bafna pharmaceuticals founded in 1981, is in the pharmaceuticals manufacturing business with specialisations in formulations and supplying high end medicines to international markets such as Europe, UK, Australia & other countries and subsequently obtained accredited facilities from UK-MHRA, Australia-TGA.

Bafna grew from a proprietor concern in 1981 to a public limited company in 1995 and then to a listed company in 2008 and to subsequently acquire accreditations and approvals in the Pharma field.

Cause of Default

- Brand Acquisition Raricap: The Company could achieve the desired results in terms of Revenue. However, project cost over-run coincided with repayment obligation warranted termination of project (Brand sell- out).

- Increased cost of compliance, Need for Capex and product registration – resulted in cash outflow during such period

- Prolonged receivables pertaining to products developed for overseas customers and working capital pressures.

CIRP

One of the Operational Creditor named Aries, under Section 9 of the IBC code filed for CIRP in early 2018 and it was admitted by NCLT, Chennai on 16.07.2018 and IRP was appointed with effect from that date.

The IRP

- Collated claims from various Creditors
- Constituted CoC

The CoC in their second meeting on 26.09.2018 decided to replace the IRP and I, Radhakrishnan Dharmarajan was appointed as RP on 12.10.2018.

Immediate Challenge as RP

The immediate task and challenge as RP for me was to keep the company as a Going concern. As Bafna Pharmaceuticals with Two factories in Chennai was still functioning and operating at 25% of the capacity. It was imperative for me to keep that running so as to protect the going concern objective of the business and to safeguard the Assets and Staff’s livelihood. At the same time, a quick resolution was to be found.

12A Vs Expression of Interest by Promoter

The immediate issue that was to be decided was whether the promoter is eligible to give EOI and the CoC was not sure if EOI can be deferred to allow the promoter to present a plan and promoter in fact had tried a 12 A application which was rejected by the CoC.

During the third, fourth CoC meetings in November/ December 2018, the promoter was vociferous to push for him being allowed to retain control of the company without publishing EOI and it was a challenge for me to defer or do away with EOI.

Promoter was pleading that there are about 400 workers and their fate is hanging in balance and if EOI is issued, then he is likely to lose out the business to bidders, that lots of work in getting approvals from various Governments will go in vain and the control and business will be lost from him, and he should be allowed the option to retain the company either through 12 A or through a submission of plan without EOI. Since, 12 A application of the promoter was rejected two times by the CoC, as the promoter could not convince the CoC on a suitable 12 A withdrawal plan and the plan put by him was not considered by the CoC, and thus the next option was only to go for EOI.

MSME Factor

The IBC code, ordinance in 2018, brought in amendment to exclude applicability of provisions for Section 29 A, through new section 240A for specific relaxations under the code to MSME.

Notwithstanding anything to the contrary contained in this Code, the provisions of this clauses (c) and (h) of Section 29 A shall not apply to the Resolution Applicant in respect of CIRP of any MSMEs.

This amendment envisages that MSME promoters can submit a Resolution Plan for their own entities and the Section 240 A further provides for Central Government to make specific directions as regards applicability or modifications in case of MSMEs.

The above provision came in very handy for the CoC and myself as RP to decide on allowing the erstwhile promoter of Bafna to file a Resolution Plan. However, the issue was whether to defer or discard EOI, as the provisions only allow the promoter of MSMEs to submit a plan and doesn’t do away with compliance to Section 25(2)(h) of the IBC, where by EOI to be issued by RP. I explained this to the CoC during the CoC meetings in December 2018. However, the issue for the CoC was whether to allow the promoter to directly submit the plan or go for EOI and if the CoC decides to go for bidding, there is a possible chance that the promoter may lose the business.

Summary of some of the Discussions in the 4th and 5th CoC meetings

CoC meeting	Discussions
4th meeting dated 30.11.2018	The reasons for deferring the issue of 'Expression of Interest' was discussed by the CoC. The CoC expressed that publication of EOI may be deferred as there is an active consideration of 'Resolution Plan' with the 'Corporate Debtor' itself. CD expressed that, he has applied for various approvals like MHRA and all these are under advance stages of consideration and acceptance with the EU authorities, and at this stage this will affect his chances of getting the approvals, if he is to be put on bidding with other bidders and thus his focus will be lost and this will cause further drain to the business.
5th CoC meeting 20/12/2018	The RP was asked by the CoC regarding the eligibility of the Resolution Applicant-RA(Erstwhile Promoter of the CD). The RP confirmed the eligibility of the RA being an MSME and eligible and some of the provisions of the Section 29A of the I&B code is not applicable to this RA. RA presented his plan and the same was discussed in the meeting.

