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RESEARCH JOURNAL OF THE INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI (IIIPI)

(A Section 8 Company Promoted by ICAI and Registered as an IPA with IBBI)

BUILDING A FUTURE READY PROFESSION

ABOUT IIIPI

The Insolvency and Bankruptcy Code, 2016 (Code) provides that no entity shall carry on its business as an Insolvency Professional Agency (IPA) under this Code and enrol Insolvency Professionals (IPs) as its members except under and in accordance with a certificate of registration issued in this behalf by the Insolvency and Bankruptcy Board of India (IBBI).

Against this backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulation, 2016 (IPA Regulation), The Institute of Chartered Accountants of India (ICAI) formed the Indian Institute of Insolvency Professionals of ICAI (IIIPI), a Section 8 company to enrol and regulate IPs as its members in accordance with the Code read with its Regulations. The Company was incorporated on 25th November 2016.

IIIPI is the first Insolvency Professional Agency (IPA) of India registered with IBBI. The certificate of registration was handed over to the agency by the then Hon'ble Minister of Finance Late Shri Arun Jaitley on 28th November 2016.

OUR VISION

To be a leading institution for development of an independent, ethical and world-class insolvency profession responding to needs and expectations of the stakeholders.

STRATEGIC PRIORITIES

- Capacity building of members by enhancing their all-round competency for their professional development in global context.
- Capacity building of other stakeholders for facilitating efficient and cost effective insolvency resolution proceedings.
- Deploying an independent regulatory framework with focus on ethical code of conduct by the members.
- Working closely with the regulator and contributing to policy formulation including with respect to the best practices in the insolvency domain.
- Conducting research on areas considered critical for development of a robust insolvency resolution framework.

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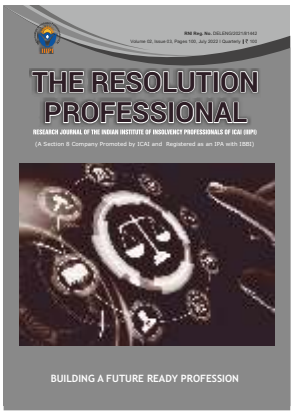

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Message from Chairman, Editorial Board

CA. (Dr.) Debashis Mitra
President, ICAI
Chairman, Editorial Board-IIIPI

Dear Member,

Since the inception of the Insolvency and Bankruptcy Code, 2016 (IBC), its stakeholder base has been diversifying on constant basis. In this context, some of the landmark amendments were made in the IBC including, (a) Extending the status of financial creditors to homebuyers in June 2018 thereby ensuring their representation in the Committee of Creditors (CoC) and making them integral part of the decision-making process for resolution of stressed real estate companies, (b) Corporate Insolvency Resolution Process for Personal Guarantors to Corporate Debtors-2019, and (c) Pre-Pack Insolvency Resolution Process for MSMEs-2021 (PPIRP for MSMEs), resulted in expansion of stakeholder base.

The proposed (full-fledged) Individual Insolvency framework in near future is expected to bring a sea change in the ecosystem. These developments have necessitated nation-wide awareness campaigns for public at large about remedies available under the Code, while dealing with distress resolution. As the backbone of India's national economic edifice, the Micro, Small and Medium Enterprises (MSMEs) Sector has around 63.4 million units spread throughout the country. Therefore, there is pertinent need to create awareness among such MSMEs regarding the avenues for reorganization of distressed assets available for them under PPIRP framework for MSMEs.

Azadi Ka Amrit Mahotsav (AKAM) is an opportunity for all of us to create awareness about insolvency profession and processes under IBC across stakeholders and public at large, particularly among youth who are the potential stakeholders in the form of Insolvency Professionals (IPs), entrepreneurs, financial creditors, operational creditors, etc. I am pleased to note that Indian Institute of Insolvency Professionals of ICAI (IIIPI) in association with Insolvency and Bankruptcy Board of India (IBBI) organized 43 events on the theme "Awareness Programme about Insolvency Profession with Special Reference to Graduate Insolvency Programme" in 40 cities, out of 75 cities planned by IBBI, throughout the country from 1st to 9th June 2022. We trust, this outreach effort will go a long way in creating awareness across stakeholders, present and future.

Real-Estate Sector has emerged the second highest stakeholder under the IBC regime in almost all the categories viz. Commencement of CIRP (20%), Commencement of Liquidation (17%), Appeal, Review, Settled and Withdrawn (25%) and Resolution through Resolution Plans (13%). As the individual homebuyers are also recognized as financial creditors, the insolvency processes of the corporate debtors of the real estate sector, impacts a significant part of population in the economy. They along with other stakeholders need to be made aware about their rights and responsibilities under various insolvency processes under the IBC. Keeping these things in mind, some of the articles in this edition are focused to deal with various aspects of Real Estate Sector under the IBC. I am confident, the readers would be benefitted a lot from the current edition of the journal.

Wish you all the best.

CA. (Dr.) Debashis Mitra
President, ICAI
Chairman, Editorial Board-IIIPI

Message from Chairman, IIIPI-Board

Dr. Ashok Haldia
Chairman, Governing Board
IIIPI, New Delhi

Dear Member,

Adding a new feather to its cap, Indian Institute of Insolvency Professionals of ICAI (IIIPI) has recently operationalized "Peer Review Framework" along with a dedicated "IIIPI Peer Review Online Portal" under the e-Services platform of the institute to facilitate peer review process. With this, IIIPI has become the first Insolvency Professional Agency (IPA) of India to introduce peer review mechanism in the field of Insolvency Profession. The Peer Review Framework has been developed basis the recommendations by a Study Group constituted for the purpose and after having wider consultations. We believe the Peer Review Framework will act as an independent process among equals for reviewing qualitative aspects of conducting assignments by another experienced professional member. This together with background guidance reports, earlier released on Quality Control and on Code of Ethics for IPs, would help enhancing the image of profession and enthuse confidence among stakeholders. The continuous feedback from our members will help us in improving the framework further.

From time to time, IIIPI has been highlighting to IBBI, inter alia, the need to ensure independence of professionals through regulating their remuneration to some extent. This also came out in recommendations of the study group(s) constituted by IIIPI in the past. It is heartening to note that IBBI has recently released a discussion paper on this matter. IIIPI jointly with Committee of IBC at ICAI, conducted a roundtable among the professional members. The feedback thus generated has been communicated to IBBI.

Besides, IBBI recently carried out regulatory amendments in timelines and procedures for expeditious redressal of grievances and disciplinary matters, which, inter alia, differentiate between serious and non-serious grievances. IBBI would refer non-serious grievances to IPAs for disposal within a time period of thirty days. Complementarily, the initiatives and capacity building measures being taken by IIIPI, including as mentioned in following paras, would help averting the occurrence of contraventions at the first instance.

Recent Initiatives of IIIPI

In an ever-evolving profession such as insolvency, research reduces information asymmetry and enables policy makers, practitioners, and other stakeholders in futuristic decisions. With the increasing diversification of insolvency ecosystem in India, there is great need to employ research as a tool to carefully study IBC's achievements and gaps, international standards, and best practices, in the field of insolvency resolution. Considering the paramount importance of research, IIIPI has launched "IIIPI Research Project Scheme" to invite high quality research projects aimed at maximizing the value of services under the IBC.

Some of the key issues being faced by IBC regime pertain to high haircuts, process related delays, outcomes of avoidance transactions and valuation processes. The need has been felt to develop best practices around some of these building blocks, which could provide guidance to practitioners and stakeholders, without dealing with art and science of valuation process or forensic audit, etc. Keeping these objectives in mind, IIIPI has recently constituted three new study groups *viz.* "Study Group on

Avoidance Transactions under IBC - Improving Outcomes", "Study Group on Best Practices on Valuation under IBC" and "Study Group on Best Practices on Individual Insolvency". These study groups comprising experts across various professions, are aimed at thoroughly studying the underlying issues and providing recommendations for addressing the same.

It is important for any corporate to keep monitoring the early signals of sickness and keep updating a road map for resolvability, to fall back on when the need arises. IPs who have unique skill sets in the domain of stress resolution, are best suited to provide value, advice, and support across the value chain from conception of project, through incipient stage to eventual resolution. *Keeping the above in mind,* IIIPI has constituted a study group of experts for carrying out study/recommendations on *"Roles of IPs/Professionals Across Insolvency Value-chain from Incipient Stage till Post-Resolution".* This study shall help expand the roles of IPs and open doors for more professional opportunities.

Recently, as a significant policy change, IBBI has released a discussion paper allowing IPEs to act as juristic IP. IIIPI jointly with Committee of IBC at ICAI conducted a roundtable to seek professionals' feedback on the matter. IIIPI followed this up by conducting another roundtable wherein all members were invited to deliberate on the matter. An online survey was also conducted on the matter. The feedback thus generated has been analysed and shared with IBBI for due consideration.

In the first quarter of current financial year, IIIPI organized nine webinars, three Executive Development Programmes (EDPs), 55th and 56th Batch of PREC, two LIE Preparatory Virtual Classroom Programs and two miscellaneous programs. Besides, under the *Azadi Ka Amrit Mahotsav* (AKAM), IIIPI jointly with IBBI organised 43 events across length and breadth of the country. These AKAM programs were held with active participation from many of our professional members.

As the government is mulling a proposal to introduce framework for cross-border insolvency, IIIPI jointly with International Insolvency Institute (III), USA organized an International Webinar on "Cross Border Insolvency and Global Lessons for India" on June 17, 2022. Addressing the Webinar as Chief Guest, Shri Ravi Mital, Chairman, IBBI said, "Cross-Border Insolvency Law will make India an attractive destination for Cross-Border Investment". He also informed, "a model law on Cross Border Insolvency in India is almost ready". Besides, insolvency professionals (IPs), bankers and eminent insolvency experts from India and the USA shared their views in the conference.

Challenges of Real Estate Sector

Resolution of financially strained real-estate companies is one of the major challenges before us due to involvement of high number of homebuyers. Most recently, in a landmark SC judgement in *New Okhla Industrial Development Authority (NOIDA) Vs. Anand Sonbhadra* (2022), it was held that the NOIDA Authority is not a Financial Creditor within the ambit of Section 5(8) of the IBC, 2016 because "there has been no disbursement of any debt (loan) or any sums by the appellant to the lessee". Recognizing the challenges, IBBI has recently invited suggestions/inputs from public for effective and expeditious resolution of Real Estate Projects. In this edition of The Resolution Professional, the articles have addressed various aspects of the Real Estate Sector.

We at IIIPI have interacted with regulatory authorities in real-estate on such challenges posed and to develop better harmony across IBC and RERA through mutual dialogue between stakeholders.

With this I request and invite all the professional members of IIIPI to actively participate in various initiatives of IBBI and IIIPI to strengthen the IBC ecosystem. Let's be the change we want to see.

Wish you all the best.

Dr. Ashok Haldia
Chairman, Governing Board - IIIPI

From Editor's Desk

Dear Member,

As the IBC ecosystem is gearing up for the Cross Border Framework under the IBC, 2016, IIIPI jointly with International Insolvency Institute (III), USA organized an International Webinar on "Cross Border Insolvency and Global Lessons for India". We are carrying the highlights of the addresses of dignitaries including Shri Ravi Mital, Chairperson, IBBI, CA. (Dr.) Debashis Mitra, President-ICAI, Ms. Jaicy Paul, Chief General Manager (SARG), State Bank of India, Dr. Ashok Haldia, Chairman-IIIPI, and a Panel Discussion moderated by CA. Sripriya Kumar, Central Council Member-ICAI. The said panel included eminent Indian and foreign panellists such as Justice Christopher Sontchi, Hon'ble Judge US Bankruptcy Court, Delaware; Prof. Irit Mevorach, University of Nottingham, UK; Mr. Eric Danner, Partner, Cohn Reznick, Boston, USA; Mr. Raghupati Mishra, Group CFO, Liberty Steel Group, India; Adv. Ashish Makhija, Insolvency Professional, India; Adv. Sajeeve Deora, Insolvency Professional, India. The key takeaways of this Webinar have been presented in this edition of journal.

You will also get to read the perspectives of CA. Sameer Kakar, Hon'ble Member (Technical), NCLT, Chennai in the form of an article which is based on his speech delivered in the Inaugural Session of the "Webinar on Landmark Judgements Under IBC" organized by IIIPI on June 23, 2022.

