AUGUST 2022

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 enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its 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 endeavor to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

INDEX

CHAIRMAN'S MESSAGE

In the Corporate Insolvency Resolution Process (CIRP), it has been observed during the past about six years that IP does not denote an Insolvency Professional alone, but it also means an Important Person. The success and efficacy of the CIRP to a great extent would depend on the domain skill, conduct, integrity and efficiency of the Insolvency Professional. An IP, therefore, has assumed the position of the most pivotal catalyst in the eco-system of IBC. While Insolvency and Bankruptcy Board of India has been tasked with the development and regulation of the profession, the Insolvency Professional Agency(s) have also been assigned an important task to act as a front line regulator. IPAs are thus responsible for skill development of IPs, ensuring a good professional conduct on the part of IPs and thereby help attain the overall objective of the Insolvency and Bankruptcy Code 2016.

In this backdrop, it becomes pertinent to understand the IBC Framework vis-a-vis the attributes required to be a good and competent Insolvency Professional and the role of IPA in making that happen. In a broader framework, IBBI has framed Regulations applicable to Insolvency Professionals, which define the Code of Conduct. IBBI has also prescribed the Model Bye Laws in this regards. Based on the model bye laws of IBBI, the IPAs have developed their bye laws to regulate the Insolvency Professionals. The onerous nature of the job and role functions of the Insolvency Professionals would lead to gaining an impression that an Insolvency Professional must possess all those attributes which are needed to make him a super human in the IBC Eco-system.

The IBC Regime in our country expects and IP to be bestowed with very high degree of commitment and conduct so as to delivery best possible performance outcomes in all his professional assignments, where all the stake-holders feel the best taken care of by IP despite their being varying and conflicting inter se interest of different stake holders. A Resolution Applicant's interest would be best served by investing the least possible amount, while on other hand a Corporate Debtors interest would call for the value maximization of all its assets. It would depend on the extra ordinary skill if IP to strike a very fine balance to conduct himself in a manner that both - a Resolution Applicant and a Corporate Debtor find the resolution as the best in its commercial terms. Generally expected qualities and attributes of an Insolvency Professional are enumerated below to help our IPs take a self-test-check in their endeavor to attain the highest Ethical and Professional Standard and so demonstrate the same in discharge of their duties:

- Independence
- Objectivity
- Impartiality - being fair and unbiased
- Honesty
- Integrity
- Morality

- Character
- Proficiency
- Ethical Standards
- Skill Sets & Domain Knowledge
- Absence of Conflict of Interest
- Commitment & strong zeal to excel
- Determination to protect and promote the reputation of IBC Eco-system
- Ability to ensure stringent compliances to Rules, Regulations and Relevant Statutes
- Guarding against undue consideration, favouritism and moral turpitude
- Corporate Governance
- Acting in Good faith and without negligence
- Ability and willingness to work with utmost devotion and diligence
- Efficiency and effectiveness
- Courteous and considerate behaviour in all his dealings and transactions with other stake-holders
- Strict adherence to prescribed time-lines

And many more depending upon the circumstances emerging during the course of Corporate Insolvency Resolution Process.

The expectation of such great order from an IP shall act as an inbuilt check to ensure the survival and growth of the fittest in such a demanding IBC Eco-system.

A strong character building, skill development, monitoring, regulating, disciplinary action and ability to act as an honest bridge between the NCLT and other stake holders with timely and apt intervention from IPA will go a long way in creating a stronger and more ethical and balanced Corporate Insolvency Resolution Process in our country.

My sincere best wishes to all the Insolvency Professionals.

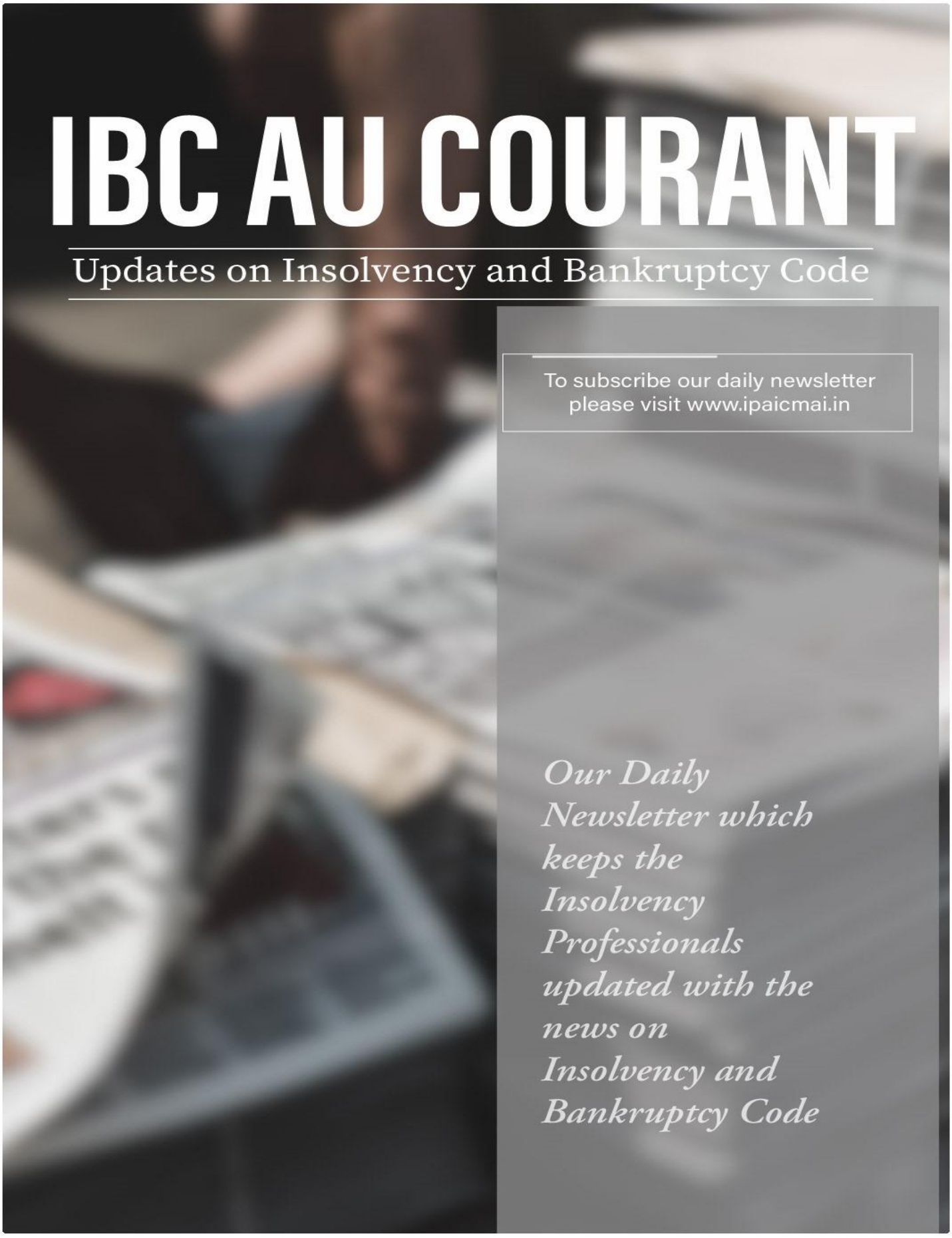
Warm Regards,
Dr. Jai Deo Sharma,
Chairman, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

Events

AUGUST 2022

05th - 07th August 2022	Master Class on Personal Guarantors to Corporate Debtors.
10th August 2022	Workshop on Compliances to be made by IPs under IBC, 2016.
20th – 21st August 2022	Learning Session on Avoidance Transactions
25th August 2022	Webinar on EPF and MP Act 1952.
27th August 2022	Workshop on Role of IPs During CIRP and Liquidation
31st August 2022	Insolvency and Bankruptcy Code: A Game Changer



IBC AU COURANT

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

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

CROSS BORDER INSOLVENCY PROCEEDINGS – THE NEED OF A LEGAL FRAMEWORK

Mr. Partha Kamal Sen,
Insolvency Professional

Concept of Cross Border Insolvency – What and Why?

Cross-border insolvency situation arises when the debtor has assets or creditors in more than one nation or when different insolvency proceedings have been filed in multiple jurisdictions. The cross-border insolvency mechanism is primarily focused towards regulating the insolvency proceedings that operate much beyond the ambit of domestic jurisdiction. Cross-border insolvency is also termed as International Insolvency. It governs the fate of debtors having multi-nations assets/ creditors or jurisdiction. The importance of cross-border insolvency lies in the fact that businesses today involve an international and cross border element, and therefore the effects of cross-border insolvency cannot be ignored for too long. Insolvency and Bankruptcy Code, 2016 (Code) provided mechanism for creditors of an entity to initiate Corporate Insolvency Resolution Process (CIRP) in the event of default in payment of debts by the corporate debtor. However, the Code does not provide for an effective mechanism to deal with cross-border insolvency proceedings.

Economic Survey 2021-22[1]

The Economic Survey 2021-22 had called for a standardized framework for 'Cross-Border Insolvency' as the Code at present does not have a standard instrument to restructure the firms involving cross-border jurisdiction. The survey pointed out that presently the Code provides for the domestic laws for the handling of an insolvent entity, but not to restructure the firms involving cross-border jurisdictions. The survey noted that the problem of not having a cross border framework was also expressed by the National Company Law Tribunal while adjudicating a cross border insolvency case involving an Indian entity, where the insolvency proceedings against the corporate debtor were already initiated before a foreign district court. It was noted by the Tribunal that since there is no provision and mechanism in the Code to recognize the judgment of a foreign insolvency court, the Tribunal could not take the order passed by the foreign court on record, even though it was verified and found to be correct. The survey said that the absence of a cross border insolvency framework creates complexities and raises various issues such as the extent of access that an Insolvency Professional may obtain to assets held in a foreign company. It further said that other issue is priority of payment i.e., whether the local creditors will have the access to local assets before the funds to the foreign insolvency administrator. Similarly the recognition of claims of local creditors by the foreign insolvency administrator is another issue. In other words issue related to the recognition and enforcement of local securities, taxation system over local assets where a foreign insolvency administrator is appointed.

[1] Economic Survey 2021-22 released by Finance Ministry, Govt. of India

Presently, while foreign creditors can make claims against a domestic entity under the provisions of the Code, the Code does not allow automatic recognition of any insolvency proceedings in other countries. Therefore the survey emphasized on framing out cross border insolvency provisions by saying that it can be seen that current provisions of the Code are ad-hoc in nature and are susceptible to delay. Entering into mutual / reciprocal agreements require individual long drawn out negotiations with each country. This leads to uncertainty of outcome of claims for creditors, debtors and other stakeholders as well.