There were several discussions between myself and the CoC on this and more specifically the purpose and intent of Section 240 A, which we believed was specifically brought in to help the promoters of MSMEs to retain their business where applicable. Hence, it was decided by the CoC that, we will allow the erstwhile promoter be allowed to submit the Resolution Plan and the EOI may be deferred. This way being the commercial decision, best left to CoC and they have the option to go for the EOI, if they are not satisfied with the Resolution Plan of the erstwhile promoters and thus, I allowed and placed the Resolution Plan of the Erstwhile Promoter to the CoC for approval in the Fifth CoC meeting held on 20.12.2018.

The CoC proposed certain modifications and directed the RA to make the necessary changes

This Resolution was passed in the CoC meeting held on 20.12.2018

" *CD(Resolution Applicant) to submit the full set of Resolution Plan by 26/12/2018 incorporating the further details required by the CoC. In case the submitted details are not adequate or the Resolution plan if presented is not approved, then the RP to seek for Expression of Interest*".

The RA then presented a Revised Resolution Plan to me as RP for presentation and approval to the CoC.

Some of the key proposals of the Revised Resolution Plan is appended below;

Resolution Period	**Payment to all Creditors within Three months from the Approval Date.**
Resolution for all the Financial Creditors	70% of admitted claims of the all the financial creditors i.e. SBI, IDBI, DCB, DBS, BOC shall be paid within three months from the date of Approval Date as a full and final settlement of the dues and personal guarantees. • Total Claims Admitted: Rs 49.23 Crs • Total Payment Proposed: Rs 34.46 Crs
Resolution for ESI & PF Dues	Full payment of PF and ESIC Dues of Rs 1.94 Crs.
Resolution for Workmen Dues	0.24 Crs
Resolution for Employee Dues	0.32 Crs
Resolution for Other Operational Creditors	Total payment of Rs 6.53 Crs (For all the approved OC claims)
Resolution for Statutory Liabilities	0.13 Crs
Resolution for Other Liabilities	0.01 Crs
Resolution for Equity Shareholders	Reduced to 10% of their holdings
Investment in Working Capital	10 Crores.
Investment in Fixed Assets	3.5 Crores for Year 1 and to scale up

Resolution Plan Approval by CoC

The Revised Resolution plan of the Erstwhile promoters was put to vote on 04.01.2019 in the CoC and the CoC approved the Resolution plan with 74.84% Voting powers of the Financial Creditors, voting in favour of the plan. I as RP, submitted the approved Resolution plan to the NCLT, Chennai and presented the plan to the Tribunal on 01.02.2019 and specifically explained the point about MSME and the erstwhile promoter being allowed to submit a Resolution Plan directly.

Resolution Plan approval by NCLT

The Adjudicating Authority on being satisfied with the requirements including the Form H filed by the RP and the further explanations provided during the hearing, approved the Resolution Plan on 02.02.2019.

Appeal from a Shareholder

Immediately on approval of the plan, one shareholder of Bafna Pharmaceuticals, M/S Saravana Holdings, challenged the NCLT, Chennai order, more specifically;

- That the provisions of EOI not being followed and alleged that the RP had not complied with Sec 25(2)(h) of the code.

- The 'information memorandum' prepared under Section 29 of the I&B code was prepared, but not circulated

- That the RP did not publish the Expression of Interest as per Section 25(2)(h) of the I&B code and it is the duty of the RP to invite 'Resolution Applicants' and thus denied an opportunity to the appellant to submit a Resolution Plan.

- CoC and AA erred in approving the plan and the plan is against the interest of the shareholders and other potential Resolution Applicants

Submissions of the RP at NCLAT

- The Information memorandum required to be prepared under Section 29 was actually prepared and circulated to the CoC members by the RP, after obtaining the necessary confidentiality disclosure.

- The Information memorandum was also shared with the RA

- The issuance of EOI was discussed in the CoC meetings and it was the decision of the CoC, as they have exercised their commercial wisdom, taking into consideration the situation on hand, MSME factor, viability of the Resolution plan submitted by the CD and they have specifically directed the RP to defer the EOI and had retained a provision to issue EOI, should the plan of the CD is not acceptable to them. Thus, there is no role for RP in these commercial decision making of the CD and RP had complied with the necessary provisions of the code and the Regulations.

- There was a stay from the NCLAT in March 2019 on the implementation of the NCLT order where the Monitoring Committee was directed that the ownership of the company should not be handed over to the RA till the appeal is disposed off. This appellant also complained against the RP with the IBBI for not issuing the EOI. RP defended, and contended that the decision to defer the EOI was taken by the CoC and he had pointed out to the CoC the necessary provisions, however the commercial wisdom of CoC prevailed. IBBI accepted the explanations of the RP.