Moreover, this edition has four research articles and two Case Studies – Liquidation of Moser Baer India Limited (MBIL) and Resolution of Aditya Estates Private Ltd. (AEPL). In the opening article "Pre-Pack Insolvency Resolution Process (PPIRP) for Real Estate Developers: Challenges and Road Ahead" the author has examined pros and cons of the PPIRP under the IBC regime and suggests some crucial reforms to make it a popular tool for resolution of MSME entities in India with a focus on Real Estate Sector. The authors of the second article, "Supreme Court upholding the status of Homebuyers as Financial Creditors: Paving a Roadmap towards Beneficial Legislative Jurisprudence" have focused on jurisprudence related to various aspects of the real estate projects under IBC. In the third article, the author presents a thorough analysis of various judicial interpretations made by different courts which have shaped the concept of moratorium under the IBC regime as it exists today. The author of the fourth article "Role of Authorised Representative under IBC, 2016 – Neglected but Critical" deals with the pros and cons of the roles of AR and also makes suggestions for improvement.

Besides, the journal also has its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, Know Your Ethics (Code of Conduct for IPs,) IIIPI News, IIIPI's Publications, Media Coverage, Services and Crossword.

Please feel free to share your candid feedback to help us improve the quality of the journal, by writing to us on iiipi.journal@icai.in

Wish you a happy reading.

Editor

Key Takeaways from the International Webinar organized by IIIPI jointly with III, USA on June 17, 2022

Indian Institute of Insolvency Professionals of ICAI (IIIPI) jointly with International Insolvency Institute (III), USA organized an International Webinar on "Cross Border Insolvency and Global Lessons for India" from 4.30 PM to 6.30 PM on 17th June 2022. The Inaugural Session of the Webinar was addressed by Shri Ravi Mital, Chairperson, Insolvency and Bankruptcy Board of India (IBBI), as Chief Guest. Besides, CA (Dr.) Debashis Mitra, President, The Institute of Chartered Accountants of India (ICAI), Mr. Evan J. Zucker, Of Counsel, Blank Rome LLP & III NextGen Chairperson (USA) and Dr. Ashok Haldia, Chairman, IIIPI also addressed the Inaugural Session.

The Inaugural Session was followed up with Special Address by Ms. Jaicy Paul, Chief General Manager (SARG), State Bank of India and a Panel Discussion moderated by CA. Sripriya Kumar, Central Council Member, ICAI. The panellists include Justice Christopher Sontchi, Hon'ble Judge US Bankruptcy Court, Delaware; Prof. Irit Mevorach, University of Nottingham, UK; Mr. Eric Danner, Partner, Cohn Reznick, Boston, USA; Mr. Raghupati Mishra, Group CFO, Liberty Steel Group, India; Adv. Ashish Makhija, Insolvency Professional, India; Adv. Sajeeve Deora, Insolvency Professional, India. Here we are presenting the key takeaways of the Webinar.

Welcome and Opening Address

Dr. Ashok Haldia

Chairman, Governing Board-IIIPI

1. It is the first ever initiative between IIIPI, the largest IPA in India and III, one of the largest professional bodies in the USA. I hope this initiative would go a long way in having more coordinated and collaborative efforts between the two large economies of the world.
2. IIIPI is the largest IPA in India with around 3,000 professional members. They are presently handling about 75% cases of corporate debtors in insolvency processes, not only the numbers but also in terms of value as well.
3. IIIPI is a frontline regulator set up under the law. It's a quasi-judicial body and also a professional development body with multiple roles to play in the effective delivery of outcomes and achieving the objectives of the IBC, 2016.
4. With the rapid increase in globalization, cross border trade and investment, the mutual dependence of global economies has increased to a great extent. This is

evident from the rising number of corporates from the USA having business interests in India and number of Indian corporates having business interests in the USA as well as globally.

5. In India, the IBC, 2016 does provide a cross border insolvency framework but that has hardly been taken recourse to by the government. IBBI has come out with a detailed framework for public comments.
6. This conference would help greatly in learning from the experience in the USA and also globally and help in developing the cross-border insolvency framework in India. In earlier conferences, we were greatly benefited from insolvency professionals and experts globally.
7. As a preparatory exercise, we are in dialogue with other institutions – the regulatory bodies and insolvency professional bodies in other countries. Besides, we will have to bring in all the participants such as bankers, regulators, judicial authorities, in the Cross Border Insolvency.

Guest of Honor
CA. (Dr.) Debashis Mitra
President, ICAI

1. Today, about 60% of the insolvency professionals in India are members of ICAI.
2. ICAI and IIIPI work closely with IBBI in furtherance of insolvency profession, and we take great pride in it.
3. Over the period, IIIPI has grown quite well. Most recently, we have publications on quality and peer review mechanism. We have been a very active participant in the development of the law relating to insolvency.
4. Cross Border Insolvency is a topic which we think has a great future. IIIPI is working very hard on this, and it is our great pleasure to have an international audience in this seminar.
5. We will continue to work with SBI, International Insolvency Institute, USA, and most importantly IBBI in ensuring that the insolvency laws are understood by the stakeholders, and we shall do everything possible to promote the insolvency laws worldwide.

Special Address
Ms. Jaicy Paul,
Chief General Manager (SARG),
State Bank of India

1. In this globalized economy, regulators, lenders, and insolvency professionals (IPs) across the globe are increasingly feeling the imperative need for putting in place an effective legal framework for addressing the issues while dealing with resolution of corporates having liabilities, assets, and operations in more than one jurisdiction.
2. Introduction of IBC has brought in a paradigm shift in the insolvency process in India. The most critical aspect of which is the shift from Debtor in Possession to Creditor in Control regime.
3. In comparison to the insolvency and bankruptcy laws in the USA and the UK, the IBC in India is quite new and evolving. However, the Central Government and IBBI have been very proactive to bring in the required amendments, based on experience and global best practices, to improve effectiveness of the Code. This has brought change in behaviour of corporate debtors and encouraged a better credit discipline and compliance culture by the borrowers in the country.
4. Several jurisdictions have adopted the UNCITRAL Model Law to address the challenges in resolutions of entities having overseas assets and operations as it provides reciprocity from other jurisdictions. Cross Border Framework allows inclusion of overseas assets and operations of a Corporate Debtor undergoing CIRP which will further enhance value maximization.
5. Indian companies having assets and operations in foreign companies can face insolvency/bankruptcy as per the law of that country. This was witnessed in the case of Jet Airways wherein the bankruptcy process of the company was initiated in Netherland, and a Bankruptcy Administrator was appointed by a Dutch Court much before the CIRP commenced in India in 2019. In this case, NCLAT did a commendable job by ordering joint CIRP.

6. Cross Border Insolvency Framework will increase predictability of investment framework thereby making India an attractive investment destination for foreign investors and creditors.

7. Enactment of standardized Cross Border Insolvency Law along with Group Insolvency Law based on UNCITRAL Model Law, across various jurisdictions will greatly facilitate speedy and effective resolution of corporate debtors.

8. Extension of Cross Border regime to individuals especially Personal Guarantors to Corporate Debtors (PG to CD) will enable lenders to tap into overseas assets of promoters.

9. Adoption of the Model Law by majority of jurisdictions, standardization of provisions to the best possible extent, uniformity in interpretation of the law, and standardization of processes across jurisdictions will greatly enhance acceptability and effectiveness of the IBC, 2016.

Panel Discussion

1. As India aspires to achieve the targets of $5 trillion economy and Atma Nirbhar Bharat (Self-Reliant India), Foreign Direct Investment (FDI) is rising. Besides Indian businesses are also going offshore. Thus, Indian economy is getting more and more globally connected.

2. Any such foreign company doing business in India may not have assets in the physical form or real assets in India and vice-versa. In this scenario, we need to provide for an orderly mechanism for resolution of stressed assets, where changes in management and recovery are done in an orderly manner with an objective to recover assets kept overseas and help in dealing with cross border legal issues in a more efficient manner.

3. Foreign representatives will have to be registered with the IBBI with subject to disciplinary proceedings and other requirements. The IBC, 2016 provides high penalty for any wrongful actions.

4. The insolvency of Jet Airways, though involved cross border assets and operations, could not be considered a case study of Cross Border Insolvency as it was only on the periphery of this concept. The potential issues under the Cross Border Insolvency will be (a) Universality Vs. Territoriality and (b) Cooperation between the insolvency laws of different countries. There are instances when even bankruptcy courts in the USA did not recognize the decisions of their UK counterparts.

5. Under Cross Border Insolvency there should be equality for domestic and foreign corporates. Besides, standardization and harmonization of judicial practices across jurisdictions should be done on priority basis.

6. US adopted Model Law in 2006 after making some minor changes in Model Law to suit its legal customs, usage and other needs. Chapter 15 of the United States Bankruptcy Code enables the authorities to recognize Insolvency Proceedings in a foreign country.

7. In the UK, the Model Law was adopted in 2006 but after the USA. It has adopted several concepts and definitions such COMI, reciprocity requirements, coordination, and cooperation. However, the criminal proceedings etc., are kept out of its scope.

Vote of Thanks
CA. Rahul Madan
MD-IIIPI

1. Distress resolution in this highly globalized world requires a consistent, fair, and transparent framework in order to deal with the cross-border issues.

2. Global experiences on the UNCITRAL model law especially in the developed markets like the USA, the UK and other leading economies may hold many lessons for India where a Cross Border Framework is on the horizon.

3. Once the Cross-Border Framework is notified, there would be significant opportunities for IPs and other professionals.

4. Heartfelt gratitude to eminent guests for their words of wisdom!

Pre-Pack Insolvency Resolution Process (PPIRP) for Real Estate Developers: Challenges and Road Ahead

Aimed at providing an efficient alternative insolvency resolution process for MSMEs that could ensure quicker, cost-effective and value maximizing outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses, and which preserves jobs, the President of India made the provision of Pre-Packaged Insolvency Resolution Process (PPIRP) for MSMEs through an ordinance on April 04, 2021. The Lok Sabha passed Insolvency and Bankruptcy Code (Amendment Bill) 2021 on July 26, which subsequently became the part of the IBC. In this article, author highlights various pros and cons of the PPIRP under the IBC regime and suggests some crucial reforms to make it a popular tool for resolution of MSME entities in India with a focus on Real Estate Sector.

Read on to Know More…

Vikram Kumar
The author is an Insolvency Professional (IP) Member of IIIPI. He can be reached at vikramau@gmail.com

1. Introduction

Experience gained from implementation of the Insolvency and Bankruptcy Code, 2016 (IBC or the Code) including evolution of the ecosystem, stabilization of the processes and growing jurisprudence, has prepared the ground for new initiatives to further improve the effectiveness of the Code. The onset of Covid 2019 pandemic with the attendant derailment of economy and the stress to various industries particularly Micro Small and Medium Enterprises (MSMEs), also fueled the thought process of the Central government on making the IBC simpler and faster, at least for the smaller businesses. It was felt that a Pre-Packaged Insolvency Resolution Process (PPIRP) may be the need of the hour under the broad framework of the IBC as a newer and as an additional option for distressed corporates, as the normal CIRPs would not yield the desired outcomes.

Almost all the industries, particularly MSMEs were severely impacted by the Covid-19 caused lockdowns. The government, with an objective to resolve the problem and provide relief to the MSMEs, constituted a sub-committee of Insolvency Law Committee (ILC) vide order dated June 24, 2020 to prepare a detailed scheme for

implementing Pre-Pack and prearranged insolvency resolution process with the objective for aiding the existing insolvency framework by cutting costs and the reducing time taken in resolution process.[1] The PPRIP was expected to emerge as an innovative rehabilitation method for corporate debtors in MSME sector as it has good aspects of both informal (out of court) and formal (judicial) insolvency proceedings. The Sub-committee submitted its report to the Government on 31st October 2021 and public comments were invited on the report of the sub-committee from 8th to 22nd Jan 2022. The Central Government through the IBC (Amendment) Ordinance, 2021 dated April 04, 2021, introduced PPIRP for MSMEs under the Code.

2. PPIRP for MSMEs

MSMEs are critical for Indian economy and contribute significantly to the Gross Domestic Product (GDP) and provide employment to a sizeable population. According to Confederation of Indian Industries (CII), there are 63.4 million MSMEs in India which contribute around 6.11% of the manufacturing GDP, 24.63% of the GDP from services activities, and 33.4% of India's manufacturing output. The MSMEs provide employment to around 120 million persons and contribute about 45% of the overall exports from India.