Section 234 and 235 – Current provisions in IBC 2016[2]

Section 234 : Agreements with foreign countries : (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. (2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

Section 235: Letter of request to a country outside India in certain cases :-
(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this code, the resolution professional , liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under Section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

Inadequacy of Section 234 and 235

Bilateral agreements are only allowed under Section 234 for the purpose of enforcing the provisions of the Code and not for any other issues arising in cross border insolvency process viz., access to the office holder appointed in foreign proceedings to participate in proceedings under the Code, recognition of foreign insolvency proceedings, etc. Adjudicating Authority is empowered under Section 235 to issue letter to the extent of applicability of Code in respect of assets or property of corporate debtor or debtor or personal guarantor situated outside India.

[2] Insolvency and Bankruptcy Code 2016

The experience of India in matters of reciprocal agreements is not encouraging. In cases of recognition of foreign judgments and proceedings which deal with the execution of decrees passed by courts in reciprocating territories took years to obtain recognition.

Negotiating multiple agreements will be time consuming and costly as it will involve multiple ministries and many stakeholders in negotiating countries.

Further sections 234 and 235 of the Code which envisage entering into bilateral agreements and issuance of letters of request to foreign courts by the Adjudicating Authority resulted in an ad-hoc framework and that was susceptible to delay and uncertainty for creditors and debtors as well as for courts.

The mechanism for enforcement of foreign judgments under the CPC, 1908 is not broad enough to include all insolvency orders, viz., orders regarding reorganization processes, administrative and interim orders, etc. rendering many judgements and orders in the insolvency process unenforceable in India.

State Bank of India vs. Jet Airways (India) Ltd.[3]

Jet Airways (India) Ltd. (Jet Airways) case is the first cross border insolvency case in India. The order of NCLT Mumbai Bench approving the resolution plan for the revival of Jet Airways has marked the end of the first cross border insolvency case determined under IBC 2016.

However, the final determination by NCLT has brought the insights into the working of the Code as well as laid its limitations for resolving cross border insolvency proceedings.

The Resolution Professional of India and the Administrator appointed in Netherlands had to test several principles in absence of regulatory framework in India for dealing with cross border insolvency cases.

Such situation raised while the liquidation proceedings was admitted against Jet Airways on May 21, 2019 by the Dutch Bankruptcy Court in Netherlands and Dutch Administrator was appointed to take charge of Jet Airways assets located therein.

State Bank of India filed a Section 7 application before NCLT, Mumbai against Jet Airways. Upon admission of which on June 20, 2019 the corporate insolvency resolution proceedings (CIRP) of Jet Airways was started, interim resolution professional was appointed and moratorium was imposed under Section 14 of IBC 2016.

The Dutch Administrator filed an intervention application before NCLT, Mumbai during the CIRP proceedings to recognize the judgment of the Dutch insolvency court.

It was requested before NCLT Mumbai to withhold the CIRP on account of the ongoing bankruptcy proceedings against Jet Airways in the competent Dutch court, NCLT,

3 State Bank of India vs. Jet Airways – reported in IBC Laws

Mumbai in this regard opined that as per Sections 234 and 235 of IBC for recognizing the orders of a foreign jurisdiction mandate the requirement of Indian Government to have reciprocal arrangements with the foreign country. NCLT noted that in the instant case no reciprocal arrangements were made with the Dutch authorities.

The primary issue that was considered was pertaining to the jurisdiction of the Dutch court to adjudicate upon and pass orders in the matter relating to the bankruptcy of Jet Airways which is registered and incorporated in India.

NCLT, Mumbai vide its order dated June 20, 2019 set aside the proceedings of the Dutch court and declared it as a nullity in the eye of law. The order of NCLT. Mumbai was challenged before the NCLAT by the Dutch Administrator as regard non-recognition of Dutch proceedings, which was allowed by NCLAT upon an assurance being provided by the Dutch Administrator that it would not alienate any offshore assets of Jet Airways. NCLAT directed the resolution professional to consider the feasibility of having a joint 'corporate insolvency resolution process in co-ordination with Dutch Administrator.

The resolution professional along with Dutch Administrator reached an agreement for facilitating the resolution process through a 'Proposed Co-operation' model, which was construed on the basis of the principles provided in the UNCITRAL Model Law and submitted it to the NCLAT for approval. NCLAT accepted the model and approved the same vide its order dated September 26, 2019.

Jet Airways case presents itself to be an interesting case study relevant to the legal position pertaining to cross border insolvency proceedings in India. It highlights an earnest attempt by the Indian judiciary in evolving principles and effecting mechanisms to deal with cross border insolvency proceedings in absence of adequate provisions in the Code.

Conclusion

The existing provisions in the Code (Section 234 and 235) do not provide a comprehensive framework for cross border insolvency matters. The Insolvency Law Committee, as constituted by the Ministry of Corporate Affairs, Govt. of India (MCA), submitted report during October 2018 recommending to provide a comprehensive framework for this purpose based on UNCITRAL Model Law on Cross Border Insolvency, 1997 by making this a separate part in the Code, after certain modifications in it necessary in the Indian context. Based on such report MCA framed Cross Border Insolvency Rules/Regulations Committee (CBIRC) on January 2020 to analyze the model law. Accordingly CBIRC submitted a report during June 2020. The necessary incorporation of these recommendations in the Code is yet to be made.

Access to foreign courts, recognition of proceedings therein, subsequent grant of relief to protect assets of debtor or interest of creditors, communication and coordination amongst the jurisdictions will facilitate successful resolution of the cross-border cases.

CAN INSOLVENCY RESOLUTION PROCEEDINGS BE INITIATED AGAINST AN OTHERWISE SOLVENT ENTITY? - AN INSIGHT TO THE LEGISLATIVE INTENT BEHIND THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Mr. Ashish Porwal,
Advocate & Insolvency Professional

INTRODUCTION

"*In most other jurisdictions,* ***the trigger to start insolvency resolution procedures against an entity requires evidence that is based on a test of insolvency****. The* ***outcome of the tests*** *are taken by the adjudicating authority as* ***evidence*** *to consider the entity to be* ***insolvent****.*

The Committee observes that there is ***no standardized, indisputable way to establish insolvency****. Several jurisdiction have balance sheet tests as one element to determine insolvency. Another is the presentation of reasoned arguments for why the entity should be considered insolvent. These too are based on performance in balance sheets and cash-flow statements of the entity. The balance sheet test is vulnerable to the quality of accounting standards. India suffers from having both a low average standard of accounting quality as well a wide variation across single entities.* ***Therefore, the Code does not prescribe fixed balance sheet variables or parameters as critical to triggering insolvency****.*

The proposed Code assumes that, under situations of stress in the entity, the debtor and creditors have already have gone through negotiations to reach a solution to keep the entity as a going concern. The IRP is considered as a last course effort to resolve conflicts in the negotiations. Then triggering the IRP can be assumed to be a considered step, after deliberation and preparation."

"Emphasis Supplied"

The above-mentioned text is from Para 5.2.2 of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015 (hereinafter referred to as the "**BLRC Report**").

Upon a careful and considered reading of the same, the intent of the Banking Law Reforms Committee (hereinafter referred to as the "**BLRC**"), with respect to 'insolvency' of an entity being a prerequisite for initiation of insolvency resolution procedure against such entity, is clearly visible. In the said context, the BLRC has noted in the BLRC Report that in most jurisdictions, an entity must be 'insolvent' and must pass the 'test of insolvency' before any insolvency resolution process could be triggered against it. The BLRC also observed that there is no standard or uniform way for testing and establishing insolvency and accordingly, the BLRC did not specify or prescribe any fixed parameters for the same. It is felt that while

the BLRC did not specify or prescribe any test to determine or establish as to whether or not an entity is insolvent (and therefore suitable for initiation of insolvency resolution proceedings), the BLRC did not do away with or dilute the key prerequisite of an entity being insolvent before initiation of insolvency resolution proceeding. This article examines whether the courts and tribunals in India are recognizing this principle and the legislative intent while ordering initiation of insolvency resolution proceeding against an entity at the behest of its creditors.

Specifically, this articles focuses on whether the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") can order initiation of insolvency resolution proceedings against an otherwise solvent company? Does the Code, as enacted, establishes the legislative intent as regards the prerequisite of 'insolvency' of the concerned entity for initiation of insolvency resolution proceedings against it and have the courts and tribunals in India taken this view?

ANALYSIS

The BLRC was constituted to design and develop a unified insolvency and bankruptcy regime in India. One of the principles adopted by the BLRC while designing the Code was relating to facilitation of **assessment of viability of** the enterprise at a very early stage. The Code has been implemented to create such an insolvency regime in the country wherein it should save businesses that are **viable** and facilitate the exit of those businesses that are not.[1]

Subsequent to its enactment, the validity of several provisions of the Code were challenged before the courts in India. The issue relating to the constitutional validity of various provisions of the Code was brought before the Hon'ble Supreme Court of India in the case of **Swiss Ribbons Private Limited & Anr. Vs. Union of India and Ors.**[2] wherein the Hon'ble Supreme Court while dealing with the said issue also gave an insight to the purpose of the Code and stated that: "*It can thus be seen that the primary focus of the legislation is to ensure* ***revival and continuation*** *of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation.* ***The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors."***

"Emphasis Supplied"

The BLRC, in its BLRC Report, while discussing the various aspects and provisions which are necessary for an effective and efficient insolvency and bankruptcy law in the country, also observed that the trigger to initiate an insolvency resolution procedure against an entity requires evidence that is based on a test of insolvency and the results of such tests are taken by the adjudicating authority as evidence to consider such entity to be insolvent. The BLRC had further observed that there is no standardised, indisputable way to establish insolvency

[1] https://www.ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf

[2] AIR 2019 SC 739

and therefore, the Code does not prescribe fixed balance sheet variables or parameters as critical to triggering insolvency. The BLRC had recommended that bankruptcy is an outcome of resolving insolvency. If the debtor and creditors agree to change the terms of their contract during the negotiations to keep the enterprise as a going concern, then the enterprise is viable, and the insolvency resolution process is closed. If the negotiations fail to deliver a solution, then the enterprise is unviable, and is deemed bankrupt.

In this regard, the following judicial precedents are relevant.

1. The Hon'ble National Company Law Appellate Tribunal, in the case of **Vinod Mittal Vs. Rays Power Experts Private Limited and Ors.**[3], while deciding upon the appeal against initiation of corporate insolvency resolution process ("**CIRP**") even when there were numerous pre-existing disputes amongst the parties, had observed that initiation of CIRP against a functional company is a serious matter and parties cannot be allowed to play hide and seek.