Landmark judgement by NCLAT

The NCLAT, in its order dated 04.07.2019, specifically held as under;

"*Admittedly, the Corporate Debtor is a 'MSME' and the promoters are ineligible in terms of Section 29A of the I&B code. Therefore, it is not necessary for the 'Committee of Creditors' to find out whether the 'Resolution Applicant' is ineligible in terms of Section 29A or not*.

NCLAT further held;

The parliament with specific intention amended the provisions of the I&B code, by allowing the promoters of MSME to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the Committee of Creditors', to regain control of the Corporate Debtor and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the IBBI.

Therefore, we hold that in exceptional circumstances, if the Corporate Debtor is MSME, it is not necessary for the ***Promoters to compete with other 'Resolution Applicants' to regain control of the Corporate Debtor.***

In view of the fact that the 'Resolution Applicant' is the promoter of the 'M/s. Bafna Pharmaceuticals('Corporate Debtor'),'MSME. We hold that it is open to the 'Committee of

Creditors' to defer the process of issuance of 'Information Memorandum', if the Promoter of the MSME offers a viable and feasible plan maximising the assets of the 'Corporate Debtor' and balancing all the stakeholders. For such purpose, it is not required to follow the procedure as the case for accepting the proposal under Section 12 A of the 'I&B Code'.

Thus, the above judgement of NCLAT, very clearly endorses the stand taken by the RP and the CoC in deferring the EOI and in fact, categorically assert that, there was no need to issue an EOI in such cases, where the MSME promoter be allowed to retain control as stated in the NCLAT order above.

Supreme Court

The appellant further appealed against the NCLAT order and the same was also dismissed by the SC, thus upholding the stand taken by RP and the CoC.

Implementation of the Resolution Plan

As a part of the Supervision and management of implementation of the plan through a Monitoring Committee, where RP is the Supervisor, Two Representatives from the Financial Creditors and one Representative from the Resolution Applicant, took over the management and implementation of the Resolution Plan.

There were certain delays from the Resolution Applicant, which irked the CoC and members representing the CoC in the MC and during September 2019 the Financial Creditors members in the MC filed a petition for default on the Resolution plan against the erstwhile promoters due to delays in implementation. However, the RA-CD had some issues with one of his investor associate backing out on the commitments and sought another set of investors to back him and implemented the Resolution plan in full be end December 2019, by making the payments to the Creditors as per the Resolution plan commitments. As a MC Supervisor, I worked closely with the other support service providers to ensure that the implementation process was smoothly handled.

Delisting and Listing Again

Bafna Pharmaceuticals, being a listed entity was delisted as part of the Resolution Plan clause on Equity Shareholders and subsequently the company is re listed again with the BSE, thus making a full turnaround.

Bafna Pharma, Today

A few weeks ago, when I received the Quarterly earnings update of Bafna Pharmaceuticals from the CFO of Bafna and it was pleasing to note that the company has shown significant top line and bottom line performance. As shown in the table below;

EARNINGS - BAFNA PHARMACEUTICALS LTD.,

Bafna	Year ending 31.03.2021	Year ending 31.03.2020	% change (year to year)
Profit (Rs.in lakhs)	582.67	(187.80)	▲ 100
Revenue (Rs.in lakhs)	7196.72	4272.78	▲ 59.37
EBITDA (Rs.in lakhs)	1030.49	138.86	▲ 86.52

Summary learning

Bafna Pharmaceuticals, CIRP is a classic case of learning for me as RP and thus emphasised the following points;

- The Success of CIRP is to protect the business as much as possible and thus Resolution be the key factor and, in this case, being a MSME, the opportunity be given to the Corporate Debtor to retain the business, where the commercial viability of his Resolution Plan is acceptable to the CoC.

The stand taken by me as RP and the CoC, as well as the Adjudicating Authorities NCLT, NCLAT and the Apex Court is further vindicated with the current performance of the Bafna Pharmaceuticals.

Thus, the experience of Bafna Pharmaceuticals as a RP is both challenging, satisfying and a proud accomplishment for me as RP.

WHETHER A DISSENTING SECURED CREDITOR CAN CHALLENGE THE APPROVED RESOLUTION PLAN INSISTING FOR HIGHER AMOUNT?

Sunil Kumar Gupta

This article discusses and analysis a recent judgment of Honorable Supreme Court in the case of India Resurgence ARC Private Limited v. M/s Amit Metaliks Limited & Another [Civil Appeal No. 1700 of 2021] where it was held that a dissenting secured creditor cannot challenge a resolution plan approved under the IBC with an argument that higher amount should have been paid to it, in light of the value of the security interest held by it over the corporate debtor. The Honourable court again recognized the supremacy of the commercial wisdom of the Committee of Creditors CoC, the SC has reiterated the limited scope of judicial review and interference in business decisions that fall under the ambit of the commercial wisdom of the (CoC).