Covid-19 pandemic has impacted their business operations and exposed many of them to financial stress. Resolution of these corporate lives requires different treatment, due to the unique nature of their businesses and simpler corporate structures. Therefore, it was considered expedient to provide an efficient alternative insolvency resolution process under the Code for MSMEs, that ensures quicker, cost-effective and value maximizing outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses, and which preserves jobs[2].

3. Management of Corporate Debtor (CD) under PPIRP

Debtor-in-possession model is the preferred option for resolution of stressed corporates through Pre-Pack. This avoids inevitable shocks to the operations of the CD associated with CIRP where the control of the CD shifts from the management/promoters to the creditors i.e., creditor-in-possession model. During CIRP, the creditors' control and supervise the operations of the CD through Interim Resolution Professional (IRP) or Resolution Professional (RP). After, resolution, the CD is transferred to the Successful Resolution Applicant (SRA).

> **"The debtor-in-possession model for pre-packs as recommended by the sub-committee makes the process simpler and its closure quicker, while helping the CD operate at its optimum level during the process."**

Under Pre-Pack, the existing management/promoters continue to run the business and have a high possibility of retaining it through a Resolution Plan. This is necessary particularly when the business needs resolution and the market may not have many third parties interested in business of the CD. The debtor-in-possession model for pre-packs as recommended by the sub-committee makes the process simpler and its closure quicker, while helping the CD operate at its optimum level during the process. The CD shall also continue to be liable for all compliances, which are otherwise the responsibilities of the RP during a CIRP[3].

4. Role of Resolution Professional in PPIRP

While the business is run by the existing management, the RP should ensure that the CD is managed during the process in a manner which is not detrimental to the interest of the creditors. RP should be entitled to attend the meetings of the Board of Directors of the CD as an observer, without any voting rights, for this purpose[4]. He must act independent to the CD and the creditors, in the

[1] Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process, (https://www.ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf)

[2] Information brochure published by IBBI on Pre-Packaged Insolvency Resolution Process. (https://www.businesstoday.in/latest/economy-politics/story/govt-amends-ibc-introduces-pre-packaged-resolution-process-for-msmes-292649-2021-04-05)

[3] Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process (https://docslib.org/doc/2504581/pre-packaged-insolvency-resolution-process)

[4] Ibid (https://docslib.org/doc/2504581/pre-packaged-insolvency-resolution-process)

best interest of all stakeholders, while assisting the CD and creditors in negotiating and drafting the resolution plan. He should be responsible for collating and verifying the list of claims against the CD, constituting the CoC, and inviting resolution plans from prospective RAs, wherever required, in accordance with the laid down processes. He may file application before the AA as regards issues relating to conduct of the process, and not relating to the conduct of business of the CD.

The sub-committee considered the role of an Insolvency Professional (IP) during the pre-admission stage in negotiations and compliances. After deliberations, it concluded that the role of an RP in pre-admission stage and the manner of appointment of RP need not be defined and codified in the interest of flexibility. The stakeholders should have the liberty to use the services of an IP to help them in tasks prior to formal insolvency process. The sub-committee, therefore, recommended that the formal role of RP may begin with admission of the Pre-Pack, as it happens with CIRP[5].

5. PPIRP for Real Estate Entities

PPIRP is ideally suited to several stressed real estate companies as the Pre-Pack process under Explanation I of Section 54K of the IBC permits the filing of an application by a stressed CD jointly with any other person. Hence the process facilities early resolution of stressed real estate projects by the CD jointly with a financially stronger real estate company. Initial beneficiaries of PPIRP from Real Estate Sector are as follows:

(a) Loon Land Development Limited

NCLT, Principal Bench, New Delhi vide an order[6] on November 29, 2021, admitted the PPIRP application filed by Loon Land Development Limited. The company joined hands with M3M Construction Private Limited to provide a viable Base Resolution Plan (BRP) which was duly approved by the financial creditors in Form P4. This was probably the first case of a real estate entity availing the benefits of a PPIRP Process.

> **"The company joined hands with M3M Construction Private Limited to provide a viable Base Resolution Plan (BRP) which was duly approved by the financial creditors in Form P4."**

(b) Krrish Realtech Private Limited

Krrish Realtech Private Limited submitted an application for PPIRP jointly with Skyline Propcon Private Ltd, however the said application was later withdrawn by Krrish Realtech Private Limited. The NCLT permitted the withdrawal vide an order[7] February 22, 2022.

6. Challenges in Implementing Pre-Packs for Real Estate Entities

The present framework of PPIRP needs certain tweaking/modifications to enable smoother implementation of the process for real estate entities as explained below:

Assume X Ltd is a Real Estate company with 200 home buyers (financial creditors in a class) and is classified as an MSME as defined under Section 7(1) of the Micro, Small and Medium Enterprises (MSMEs) Development Act, 2006. X Ltd has committed a default more than ₹ 10.00 Lakhs[8]. It is also assumed that X Ltd meets all the eligibility conditions as defined under Section 54A (2) of the Code. It is also assumed that homebuyers are the only financial creditors. The steps involved in the Pre-Pack process and the challenges in implementation of the process in its present framework of the PPIRP are narrated below:

(a) First Step: The CD may seek the assistance of an IP and shall prepare a Base Resolution Plan (BRP) proposing a mechanism of resolving the stress so that the project can be completed. The said BRP must in principle be acceptable to the financial creditors. In case of a non-real estate entity, where a few banks are the financial creditors, it is possible

[5] Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process (https://insolvencytracker.in/2021/01/10/resolution-professionals-have-a-limited-yet-crucial-role-in-pre-pack-scheme/)

[6] NCLT Principal Bench, New Delhi: Reference No. (IB)-(PP)-03(PB)-2021 dated November 29, 2021.

[7] NCLT: Reference no. IB-PP-02/ND/2021 dated 22.02.2022

[8] Gazette Notification no. S.O. 1543(E) dated 09.04.2021, the minimum amount of default for a PPIRP process is ₹ 10.00 Lacs. This Notification has been issued under proviso to Section 4 of the IBC.

for the promoters to get the buy-in on the BRP with a few modifications. However, obtaining buy-in of the BRP from a large group of unorganized home buyers is a herculean task.

(b) Second Step: Seeking approval of the name of the RP to be appointed in the process- Section 54A(2)(e) read with Regulation 14(4) of the PPIRP Regulation stipulates convening a meeting of the CoC (200 home buyers in the example given above) and seeking approval by a vote share of at least 66% by the unrelated financial creditors. The name of the RP is to be proposed by financial creditors who are not related parties of the CD and have not less than ten per cent of the value of the total financial debt. This exercise in itself can be challenging as narrated below:

(i) There could be circumstances where no single homebuyer has a ten or more percent of the value of the total financial debt due to which RP may have to be proposed by several creditors jointly. The Regulation is silent as to whether the RP can be proposed jointly by several financial creditors.

"There could be circumstances where no single homebuyer has a ten or more percent of the value of the total financial debt due to which RP may have to be proposed by several creditors jointly."

(ii) A meeting of the unrelated financial creditor is to be convened just for seeking approval of the appointment of the RP. The financial creditors have to give the approval in Form P3. The CD has to call for a meeting of all the 200 home buyers wherein getting the vote of 66% or more from home buyers can itself be challenging. Whether provisions of Section 25A(3A) of the Code will be applicable in case say only 50% of the homebuyers vote on the proposal is a grey area and needs clarity.

(iii) It is important to note that the Authorized Representative (AR) can only be appointed post appointment of the RP, hence the CD has no choice but to convene the meeting of all the home buyers.

(c) Third Step: The CD has to convene second meeting of the unrelated financial creditors (200 home buyers in this case, not being related parties of the CD) for seeking approval by a vote of at least 66% for the filing of an application for initiating PPIRP as per extant provisions of Section 54A (3) read with Regulation 14 of the PPIRP Regulations. The approval of the unrelated financial creditors is to be obtained in Form P4. The need for calling the second meeting of the unrelated financial creditors arises, as the notice for calling the said meeting requires the applicant to attach Form P6 along with the said notice. It is pertinent to refer to Form P6 at this stage. Form P6 is the form for "Declaration by the Director" as per Section 54A(2)(f) of the Code. One of the requirements of Form P6 is that the applicant is required to specify the name of the RP appointed by the unrelated financial creditors. Hence RP has to be appointed prior to calling the said meeting. Therefore, two meetings of the CoC have to be compulsorily convened, (i) First meeting for approval of the name of the RP to be appointed and (ii) Second meeting for approval for filing of an application for initiating PPIRP. There is a lack of clarity in the Regulations with respect to the following:

(i) Whether the AR has to be appointed by the RP prior to convening the second meeting of the unrelated financial creditors or otherwise.

(ii) The primary duty of the RP under Section 54B i.e., before initiating PPIRP is to confirm that whether the CD meets the requirements as per Section 54A, and the BRP conforms to the requirements referred to in clause (c) of subsection (4) of Section 54A. Without the approval of the unrelated financial creditors for filing of an application for PPIRP, no meaningful duty can be undertaken by the RP. Therefore, more clarity needs to emerge about the duties of the RP prior to the initiation of pre-packaged insolvency resolution process.

"The approval for "Appointment of the RP" and "Filing of an Application for Initiating PPIRP" should happen in the same meeting."

The present framework needs to be suitably modified to enable the following:

(i) The approval for "Appointment of the RP" and "Filing of an Application for Initiating PPIRP" should happen in the same meeting.

(ii) The Regulation can specifically provide that in case of class of creditors (like home buyers), the AR must be appointed prior to convening the meeting for the appointment of the RP, so that the process can be conducted smoothly.

(iii) The provisions of Section 25A(3A) of the Code should be applicable for approval of "Appointment of the RP in Form P3" and "Filing of an Application for Initiating PPIRP in Form P4".

7. Other Challenges in the Implementation of PPIRP

The framework for pre-packs as envisaged under the Code casts several responsibilities and obligations on the CD. It is prerequisite for the CD to come forward with clean hands, honest intent and purpose as it provides an opportunity to reorganise and resurrect its business with a potential haircut. The lack of trust between the CD and the financial creditors is the biggest challenge in making the PPIRP process a success. The PPIRP framework is designed to assist the promoters of MSMEs to overcome genuine business stress only. The other challenges in successful implementation of the PPIRP are detailed below:

(i) PPIRP process can only start if the unrelated financial creditors with 66% or more votes approve for filing of an application to initiate PPIRP in Form P4. Hence getting this approval itself becomes a challenge, as the financial creditors would insist on improving the amount proposed for payment under the base resolution plan by the CD to the financial creditors. This is because creditors are generally under the impression that the CD is not honest, and more amounts can be obtained from management/ promoters.

(ii) CD will normally propose impairment of the debts of financial creditors, since if the CD impairs the debts of operational creditors in the BRP, it is mandatory under Section 54K (4) of the Code for the CoC to invite resolution plans from prospective resolution applicants, i.e., a process of value maximisation has to be compulsorily undertaken. The FCs are very sceptical to approve a plan which proposed no haircut for the OCs but impairs the debts owed to the FCs.

(iii) The time period for approval of a resolution plan under PPIRP is only 90 days which is too short for a successful and a meaningful value maximisation process to be undertaken by the CoC. The financial creditors might feel that the prospective resolution applicants will not have the sufficient time to effectively participate in the value maximisation process. This might act as a deterrent where the value offered by the CD under a BRP is not to the satisfaction of the FCs. The timelines under PPIRP needs reconsideration as it is too optimistic and difficult to be implemented in practice.

(iv) The COC may decide during the PPIRP process to convert the said process into a CIRP process, this creates a fear for the CD that he might lose control over the CD.

"The COC may decide during the PPIRP process to convert the said process into a CIRP process, this creates a fear for the CD that he might lose control over the CD."

(v) If during the PPIRP process, avoidance transactions (i.e., preferential, undervalued, fraudulent etc) are observed by the RP, in all likelihood the CoC shall decide to vest the management of the CD under the RP. In this scenario, as per Section 54N(4) of the Code, in all likelihood the PPIRP process will be terminated and CD shall go for liquidation, this acts as a deterrent for the CD to initiate a PPIRP Process. Hence the Regulation must provide for a forensic audit to be conducted by the unrelated financial creditors prior to initiating a PPIRP process. Only after the CD gets a clean

forensic audit report, process should be initiated to overcome such uncertainties.