2. The Hon'ble National Company Law Tribunal, Bengaluru Bench, in **Sri M Visveswaraya Co-operatives Bank Limited Vs. M/s Golden Gate Properties Limited**[4], placing reliance on the Hon'ble Supreme Courts' judgement in the case of Mobilox Innovations, held that - "*It is also well settled that the provisions of the Code cannot be invoked for recovery of outstanding amount but can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited v. Kirusa Software Private Limited has, inter alia, held that I&B Code, 2016 is not intended to be a substitute to a recovery forum* ***and cannot be used to jeopardize the financial health of an otherwise solvent company by pushing it into insolvency****. The Hon'ble Supreme Court in the case of K. Kishan v. Vijay Nirman Company Pvt. Ltd. clarified that the Petitioners cannot use IBC either prematurely or for extraneous considerations or as substitute for debt enforcement procedures. In the instant case it is seen that the Respondent/Corporate Debtor has already repaid 3 instalments out of the initial debt of Rs. 13 Crores. Thus the Petitioner's recovery exercise had begun and is continuing when it has chosen to come prematurely before this Tribunal, although the Agreement itself provides other options for recovering its dues, such as by sale of the assets taken as security from the Respondent/Corporate Debtor. It is clear that the Petitioner intends to use this process for recovery alone, without making out a case for initiation of CIRP, which is not permissible*."

3. Again, the same bench of the Hon'ble National Company Law Tribunal, Bengaluru Bench (as that of Sri M Visveswaraya Co-operatives Bank Limited Vs. M/s Golden Gate Properties Limited, mentioned above), in the case of **G.V. Sudhindra Vs. American Road Technology & Solutions Private Limited**[5], while reaffirming its' previous stand stated the following:

[3] [2020] 219 CompCas 523
[4] [2020] 160 SCL 478
[5] MANU/NC/5434/2020

"*We must observe at the very beginning that these proceedings under the Code are summary proceedings, where even if there was a debt, the same should be clear and undisputed and the default, as defined under section 3(12) of the Code should be clearly established. There is no scope for investigation under the Code, further than what has been brought on record. Further, it is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018)1 SCC 353, has inter alia, held that* ***I&B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardize the financial health of an otherwise solvent company by pushing it into insolvency****. The Hon'ble Supreme Court in the case of K. Kishan Vs. Vijay Nirman Company Pvt. Ltd. clarified that the Petitioners cannot use IBC either prematurely or for extraneous considerations or as substitute for debt enforcement procedures. In Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd., Hon'ble Supreme Court of India has inter alia held that existence of an undisputed debt is sine qua non of initiating CIRP. The facts of the case as obtaining in the present petition and the legal position on the issue have, therefore, to be understood in the light of these decisions. Unless a case is made out that there is a clear and undisputed debt, there is default, and also that the respondent is insolvent and has lost its ability to pay its debts, the proceedings become mere recovery proceedings which is not the intent of legislature in introducing the IBC*."

4. The Hon'ble Supreme Court of India in its recent order dated July 12, 2022, in the matter of **Vidarbha Industries Power Limited v. Axis Bank Limited**[6] has clearly held as follows:

*"**81. The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP**. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.*

***82. The Adjudicating Authority (NCLT) failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise.** Moreover the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same."*

5. Further, the Hon'ble Supreme Court of India in its recent order dated July 15, 2022, in the matter of **M/s S.S. Engineers v. Hindustan Petroleum Corporation Limited & Others**[7] has clearly held as follows:

[6] MANU/SC/0874/2022
[7] Supreme Court of India, Civil Appeal No. 4583 OF 2022

"***31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor***. "

It is pertinent to mention here that the Mobilox Innovations judgment, as has been relied upon by different NCLT benches as evidenced above, does not clearly specifies that the Code is not applicable on the solvent companies. The same is the result of interpretation adopted by jurists while protecting the legislative intent of the Code.

Conclusion

A closer analysis of the principles and provisions of the Code and the jurisprudence, as mentioned above, it appears that the legislative intent, as enshrined in the BLRC Report, certainly envisaged 'insolvency' as a prerequisite for initiation of insolvency resolution proceedings and the Hon'ble Supreme Court has also been guided by the said principle when dealing with important questions of law. However, it appears that multiple NCLT benches have failed to: (i) follow such principle uniformly, and (ii) comment upon critical issues thereby causing hesitation and uncertainty amongst the stakeholders with regards to the application of the Code as it was originally intended by the BLRC. Unfortunately, while there is sufficient legislative and judicial guidance available on this matter, however, in the practical scenario as it exists today, several adjudicating authorities in the country seem to have failed to appreciate BLRC's intent while drafting the Code and the same is being interpreted variably by different adjudicating authorities.

It is time for the adjudicating authorities to keep the following two cardinal principles in mind and consideration while deciding applications made under Section 7 and 9 of the Code:

(i) The Code is not and should not be used as a substitute to a recovery forum; and
(ii) The Code should not be used jeopardize the financial health of an otherwise solvent company by pushing it into insolvency.

Once the adjudicating authorities in India start applying these principles uniformly and consistently, not only will it save several financially solvent ventures from falling in clutches of insolvency resolution, but it will also boost confidence of the entrepreneurs in the judicial system and significantly impact India's outlook from the perspective of ease of doing business in India.

Risk Analysis and Mitigation

CA. Gurbinder Singh Kathuria,
DISA, IP , Independent Director

One of the significant factors affecting the availability of capital and its cost to an entity is its risk perception of investors. An elevated risk perception can jeopardize the efforts of an entity to attract capital to meet its growth prospects. The financial turmoil being experienced by many South Asian countries reflect this fact very vividly; millions have been driven to poverty and it might take years to repair the damage. Considering the severity of its impact, it become important to list such risk factors, understand what cause them and strategize as to how an entity can safeguard itself against their detrimental impact.

At the outset, Lets understand what exactly is Risk, I financial parlance. Risk is defined in the financial world as the chance of an outcome or investment's actual gain varying from the expected outcome or return.

Broadly an organization faces four type of risk which may be listed as:

a) Financial Risk : Possibility of losing the money
b) Operational Risk : Losses arising from flawed processes , polices , systems or events which might disrupt the operations.
c) Compliance Risk: Threat to an organisation's existence from a potential exposure to legal & financial penalties stemming legal or regulatory non-compliances.
d) Strategic Risk: Losses caused by the Corporate Business Strategy.

The process of Risk analysis has been a complex one and over the period many quantitative and qualitative approached to study the risks have evolved. Some of the important quantitative approaches are : **Statistical;** Analysis of cost expedience, Expert systems; **Analytical**; Analogue appliance; Analysis of relative risk value; Sensitivity analysis; Monte Carlo simulation; Turning-point analysis; **Methods of discount norm**; Cost-Benefits Analysis; Delphi technique.

The Qualitative approaches includes What if? ; Fuzzy Metrics; Scenario Analysis; Questionnaires Failure Mode and Effect/Criticality Analysis) (FMEA/FMECA); Human Error Analysis (HEA); Reliability Block Diagrams Fault Tree Analysis (FTA); Event Tree Analysis (ETA); Survey questionnaires; Fuzzy metrics; Scenario analysis.
Before deciding which method of risk analysis to apply, the organization should assess the advantages and disadvantages of qualitative and quantitative risk analysis methods & summarize their advantages and disadvantages.

A pro-active holistic assessment of its risk profile by an enterprise shall maximise the return to its stakeholders since a riskier and uncertain cash flow shall entail a higher discount rate thereby reducing the valuation of the asset. As such it become extremely important that an organisation to institute appropriate Risk management strategies in place. The Risk Management Unit of the organisation must encourage the positive risks; the opportunities

which enhances the value of the business. Managing a risk must never be construed as "No Risk". A successful risk management strategy should methodically address all the risks surrounding the organisation and must be tailor made to the organisation's specific needs and culture as any strategy that is not embedded and owned by the management as an integral part of their business processes shall loose its impact and might not be able to deliver the intended results.

Traditionally the Risk Management has been the job of the respective vertical head of the business vertical where the risk lies; the CFO is responsible for financial risk, the CTO for technology related risk, COO for the operational risk. A fragmented approach, however, does not adequately identify, evaluate and manage the risk in an effective manner. As the organisations grow, risk too grow and to mitigate these risks managements have started to lean towards a more integrated approach to the risk management: Enterprise Risk Management (ERM). Casualty Actuarial Society defined ERM as: *"The process by which organizations in all industries assess, control, exploit, finance and monitor risks from all sources for the purpose of increasing the organization's short and long term value to its stakeholders."* Traditionally risk management approaches address the downside – possible losses from risk events whereas ERM scholars encourage management to recognize risks with both upside and downside factors (Investopedia, 2013).

The two most well-known ERM frameworks are that of Casualty Actuarial Society (CAS) and Committee of Sponsoring Organizations of the Tread way Commission (COSO). The CAS conceptualized ERM as a means to increasing the organization's value. The process of ERM is recognized depending on the risk types: hazard risk, financial risk, operational risk and strategic risk (CAS, 2003). COSO ERM framework is categorized into components and objectives, with highlights lie in supporting the organization's strategy, ensuring effective and efficient use of resources, resulting in financial profit while complying with laws and regulations.

To conclude

Risk has always been an integral part of business. However in an increasing inter-connected & globalised business environment, it is critical for business enterprises to have an appropriate risk analysis and mitigation strategy in place to safeguard their business interests.

SLUMP SALE DURING LIQUIDATION PROCESS CANNOT BE CONVERTED INTO SALE AS A GOING CONCERN

M. Govindarajan
IP

Sale of Assets of corporate debtor

Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides that the liquidator may sell-

- an asset on a standalone basis;
- the assets in a slump sale;
- a set of assets collectively;
- the assets in parcels;
- the corporate debtor as a going concern; or
- the business(s) of the corporate debtor as a going concern.

Where an asset is subject to security interest, it shall not be sold under any of the above unless the security interest therein has been relinquished to the liquidation estate.

Sale as a going concern

Regulation 32A provides that where the Committee of Creditors has recommended or where the liquidator is of the opinion that the sale of the assets of the corporate debtor as a going concern shall maximize the value of the corporate debtor the liquidator shall try to first sell the assets as a going concern. If the liquidator is unable to sell the corporate debtor as a going concern within 90 days from the date of commencement of liquidation shall proceed to sell the same under any one of the following methods-

- an asset on a standalone basis;
- the assets in a slump sale;
- a set of assets collectively;
- the assets in parcels.