Brief facts of the case:

An application for initiation of Corporate Insolvency Resolution Process (CIRP) against VSP Udyog Private Limited (Corporate Debtor, "CD") was admitted in NCLT and CoC was constituted. A financial creditor i.e. India Resurgence ARC Private Limited ("Appellant"), with 3.94% of voting share in the CoC was the assignee of the right and interest carried by Religare Finvest Limited as secured creditor of CD. A resolution plan was proposed by Amit Metaliks Limited ("Respondent"). When the resolution plan submitted by the respondent was taken up for consideration by the CoC, the Appellant expressed reservations on the share being proposed, particularly with reference to the value of the security interest held by it, and chose to remain a dissentient financial creditor. But with 95.33% voting share of other financial creditors of the CD, such resolution plan was proposed by CoC. Subsequently said plan was approved by NCLT.

The Appellant, subsequently challenged this in NCLAT under section 61(1) read with section 61(3) of the IBC, 2016 ("Code"). The key ground was that the approved resolution plan was not in compliance with the provision of the Code since the value of the secured asset on which security interest was created by the CD, in its favour, was not taken into consideration.

The NCLAT relied upon the judgment of Committee of Creditors of *Essar Steel India Limited v. Satish Kumar Gupta and others {(2020) 8 SCC 531} ("Essar Steel"),* and rejected the Appellant's contentions, on the grounds that considerations including priority in scheme of distribution and the value of security fell within the realm of CoC and such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the CoC, could not be the subject of judicial review in appeal within the parameters of Section 61(3) of the IBC.

Thus, aggrieved by the decision of the NCLAT, the Appellant preferred this instant appeal before the SC.

Issues:

-Can an approved Resolution Plan sustain if it is failed to consider the valuation & quality of the security held by Secured Financial Creditor?

-Whether a dissenting secured creditor can challenge an approved resolution plan on the basis of the value of the security interest held by it over the corporate debtor?

The Appellant contended that the CoC could not have approved the resolution plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended Section 30(4) of the IBC, requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the IBC, including the priority and value of the security interest of a secured creditor. The amended Section 30(4) of the IBC lays down that "The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent, of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor, and such other requirements as may be specified by the Board"

The primary reason for the Appellant's dissent to the resolution plan was that the Respondent had offered the Appellant a meager amount of about INR 2,02,60,000 (approximately) as against the total admitted claim of INR 13,38,00,000 (approximately), without even considering the valuation of the security held by the Appellant, which admittedly had the valuation of more than INR 12,00,00,000 (approximately). Further, the Appellant argued that the observation of the NCLAT, deeming that, the amendment to Section 30(4) of the IBC as a mere guideline, failed to take into account the fact that CoC does not have an unfettered and arbitrary right to exercise its commercial wisdom and to approve the plan which does not stand in conformity with the provisions of the IBC.

Observations of the Supreme Court

The SC observed that the process of consideration and approval of resolution plan is essentially that of the commercial wisdom of the CoC and the scope of judicial review was limited within the four-corners of Section 30(2) of the IBC for the NCLT, and Section 30(2) read with Section 61(3) of the IBC for the NCLAT. It was observed that if all the mandatory requirements have

been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal. The SC opined that the provisions of the amended Section 30(4) of the IBC do not warrant interference with the resolution plan at the instance of the Appellant. Placing reliance on Essar Steel (supra) with regards to the purport and effect of the amendment to Section 30(4) of the IBC, the SC affirmed the observation of the NCLAT, that the amendment to Section 30(4) of the IBC only amplified the considerations for the CoC while exercising its commercial wisdom, to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors. Further, the SC upheld the view of the NCLAT that the business decision taken in exercise of the commercial wisdom of CoC does not call for interference, unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. The SC noted that the proposal for payment to all the secured financial creditors was equitable and the proposal for payment to the Appellant was at par with the percentage of payment proposed for other secured financial creditors. The SC observed that, there was no case of denial of fair and equitable treatment or disregard of priority and pointed out that determining the amount to be paid to different classes or subclasses of creditors in accordance with provisions of the IBC and the related regulations, was essentially the commercial wisdom of the CoC, and a dissenting secured creditor like the Appellant could not suggest a higher amount to be paid to it with reference to the value of the security interest.

In the case of Jaypee Kensington Boulevard Apartments Welfare Association and Others. v. NBCC (India) Limited and Others [Civil Appeal No. 3395 of 2020], the SC had made it clear that a dissenting financial creditor would receive the payment of the amount as per his entitlement, and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It had never been laid down that if a dissenting financial creditor had security available with him, he would be entitled to enforce the entire security interest or to receive the entire value of the security available with him. His dealing with the security interest would be conditioned by the extent of value receivable by him.