(vi) Maintaining the confidentiality of BRP and the terms of what constitutes a Significantly Better Resolution Plan (SBRP) is another challenge. This is because the BRP given by the CD cannot compete with a SBRP as per Section 54K (10) of the Code and the promoters shall lose control over the CD. Hence it is critical to maintain the confidentiality of the BRP and the terms of SBRP from the prospective resolution applicants.

8. Impediments in Making PPIRP a Popular Tool for Resolution

(a) Lack of awareness and knowledge about the PPIRP process: A CD being an MSME entity alone can initiate the process of PPIRP, hence it is crucial that the MSME entities are well versed with the nuances of a PPIRP process, its benefits and pitfalls. However, there is very little awareness amongst the MSME entities about the PPIRP, which acts as a major impediment in promoting this important tool for resolution of financial stress in MSME entities. There is therefore an urgent need to educate and create awareness amongst MSME promoters through MSME industry associations about the PPIRP.

(b) Need for a policy framework: Most of the banks and financial institutions don't have an internal policy and framework in place to approve an application for PPIRP. As the approval for PPIRP process has to be given in Form P-4 at a preinitiation stage, it becomes difficult for the public sector banks and financial institutions to approve an application for PPIRP.

Indian Bank's Association (IBA) may take the initiative for creating a common policy framework for implementing the PPIRP process amongst its member banks. This shall go a long way in promoting PPIRP as a tool for resolution of financially stressed MSMEs.

MSME industry bodies and insolvency practitioners need to be consulted to understand their concerns as to why as the MSMEs have not actively considered the PPIRP process as a tool for resolution. Through a consultation process and with a little bit of tweaking, PPIRP can become the preferred tool for resolution of financially stressed MSME industry.

Supreme Court upholding the status of Homebuyers as Financial Creditors: Paving a Roadmap towards Beneficial Legislative Jurisprudence

The IBC, 2016 makes a decent attempt in consolidating the different laws operating in the field of recovery and resolution of stressed assets. It is hailed as the success story of India's economic reforms[1]. Since the law is in its nascent stage, its jurisprudence is developing. Upholding the status of homebuyers as financial creditors by the Supreme Court has come as a cushion to the scores of grieving homebuyers in the country who have invested their life savings for fulfilling their dream of owning a home but had been left in the lurch by the builders. The paper tries to analyse the amendments made to the Code in relation to homebuyers in the light of judgments of the courts and implications thereof.

Read on to Know More…

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1. Introduction

Enactment of the Insolvency and Bankruptcy Code, 2016 (IBC or Code) is a serious effort on the part of the Government of India to increase the ease of doing business in the country. India is in the process of laying foundations of a mature market economy. This involves well drafted modern laws suitable for the current market scenario and repealing the obsolete ones[2].

With a view to consolidate and amend various laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such person, the Government enacted the IBC in 2016[3]. As the law is evolving and developing, the government is keeping a close watch on the outcome of the proceedings in the courts of law, and it has been seen that it is quick in plugging the loopholes. The present article attempts to analyse the position of homebuyers under the IBC regime.

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[1] Hon'ble Vice President Mr. M. Venkaiah Naidu at the inauguration of Insolvency Research Foundation on August 2, 2019 quoted in quarterly newsletter of Insolvency and Bankruptcy Board of India Vol.12 Issue July-Sept.2019.
[2] The Report of the Banking Law Reforms Committee, 2015, Vol.1, available at: ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited on Nov. 19, 2019).
[3] Insolvency and Bankruptcy Code, 2016, No. 31 Acts of Parliament, 2016 (India).

A company has different types of creditors each of whom have different rights and motivations. Accordingly, when insolvency resolution process commences, their concerns are different and have to be differently accounted for. Insolvency regimes make different accommodation for different creditors[4].

IBC recognises three types of creditors in the order of ranking with respect to rights and powers as Financial Creditor (FC), Operational Creditor (OC) and other creditors.

The Code defines financial debt as a debt including interest which is disbursed against the consideration for the time value of money. It includes borrowed money against interest, issue of bonds, notes, debentures, loan stock, receivables sold or discounted or any amount raised under any other transaction having the commercial effect of borrowing[5]. The amendment made in the section which is under consideration in this article, is by way of explanation attached to the definition of the financial debt[6] which provides that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing[7]. The expression allottee and real estate project have been attributed the same meaning as in Real Estate (Regulation and Development) Act, 2016.

Operational debt would include a claim in respect of goods or services including employment or any payment due under any law or payable to the government or any local authority[8].

2. Judicial Decisions on the Issue of Homebuyers

Court Decisions Before the Amendment in the Code on the Position of Homebuyers

Section 6 of the Code provides in case a Corporate Debtor (CD) commits a default, an FC, or an OC, or the CD itself can initiate Corporate Insolvency Resolution Process (CIRP)[9].

In *Col. Vinod Awasthy Vs. A.M.R Infrastructure Ltd.*[10], NCLT rejected the petition for initiation of insolvency proceedings against the developer on the ground that home buyer cannot be considered as OC under the Code. The amount paid to the developer does not fall within the definition of operational debt as the same is not a claim in respect of provision of goods or services, any employment dues, or any statutory dues payable to government or any local authority.

However, in cases where contract between the parties provided home buyers with guaranteed assured returns by the developer, they were held to be financial creditors.[11]

Given that in most cases, the home buyers were considered neither as financial creditors nor as operational creditors, they could not take any action. Further, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 initially provided the procedure for filing claim forms by the financial creditors and operational creditors only. Home buyers faced difficulties even in filing their claims as their claims came under the category 'other creditors'. When the plight of the home buyers came to the fore, the Insolvency and Bankruptcy Board of India (IBBI) amended the Regulations with respect to forms for filing claims, to include the claims of 'other creditors.[12]

2.1. What prompted the Government to Amend the Code and include Homebuyers as Financial Creditors?

Lakhs of homebuyers across the country especially in the NCR region were facing a lot of uncertainty with regard to the delivery of possession of their flats and apartments. In some cases, possession is being delayed by more than ten

[4] Insolvency and Bankruptcy Board of India Centre for Legal Policy, "Understanding the Insolvency and Bankruptcy Code, 2016: Analysing developments in jurisprudence", (June 2019) www.ibbi.gov.in (last visited Nov. 16, 2019).
[5] Insolvency and Bankruptcy Code, 2016, s. 5(8)(f).
[6] Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 No. 26, Acts of Parliament, 2018 (India).
[7] Ibid. section 5 (8)(f) Explanation added by the Amendment Act.
[8] Section 5 (21) of Insolvency and Bankruptcy Code, 2016.
[9] Insolvency and Bankruptcy Code, 2016, s. 6- Persons who may initiate corporate insolvency resolution process.
[10] 2017 SCC OnLine NCLT 16278.
[11] *Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd.*, 2017 SCC OnLine NCLAT 859: Company Appeal (AT) (Insolvency) No.7 of 2017; *Anil Mahindroo Vs. Earth Organics Infrastructure,* NCLAT New Delhi, 2017 SCC OnLine NCLAT 216: Company Appeal (AT) (Insolvency) No. 74/2017.
[12] Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Corporate Persons) 2016, Regulation 9A.

years. Hapless buyers had no rescue except the long-drawn litigations in the consumer forums for the deficiency in service by the builders.

The Supreme Court in *Bikram Chatterji Vs. U.O.I.*[13] delivered a landmark judgment protecting the interest of distraught home buyers of Amrapali Group in Noida and Greater Noida. The Court in strong words observed that they are the victims of collusion of the statutory authorities, bankers, and the developer. The builder was granted land lease by just paying 10% of the lease amount. The project was financed by the bankers without verifying the status of lease dues. The forensic audit proved diversion of funds by the builder to its other companies and projects. Since the home buyers were not classified into any specific category of creditors under the IBC, they had no rights under the law. It was felt by the court that if in the insolvency resolution process, the home buyers are left in the last category of creditors, this would amount to gross injustice to them. The court, therefore, gave relief to the thousands of home buyers by directing NBCC to complete the remaining projects and cancelled the registration of Amrapali Group under RERA.[14]

"It was felt by the Supreme Court that if in the insolvency resolution process, the home buyers are left in the last category of creditors, this would amount to gross injustice to them."

In another case similar to the *Amrapali Group,* several home buyers who had invested in the projects floated by the Jaypee Infratech Ltd. (JIL), under the holding company of Jayprakash Associates Ltd. (JAL), had to knock the doors of the Supreme Court to protect their interests against the resolution proceedings initiated by IDBI Bank under Section 7 of the Code[15] in National Company Law Tribunal (NCLT) against JIL's[16] Interim Resolution Professional (IRP), appointed by the court called for submission of claims by the stakeholders. The claim of home buyers was placed under the heading 'claim by other creditors' which came in the lowest hierarchy after financial creditors, operational creditors, employees, workmen etc. This led to a wide unrest and panic among the home buyers. They challenged the validity of the provisions of the Code concerning to their rights.

The court observed that IBC does not contain an adequate recognition of the interest of home buyers in the resolution process who are the vital stakeholders.

To find a suitable solution, the government constituted an Insolvency Law Committee (ILC) under the Chairmanship of Injeti Srinivas. The Committee was of the view that non-inclusion of home buyers either in the category of financial creditors or operational creditors deprives them of some of their important rights, viz, right to initiate CIRP, right to be represented on the Committee of Creditors (CoC) and in case of liquidation of the CD, the guarantee of receiving at least the liquidation value under resolution plan.[17]

The concerns of home buyers were recognised through an Amendment Ordinance, 2018[18] wherein home buyers have been brought within the purview of financial creditors. Being part of financial creditors, made them necessary constituent of committee of creditors (CoC) and will also have voting rights in proportionate to the share of interest in the financial debt owed by the CD. The court in the *Jaypee case* gave relief to the thousands of home buyers by recognising their claims under the amended definition of the Financial Creditor (FC).

2.2. Challenge to the Constitutionality of the Amendment: The constitutional validity of the amendment[19] was challenged in the Supreme Court by a number of real estate companies by filing a large number

[13] 2019 SCC OnLine SC 901.
[14] Pranav Shroff, IBC amendment gives voice to beleaguered homebuyers, Vol.12 Issue 5 India Business Law Journal 53 (2018).
[15] Initiation of corporate insolvency resolution process by financial creditor.
[16] *Chitra Sharma Vs. Union of India*, (2018) 18 Supreme Court Cases 575: 2018 SCC OnLine SC 874.
[17] The Insolvency Law Committee Report 2018, March 26, 2018.
[18] Insolvency and Bankruptcy (Amendment) Ordinance, 2018: a consensus had emerged among the law makers that further fine tuning of the Code would be required. The Government constituted an Insolvency Law Committee to review the functioning and implementation of the Code. The recommendations of the Committee were examined by the Government and it was accordingly decided to amend the Insolvency and Bankruptcy Code, 2016. Since Parliament was not in session and immediate action was required to be taken, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated by the President on the 6th day of June, 2018.
[19] Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018 (India), s. 5(8)(f) Explanation: any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

of writ petitions on the ground of violation of Articles 14 and 19 of the Constitution of India.[20]

The builders argued that allottees should not be equated to the status of financial lenders as they are not interested in the viability and health of the CD or its business but only with the delivery of their flat or the apartment. A trigger happy allottee aggrieved by the delay in possession of his flat may invoke the process, much to the chagrin of other allottees and stakeholders. A perfectly good management can be removed and replaced at the instance of such allottee and in worst case if resolution is not successful, will eventually lead to the death of the corporate through liquidation. Liquidation of a company can never be in the interest of any one lest the bulk of allottees. The amendment was challenged as arbitrary and discriminatory in nature, being excessive and disproportionate to the ill it seeks to remedy to the ill it may beget.

The builders further argued that the allottees in case of delay of delivery or any other grievance can seek the remedy under RERA[21] which is a sector specific legislation and provides comprehensive mechanism for adjudication of disputes between builders and buyers.

Legal points in previously decided cases were also referred to by the parties, namely, in *Innoventive Industries Vs. ICICI Bank*[22] the court had distinguished between FC and OC in terms of scope of their powers within the law. In case of default, the OC has to give a demand notice to the CD who can within a stipulated time period of ten days, bring to the notice of the OC existence of any pre-existing dispute/pending suit or arbitration proceedings. Such pre-existing dispute or litigation is enough to bring the CD out of the clutches of the Code. But in case of default against FC, existence of any pre-existing dispute or litigation will not be a bar for initiating the insolvency proceedings. The Adjudicating Authority (AA) i.e., NCLT, has to merely satisfy itself that the debt is due. This distinction highlights the superiority of financial creditors over operational creditors.