Issue

The issue to be discussed in this article is whether the bidder who accepted the bid under slump sale, later pray the Adjudicating Authority to convert the slump sale as a sale of going concern with decided case law.

As per Regulation 32A the liquidator first mandatorily opts to sell the assets of the corporate debtor as a going concern. If it is not able to sell as a going concern then the liquidator may

opt to sell the assets of the corporate debtor as slump sale. Once slump sale is confirmed the same cannot be changed into the sale as a going concern. There is no provision enabling such a change either in the Insolvency and Bankruptcy Code, 2016 ('Code' for short) or in the Regulation.

Case law

In **'Jindal Power Limited v. Dushyant C. Dave, Liquidator of Shirpur Power Limited' – Item No. 161 –IA 561 (AHM) 2022 and Item No. 162-IA 564 (AHM) 2022 in IA 561 (AHM) 2022 in CP (IB) 487 of 2018 – NCLT, Ahmadabad – decided on 02.08.2022**, the corporate insolvency resolution process was initiated against Shirpur Power Limited (Corporate Debtor) and the same was admitted by the Adjudicating Authority 04.03.2020. During the corporate insolvency resolution process no resolution, worth to be accepted, has been received by the Resolution Professional. Therefore the Committee of Creditors passed a resolution on 03.02.2021 recommending for the liquidation of corporate debtor. The Adjudicating Authority on application by the Resolution Professional, ordered for liquidation of the corporate debtor on 15.03.2021.

The liquidator published the first notice on 05.04.2021 for the sale of the corporate debtor as a going concern. The reserve price for the said sale was fixed @ Rs.566.23 crores. Since no bid has been received in this regard the liquidator reduced the reserve price by 15% and published another notice for sale of the corporate debtor as going concern. For this also no response has been received. This happened on three occasions on 20.04.2021, 15.06.2021 and 29.06.2021 though the reserve price was reduced by 25%.

Therefore the Resolution Professional dropped the proposal to sell the corporate debtor as a going concern. The next step moved is the proposal to sell the corporate debtor by slump sale. The Resolution Professional published a fresh notice on 20.07.2021 declaring the slump sale of the corporate debtor fixing the reserve price @ Rs.477.85 crores. There is no response for this notice also. The Resolution Professional did not get any bidder for six consecutive times despite he reduced the reserve price fixed @ Rs.314.49 crores.

The applicant accepted the bid amount as a slump sale and deposited the bid amount with the liquidator. In the meanwhile the applicant filed the application IA 561/2022 before the Adjudicating Authority with the prayer to direct the liquidator to treat the sale of corporate debtor as a going concern instead of slump sale and allow the applicant to have all benefits of approved resolution plan as per section 31 and 32A of the Code.

The Stakeholders' Committee filed another application in IA 564 of 2022 with the prayer to implead them as a party respondent to oppose the application of the applicant since they did not want the slump sale to be converted into the sale as a going concern.

The applicant submitted the following before the Adjudicating Authority-

- The applicant is a successful bidder. He has deposited the bid amount with the liquidator.
- The request of the applicant is only to direct the liquidator to treat the sale of the corporate debtor as a going concern instead of confirming the sale as a slump sale.
- It is the main object of the Insolvency and Bankruptcy Code, 2016 to promote entrepreneurship and preserve the existence of the corporate debtor.
- If it is directed to treat this sale as a going concern then all stakeholders would be benefited, and employment will be generated.
- It is the duty of the liquidator to protect the existence of the corporate debtor as far as possible and to avoid its death by pushing the corporate debtor to be dissolved.
- If the liquidator is directed to treat the slump sale as sale as a going concern, no one, even the stakeholders' committee, will not be affected prejudicially.

The liquidator submitted the following before the Adjudicating Authority-

- The liquidator had published the notice of the sale of the corporate debtor as slump sale and in response thereto the applicant accepted the bid for a sum of Rs. 314.39 crores which is the minimum price for a slump sale.
- Once the sale is concluded the applicant cannot turn around and putting the conditions asking the liquidator to issue the sale certificate to treat the sale as a going concern.
- The liquidator has consulted the stakeholders' committee and the stakeholders' committee suggested that let the purchasers deposit the bid amount then the committee will take a call on the applicant's request.
- The liquidator has no authority to convert the slump sale into the sale as a going concern.
- This application is not maintainable, hence, may be rejected.

The stakeholders' committee submitted the following before the Adjudicating Authority-

- Initially when the liquidator published the sale notice of the corporate debtor as a going concern for the reserve price of Rs.566.23 crores, the applicant did not opt for the same.
- The applicant has conveniently accepted the bid for less amount under the slump sale.
- The prayer of the applicant to treat the slump sales as a sale on going concern is unknown to the law.
- The rights of the members of the stakeholders' committee will be greatly affected if such prayer is allowed by this Adjudicating Authority.
- The slump sale cannot be converted into a sale as a going concern unilaterally without consulting the Stakeholders' Committee.
- Therefore the application is liable to be dismissed.

The Adjudicating Authority considered the submissions put forth by the applicant, the liquidator and the Stakeholders' Committee. The Adjudicating Authority framed the issue to be decided in the application - Whether having accepted the corporate debtor in a slump sale, the bidder can request to treat that sale as a sale of the corporate debtor as a going concern?

The Adjudicating Authority observed that the liquidator, as per the provisions of the Code, first took efforts to sell the corporate debtor as a going concern. But he did not succeed in his efforts. The Adjudicating Authority wondered why the applicant did not accept the bid of the corporate debtor as a going concern at the first point of time. In this case the sale was concluded by slump sale and the applicant accepted the same.

The Adjudicating Authority also observed that the applicant did not put any condition at the time of accepting the bid to purchase the corporate debtor by slump sale. Now the applicant prayed for converting the slump sale into the sale as going concern. The Adjudicating Authority opined that this conversion could not be done. The price of the corporate debtor in the sale as going concern is Rs. 566.23 crores at the maximum and Rs. 433.17 crores. In the slump sale the maximum price was fixed @ Rs.477.85 crores and the minimum @ Rs.314.38 crores. Definitely there is a vast difference between the two sales. The Adjudicating Authority opined that if the request of the applicant is allowed the rights of the stakeholders will be affected prejudicially. Therefore the Adjudicating Authority did not accept the request of the applicant and rejected the same and also dispose the IA filed by the Stakeholders' Committee.

SYNOPSIS

If no resolution plan has been received by the Resolution Professional then the Committee of Creditors may recommend for the liquidation of the corporate debtor. The liquidation process is regulated under Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and also by the provisions of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. The liquidator shall try to maximize the assets of the corporate debtor and distribute the process of the same to the stakeholders. The liquidator shall first try to sell the assets as a going concern. If it is not possible to do so then the liquidator may try the other steps indicated in Regulation 32A. There is no possibility of changing the confirmed sale to other process. In this article the Adjudicating Authority confirmed the above view.

Treatment of belated claims i.e., filed beyond the 90th day of Insolvency Commencement date (ICD) under CIRP

Sunil Kumar Gupta

Synopsis:

CIRP is a largely creditor -driven process and therefore a claim submitted by a creditor deserves to be handled with due care and seriousness to ensure the successful resolution of insolvency. To save time and avoid litigation, claims beyond the 90th day of ICD should be considered and incorporated in Information Memorandum appropriately so that proper care be given by Resolution Applicant. There is no express power granted to an IRP/RP to adjudicate the claim during the CIRP like that power granted to a liquidator to verify and either admit or reject a claim made by a creditor. Extra care is required in the case of Homebuyers' claims because a large number of Homebuyers are unable to file their claim within the time due to various genuine reasons related to such Homebuyers.

Background:

In the Corporate Insolvency Resolution Process (CIRP) initiated under the I&B Code 2016 (Code), the claim is an important factor to be decided in the Resolution Plan for the Corporate Debtor (CD).

The term "Claim" is defined under section 3(6) of IBC which states that –

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured.

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

Therefore, to qualify as a claim, the right to payment must be established. Regulation 12(2) of Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Corporate Persons) Regulations. 2016 {"Regulations"} states that-

(2) A creditor, who fails to submit a claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

As per provisions of Section 18 and Section 25 of the Code, it's the duty of the Interim Resolution Professional ("IRP")/ Resolution Professional ("RP") to collate all claims submitted by the creditors in pursuant to the public announcement. It is, however, to be noted that neither Section 18 nor Section 25 expressly cast a duty upon the IRP/RP to verify and admit or reject claims.

The Hon'ble Supreme Court in 'Swiss Ribbons Pvt. Ltd. & Anr.' Vs. Union of India & Others – Writ Petition (Civil) No. 99 of 2018 wherein it held that Resolution Professional has no adjudicatory power and that he is "really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the Adjudicating Authority." The Resolution Professional has been vested with administrative as opposed to quasi-judicial power.

Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Others [Civil Appeal No. 8766-67/2019 and other petitions], held in para no. 27 that the role of the resolution professional is not adjudicatory but administrative. Further in para no. 67, with respect to the claim, it has been stated that in the CIRP, all claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the Corporate Debtor.

Recently, NCLAT -New Delhi held in the case of Synergy Technologies vs. Parthiv Parikh 401 that prima facie, there was an apparent mistake by the Resolution Professional for not considering the claim of the appellant (unsecured financial creditor in the Company). Therefore, the financial creditors who had received the major chunk from the resolution applicant were required to refund appropriately the original claim, minus any amount received by the financial creditor as an operational creditor in the same percentage as those financial creditors received from the resolution applicant.

In the matter of Sumat Kumar Gupta, RP. M/s Vallabh Textiles Company Limited vs. Vardhman Industries Limited, Company Appeal (AT) (Insolvency) no. 762 of 2022, RP rejected a belated claim at his own level without presenting the complete list to the COC. NCLAT-New Delhi directed the Resolution Professional to reconsider the claims including evaluating the claim to be classified as Financial Creditor and to reconstitute the CoC.

R Natarajan vs Mr. Radhakrishnan Dharmarajan RP of Appu Hotels, NCLT Chennai Bench dated 15/07/2021 held that a Belated claim cannot be condoned and accepted at a belated stage especially when the Resolution Plan is approved by the CoC and is pending before NCLT.

Mukul Kumar vs. M/s RPS Infrastructure - Company Appeal (AT) (Insolvency) Nos. 390, 391, 392, 393 & 394 of 2022 15 Appeal (AT) (Insolvency) No. 1050 of 2020, where this Tribunal has held that the Resolution Plan has already been approved by the CoC and pending resolution for approval, new claims cannot be entertained.