Further observed that, "The material propositions laid down in Essar Steel (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. And, if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept

in view, it may send the resolution plan back to the Committee of Creditors for re- submission after satisfying the parameters. Then, as observed in case of Maharashtra Seamless Limited vs Padmanabhan Venkatesh on 22 January, 2020, there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors."

For the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code, the dissenting financial creditors are to be "paid" an "amount" quantified in terms of the "proceeds" of assets receivable under Section 53 of the Code; and the "amount payable" is to be "paid" in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression "payment" is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such money by enforcement of security interest, as per the entitlement of the dissenting financial creditor.

The SC remarked that if the Appellant's propositions were to be accepted, it would result in more liquidation with every secured financial creditor opting to stand on dissent, as against insolvency resolution and value maximization of the assets of the corporate debtor, thereby defeating the very purpose envisaged by IBC. The SC relied on the observation made in Essar Steel (supra) that if an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process was adopted, secured financial creditors would be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the IBC, which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

Held:

The Supreme court held that the process of consideration and approval of resolution plan is essentially within the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution

plan; and (e) implementation and supervision of the resolution plan. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. Every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. Thus, what amount is to be paid to different classes or sub- classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest. It was further held that the fact that a dissenting financial creditor is having a security available with him, would not entitle him to enforce the entire of security interest or to receive the entire value of the security available with him.

Conclusion:

The vary purpose of IBC is the maximization of wealth of the Corporate Debtor. It is not meant for recovery of dues. The Court rightly observed that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximization of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. If an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- ✓ **Swwapnil Bhingardevay v. Khandoba Prasanna Sakharkar Khana Ltd. - [2020] 118 taxmann.com 341 (NCL-AT)**

Where there was compromise of confidentiality regarding liquidation value which appears to have been known to resolution applicant before submitting resolution plan and resolution plan proceeded on ground that plant and machinery belonged to corporate debtor, however, plant and machinery were taken by corporate debtor on rent, resolution plan so approved suffered from feasibility and viability and hence was to be set aside.

The corporate Debtor had taken license for production of ethanol from rectified spirit. Loan taken from the financial creditors became NPA and application under section 7 came to be filed. The application came to be admitted and company went through corporate insolvency resolution process (CIRP) which culminated into resolution plan of R-2 being accepted. The appellant claimed that plan as had been approved was not feasible and viable and CIRP also suffered from material irregularities. It was found that there was compromise of confidentiality regarding liquidation value which appeared to have been known to R-2 before submitting resolution plan. It was also found that plan of R-2 was only plan received and was rushed through CoC meeting and in two-three hours, it was approved without due examination by Resolution Professional (RP) and without CoC being satisfied as required under section 30(4) that plan was feasible and viable. Further, plan proceeded on basis that ethanol plant and machinery belonged to the corporate debtor, however, fact was that R-3 had given plant machinery to the corporate debtor on heavy rent and feasibility and viability of resolution plan in case plant and machinery were taken away by R-3 had not been considered. Thus, the resolution plan was put forward on hypothesis that plant and machinery would be available for business. Further, by issuing notice for outright sale, instead of inviting expression of interest for resolution plan of the corporate debtor, there was clearly irregularity in conducing CIRP.

Held that CIRP suffered from material irregularities and resolution plan approved suffered from feasibility and viability and hence, resolution plan as approved deserved to be set aside.

Case Review : *Karad Urban Co-op.Bank Ltd. v. Khandoba Prasanna Sakhar Karkhana Ltd. [2020] 118 taxmann.com 329 (NCLT - Mum.), set aside.*

SECTION 22 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - APPOINTMENT OF

- ✓ **Bank of India v. Nithin Nutritions (P.) Ltd. - [2020] 118 taxmann.com 343 (NCL-AT)**

CoC has requisite powers to propose change of IRP even in meeting/s subsequent to first meeting and it is not necessary to replace an IRP in first meeting of CoC.

Held that CoC has requisite powers to propose change of Interim Resolution Professional even in meeting/s subsequent to first meeting mentioned in section 22(2) and it is not necessary to replace an IRP in first meeting of CoC. Further, there is no requirement that they should give particular reasons for change.

Case Review : Bank of India v. Nithin Nutritions (P.) Ltd. [2020] 118 taxmann.com 342 (NCLT - Amravati), Set aside.

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

- ✓ **Ritu Rastogi, (RP) v. Riyal Packers - [2020] 118 taxmann.com 346 /[2020] 162 SCL 663 (NCL-AT)**

Where owing to non-compliance of certain mandatory statutory compliances, resolution plan could not be placed before Adjudicating Authority for approval, CIRP time limit was to be extended beyond outer limit of 330 days in exercise of power of rule 11 of NCLAT rules, enabling RP to seek approval of resolution plan from Adjudicating Authority.