Swiss Ribbons Vs. Union of India[23] was also referred to by the builder lobby, wherein the court had laid down several characteristics of financial creditors and in terms of those features, the builders tried to impress upon the court that real estate allottees can at best be categorised as operational creditors and not as financial creditors.

Giving judgment in favour of the homebuyers, the Supreme Court upheld the validity of the amendment and held that there is no infringement of Article 19 of the Constitution. The amendment is made in public interest and no unreasonable restriction is placed on the fundamental rights of the petitioners under Article 19(1)(g). No person is deprived of his property without the authority of a constitutionally valid law.

Post amendment to the Code, NCLT started the CIRP against the defaulting builder in *Mrs. Rachna Singh. Vs. M/S Umang Realtech Pvt. Ltd.*[24] on the application of home buyer treating her as an FC.

> **"Finally, the Supreme Court opined that the amendment is in public interest and no unreasonable restriction is placed on the fundamental rights of the petitioners under Article 19(1)(g)."**

2.3. Benefits of the Amendment to the Homebuyers

1. Prior to the amendment the home buyers were neither recognised as financial creditors nor as operational creditors. The amendment has upgraded their status to that of financial creditor.
2. The amount raised from a home buyer in a real estate project now comes under the definition of financial debt as a result, they are entitled to invoke insolvency proceedings (irrespective of a dispute between builder and the buyer).

[20] *Pioneer Urban and Land Infrastructure Co. Ltd. Vs. Union of India* (2019) 8 Supreme Court Cases 416: (2019) 4 Supreme Court Cases (Civ) 1: 2019 SCC OnLine SC 1005.
[21] Real Estate (Regulation & Development) Act, 2016, No. 16, Acts of Parliament 2016 (India).
[22] (2018)1 SCC 407: 2017 SCC OnLine SC 1025.
[23] (2019)4 SCC 17.
[24] C.P. No. (IB) 1564(PB)/2018, ibbi.gov.in/orders/nclt.

3. The home buyers will have due representation in the CoC through their authorised representative and voting rights in proportionate to the amounts due.

4. In the event of liquidation, they will now be placed at par with the financial creditors.

2.4. Further Amendment

The Code has been further amended by adding a proviso in Section 7, which provides the requisite minimum strength of allottees who are eligible to initiate the insolvency proceedings, which is, either minimum hundred allottees of the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project whichever is less, are eligible to file the insolvency resolution process against the defaulting real estate corporate.[25] Further, where an application for initiating CIRP against a CD has been filed by such FC and the same has not been admitted by the AA before the commencement of the Amendment Act, such application is to be modified to comply with these requirements within thirty days of this amendment, failing which the application shall be deemed to have been withdrawn before its admission.

The Supreme Court has upheld the validity of this amendment also requiring a minimum threshold limit to initiate the process. The court observed that in a real estate project there can be hundreds or even thousands of allottees and if a single allottee as a FC is allowed to make an application under Section 7, the interests of other allottees may be put in peril.[26]

2.5. Homebuyers as Secured or Unsecured Financial Creditors

Whether homebuyers are considered as secured or unsecured financial creditors is another important area of concern which needs attention. The term 'secured creditor' as defined in the code means a creditor in whose favour security interest is created.[27] Security interest means any

right, title or interest/claim to a property created in a transaction for security of the payment of the debt or the loan amount. It includes mortgage, charge, hypothecation, assignment or any encumbrance on a property.[28] The property on which the charge is created is known as the 'security' and the person in whose favour such charge is created is called as 'secured creditor'.

"Whether homebuyers are considered as secured or unsecured financial creditors is another important area of concern which needs attention."

In *Flat Buyers Association Vs. Umang Realtech Pvt. Ltd.*[29] the NCLAT New Delhi observed that the infrastructure/ apartments in a real estate project are constructed for the homebuyers by the CD. These assets which are security for secured creditors cannot be distributed among them. On the contrary, the assets are liable to be transferred to the allottees (homebuyers) who are the unsecured creditors, and not to secured creditors such as banks and financial institutions. Moreover, the banks as secured creditors would not like to take the flats/apartments in lieu of the money disbursed by them, whereas the unsecured creditors (here homebuyers) have rights over these flats and apartments.

[25] Insolvency and Bankruptcy Code (Amendment) Act, 2020, No. 1, Acts of Parliament, 2020 (India).
[26] *Manish Kumar Vs. U.O.I.* 2021SCC OnLine SC 30.
[27] Insolvency and Bankruptcy Code, 2016 s. 3(30).
[28] Insolvency and Bankruptcy Code, 2016, s. 3(31).
[29] 2020 SCC OnLine NCLAT 1199 see paras 11 & 12.
[30] Company Appeal (AT) (Insolvency) No. 1056 of 2019.

The observations of the NCLAT in the above case has been reiterated by it in its another decision in *Rajesh Goyal Vs. Babita Gupta*.[30]

The Supreme Court in *Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority* while upholding the decision of Rajasthan High Court, held that complaint against the bank can be filed under RERA if the bank takes the possession of the project as a secured creditor under SARFAESI Act, on account of default of the promoter. The court has rightly held that if there is a conflict between RERA and recovery proceedings under SARFAESI Act, the former will prevail.[31]

RERA provisions were discussed in the High Court judgement. In terms of clause (h) of sub-section 4 of Section 11 of the RERA Act, 2016, after a promoter executes an agreement for sale of an apartment, he shall not mortgage or create a charge on such apartment, or building and if any such mortgage is created it shall not affect the right and interest of the allottee who has taken or agreed to take such flat/apartment.

Many a times, homebuyers also take loan for the purchase of their flats. In that case, they mortgage their flat in favour of the bank who has given the loan. Although homebuyers are unsecured creditors, but it should be ensured that their interests are protected. This can be seen through beneficial judicial interpretations of the provisions of the different statutes operating in the field, in the interest of homebuyers.

3. Conclusion

The aim of the IBC is value maximisation of the assets of the CD through time bound resolution. Value-maximisation is often a function of time, as value may tend to erode with passage of time. The process of negotiation in insolvency resolution must be designed in such a way that not too many stakeholders are involved as the same may lead to unnecessary delays. However, at the same time the law must be cautious that it should not ouster those stakeholders who have primary interest. Home buyers are such primary stakeholders in a real estate project whose rights needed to be safeguarded. If bankers are interested in completion of the project for a return on their investments, then so are the allottees, for they too had invested their lifetime savings in the dream of a house. The minimum threshold limit is rightly prescribed so that the resolution process is not used as recovery mechanism.

The jurisprudence on the law is continuously developing. In a recent judgment of the Supreme Court, it has been held that where proceedings are initiated by the homebuyers under RERA, their rights will prevail over rights of bank as a secured creditor under SARFAESI.[32]

> **"If bankers are interested in completion of the project for a return on their investments, then so are the allottees, for they too had invested their lifetime savings in the dream of a house."**

Concluding through analysis of various judicial decisions, the homebuyers have thus now been given sufficient safeguards while at the same time legislature has tried to balance the competing interests of the home buyers as well as the real estate developers. The new insolvency regime is designed to reduce the possibility of allowing some stakeholders to benefit at the expense of others. Therefore, the amendments are also in tune with objectives as enshrined in the preamble to the Code.

[31] Editorial, "Homebuyers, Banks on the Same Side", *The Economic Times, Feb.* 16, 2022.

[32] *Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority*, Special Leave to Appeal (C) Nos. 1861-1871/2022.

Moratorium under CIRP: Statutory Provision Under IBC & Judicial Interpretations

Moratorium denotes the 'cooling period' which starts with the commencement of CIRP and ends when the Resolution Plan is either accepted or rejected by the Adjudicating Authority and if there is no resolution plan then liquidation petition is filed by the IRP/ RP. It gives time to the Corporate Debtor a chance to revive and come out of the financial distress by giving protection from recovery of pending debts and litigations etc.

The present article analyses the various provisions of Section 14 of the IBC and related judicial interpretations made by various courts which have shaped the concept of moratorium under the IBC regime as it exists today. ***Read on to Know More…***

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1. Meaning of Moratorium

The word 'Moratorium' has not been defined under the Insolvency and Bankruptcy Code, 2016 (IBC/ the Code). Moratorium is an authorized postponement in the deadline for paying a debt or performing an obligation. This authorized period of delay or suspension of a specific act is termed as moratorium. Generically moratorium also means the time period allowed before repayment or payment of interest on a loan commences[1]. Moratorium means a legal authorization to a debtor to postpone payment for a certain time[2].

2. Rationale behind the Moratorium

One of the goals of having an insolvency law is to ensure the suspension of debt collection actions by the creditors and provide time for the debtors and creditors to re-negotiate their contract. This requires a moratorium period in which there is no collection or other action by creditors against debtors[3].

In the matter of *Power Grid Corporation of India Limited Vs. Jyoti Structures Limited,* the Delhi High Court held

[1] *National Hydroelectric Power Corporation Ltd Vs. The Chairman Punjab State Electricity Board,* Appellate Tribunal for Electricity, Appeal No. 130 of 2006, dated 10th December, 2009

[2] Section 3(f) of Andhra Pradesh Farmers Agricultural Debts (Moratorium) Act, 2004.

[3] Para 6.4.1 of Banking Law Reforms Committee, Volume I, Report-November, 2015.

that the object of the IBC is to ensure that the Corporate Debtor (CD) receives relief during the "standstill" period, protecting its assets from being diminished, and alternatively using this period to strengthen its financial position[4].

In the matter of *Power Grid Corporation of India Limited Vs. Jyoti Structures Limited,* Delhi High Court held that moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of CD.

3. When Moratorium starts [Section 13(1)(a)]

The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order declare a moratorium for the purposes referred to in section 14. Section 14(4) states that the order of moratorium shall have effect from the date of such order. The insolvency commencement date starts from the date when the Adjudicating Authority admits the application filed as mentioned above for Corporate Insolvency Resolution Process (CIRP).

4. Effect of Moratorium on CIRP

4.1. Prohibition of Suits etc. [Section 14(1)(a)]

On the insolvency commencement date the Adjudicating Authority shall by order declare for prohibition of:

- Institution of suits
- Continuation of pending suits
- Proceedings against the corporate debtor
- Execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.

4.1.1. Moratorium declared under the Code supersedes the moratorium already imposed by any State Government Authority

In the matter of *M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.*[5] the Supreme Court opined that Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (MRU Act) is repugnant to IBC as under MRU Act, State Government may take over management of undertaking and impose moratorium in the same manner as contained in IBC. However, moratorium imposed under MRU Act is discretionary, whereas moratorium imposed under IBC relates to all matters listed in section 14 and follows as a matter of course. The non-obstante clause of IBC will prevail over non-obstante clause in MRU Act, hence MRU Act cannot stand in way of corporate insolvency resolution process under IBC. Therefore, application filed by respondent bank had rightly been admitted.

4.1.2. No Arbitration Proceedings could go on

In the matter of *Alchemist Asset Reconstruction Company Ltd Vs. M/s. Hotel Gaudavan Pvt. Ltd. & Ors*[6], the Supreme Court ordered that the mandate of the Code is, the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors. The effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

4.1.3. Continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code.

In the matter of *Power Grid Corporation of India Limited Vs. Jyoti Structures Limited,*[7] Delhi High Court held that moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of CD. Continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code. The use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability. The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).

4.1.4. Moratorium will not affect any suit pending before the - Supreme Court under Article 32 or pending before the High Court under Article 226 of the Constitution of India

In the matter of *Canara Bank Vs. Deccan Chronicle*

[4] OMP(COMM.) 397/2016 dated 11th December, 2017
[5] Civil Appeal Nos. 8337-8338 of 2017, dated 31st August, 2017
[6] Civil Appeal No. 16229 of 2017 dated 23rd October, 2017.
[7] O.M.P. (COMM)397/2016 dated 11th December, 2017.
[8] Company Appeal (AT)(Insolvency No. 147 of 2017 dated 14th September, 2017.