The Hon'ble Supreme Court in Ghanashyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited – (2021) 9 SCC 657 while dealing with the above question, concluded in paragraph 102.1 and held that once Resolution Plan is approved by the Adjudicating Authority, the claims as provided in the Resolution Plan shall stand frozen and all such claims, which are not part of Resolution Plan shall stand extinguished.

Homebuyers belated claims

Puneet Kaur vs. K V Developers Private Limited, Company Appeal (AT) (Insolvency) No. 390 of 2022, NCLAT -New Delhi dated 01/06/2022.

The Appellant(s) who have booked their flats with the Corporate Debtor, could not know about the publication of Form-A and the initiation of the Corporate Insolvency Resolution Process ("CIRP"). These appellants are residing at different places.

Learned Counsel for the Appellant(s) submits that Appellant(s) are Financial Creditors and even though, they could not file their claims within the time prescribed in Form-A, but details of their allotment and payments made by them already existed in record of the Corporate Debtor. It was the duty of the Resolution Professional to inform the Appellant(s) to file their claims and further the claim of the Appellant(s) qua the Corporate Debtor being matter of record, Resolution Professional could very well included Company Appeal (AT) (Insolvency) Nos. 390, 391, 392, 393 & 394 of 2022 11 their claims in the Information Memorandum prepared under Regulation 36 of CIRP Regulations as liabilities to Corporate Debtor to inform the Resolution Applicant to take into consideration the liabilities towards those Homebuyers, who could not file their claims.

The learned Senior Counsel for Resolution Professionalsubmits that Appellant(s) have submitted their claim much after submission of the Resolution Plan/ subsequent to approval of Resolution Plan by CoC. It is submitted that Appellant(s) having not filed their claims within time and filing of their claim was also beyond 90 days as provided by Section 12 of the Code. There was no occasion to include the name of the Appellant(s) in Information Memorandum, since, they have not filed their claim within time. There is no obligation on the Resolution Professional to inform the Homebuyers for filing their claims, apart from making publication in Form-A as required by Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "CIRP Regulations")

The following questions were addressed:

- Whether the Adjudicating Authority (AA) has rightly rejected the IAs filed by the Appellant(s) seeking direction to include their claims, which was belatedly filed?
- Whether after approval of the Resolution Plan on 20.07.2021 by CoC, the claim of the Appellant(s) stood extinguished?

• Whether the Resolution Professional was obliged to include the details of Homebuyers as reflected in the records of the Corporate Debtor in the Information Memorandum, even though they have not filed their claim before the Resolution Professional within time?
• Whether Resolution Applicant ought to have also dealt with Resolution Plan regarding Homebuyers, whose names and claims are reflected in the record of the Corporate Debtor, although they have not filed any claim?

The answer to question no 1 is yes because as the law exists today, belated claims cannot be included in the List of Creditors and that too after approval of the Plan by CoC. Therefore, AA is right.

Extinguishment of belated claims shall happen only after approval of the Plan by the Adjudicating Authority. The argument of the Respondents that since CoC has approved the Resolution Plan, the belated claims have been extinguished, cannot be accepted as there is no extinguishment of claim of the Appellant(s) on approval of Plan by the CoC.

In the case of Homebuyers has been now recognized as Financial Creditors under the provisions of the Code as amended by Act 26 of 2018 (w.e.f 06.06.2018). The amendment in Code was brought to mitigate the misery of Homebuyers and to give them participation in the CIRP of a real estate Company.

There are two important provisions of Regulation 36. Regulation 36(2)(a) and Regulation 36(2)(l). Regulation 36(2) oblige the Resolution Professional to include the details of the Corporate Debtor regarding assets and liabilities. The word "liabilities" is an expensive word. The "liability" has been defined in P Ramanatha Aiyar – Advanced Law Lexicon in the following words:

"The term 'liability means a liability to pay money or money's worth and it includes "any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution. [(English) Insolvency Act, 1986, section 382(4) as cited in Chitty on Contracts, 27th Edition, 1994 Vol. I, c.20, para 20- 037, p.1015]"

When the allotment letters have been issued to the Homebuyers, payments have been received, there are Homebuyers and there is an obligation on the part of the real estate Company to provide possession of the houses along with other attached liabilities. The liability towards those Homebuyers, who have not filed their claim exists and is required to be included in the Information Memorandum. Further, under Regulation 36, sub-regulation 2(l), there is column for other information, which the Resolution Professional deems relevant to the Committee. The purpose of CIRP of Corporate Debtor is to find out all liabilities of the Corporate Debtor and take steps towards resolution. Unless all liabilities of the Corporate Debtor are not known or included in the Information Memorandum, the occasion to complete the CIRP shall not arise.

Homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities, and should have

appropriately dealt with them in the Resolution Plan. It is directed to prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration.

Conclusion:

CIRP is a largely creditor - driven process and therefore a claim submitted by a creditor deserves to be handled with due care and seriousness to ensure the successful resolution of insolvency. There is no express power granted to an IRP/RP to adjudicate the claim during the CIRP like that power granted to a liquidator to verify and either admit or reject a claim made by a creditor. Section 18 of the IBC lays down the various duties of the IRP in respect of handling claim proposals. Section 18(1)(b) lays down that IRP shall "receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15. As regards the role of the Resolution Professional in this regard, Section 25(e) of the IBC lays down that he shall "maintain an updated list of claims." The Resolution Professional while examining claims is therefore expected to act in a manner which inspires confidence in the Financial Creditor so as to ensure the credibility of the insolvency process. Therefore, to avoid litigation, all claims received beyond 90 day of the Insolvency Commencement date should be considered and properly placed in Information Memorandum so that it can be taken care by the prospective resolution plan. The responsibility has increased in the case of Homebuyers because residing in different places, could not see the public announcement. These are very large in numbers. Sometimes, without the meeting/getting together, it is not easy for homebuyers/allottees to discuss and convey their views to the Authorized Representative who would then represent their views in the CoC. Without considering associate liability as appearing in books of accounts of CD, the purpose of CIRP will be defeated. For a successful resolution, proper consideration should be given to the homebuyers' claim and to present all facts to CoC.

What is the PUEF transactions under IBC? When an RP and Liquidator should take notice of these transactions with important Judicial Pronouncements?

CMA Lalit Maheshwari,
IP Registrar, NCLT Jaipur Bench

PUEF Transactions means Preferential (u/s 43), Under Valued (u/s 45), Extortionate (u/s 50) and Fraudulent (u/s 66) have been inserted in IBC to save the creditors from defrauding by Corporate Debtor. The RP shall form an opinion whether the CD has been subjected to any transactions covered u/s 43, 45, 50 & 66 on or before 75th day of insolvency commencement date, shall make a determination on or before 115th day of ICD and shall apply to Adjudicating Authority (AA) for appropriate relief on or before 135th day of ICD.

The Code mandates that Resolution Professional (RP) and the Liquidator to determine if the CD has been subject to Avoidance transactions such as preferential transactions, undervalued transactions, extortionate transactions and fraudulent transactions in the past, and if so, cast an obligation on the Insolvency Professional to file an application to the Adjudicating Authority for appropriate directions, The Code, in this manner enables the RP / Liquidator to facilitate the claw-back or disgorgement of value, if any, lost through avoidance transactions and is aligned with the objective of maximization of value of the assets of the CD for the relevant stakeholders.

PUEF Transactions means Preferential, Under Valued, Extortionate and Fraudulent Transactions. PUEF Transactions (Avoidance Transactions) are described under Section 26, 43 to 51 and 66 – 67 of IBC, 2016.

As per Section 26 of IBC "The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process."

1. *What are Preferential Transactions:* -

As provided in Section 43 of the Code, a corporate debtor shall be deemed to have given a preference in the following circumstances: -

(a) If there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
(b) If the transfer under clause (a) **has the effect of putting such creditor or a surety or a guarantor in a beneficial position** than it would have been in the event of a distribution of assets being made in accordance with **Section 53 of the Code.**

2. *What are not covered under preferential transactions?*

As per Section 43(3) of the Code, following transfers shall not be referred to as a preference transaction: -

(a) The transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee.

(b) **Any transfer creating a security interest in property acquired by the Corporate Debtor** to the extent that-

(i) such security interest secures **new value** and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an **information utility** on or before **thirty days** after the **Corporate Debtor receives possession of such property**. Further, any transfer made in pursuance of the order of a Court shall not preclude such transfer to be deemed as giving of preference by the corporate debtor.

3. *What are the Undervalued Transactions?*

As per Section 45 of the Code, a transaction shall be considered undervalued where the Corporate Debtor: -

(a) Makes a gift to a person; or
(b) Enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a **consideration which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.**

4. *What are Extortionate credit transactions?*

As per section 50 of the Code, any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

As provided in Regulation 5 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an Extortionate Credit Transactions shall be considered extortionate under section 50(2) where the terms:

(i) Require the corporate debtor to make exorbitant payments in respect of the credit provided, or

(ii) Are unconscionable under the principles of the law relating to contracts.

5. *What is fraudulent trading or wrongful trading? (Under Section 66)*

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the **Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.**

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) Before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) Such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub- section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per Section 10A. Explanation — For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Section 67A: Fraudulent management of corporate debtor during Pre-Packaged Insolvency Resolution Process (PPIRP).

On and after the pre-packaged insolvency commencement date, where an officer of the corporate debtor manages its affairs with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may, on an application by the resolution professional, pass an order imposing upon any such officer, a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

What are the powers of an Adjudicating Authority where applications are filed for Avoidance Transactions?

AA passes appropriate order u/s 44 (for Preferential Transaction), u/s 48 (for Undervalued Transaction), u/s 51 (for Extortionate Transaction) & u/s 67 (for Fraudulent Transaction) to facilitate restore the previous position, claw-back or disgorgement of value lost through Avoidance Transaction and is aligned with the objective of maximization of value of assets of the Corporate Debtor for the relevant stake-holders.

When RP/Liquidator should be alert about the Preferential and other transactions?

a). Regulation 35A of CIRP: - Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

(4) The creditors shall provide to the resolution professional, relevant extract from the audits of the corporate debtor, conducted by the creditors such as stock audit, transaction audit, forensic audit, etc.

b). Regulation 39 (2) of CIRP: -

The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -
(a) Preferential transactions under section 43;
(b) Undervalued transactions under section 45;
(c) Extortionate credit transactions under section 50; and
(d) Fraudulent transactions under section 66,

And the orders, if any, of the adjudicating authority in respect of such transactions.

c). Section 35 (1) (L) of IBC: -

Empowers Liquidator to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

Look-back period: -

For looking these transactions there should be basis of Transaction Audit /Forensic Audit. RP/Liquidator should look into those transactions which has the Red-Flag document or Preferential / Undervalued / Exorbitant / Fraudulent Transactions as per given table.