The resolution plan of one SK had been approved by 'Committee of Creditors' within extended timeline duly allowed by the Appellate Tribunal and process of approval of 'resolution plan' of SK by 'Committee of Creditors' was completed within extended period as allowed by the Appellate Tribunal. However, only one day was left for Resolution Professional (RP) to file an application under section 31 for placing approved resolution plan before the Adjudicating Authority for approval which despite diligence and best efforts on his part was improbable as he had to complete all legal formalities including seeking performance guarantee in terms of approved resolution plan. Hence, he sought further extension of time. It was submitted that hardship encountered by 'Resolution Professional' was not on account of any lapse on his part but due to certain statutory compliances to be made, which were mandatory or without adhering to which resolution plan could not be placed before the Adjudicating Authority.

Held that instant case was fit one for exercising power under rule 11 of the NCLAT Rules, being an exceptional case to depart from general rule of 330 days being outer limit prescribed under law for completion of CIRP inclusive of period of judicial intervention and accordingly, period of CIRP was to be extended by 10 days, enabling RP to seek approval of resolution plan from the Adjudicating Authority.

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

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

- ✓ **S. Rajendran v. S. Mukanchand Bothra - [2020] 118 taxmann.com 368 /[2021] 163 SCL 29 (NCL-AT)**

I. Where names of legal heirs of deceased financial creditor were substituted to which Resolution Professional had no objection and resolution plan was approved, demand for succession certificate, probate order from appellants at time of distribution of amount would be without any basis.

During pendency of CIRP petition, one of unsecured financial creditors expired and application was filed on behalf of appellants as legal heirs of said creditor for substitution of their names in place of said creditor. Counsel for Resolution Professional had no objection to same. The Adjudicating Authority substituted names of appellants as legal heirs of deceased creditor. Subsequently, resolution plan was approved.

Held that since approved resolution plan was binding on all stakeholders, resolution professional had no right to raise issue of succession; and any demand for succession certificate, probate order from appellants at time of distribution of amount would be without any basis.

II. Held that where after approval of revised resolution plan by CoC, resolution professional had himself filed an application for its approval which was allowed, appeal filed by resolution professional against said resolution plan would not be maintainable as resolution professional could not be termed as an aggrieved person.

Case Review : S. Mukanchand Bothra v. S. Rajendran [2019] 108 taxmann.com 320/155 SCL 60 (NCLT - Chennai), Affirmed.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

- ✓ **Garden Silk Mills Ltd. v. GSL Nova Petrochemicals Ltd. - [2020] 118 taxmann.com 400 /[2020] 162 SCL 670 (Gujarat)**

In view of amended provisions of section 434 of Companies Act, 2013, company petition pending before High Court was to be transferred to NCLT to be dealt with as an application for initiation of corporate insolvency resolution process under IBC.

Held that in view of amended provisions of section 434, company petition pending before High Court was to be transferred to NCLT and same was to be dealt with as an application for initiation of corporate insolvency resolution process under Insolvency and Bankruptcy Code, 2016.

SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

- ✓ **Gouri Prasad Goenka v. Surenda Kumar Agarwal - [2020] 118 taxmann.com 401 /[2021] 164 SCL 57 (NCL-AT)**

Adjudicating Authority without disposing of application filed under rule 11 has no jurisdiction to defer matter and direct 'interim resolution professional' to constitute 'Committee of Creditors' to render application filed under rule 11 as infructuous.

Held that the Adjudicating Authority without disposing of application filed under rule 11 has no jurisdiction to defer matter and direct 'interim resolution professional' to constitute 'Committee of Creditors' to render application filed under rule 11 as infructuous. Further, if the Adjudicating Authority is of view that application under rule 11 is fit to be rejected, it is only after rejecting same, it can direct 'interim resolution professional' to constitute 'Committee of Creditors'.

Case Review : Tirupati Timber & Packaging Ltd. v. Duncans Industries Ltd. [2020] 116 taxmann.com 106 (NCLT - Kolkata) Set aside.

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

- ✓ **Indian Oil Corporation Ltd. v. Union of India - [2020] 118 taxmann.com 404 (Delhi)**

Efficacious alternative remedy being available with petitioner by way of statutory appeal under section 61, Writ Petition against order of NCLT whereby stay had been granted against encashment of bank guarantee would not be maintainable.

The petitioner filed Writ Petition being aggrieved by the order of NCLT, Principal Bench, whereby stay had been granted by the said Bench against encashment of Bank guarantee. However, efficacious alternative remedy is available with the petitioner by way of statutory appeal under section 61 and there is no violation of principles of natural justice. Further, there is no argument canvassed by the petitioner about constitutionality of any provisions of Code, nor is there any violation of fundamental rights as alleged by petitioner - Whether therefore, instant Writ Petition could not have been entertained.