Holdings Limited[8], the NCLAT ordered that 'moratorium' will not affect any suit or case pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136 of Constitution of India. 'Moratorium' will also not affect the power of the High Court under Article 226 of Constitution of India. However, so far as suit, if filed before any High Court under original jurisdiction which is a money suit or suit for recovery, against the 'corporate debtor' such suit cannot be proceeded after declaration of 'moratorium, under Section 14 of the I&B Code.

4.1.5. Whether adjudication of a counter claim would be liable to be stayed by moratorium

In the matter of *SSMP Industries Ltd Vs. Perkan Food Processors Pvt. Ltd*,[9] the High Court of Delhi opined that under Section 14(1)(a) of the Code, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor". A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims, but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed, and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.

4.1.6. Moratorium prohibits proceedings, but such proceedings do not include prosecution

In the matter of *Mr. Ajay Kumar Bishnoi, Former Managing Director M/s.Tecpro Systems Ltd Vs. M/s.Tap Engineering,*[10] the CD underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the CD was approved with a change in management and control. The MD of the erstwhile CD sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include prosecution.

4.1.7. Moratorium is not applicable to criminal proceedings under the Prevention of Money Laundering Act, 2002

In the matter of *Varrsana Ispat Limited through the Resolution Professional Mr. Anil Goel Vs. Deputy Director, Directorate of Enforcement*[11], the NCLAT opined that Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the 'Prevention of Money Laundering Act, 2002' (PMLA) is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Since the PMLA or provisions therein relates to 'proceeds of crime', Section 14 of the Code is not applicable to such proceeding.

"In the matter of Varrsana Ispat Limited (2019), the NCLAT opined that Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding."

4.1.8. Quasi-judicial proceedings are not barred

In the matter of *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors*[12]. the Supreme Court held that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, however, they would not have jurisdiction to adjudicate upon disputes, specifically when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. The Apex Court clarified that many statutes provides for a detailed mechanism for the assessment of the statutory dues (viz: Section 144 to 148 of the Income Tax Act, 1961) and such quasi-judicial proceedings are not barred by the moratorium declared under section 14(1)(a) of the IBC.

4.2. Prohibition of transferring of assets by the corporate debtor [Section 14(1)(b)]

On the insolvency commencement date the Adjudicating Authority shall by order declare for prohibition of:

- Transferring
- Encumbering
- Alienating
- Disposing off

[9] CS(COMM) 470/2016 & CC(COMM) 73/2017, dated 18th July, 2019.
[10] CRL OP (MD) Nos. 34996 of 2019, dated 9th January, 2020.
[11] Company Appeal (AT) (Insolvency) No. 493 of 2018, dated 2nd May, 2019.
[12] Civil Appeal No. 9170 of 2019 dated 3rd December, 2019

by the corporate debtor any of its assets or any legal right or beneficial interest therein.

4.3. Prohibition of enforcement of security interest under SARFAESI [Section 14(1)(c)]

On the insolvency commencement date the Adjudicating Authority shall by order declare for prohibition of:

- Any action to foreclose
- Recover
- Enforce any security interest

created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).

4.3.1. High Court not to proceed with the auction of the CD

In the matter of *Mr. Anand Rao Korada, Resolution Professional Vs. M/s Varsh Fabrics (P) Ltd. and Ors.*[13] the Supreme Court held that in view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the corporate debtor Respondent No. 4 herein, once an order declaring moratorium was passed by the NCLT. The High Court passed the impugned order dated 14.08.2019 and 05.09.2019 after the CIRP had commenced in this case. If the assets of the Respondent No. 4 – Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders.

4.3.2. After commencement of CIRP, the IRP/RP can take possession of the assets of the CD from the Commissioners appointed by the DRAT

In the matter of *Amira Pure Foods Pvt Ltd Vs. Canara Bank & Ors*[14], the High Court of Delhi observed that the Debt Recovery Appellate Tribunal (DRAT) appointed two joint court commissioners to take over the properties of the CD. Soon after CIRP of the CD commenced, the IRP approached DRAT for taking over the properties of the CD. The DRAT took the view that given the moratorium under section 14 of the IBC, the continuation of proceedings against the CD is prohibited and therefore the relief sought by the IRP cannot be granted. The IRP approached the High Court on the same issue. The High Court observed that the DRAT was not powerless to modify its own order whereby the two court commissioners had been appointed to take over control of the assets of the CD. In the facts of the case, the DRAT should have recalled its order so that the IRP/RP could take over the assets of the CD in exercising its mandate under the IBC. The High Court set aside the order of the DRAT, recalled the appointment of two court commissioners, and permitted the IRP/RP to act under the IBC.

"In the matter of *Amira Pure Foods Pvt Ltd Vs. Canara Bank & Ors,* the High Court of Delhi set aside the order of the DRAT, recalled the appointment of two court commissioners, and permitted the IRP/RP to act under the IBC."

4.4. Prohibition of recovery of property by an owner occupied by the corporate debtor [Section 14(1)(d)]

On the insolvency commencement date the Adjudicating Authority shall by order declare for prohibition of the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

4.4.1. Corporate Debtor cannot be ejected from the premises during the moratorium

In the matter of *Srei Infrastructure Finance Ltd. Vs. Sundresh Bhatt, Resolution Professional Sterling Biotech Ltd.,*[15] the NCLAT observed that although 'A' and 'B' Wings premises of Lakshmi Towers do not belong to the 'Corporate Debtor', in view of Section 14(1) (d), the 'Corporate Debtor' cannot be ejected or disturbed from the premises, in question, during the 'Moratorium'.

4.4.2. What is prohibited under moratorium is only the right not to be disposed, but not the right to have renewal of the lease of such property

In the matter of *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors.*[16] the Supreme Court held that the purpose of moratorium is only to preserve the status quo and not to create a new right. Even Section 14(1)(d) of the IBC, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor since what is prohibited therein is only the right not to be disposed, but not the right to have renewal of the lease of such property.

[13] Civil Appeal Nos. 88008801 of 2019, dated 18th November, 2019.
[14] WP(C) 5467/ 2019 dated 20th May, 2019.
[15] Company Appeal (AT) (Insolvency) No. 781 of 2018, dated 31st July, 2019.
[16] Civil Appeal No. 9170 of 2019, dated 3rd December, 2019.

4.4.3. The term "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property.

In the matter of *Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority (MHADA) and Another*[17] the Supreme Court opined that when recovery of property is to be made by an owner under Section 14(1)(d), such recovery would be of property that is "occupied by" a corporate debtor. The expression "occupied by" would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression "possession", which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would be "occupied by" the developer.

It is clear that Section 14(1)(d) of the IBC, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property.

4.5. Corporate Debtor undergoing CIRP cannot be used as a ground to cancel licence, etc. - Explanation to Section 14(1)

The explanation to section 14(1) clarifies that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

"If the CD is undergoing CIRP any Authority shall not cancel any license etc., if the CD is paying the current dues during the moratorium period."

It means that while where the CD is undergoing CIRP any Authority shall not cancel any license etc. if the CD is paying the current dues during the moratorium period. However, as regards the pre-CIRP dues are concerned, such authority cannot insist for the same during the continuance of the moratorium period.

4.5.1. Declaration of Moratorium by AA shall not give right of termination of agreement by the creditor

In the matter of *Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain, Resolution Professional, S.K. Wheels Private Limited* the NCLAT held that once the moratorium was imposed by the Adjudicating Authority and appointment of Interim Resolution Professional (IRP) is made, the IRP will be at the helm of affairs of the company in view of the suspension of the Board of Directors of the 'Corporate Debtor'. As on the date of the imposition of moratorium the business and activities of the 'Corporate Debtor' will have to be carried out for smooth functioning of the company and the company shall remain as a going concern. The Resolution Professional shall perform the duties as per Section 25 of the I&B Code. Pursuant to these duties and to maintaining the CD as a going concern, which is the main object of the IBC , the application was filed seeking stay of the termination notice and direction to the appellant to continue the facilities of Agreement.

4.5.2. Moratorium applies on the pre-CIRP dues, even if demand is from Government

In the matter of *Union of India & Anr. Vs. Videocon Industries Ltd. & Ors.*[18], the NCLAT upheld the decision of the AA that during the period of 'Moratorium', Union of India, Ministry of Petroleum & Natural Gas, cannot recover any amount nor can issue demand notice to the Corporate Debtor through 'Interim Resolution Professional' to pay any amount.

4.5.3. Moratorium also applies on the Regulatory Authorities

In the matter of *Ms. Anju Agarwal Resolution Professional For Shree Bhawani Paper Mills Ltd. Vs Bombay Stock Exchange & Ors*[19], the NCLAT observed that Section 28A of the SEBI Act, 1992 being inconsistent with Section 14 of IBC, it held that Section 14 of IBC will prevail over Section 28A of the SEBI Act, 1992 and SEBI cannot recover any amount including the penalty from the CD. The 'Bombay Stock Exchange' for the same very reason cannot take any coercive steps against the 'Corporate Debtor' nor can threaten the 'Corporate Debtor' for suspension of trading of shares.

[17] Civil Appeal No. 12248 of 2018, dated 19th February, 2020.

[18] Company Appeal (AT) (Insolvency) No. 408 of 2019, dated 30th August, 2019.
[19] Company Appeal (AT) (Insolvency) No. 734 of 2018, dated 23rd April, 2019.

4.5.4. Penalty imposed by Regulator may be claimed as Operational Creditor but cannot be recovered during the Resolution Process

In the matter of *Maharashtra Seamless Ltd. Vs. Shri Padmanabhan Venkatesh & Ors*.[20], the NCLAT held that the statutory dues i.e. the dues to Central Government or the State Government arising under any law for the time being in force and payable come within the meaning of 'Operational Debt'. If penalty is imposed or amount is payable to the 'Securities Exchange Board of India' in such case, it may claim as an 'Operational Creditor' but cannot recover the same during the 'Resolution Process'.

4.6. Supply of essential goods or services to the corporate debtor [Section 14(2) & (2A)]

The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

> **"The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period."**

This sub-section states that essential supply of goods or services shall be continued since the IRP/RP has to run the company as a going concern. What is meant by 'essential supplies' has been defined under Regulation 32 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. It states that the essential goods and services as referred to in section 14(2) shall mean:

- electricity;
- water;
- telecommunication services; and
- information technology services,

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration: Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Discretion of IRP/RP to decide the essentiality of supply of goods or services

Sub-section (2A) of Section 14 provides that where the IRP/RP considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

4.6.1. There is no bar in the IBC/ its Regulations, towards the payment of current charges of essential services.

In the matter of *Dakshin Gujarat VIJ Company Ltd. Vs. M/s. ABG Shipyard Ltd. & Anr.*[21] the NCLAT held that from the provisions of IBC, no prohibition has been made or bar imposed towards payment of current charges of essential services. Such payment is not covered by the order of 'Moratorium'. Regulation 31 cannot override the substantive provisions of Section 14; therefore, if any cost is incurred towards supply of the essential services during the period of 'Moratorium', it may be accounted towards 'Insolvency Resolution Process Costs', but law does not stipulate that the suppliers of essential goods including, the electricity or water to be supplied free of cost, till completion of the period of 'Moratorium'.

4.6.2. Insurer to continue with insurance of the CD

In the matter of *Shyam Pradhan & Anr. Vs. Anand Chandra Swain*[22], the NCLAT held that merely, because the CIRP has been initiated against 'M/s. Kei-Rsos Maritime Limited'- by an Agent or Insurer- 'Ship Owners Protection Limited, London' (who has not moved any appeal) and as during the 'Corporate Insolvency Resolution Process', the 'Corporate Debtor' is to continue as a going concern, the NCLT, rightly passed the impugned order directing the Insurer to continue with the Insurance. If any amount is payable during the CIRP towards the instalment to the Insurer, the IRP will take care of the same.

4.6.3. The electricity generated by the CD which is undergoing CIRP, the Power Purchase Agreement cannot be terminated by the recipient of the electricity.

In the matter of *Gujarat Urja Vikas Nigam Ltd. Vs. Mr. Amit Gupta,*[23] the NCLAT held that to keep the 'Corporate Debtor' a going concern, which is generating electricity and supplying only to 'Gujarat Urja Vikas Nigam Ltd.', the Adjudicating Authority rightly asked 'Gujarat Urja Vikas Nigam Ltd.' not to terminate the 'Power Purchase Agreement' dated 30th April, 2010.

[20] Company Appeal (AT) (Insolvency) No. 220 of 2019, dated 8th April, 2019.