Sr. No.	Type of Transactions	U/S	Look Back Period	
			Related Parties	Others
1	Preferential Transactions	43	2 years	1 year
2	Under Valued Transactions	45	2 years	1 year
3	Extortionate Transactions	50	2 years	2 years
4	Fraudulent Trading/Transactions	66	No time limit but as per Section 17 of Limitation Act, 1963, within one year from the date of the discovery of the fraud.	

Note: - For Individual Insolvency look-back period will be two years for all type of transactions.

Duties and responsibilities of RP for Avoidance Transactions: -

The RP shall –

(i) **Sift through all transactions relating to the property/interest of the CD** backwards from the **ICD and up to the preceding two years**;

(ii) **Identify persons involved in the transactions** and put them in two categories: (1) related party under section 5(24) and (2) **remaining persons**;

(iii) Identify which of the said transactions of preceding two years, the **beneficiary is a related party** of the CD and in which the **beneficiary is not a related party**. The subset relating to unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD;

(iv) **Examine** every transaction in each of these sub-sets to find out whether (1) the transaction is of transfer of property of the CD or its interest in it; and (2) beneficiary involved in the transaction stands in the capacity of creditor/surety/ Guarantor;

(v) **Scrutinize** the shortlisted transactions to find, if the transfer is for or on account of antecedent financial debt/operational debt/other liability of the CD;

(vi) **Examine the scanned and scrutinized transactions to find, if the transfer has the effect of putting such creditor/surety/ guarantor in beneficial position, then it would have been in the event of distribution of assets under section 53. If answer is in the affirmative, the transaction shall be deemed to be of preferential, provided it does not fall within the exclusion under section 43(3); and then**

(vii) Apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions.

Judicial pronouncements with regard to Preferential Transactions and other Avoidance Transactions

1. ***Anuj Jain Vs. Manoj Gaur & Ors. NCLT, Allahabad order dt. 16.05.2018***

   The mortgage of land of the CD in favour of a creditor amounts to transfer of interest in the property of the CD for the benefit of the creditor, and putting it in a beneficial position vis-à-vis other creditors, is a preferential transaction.

2. ***S.V. Ramkumar Vs. Orchid Health Care Pvt. Ltd. & Ors. NCLT, Chennai order dt. 04.07.2019***

   To invoke section 43 of the Code, there shall be two elements in the given facts, (1) there shall be transfer of property or interest from CD to a creditor, (2) and it must be for the benefit of such creditors in preference to the other creditors of the CD in the event of a distribution of assets being made in accordance with section 53 of the Code.

3. ***K.L. Jute Products Pvt. Ltd. Vs. Tirupti Jute Industries Ltd. & Ors. NCLAT order dt. 20.02.2020***

   Section 43 of the Code is applicable during the pendency of resolution process or liquidation proceedings, if there are genuine, reasonable grievances relating to preferential transactions at a relevant time. A liquidator by filing an application can seek one or other order from the AA as per section 44 of the Code.

4. ***Anuj Jain Interim RP for Jaypee Infratech Ltd v Axis Bank Ltd & Ors. SC Order dt. 26.02.2020***

The Supreme Court considered the concept and connotations of preferential transactions at a relevant time in detail and analysed section 43 and 44 of the Code. 7 It was contended on behalf of the appellant IRP that the impugned transactions have the effect of putting "JAL" which was the holding company of the Corporate Debtor, in a beneficial position than it would have been in the event of distribution of assets under section 53 of the Code vis-à-vis other creditors; and that if the transactions are held to be valid, the liability of JAL towards its own creditors gets secured and becomes realizable from the value of the mortgaged properties whereby, JAL's liabilities are reduced and JAL gets benefitted in exclusion of creditors of the corporate debtor JIL.

The contesting respondents have refuted the contentions of the appellants with essentially similar submissions that the transactions in question cannot be termed as preferential transactions within the meaning of section 43 of the Code with reference to the intent and object, the transactions in question, representing the security and guarantee extended by the corporate debtor JIL, cannot be construed as preferential, particularly when they were entered into in the ordinary course of business and financial affairs of the corporate debtor as also the transferees.

The court noticed that NCLT in its detailed and considered order essentially dealt with the features of the transaction in question being preferential at a relevant time but recorded combined findings on all these three aspects that the impugned transactions were preferential, undervalued and fraudulent. The Supreme Court held that it would have been Appropriate to deal with all these aspects separately and distinctively. The court after scrutinizing the IBC, 2016 and sections 45/46/47 or section 66 of the same, found that the transactions in question cannot be countenanced, for being of preference during a relevant time to a related party.

5. Venus Recruiters Pvt. Ltd. Vs. Union of India & Ors HC, New Delhi order dt. 26.11.2020

In the context of CIRP, it was observed that:

i. Avoidance applications cannot survive beyond the conclusion of the CIRP. It is meant to give benefit to the creditors of the CD and not to the CD in its new avatar, after the approval of the resolution plan.

ii. The NCLT has the jurisdiction to deal with all applications and petitions 'in relation to insolvency resolution and liquidation for corporate persons'. After the approval of the resolution plan and the new management has taken over the CD, no proceedings remain pending before the NCLT, except issues relating to the resolution plan itself, as permitted under section 60. It has no jurisdiction to entertain and decide avoidance applications, in respect of a CD which is now under a new management unless provision is made in the final resolution plan.

iii. The RP cannot continue to act on behalf of the CD under the title of `Former RP', once the plan is approved and the new management takes over. His continuation beyond the closure of the CIRP would in effect mean an interference in the conduct and management of the company.

iv. The successful resolution applicant cannot file an avoidance application, as it is neither for the benefit of the resolution applicant nor for the CD after the resolution is complete. v. Section 26 of the Code cannot be read in a manner to mean that an application for avoidance of transactions under section 25(2)(j) can survive after the CIRP. Once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated. If the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the resolution plan.

6. Mohan Lal Jain, in the capacity of Liquidator of Kaliber Associates Pvt. Ltd. Vs. Lalit Modi & Ors. NCLAT order dt. 16.12.2020

Allegations of preferential transaction as also fraudulent trading/wrongful trading carried on by the CD during the insolvency resolution can be inquired into by the AA.

7. Suraj Fabrics Industries Ltd. & Anr. Vs. Bipin Kumar Vohra & Ors. NCLT, Kolkata order dt. 18.02.2021

The RP is duty bound to file the application for preferential transaction within time and also seek for urgent hearing of the application before the plan is approved. Once the resolution plan is approved, the CD is managed by a new management and the RP becomes functus officio. An application for avoidance of preferential transaction cannot be carried on by the RP on behalf of the CD.

8. Aditya Kumar Tibrewal Vs. Om Prakash Pandey & Ors. order dt. 06.04.2022

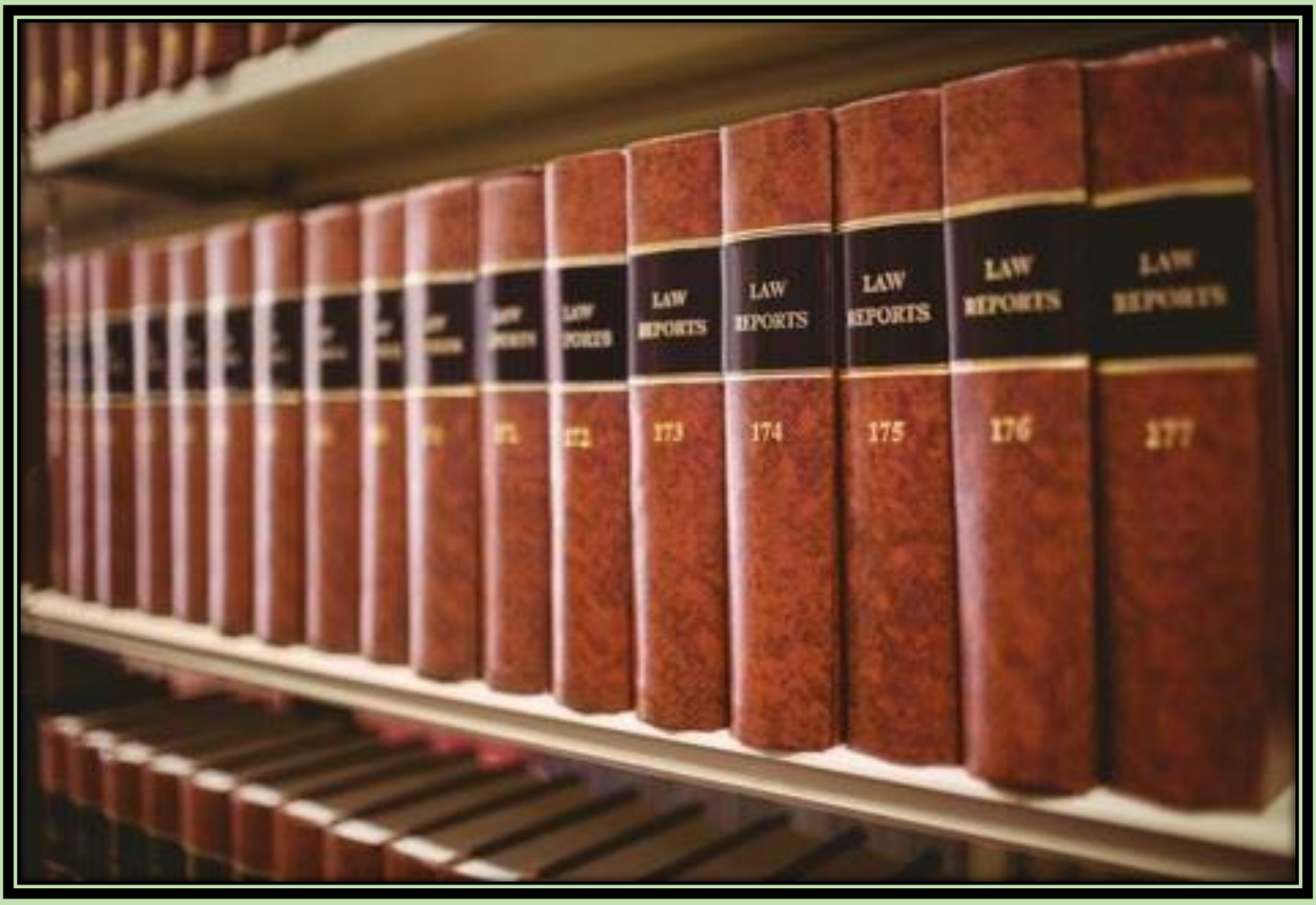
The NCLAT held that the expression 'shall' in regulation 35A (1), 35A(2) and 35A(3) is not mandatory and requirement of 'forming an opinion' under section 35A(1), 'make a determination' under section 35A(2) and '*shall apply to the Adjudicating Authority for appropriate relief on or before 135th day of the Insolvency Commencement Date'* are only directory. It observed that in event the actions taken by the RP after the timeline prescribed in regulation 35A of the CIRP Regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of resolution process and shall cause great inconvenience and injustice to the CD. Action taken by the RP beyond the time prescribed under said regulation cannot be held to be non-est or void only on the ground that it is beyond the period prescribed.