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

- ✓ **Bijay Pratap Singh v. Unimax International - [2020] 118 taxmann.com 414 (NCL-AT)**

Where Operational Creditor supplied Aluminum / M.S. Shuttering Material to Corporate Debtor real estate developer who failed to pay due, CIRP application filed by Operational Creditor was correctly admitted; intervenor-flat purchasers, for redressal of grievances, should take recourse before Resolution Professional/ Competent Forum.

The operational Creditor supplied Aluminum / M.S. Shuttering Material to the corporate debtor real estate developer. In spite of notice, the corporate debtor failed to effect payments due to the operational creditor and an amount of Rs. 61.25 lakh was claimed to be due as on date of filing of CIRP application before the Adjudicating Authority. The corporate debtor took plea that the operational creditor had accepted payments in respect of supplies and full and final payment was made. However, no tangible/substantial material/evidence was produced to prove such payment. On the contrary, subsequently, the corporate debtor issued three cheques in favour of the operational creditor which were again dishonoured. Although, the corporate debtor had taken a plea that these cheques were issued by corporate debtor for some other project and

not for project concerning subject matter in issue, same was not established by corporate debtor to subjective satisfaction of the Tribunal.

Held that if the corporate debtor had paid full and final payment then there was no need or necessity for the corporate debtor to issue cheques in favour of the operational creditor subsequently. Whether the Tribunal was justified in rejecting the corporate debtor's plea that the operational creditor had accepted payments in respect of supplies and full and final payment was made . Therefore, the Adjudicating Authority was justified in holding that the corporate debtor had committed default; the Tribunal was justified in admitting CIRP application filed by the operational creditor. The intervenor-flat purchasers should have taken recourse before the Resolution Professional/Competent Forum for redressal of their grievances and seek necessary reliefs.

Case Review : Unimax International v. Soho Infrastructure (P.) Ltd. [2020] 118 taxmann.com 318 (NCLT - New Delhi), Affirmed.

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

- ✓ ***Abhishek Agarwal v. Manasadevi Bakers (P.) Ltd. - [2020] 118 taxmann.com 416 (NCL-AT)***

Where Adjudicating Authority after considering record found that there was material in form of MOU and agreement which dealt with interest free unsecured loan advanced by financial creditors to corporate debtor and concluded that there was no time value of money and that it was not financial debt, findings recorded by Adjudicating Authority could not have been interfered with.

Appellants/financial creditors had advanced unsecured loans to the corporate debtor. Even after several requests said loan amount along with interest remained unpaid, hence the financial creditor filed application under section 7. The Adjudicating Authority held that unsecured loan was interest free and there was no consideration for time value of money and could not be said to be financial debt. It further referred to subordination agreement entered into with Canara bank and found that appellants were signatories to agreement and they along with other signatories had undertaken that they will not issue or collect, assign or receive payment of their claims until claims of Canara bank were settled. Appellants by way of instant appeal claimed that all that material was brought before the Adjudicating Authority at instance of one director of the corporate debtor who had been removed as MD from Board after filing of application under section 7 of IBC and was not authorized. However, fact that he still appeared to be Director of the corporate debtor and the Adjudicating Authority had accepted material pointed out by said Director, which was found to be relevant, no interference was warranted - Further,

claim of appellants denying signatures in subordination agreement was not necessary for the Adjudicating Authority to decide in proceeding under section 7. It was found that the Adjudicating Authority had after considering record found that there was material in form of MOU and agreement which dealt with interest free unsecured loan and equity shares to be allotted to both parties and concluded that there was no time value of money and that it was not financial debt .

Held that there were no reason to interfere with such findings recorded by the Adjudicating Authority.

Case Review : Abhishek Agarwal v. Manasadevi Bakers (P.) Ltd. [2020] 117 taxmann.com 770 (NCLT - Hyd.), Affirmed.

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

- ✓ **Vivek Bansal v. Burda Druck India (P.) Ltd. - [2020] 118 taxmann.com 417 /[2020] 162 SCL 539 (NCL-AT)**

Where CIRP was admitted but parties had reached a settlement before constitution of Committee of Creditors, CIRP proceedings along with all consequential order(s) passed by Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium etc., pursuant to impugned order, were to be set aside.

An application under section 9 for initiation of CIRP, was filed by the operational creditor against the corporate debtor. Application was admitted by NCLT and consequently, orders imposing moratorium and appointing IRP, were also made on same date. However, thereafter parties had amicably settled their dispute and the corporate debtor had agreed to accept amount of Rs. 4.25 crores towards full and final settlement of all claims. Accordingly parties entered into a settlement agreement, incorporating terms of settlement and mode of payment. Consequently, an appeal was filed in terms of rule 11 of NCLAT Rules, 2016, for recording settlement arrived between parties.