[21] Company Appeal (AT) (Insolvency) No. 734 of 2018, dated 23rd April, 2019.
[22] Company Appeal (AT) (Insolvency) No. 15 of 2020, dated 21st January, 2020.
[23] Company Appeal (AT) (Insolvency)No. 1045 of 2019, dated 15th October, 2019.

4.7. Moratorium is not applicable on certain transactions and on surety [Section 14(3)]

The provisions of sub-section (1) shall not apply to:

a. such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

b. a surety in a contract of guarantee to a corporate debtor.

4.7.1. Moratorium do not apply on the personal guarantor of CD

In the matter of *SBI Vs. V. Ramakrishnan & Anr*[24], the Supreme Court held that section 14 did not apply to the personal guarantor of the CD but only to the CD. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order.

> **In the matter of *SBI Vs. V. Ramakrishnan & Anr,* the Supreme Court held that section 14 did not apply to the personal guarantor of the CD but only to the CD.**

Further, in the matter of *Lalit Kumar Jain Vs. Union of India and Others*[25], the Supreme Court opined that that approval of a resolution plan does not ipso facto discharge a personal guarantor's (of a corporate debtor) liabilities under the contract of guarantee. The release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the guarantor's liability, which arises out of an independent contract.

4.8. Moratorium - When starts and ceases [Section 14(4)]

The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

5. Punishment for Contravention of Moratorium

Contravention on the part of the CD or its official [Section 74(1)]

Where the corporate debtor or any of its officer violates the provisions of section 14, any such officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable:

Punishment	Minimum	Maximum
(a) With Imprisonment	Three years	Five years
OR		
(b) With Fine	Rs. One Lakh	Rs. Five Lakh
Or with both of (a) and (b)		

Contravention on the part of the Creditor [Section 74(2)

Where any creditor violates the provisions of section 14, any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable:

Punishment	Minimum	Maximum
(a) With Imprisonment	1 years	5 years
OR		
(b) With Fine	Rs. One Lakh	Rs. One Crore
Or with both of (a) and (b)		

6. Summing up

Moratorium is a temporary suspension of the legal recourse of recovering the dues from the Corporate Debtor. In other words, it is a 'cooling period' which starts from the day, when an order of Adjudicating Authority of commencement of the CIRP against the Corporate Debtor is accepted and ends on the day, when the Resolution Plan is accepted or rejected by the Adjudicating Authority. The provision of moratorium as specified in the IBC is for a limited period while the period of moratorium under the erstwhile SICA regime, was not specified.

[24] Civil Appeal No. 3595 of 2018, dated 14th August, 2018.
[25] Transferred Case (Civil)No. 245/ 2020 dated 21st May, 2021

Role of Authorised Representative under IBC, 2016 – Neglected but Critical

The provision of Authorized Representative (AR) was introduced by IBBI via Regulation 16 A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations 2016 through a notification on July 03, 2018. Though an AR can be appointed for debenture holders and fixed depositors etc., the numbers and complexities are perceived to be higher in case of real estate cases. The role of an AR in insolvency processes has gradually evolved with the judicial pronouncements and practice of the insolvency processes in past over five years of implementation of the IBC. However, there exists several loopholes related to the roles, responsibilities, and rights of the ARs. In the present article, the author deals with pros and cons of the roles of AR. ***Read on to know more…***

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1. AR under Insolvency and Bankruptcy Code, 2016 (IBC)

The Insolvency and Bankruptcy Board of India (IBBI) under IBBI (Insolvency Process for Corporate Persons) Regulation, 2016 (hereafter, Regulations) provides the provision of AR which states, "The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorized representative of the creditors of the respective class…." However, IBC and Regulations thereof do not define the same under "definitions".

2. Rationale behind introduction of Regulation 16A

The provision of AR has been introduced into the Corporate Insolvency Resolution Process (CIRP) so that representatives of various class of creditors can put their mandate at the CoC and thus take part in the process effectively. Otherwise, it will be practically difficult for the large number of members of each class to participate in the CoC meetings. The AR is appointed to communicate the decision taken by majority of creditors on the agenda items proposed for resolution at the CoC. The role of AR in the insolvency resolution process under IBC is found to be of paramount importance in case of real estate matters where

homebuyers constitute a class of creditors. There are AR appointments for debenture holders and fixed depositors etc., as well but the numbers and complexities are perceived to be higher in case of real estate matters.

The role of AR in the insolvency resolution process under IBC is found to be of paramount importance in case of real estate matters where homebuyers constitute a class of creditors.

Moreover, seeking the vote or mandate of the class of creditors pose several challenges. In the context of discussion with regard to the issue of providing voting rights to operational creditors, the Report of the Insolvency Law Committee[1] (ILC), of March 2018 stated that "..a mechanism requires to be provided in the Code to mandate representation in meetings of ---and all classes of financial creditors which exceed a certain number, through an authorised representative, This can be done by adding a new provision to Section 21 of the Code. ,,,Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent of voting share of each such creditor, and as per their instructions."…..The Insolvency Law Committee Report submitted in February 2020, para 10.8 states, "the committee suggested that in order to maintain the efficiency of the CoC, they should be represented by an authorised representative in the same manner as provided under section 21(6A) for security holders, deposit holders and other classes of creditors"(para 10.8). The role of an AR in CIRP gradually evolved with the judicial pronouncements and practice of the insolvency process during last five years of implementation of the IBC.

3. Eligibility Criteria for an AR

Regulation 4A of the Regulations deals with the choice of AR. As per this regulation, the basic criteria required to be fulfilled for an eligible AR is same as an IRP/RP i.e., the person concerned must be registered with IBBI as an IP, must be independent of the Corporate Debtor (CD) and the Resolution Professional (RP) and must not be subject to any disciplinary proceedings. He must have a valid Authorisation for Assignment (AFA) from the concerned Insolvency Professional Agency (IPA).

IBBI through a notification dated July 03, 2018, inserted a Regulation 4 A in the Regulation 4 which was further amended through notifications dated August 07, 2020, and July 14, 2021. The finally amended[2] Regulation 4A (2) is as follows:

For representation of creditors in a class ascertained under sub-regulation (1) in the committee, the IRP shall identify three IPs who are:

(a) Not his relatives or related parties,

[(aa) having their addresses, as registered with the Board, in the State or Union Territory, as the case may be, which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor:

Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;]

(b) eligible to be [resolution professional] under regulation 3; and

(c) willing to act as authorized representative of creditors in the class.

Furthermore, Regulation 4 A (3) states that the IRP shall obtain the consent of each IP identified under Regulation 4 A (2) to act as the AR of the creditors in the class in Form AB of the Schedule.

4. Choice of an AR: How much say does the Homebuyers / Class of Creditors have

It is necessary that the class of creditors must be able to choose their representative. But as explained earlier, the initial choice of an AR is a nomination process where the IRP only decides and put the choice before homebuyers to select the IP. But the creditors in reality are not aware of the traits or capabilities or his past records as an IP.

As a good practice some of the IRPs provide a brief profile of the IPs interested in the role of AR to facilitate those who want to understand his background, education, and experience etc. This helps the creditors to make an informed decision. In some cases, the class of creditors (or

[1] Report of the Insolvency Law Committee, March 2018, paragraph, 10.8, Ministry of Corporate Affairs, Government of India.

[2] IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Amended up to 30.09.2021)

their spokesperson) meet the proposed IPs for a discussion to make their decision. But this is possible only if the class of creditors have an organized association or body which in turn have some representative to speak on common issues of the class. Such association/s can take a call based on the information provided about the proposed choice of AR and accordingly give their mandate while submission of claim before the IRP.

5. Evolving role of the AR

IBBI through a circular[3] dated July 13, 2018, clarified that wherever the approval of resolution plan under Regulation 39 (3) is at least 15 days away, the Resolution Professional (RP) shall expeditiously obtain, by electronic means, the choice of the IP from creditors in a class to act as AR of the class and proceed further in the manner as specified in Regulation 16A.

The role of an AR was further strengthened in the Supreme Court judgement in August 2019 in the matter of *Pioneer Urban Land & Infrastructure Vs. Union of India*[4] which upheld the amendment in the IBC and conferred the homebuyers the status of financial creditors. As a consequence, the homebuyers are treated at par with banks and financial institutions and form a part of the Committee of Creditors (CoC). The homebuyers, as a class of creditors, are entitled to be represented in the CoC through their ARs.

The role of an AR was further strengthened in the Supreme Court judgement in August 2019 in the matter of *Pioneer Urban Land & Infrastructure Vs. Union of India* which upheld the amendment in the IBC and conferred the homebuyers the status of financial creditors.

Out of total 5,258 insolvency cases admitted under IBC by March 31, 2022, about 20% came from Real Estate sector[5]. The number of real estate cases has been steadily rising from 209 in September 2018 to 500 in September 2019 to 793 as of September 2020. Therefore, this can be stated that in real estate sector cases alone an approximately 800 ARs were appointed till 2020. Based on the experience regarding role of ARs in CIRP, necessary amendments were made in IBC in December 2019.

[3] IBBI CIRCULAR No. IBBI/CIRP/015/2018 13th July 2018 (https://ibbi.gov.in//webadmin/pdf/legalframwork/2018/Jul/ClarificationNo.%20IBBI-CIRP-015-2018%20dated%2013072018-Approved_2018-07-13%2020:07:34.pdf)

[4] *Pioneer Urban Land & Infrastructure Vs. Union of India*, WP (Civil) 43/ 2019, Supreme Court of India, Date of Judgement, August 09, 2019.

[5] IBBI Quarterly Newsletter for January – March 2022, pp. 12-13.

6. A critical analysis of the Role of AR

6.1. Challenges to AR: The role of an AR as per the IBC and Regulations may appear very simple with limited responsibilities. This is because, as per the IBC an AR is required only to communicate the agenda for CoC meetings and getting the mandates of homebuyers either in physical or electronic form but in realty the challenges faced by the AR and the practical difficulties that he / she has to keep in fulfilment of the role are many. This could be summarised as follows:

(a) Generally, the homebuyers do not have the knowledge regarding various provisions of the IBC and Regulations that govern the appointment, role, and responsibilities of the AR.

(b) The homebuyers lack familiarity or information regarding IPs proposed for their choice of AR.

(c) ARs usually go by the IBC and Regulations with or without being able to relate to the big group of the class that presumably considers him / her as their advocate or nominee to take up all possible issues with the developers at the CoC.

(d) The AR may at times require to manage too many queries, emails and phone calls from the various homebuyers on issues concerning their claims, issues in updating the right contact details, technical issues faced in e-voting and so forth.

6.2. Statutory Responsibilities of AR: As per the various provisions of the IBC and Regulations, an AR is expected to discharge following responsibilities:

(a) Section 25A. Rights and duties of AR to financial creditors:

i. The AR under sub-section (6) or sub-section (6A) of Section 21 or sub-section (5) of Section 24 shall have the right to participate and vote in meetings of the CoC on behalf of the financial creditors he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

ii. It shall be the duty of the AR to circulate the agenda and minutes of the meeting of the CoC to the financial creditor he represents.

iii. The AR shall not act against the interest of the

financial creditor/s he represents and shall always act in accordance with their prior instructions…"

(b) 25A (3A) Voting by Authorised Representative: The authorised representative shall cast his vote in respect of each financial creditor or on behalf of all financial creditors he represents in accordance with the provisions of sub- section (3) or sub-section (3A) of section 25A, as the case may be.]

Furthermore, the IBC puts stress on the AR's role in Section 25 A (3) which states "the AR shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions". Thus, the AR has to play the role of a spokesperson for the class and take required efforts to safeguard the interest of the creditors represented by him/her.

6.3. Practical Responsibilities of AR

In practice, the role of an AR involves a lot more than the voting at the CoC as per instruction of the creditors. As a representative of homebuyers, the AR is expected to discharge following responsibilities:

(a) Communicate the details of the provisions of the IBC and Regulations to homebuyers / class of creditors through individual emails and if opportunity is available, during meeting of homebuyers: Once chosen by the majority of the creditors, an AR should make organized effort to inform and explain the class of creditors the various provisions of the IBC and Regulations which will be relevant for the creditors during the insolvency resolution process that is to follow. For this, the AR is required to have meeting with homebuyers either through physical or virtual mode. This process is critical as the average creditor will not be conversant with the IBC and Regulations thereof and there may be apprehensions or expectations which may not be relevant or beyond the scope of the law and rules concerned or they may not be aware of what the IBC provides for achieving their objective.