It also observed that for transactions defrauding creditors and fraudulent trading or wrongful trading the timeline prescribed under section 46 is not applicable.

9. *Mr. Nitin Bharal & Ors. Vs. Stockflow Express Pvt. Ltd. order dt. 04.05.2022*

The AA while allowing a section 66 application directed the suspended directors/promoters of CD to contribute a certain sum of money in the CD's account and also directed the IRP to institute a prosecution against them under section 69 of the Code. The promoters filed an appeal before the NCLAT contending that the AA has erroneously allowed the application in the absence of any Transaction Audit Report. The NCLAT noted that after the resignation of the four directors only one director was appointed three days prior to their resignation. It further noted that there were no substantial reasons for the share sales transactions, whereby four Promoters sold their 100% shareholding to a related concern during their tenure and after the resignation, the same concern sold a part of its shareholding in the CD to the same four directors/ promoters. It also took note of the bank transactions done by the ex-directors/promoters after resigning as directors which amounted to ` 19,98,602/-. Also, an amount of ` 42,33,304/- was settled for a payment of ` 3 lakh during their tenure. Keeping in view, the copy of the bank statements, amounts written off as bad debts during the financial year when the promoters were the directors, the circuitous sale of shares, the NCLAT observed that the contention of the suspended directors/promoters is unsustainable and dismissed the appeal.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

Commissioner of Central Taxes Goods & Service Tax v. C.S. Ashish Singh [2022] 134 taxmann.com 27 /[2022] 169 SCL 522 (NCL-AT)

Where appellant, Commissioner CGST challenged impugned order approving resolution plan submitted by financial creditor on ground that its pending dues of GST had not been accounted for, however, in records submitted by appellant and in arguments presented by appellant, it was nowhere pointed out as to when and in what form, claim of pending dues of GST were filed by appellant, claim of appellant could not have been considered after Resolution Plan had been approved and implemented.

The Adjudicating Authority approved a resolution plan submitted by the financial creditor with respect to the corporate debtor under section 31. The appellant/Commissioner CGST challenged impugned order on ground that its pending dues of GST had not been accounted for. However, on perusal of appeal memo, it was found that the appellant had not filed any claim before the Resolution Professional regarding his dues. The appellant stated that his claim of GST dues had arisen from a Show-Cause Notice which was available in record of corporate debtor, which was taken over by Interim Resolution Professional, hence, pending GST dues should have been automatically considered by RP in Information Memorandum and should have been accounted for in the Resolution Plan.

Held that financial and operational creditors have to file claims in accordance with regulations 7 and 8 of Regulations, 2016 in a specified format and stipulated time period. Since in records submitted by the appellant and in arguments presented by the appellant, it was nowhere pointed out as to when and in what form, claim of pending dues of GST were filed by the appellant, claim of the appellant could not have been considered after Resolution Plan had been approved and implemented.

Case Review : American Express Banking Corporation v. Fourth Dimension Solutions Ltd . [2020] 120 taxmann.com 166 (NCLT - New Delhi), affirmed.

I. SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

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

Chand Prakash Mehra v. Praveen Bansal Interim Resolution Professional of Silverton Spinners Ltd. [2022] 134 taxmann.com 28 /[2022] 169 SCL 536 (NCL-AT)

I. *Where letters addressed by corporate debtor on 15-6-2016 to financial creditor bank for resolution of debt clearly acknowledged its debt liability, CIRP application filed within three years of such acknowledgement was not barred by limitation.*

The corporate debtor was granted credit facility by the financial creditor-bank. Due to CDR (Corporate Debt Restructuring) package being worked out and implemented from RBI guidelines, extended time was given to the corporate debtor to pay his debts. However, the corporate debtor failed to act as per CDR package and failed to repay his debts. Consequently, the financial creditor-Bank filed an application under section 7 against the corporate debtor which was admitted by the Adjudicating Authority. The corporate debtor contended that its Account was classified as NPA on 15-1-2013, and therefore application filed under section 7 on 5-3-2018 was time-barred.

Held that since letters addressed by corporate debtor on 15-6-2016 to financial creditor bank for resolution of debt clearly acknowledged its debt liability, CIRP application filed within three years of such acknowledgement was not barred by limitation.

II. *Where Lead Bank for any reason did not take steps or failed to take steps, other Banks in consortium would have a statutory right to move an application under section 7.*

Held that where Lead Bank for any reason did not take steps or failed to take steps, other Banks in consortium would not be left high and dry without any remedy, thus, other bank would have a right to move application under section 7.

Case Review : State Bank of India v. Silverton Spinners Ltd. [2020] 113 taxmann.com 468 (NCLT - Kol.), affirmed.

SECTION 3(27) - CORPORATE INSOLVENCY RESOLUTION PROCESS - PROPERTY

Jitender Arora v. Tek Chand [2022] 134 taxmann.com 38 /[2022] 169 SCL 552 (NCL-AT)

Where assets of corporate debtor-developer company and respondent No. 2-land owning company were interwoven but corporate debtor was under CIRP and respondent No. 2 was not

under CIRP, it would not be possible to include in CIRP of corporate debtor asset of land on which corporate debtor was developing housing project but which was owned by respondent No. 2 company without following due procedure as enumerated in law and, therefore, Adjudicating Authority was directed to consider a consolidation of CIRP so that combined assets of land and flats might be considered together to provide fair, just and proper relief to creditors of corporate debtor.

The corporate debtor-developer entered into collaboration agreement with the respondent No.2-landowning company. 'T' was director and major shareholder of the corporate debtor, which had total control over respondent No. 2 company. MOU was entered into with homebuyers for booking and sale of flats. On failure to construct flats, application under section 7 was filed against the corporate debtor developer, which was admitted by the Adjudicating Authority and Resolution Professional (RP) was appointed. RP filed an application before NCLT and sought for directions from NCLT to allow RP to initiate joint CIRP of both Developer Company (holding company) and Landowning Company (subsidiary company). NCLT by impugned order denied relief sought by RP.

Held that if a corporate debtor has intricate financial relationship with another company which is controlled in an overwhelming manner by same set of directors as the corporate debtor and their businesses are inter-related, intertwined and interwoven, it stands to reason that such companies should be looked at jointly, for matters related to insolvency resolution, as financial revival of one company will be closely linked to financial health of other company. 'T' defrauded homebuyers by collecting money from them through the corporate debtor, but not constructing and completing projects promised under MOU entered into with various homebuyers. For successful resolution of the corporate debtor 'piercing of corporate veil' of two companies i.e. the corporate debtor (developer) and landowning subsidiary company (respondent No. 2) became absolutely necessary and imperative. Since assets of the corporate debtor and respondent No. 2 had been taken together for development of housing project, there was a strong case for considering assets of both companies jointly. Land held by respondent No. 2 was an integral part of housing development project, and should be considered as a part of total asset for insolvency resolution of corporate debtor. However, since the corporate debtor was under CIRP but respondent No. 2 was not under CIRP, it would not be possible to include in CIRP of the corporate debtor asset of land on which the corporate debtor was developing housing project but which was owned by respondent No. 2 without following due procedure as enumerated in law. Therefore, matter was to be remanded to the Adjudicating Authority with a direction that an admission application for respondent No. 2 be considered and thereafter consolidation of CIRP was to be considered so that combined assets of land and flats might be considered together to provide fair and proper relief to creditors of the corporate debtor.

Case Review : Tek Chand v. Premia Projects Ltd. [2022] 134 taxmann.com 37 (NCLT - New Delhi), reversed.

SECTION 5(13) 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INSOLVENCY RESOLUTION PROCESS COST

Devarajan Raman v. Bank of India Ltd. [2022] 134 taxmann.com 57 / [2022] 170 SCL 221 (SC)

Where NCLT allowed only part of fee claimed by Resolution Professional (RP) and NCLAT confirmed said order, in view of fact that impugned orders were passed without citing any reasons and without considering RP's submissions, both orders were to be set aside and matter was to be remanded to NCLT to decide matter of RP's fees afresh.

The respondent bank filed a petition under section 7 against the corporate debtor. Said petition was admitted by National Company Law Tribunal (NCLT) and the appellant was appointed as an Interim Resolution Professional. Subsequently, the order of the NCLT was set aside by the NCLAT at the behest of the Directors of the corporate debtor. By the order of the Appellate Authority, the proceedings were remitted to the NCLT to decide upon the fee and costs of the Corporate Insolvency Resolution Process incurred by the appellant which was to be borne by the respondent as a financial creditor. The appellant addressed a letter to the respondent enclosing a statement showing the amount payable as fee and costs. The amount was quantified in the amount of Rs. 14.75 lakh. An amount of Rs. 5.66 lakh was reimbursed by the respondent leaving in balance, according to the appellant, an amount of Rs. 9.08 lakh. The appellant moved the NCLT for obtaining the release of the remaining fee and costs. NCLT disposed of the application filed by appellant and directed respondent bank to pay Rs. 5 lakh to appellant towards his fee. The NCLAT dismissed the appeal filed by appellant for balance amount on ground that appellant had worked for about three months as RP; expenses had been allowed in full and the consolidated amount of Rs. 5 lakh plus GST allowed as fee of the RP for the entire period was not unreasonable; and fixation of the fee was not a business decision depending on the commercial wisdom of the CoC.

Held that where NCLT allowed only part of fee claimed by Resolution Professional (RP) and NCLAT confirmed said order, in view of fact that impugned orders were passed without citing any reasons and without considering RP's submissions, both orders were to be set aside and matter was to be remanded to NCLT to decide matter of RP's fees afresh.

Case Review : Devarajan Raman, Resolution Professional Poonam Drum & Containers (P.) Ltd. v. Bank of India Ltd. [2021] 133 taxmann.com 445 (NCLAT - New Delhi), reversed.

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

Utpal Kumar Guha v. NTPC GE Power Services (P.) Ltd. [2022] 134 taxmann.com 141 /[2022] 170 SCL 69 (NCL-AT)

Where there was pre-existing dispute between parties as regards additional bills raised for work orders, Adjudicating Authority rightly rejected application filed by operational creditor for initiation of corporate insolvency resolution process against corporate debtor.