Held that parties having reached a settlement and committee of creditors was not yet constituted, parties were to be allowed to exit from CIRP. All order(s) passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium etc., pursuant to impugned order were to be set aside and application filed under section 9 was to be dismissed as withdrawn.

Case Review : Burda Druck India (P.)Ltd. v. Dynamic Textbooks Printers (P.) Ltd. [2020] 118 taxmann.com 35 (NCLT - New Delhi), Set aside.

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

- ✓ **India Power Corporation Ltd. v. Dynamic Cables Ltd. - [2020] 118 taxmann.com 422 /[2020] 162 SCL 666 (NCL-AT)**

Where dispute in regard to quality of goods not matching specification of franchiser was for first time raised by corporate debtor in its reply to demand notice and corporate debtor acknowledged liability in respect of an amount due and payable to operational creditor, application under section 9 had rightly been admitted.

The operational creditor supplied cables to the corporate debtor against purchase orders raised by the corporate debtor. On account of non-payment of debt, the operational creditor filed application under section 9 to initiate CIRP against the corporate debtor . The Adjudicating Authority by impugned order admitted said application. The corporate debtor filed instant appeal assailing impugned order of admission primarily on ground of pre-existence of dispute with regard to quality of goods not matching specification of franchiser. However, said dispute was for first time raised by the corporate debtor in its reply to demand notice. Further, it was found that the corporate debtor while disputing claim of the operational creditor' in regard to amount as claimed in Form-5 acknowledged liability in respect of an amount of Rs. 1.74 crores being due and payable to the operational creditor.

Held that operational debt, being due and payable, stood admitted and acknowledged, appeal was to be dismissed.

Case Review : Kolkata Bench in Dynamic Cables Ltd. v. India Power Corpn. (Bodhgaya) Ltd. [2020] 117 taxmann.com 845 (NCLT - Kol.), Affirmed.

SECTION 40 - CORPORATE LIQUIDATION PROCESS - CLAIMS - ADMISSION OR REJECTION OF

- ✓ **Indian Oil Corpn. Ltd. v. Ashish Arjun Kumar Rathi - [2020] 118 taxmann.com 423/[2020] 162 SCL 854 (NCL-AT)**

A decision by judicial or quasi-judicial Authority not informed of reasons provides room for arbitrariness and such decision cannot be supported; in terms of ingredients of section 40,

reasons are to be spelt out for rejecting claims as; not assigning reasons; and that too in a rejection order relating to a claim is not a prudent and reasonable course of action.

The appellant/applicant had entered into an agreement with company towards supply of furnace oil for a period of 15 years and the company had agreed to procure a minimum quantity 1000-MT of furnace oil per annum from the 2nd years onwards till 6th year from the date of upliftment failing which the Company had agreed to compensate the appellant at the rate of Rs. 2000 MT of furnace oil. The appellant submitted that since the company had failed to perform its obligations as per agreement, the appellant was forced to initiate 'Arbitration proceedings' against the company. Furthermore, the Insolvency proceedings were initiated against the company and a 'moratorium' was issued. Moreover, Form B as regards the proof of claim was submitted by the appellant before the 'Interim Resolution Professional'. The company was ordered to be liquidated on 30-1-2019 and appellant submitted its claim to the Liquidator under Form-C and had also furnished a Surveyors Report together with its claim. The Liquidator' rejected the claim of appellant towards investment made in the storage facility and in respect of interest. As a matter of fact, the appellant's claims to the tune of Rs. 9.87 crores was admitted by the Liquidator as per email dated 23-4-2019, however, no reasons were assigned for rejecting the claims on 'Investments' made and for 'payment of Interest'.

Held that as per section 40, a 'Liquidator' being an 'Authority' decides matter in a quasi-judicial manner and his decision is open to challenge under section 42. A decision by judicial or quasi-judicial Authority not informed of reasons provides room for arbitrariness and such decision cannot be supported. In terms of ingredients of section 40, reasons are to be spelt out for rejecting claims as; not assigning reasons; and that too in a rejection order relating to a claim is not a prudent and reasonable course of action. A liquidator' as an Officer of Adjudicating Authority/Tribunal is expected to perform his duties fairly, justly and honorably in dealing with claims of persons. An Adjudicating Authority can interfere when a liquidator had not exercised its discretion in a bona fide manner. Thus, where Adjudicating Authority confirmed action of liquidator in rejecting claim of the appellant relating to investment made in storage facility and interest, however, liquidator has not assigned any detailed reasoning in respect of non-admissibility of claim and had merely stated that as per contractual agreement there was no provision for said claim and hence not considered, tenor and spirit of section 40, not having been adhered to at time of passing impugned order, said impugned order was to be set aside.

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- ✓ *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.*
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