The appellant-operational creditor was a sole proprietor of construction firm, engaged in mechanical construction work. The respondent-corporate debtor issued work orders for carrying out electrical erection works and mechanical erection work. An amendment was carried out to said work order. The appellant raised invoices for work orders and also bills for some additional work done. The appellant issued demand notice under section 8 but the respondent company neither responded to said notice with regard to existence of dispute etc. nor paid outstanding debt. The appellant filed an application under section 9 for initiation of corporate insolvency resolution petition against the corporate debtor. The Adjudicating Authority by impugned order rejected said application on ground that there was a pre-existing dispute between parties. The corporate debtor stated that bills of additional work were fake bills as those bills were never part of work order and were allegedly raised unilaterally and had never been admitted by the corporate debtor.

Held that there was no illegality in the impugned order passed by the Adjudicating Authority and, therefore, same was not to be interfered with.

Case Review: New Engineering Works v. NTPC GE Power Services (P.) Ltd. [2022] 134 taxmann.com 140 (NCLT - New Delhi), affirmed

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

KKR India Financial Services Ltd. v. Sintex Plastics Technology Ltd. [2022] 134 taxmann.com 164 /[2022] 170 SCL 67 (NCL-AT)

Where applicant banks sought to intervene in main pending Company Appeal so as to enable them to bring on record certain relevant and crucial facts pertaining to appeal and Tribunal was subjectively satisfied as to reasons ascribed in impleading Applications, impleading applications were to be allowed.

The applicant banks sought to intervene in main pending Company Appeal so as to enable them to bring on record certain relevant and crucial facts pertaining to the appeal. Grievance of the applicant was that in instant appeal, 'withdrawal' itself was assailed and therefore, whole controversy was about whether 'withdrawal order' was valid in law. It was also represented that since both 'Impleading Application' and Company Appeal effectively dealt with 'withdrawal order', adjudication and determination of impleading application would necessarily depend upon outcome of the appeal. Therefore, a fervent plea was made on behalf of the applicant that it be permitted to intervene and place their stand point of views on record. The Tribunal was subjectively satisfied as to reasons ascribed in impleading applications.

Whether, therefore, impleading applications were to be allowed and consequently, the applicant would be arrayed as a party respondent and necessary corrections were to be directed to be carried out in the 'Appeal Memo'.

SECTION 42 - CORPORATE LIQUIDATION PROCESS - APPEAL AGAINST DECISION OF LIQUIDATOR

Assistant Commissioner of Commercial Taxes v. Right Engineers & Equipment India (P.) Ltd. (in liquidation) [2022] 134 taxmann.com 179 / [2022] 170 SCL 22 (NCLAT - Chennai)

Where appellant filed application before NCLT against order passed by Liquidator rejecting appellant's claim on ground that same was submitted belatedly, since reason of delay in submitting claim that appellant was unaware of CIRP and liquidation process of corporate debtor was unworthy of acceptance, Adjudicating Authority rightly rejected application and claim of appellant.

The Adjudicating Authority had passed an order directing initiation of liquidation proceeding against the respondent No. 1-corporate debtor. Public announcement was issued by the liquidator as per which last date of submission of claim was on 11-1-2021. The appellant passed reassessment order in terms of Karnataka Value Added Tax by which the corporate debtor was liable to pay tax, interest and penalty. The appellant filed statement of claim before the liquidator on 4-3-2021. The liquidator rejected claim on ground that it was filed belatedly. The Adjudicating Authority by impugned order dismissed application filed under section 42 on ground that reason for condonation of delay that the appellant was unaware of CIRP and liquidation of the corporate debtor was untenable.

Held that reason of delay in submitting claim before the liquidator by the appellant was unworthy of acceptance and, therefore, the Adjudicating Authority rightly rejected said reason and claim of the appellant.

Case Review : Assistant Commissioner of Commercial Tax v. Right Engineers & Equipment India (P.) Ltd. [2022] 134 taxmann.com 178 (NCLT - Beng.), affirmed

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

Agarwal Coal Corporation (P.) Ltd. v. Sun Paper Mill Ltd. [2022] 134 taxmann.com 181 (NCL-AT)

Application filed by applicant to recall judgment of NCLAT was dismissed as 'in absence of any power of 'Review' or 'Recall' vested with 'Adjudicating Authority' and 'Appellate Authority', an order/judgment passed by it cannot be either reviewed or recalled.

The applicant operational creditor's claim was permitted to a sum of Rs. 2173 as against claim of Rs. 2,39,33,935 before the Resolution Professional. It preferred an application before NCLT against rejection of its claim, however said application was dismissed. Its appeal before NCLAT against said dismissal also came to be dismissed. It filed instant application to recall judgment of NCLAT by exercising its inherent powers under rule 11.

Held that in absence of any power of review or recall vested with the Adjudicating Authority/Appellate Authority, judgment passed by it cannot be either reviewed or recalled. Recalling of judgment passed by the Appellate Tribunal is impermissible in law. Appropriate course of action open to the applicant was to approach the Supreme Court under section 62 against said judgment, if it so desired; therefore instant application was to be dismissed.

Case Review : Agarwal Coal Corpn. (P.) Ltd. v. Sun Paper Mill Ltd. [2022] 134 taxmannn.com 180 (NCLAT - New Delhi), affirmed

SECTION 10 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY CORPORATE APPLICANT

RNY Healthcare Services (P.) Ltd. v. Bourn Hall International India (P.) Ltd. [2022] 134 taxmann.com 216 (NCL-AT)

Where operational creditor filed intervention application in petition under section 10 filed by corporate debtor and did not comply direction of Adjudicating Authority to file its claim before IRP, intervention application was rightly dismissed.

The appellant-operational creditor held arbitral award against the respondent-corporate debtor in lieu of unpaid lease rents. The corporate debtor filed application under section 10.

The operational creditor filed intervention application objecting application of the corporate debtor on ground of arbitral award which was constituted with consent of the corporate debtor and in terms of which the operational creditor had been held entitled to certain amount. It was further alleged that petition under section 10 was filed mischievously to defeat lawful claims of various creditors including the appellant. The Adjudicating Authority dismissed the intervention application filed by the appellant directing it to file claim before the IRP.

Held that since despite directions passed by the Adjudicating Authority the appellant had not filed claim before IRP, it appeared that the appellant had not come with clean hand before the Tribunal and, therefore, there was no illegality in the impugned order passed by the Adjudicating Authority rejecting the application filed by the appellant.

Case Review : Bourn Hall International India (P.) Ltd., In re [2022] 134 taxmann.com 215 (NCLT - Chd.), affirmed.

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

Vinay Kumar Mittal v. Dewan Housing Finance Corporation Ltd. [2022] 134 taxmann.com 333 (NCL-AT)

Decision about payments to creditors falls within commercial wisdom of CoC, subject to fair and equitable play, hence, approved Resolution Plan that stipulated extinguishment of Fixed Deposits of corporate debtor, Housing Finance Company (HFC) without fully paying FD holders, was legally valid under IBC and hence, could not have been interfered with.

NCLT by order approved resolution plan submitted by Piramal Group in CIRP of DHFL. The appellant, FD holders challenged said Resolution Plan on ground that treatment of F.D. Holders as unsecured creditors was entirely erroneous, illegal, arbitrary and discriminatory as F.D. Holders were entitled to their money in priority over any other creditors, as in fact, F.D. Holders were not mere creditors, but their money was in trust with DHFL.

Held that appellants could not have challenged action of the CoC to approve the Resolution Plan, which was otherwise in compliance with provisions of IBC. The Adjudicating Authority has limited jurisdiction in matter of approval of a resolution plan, which is well-defined and circumscribed by sections 30(2) and 31 and it is not to act as a court of equity or exercise plenary powers. Decision about payments to creditors falls within commercial wisdom of COC, subject to fair and equitable play, i.e. payment of minimum liquidation value to creditors and is not amenable to judicial review of any kind. IBC being a subsequent enactment, overwrites provisions of National Housing Bank Act, 1987 (NHB Act), NHB directions and Reserve Bank of India Act, 1934 (RBI Act). No right of full payment exists

under NHB Act or RBI Act or under any other legislation and even if it exists, any such right would be wholly repugnant to provisions of IBC, which provide for a specific manner in priority of payment. Further, section 238 of IBC overrides RBI and NHB Act, therefore, approved Resolution Plan that stipulates extinguishment of claims to Fixed Deposits without discharging their payments in full is valid and legal under IBC. FD holders are Financial Creditors of DHFL and have been treated accordingly as per provisions of IBC, therefore, the Adjudicating Authority had not erred in approving the Resolution Plan that proposed extinguishing claims to FD's of DHFL without discharging their payments in full to FD Holders. It did not contravene statutory provisions of NHB Act and RBI Act and hence could not have been interfered with.

Case Review : Raghu K.S v. Dewan Housing Finance Corpn. Ltd. [2021] 133 taxmann.com 448 (NCLT - Mum.) affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Kedrion Biopharma Inc. v. Wizaman Impex (P.) Ltd. [2022] 134 taxmann.com 370 /[2022] 230 COMP CASE 1 (NCL-AT)

Where corporate debtor confirmed and acknowledged outstanding amount as due and payable and proposed settlement offer on 15-10-2018, corporate debtor had acknowledged its debt and, therefore, limitation period for default dated 23-5-2014 was extended and petition filed under section 9 on 30-6-2020 was not barred by limitation.

The appellant-operational creditor entered into a distribution agreement with the corporate debtor for purpose of distribution and sale of its pharmaceuticals products in 2014. During course of business operation, the operational creditor raised several invoices upon the corporate debtor with respect to sale and distribution of products. However, an amount was pending towards said invoices. The appellant - operational creditor served demand notice and filed petition under section 9 on 30-6-2020 against the corporate debtor for initiation of corporate insolvency resolution process (CIRP). NCLT by impugned order dismissed said petition as barred by limitation.

Held that since the corporate debtor confirmed and acknowledged outstanding amount as due and payable and proposed a settlement offer on 15-10-2018, the corporate debtor had acknowledged its debt and, therefore, limitation period for default dated 23-5-2014 was extended and petition filed under section 9 on 30-6-2020 was not barred by limitation.

Case Review : Kedrion Biopharma Inc. v. Wizaman Impex (P.) Ltd. [2022] 134 taxmann.com 369 (NCLT - New Delhi), reversed.

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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.

✓ In case the article is found not suitable for publication, the same shall not be published.

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