(b) The AR may not have any role in the matter of finalization of claim acceptance by the IRP / RP but there is no bar in his communication of the queries / disputes that may be intimated to him concerning claims by any member of the class of creditors: Regulation 16 A (5) states that the AR shall have no role in receipt or verification of claims of creditors of the class he represents. The concerned AR must explain to the class of creditors he is representing that he / she cannot decide on their claims which is the prerogative of IRP/RP appointed for the CIRP. But as an extended role, since he is expected by the legislation to protect the interest of the creditors, he / she must take the time and effort to guide the individual creditors in filing their claims within timelines, correctly, and facilitate to remove any difficulty faced by them in filing the claim. Post submission and verification of the claims, the IRP/ RP is required to provide an updated claims list to the AR. The AR must share the same with the class of creditors. There can be instances when the claims admitted are not agreed by the creditors, the AR should be responsive in such cases where individual creditors raise some issues, or the IRP/RP cannot admit some claim for want of documentation or other issues. The AR shall play a very important role in such matters as a subject expert and counsel the creditors in the class he is representing and on the other hand the AR need to coordinate with the IRP / RP to facilitate admission of the claims.

"The AR must attend to the queries from the creditors as the same will help in bringing the spread-out group to have faith in the process and will get their cooperation and participation to complete the process successfully."

(c) The AR should make best efforts to reply or revert on every email from the homebuyers/class of creditors on any concern which the AR may convey to the IRP / RP: The members of the class of creditors have various issues to resolve and also at times there may be queries from creditors which are not relevant to the process as per the IBC or Regulations. The AR must attend to the queries from the creditors as the same will help in bringing the spread-out group to have faith in the process and will get their cooperation and participation to complete the process successfully. Some issues that require IRP/ RP's attention has to be communicated immediately for a resolution.

(d) **The AR must give fair hearing to any of the issues raised by the homebuyers and communicate the practical position correctly:** This involves taking telephone calls at odd hours which at times could appear to be an intrusion on his or her plans. The AR who is able to respond to the individual members will definitely earn their trust and confidence which will help to take the process forward.

(e) **The AR can explain the requirements for an agenda, a resolution plan, its implementation, and the likely effect of a plan being accepted or rejected:** The AR is looked upon by the homebuyers / class of creditors as their counsel. As the meetings of the CoC are conducted, various agenda items are taken up and resolution plans are put forth for creditors' mandate. At this stage the AR must be able to relate impartially with the members of the class of creditors he is representing and should explain the implication of the proposed resolution. This is more critical when the agenda relates to resolution plan by any resolution applicant / s as the same will affect the interest of the members going forward and will thus be the result achieved on completion of the process.

(f) **The AR needs to take a balanced approach while engaging with the homebuyers, IRP / RP and encourage the homebuyers or class of creditors to participate in the e-voting process in large numbers so that the majority views of the class of creditors is reflected:** The essential aspect of the role played by an AR is to get maximum number of members in a class of creditors to participate in a process and give their mandate on agenda items through voting. The high percentage of voting by the homebuyers / class of creditors helps ascertain the majority views.

The AR's role is extremely important in matters of e-Voting on the CoC resolutions which have direct bearing on the interest of the members of the class of creditors he / she is representing. NCLAT in the matter of *Amit Goel Versus Piyush Shelters India Pvt. Ltd. and Ors*[6], passed order to redo the entire process of inviting expression of interest for resolution plans till submission of the plans before the Adjudicating Authority (AA) after seeking necessary approvals through e-Voting by the creditors on the ground that the AR had not followed the timelines and due process of e-Voting while seeking mandate from the homebuyers on the approval of Resolution Plan.

7. Recommendations

As we discuss on the desired role of an IP as AR, their suitability to the process is critical and should not merely be taken as a role where the job is to put the creditors mandate before the CoC and facilitate the agenda items to be circulated. The AR is meant to represent the class of creditors.

IBC is silent on process for changing AR during CIRP. If CoC is allowed to change the Resolution Professional (RP) at any stage of CIRP then the class of creditors should have the right to change their representative if they are not satisfied with the conduct of his performance. The Code has got provisions to allow the CoC to change the Resolution Professional, during the CIRP, if they find it suitable for reasons of the performance of the RP or any other reason but presently the Code or Regulations do not have any such provision for the class of creditors to change their representative (AR) once chosen. This may be provided in the Code to allow the class of creditors to have some process of voting among the class to access the mandate, which can be 55 / 60 percent vote in favour of the mandate to make such change. Besides, there is need to clarify the law on who should take up the role of AR during the transition period i.e., whether an IP whom the majority of the class of creditors nominate or the RP can provide some choice of IPs or AA should put an IP from the IPs panel to take up this role. Furthermore, the term "Authorised Representative" should be defined in the IBC framework.

Furthermore, Regulation 16(A)(8) provides for the fees payable to AR which ranges between 15000 to 25000 per month. It is pertinent to mention that the AR is paid fee only for attending the CoC meetings but not the meetings of the class of creditors before or after the CoC or any other meetings with the class of creditors. The AR being an Insolvency Professional as per the mandate is expected to help the members of the class, he/she is representing to take critical decisions to safeguard their interests, it's very naïve to think that the AR only collates the query and puts before CoC. The AR is actually the guide for the class of creditors in this process and while he/she is executing the mandate before the CoC the AR is expected to take up the

[6] NCLAT, New Delhi, CA 700/2021, Date of Order, January 18,2022.

issues which affects the class and also need to raise objections is case the IBC is violated; this is required to protect the interest of the creditors. Considering the role and responsibilities of an AR, the IBBI may consider a reasonable remuneration depending on the assignment to encourage IPs in taking up this assignment and not merely putting a minimal role in the CIRP. Emphasizing on the crucial role of AR in insolvency process, NCLT Allahabad Bench in the matter of *Jaypee Greens Krescent Homes Buyers Welfare Association Vs. Jaypee Infratech Ltd*[7]. has observed, "there is a substantial responsibility thrust on the AR to take the CIRP to success in coordination with the IRP/ RP by using his knowledge and the trust imposed on him /her by the class being represented by him/her irrespective of their share in voting,".

Last but not the least, the IBC or Regulations need to specify or provide the period, process, and timelines for completion of the role of the AR. It is assumed that the role of AR is completed when the Resolution Plan is placed before NCLT or the liquidation process sets in, as there are no more CoC meetings after the said action. But the AR keeps getting emails and meeting requests from the homebuyers or creditors in the class even when the Resolution Plan is under consideration other applications might be moved by different members before the AA concerning the proposed plan, so the IBC and Regulations thereof may provide suitable guidelines and process for the AA to conclude his / her involvement in the assignment.

[7] NCLT Allahabad, CA No. 223/2018 & CA No.266/2018 in CP No. (IB) 77/ALD/2017.

Perspective: Inaugural Address by Shri Sameer Kakar, Member, NCLT in Webinar on Landmark Judgements Under IBC

Shri Sameer Kakar, Hon'ble Member (Technical), National Company Law Tribunal (NCLT), Chennai Bench, addressed the Inaugural Session of Webinar on "Landmark Judgements Under IBC" organized by the Indian Institute of Insolvency Professionals of ICAI (IIIPI). Here we present a brief version of his views: ***Read on to know more…***

Shri Sameer Kakar
Hon'ble Member
NCLT Chennai Bench

I take this opportunity to share the practical experience that we come across during judicial proceedings pertaining to insolvency cases. I would also link this with my earlier experience as practicing Insolvency Professional (IP). Before joining the Bench at Hon'ble NCLT, I had been practicing as a member of IIIPI, my alma-matter.

Though IBC related jurisprudence has evolved a lot, more needs to be achieved on the fronts of Personal Insolvency, PUFE (Preferential, Undervalued, Fraudulent, and Extortionate) transactions and Liquidation. Only a few orders are available on Section 100 in respect of individual resolution process. In the days to come, jurisprudence shall evolve around some of these areas. The insolvency of the Personal Guarantors to Corporate Debtors (PG to CD) shall also be tested in the courts. Therefore, it is imperative for IPs to keep themselves abreast and updated.

A well informed and well-read Resolution Professional (RP) can solve many challenges through dialogue. With constant dialogue between an RP and various stakeholders including Committee of Creditors (CoC), issues can be managed and resolved outside the court, avoiding an otherwise time-consuming and costly affair.

Regarding expectations of the judiciary from the IPs and various stakeholders, one issue that gets escalated quite often, is regarding admission/rejection of claims. It is observed that claimants whose claims get rejected, do not appeal timely. Many a times, appeals are filed post-approval of the Resolution Plan. I remember a case in Chennai, wherein about 40-50 such applications were filed just after approval of the Resolution Plan. While going through these applications, it transpired that RP and claimants could have resolved the issue with active dialogue. RPs should not need instructions from the Bench to start the dialogue with the claimants. A proactive RP can certainly resolve these issues out of court since litigation is costly and time-consuming for both the parties.

I would like to share my earlier experience as an RP as well. In one case, Income Tax Return was filed by the company and an assessment was carried out under Section 143(1). A huge refund was due to the company which was appropriated towards the past dues. In this case an application (IA) was to be filed. Instead of approaching Hon'ble NCLT, I wrote to the Assessing Officer stating that since moratorium under Section 14 was in place, he ought not to have carried out the assessment. And that, if funds were not returned, a 'contempt of court' plea shall be filed before Hon'ble NCLT for violating the moratorium. On the eighth day of this letter, the Commissioner called me and requested not to prefer the plea and that funds would be refunded. In another case, I received a notice from Commercial Taxes Department stating that "Since the company has not paid the past dues, we are referring this matter to the Collector for sale of the assets of the company and recovery of the pending sales tax dues". We wrote to the authorities that they were violating moratorium ordered by the NCLT under Section 14 of the IBC. This was not responded. Finally, we submitted a letter at the counter of the Department. On receipt of the letter, instructions were passed to the Collector not to proceed for recovery of dues by way of sale but to file a claim before the RP. A proactive and persuasive RP can avoid these kinds of litigations. The RP is an officer appointed by the court, and s/he should assert authority wherever necessitated.

Another important issue is regarding the pleadings being filed by the professionals which at times are not up to the mark. What RPs try to argue at times, is not captured in the pleadings. Sometimes small matters like replacement of the RP, which should not take more than five minutes, remain undecided due to lack of requisite/supporting documents.

The third issue, I would like to delve upon is, public interest. Though RP needs to stress his authority, he should act as a trustee of the company. Sometimes situation is not perfect, the management is non-cooperative, CoC is not cooperative enough for payment of fees, or authorities do not listen. etc. In such circumstances, the RP should keep his personal issues at bay while dealing with situations professionally. In a case of a shipping company before Hon'ble NCLT, Chennai Bench, the RP did a good job and took some innovative decisions as well. As a result, the Resolution Plan was approved. However, later it came to light that he had not released salary of a senior employee because of an altercation with him. This should not have been done.

The fourth issue I would highlight is regarding admission matters and approval of the Resolution Plan. I have already emphasized the importance of pleadings and drafting; these ideas apply here as well. Many RPs utilize the services of specialized agencies for carrying out due diligence on Section 29A. But when it comes to filing for approval of the Resolution Plan such due diligence reports do not form part of the IA, which should be ensured invariably. Besides, voting pattern along with ballot or e-voting report should always be attached along with the IA while seeking approval of the Resolution Plan.

The next issue worth attention is 'haircuts', which is a matter of concern for the entire ecosystem. We have seen a lot of narratives on this issue in media or otherwise. My advice to RPs is that whenever they file a Resolution Plan, they should provide relevant additional information. For instance, a table can be provided about details of the principal outstanding, interest (normal), interest (penal), damages etc., separately. While approving the Resolution Plan, it matters as to how much of the principal amount is to be recovered as part of total claim. This may change the mindset of the Hon'ble Bench and may bring about clarity resulting in expeditious approval of the Resolution Plan. Likewise, it is helpful if RPs provide reasons for taking decisions about having second or third valuation report. The IBBI has also amended Regulations in this regard wherein the RPs would now be required to provide previous valuation report(s) to valuer.

Lastly, more need to be done by RPs in respect of PUFE applications. The quality of PUFE applications, at times, leaves much to be desired. In some applications, we found that RPs focused on credit side and ignored the debit side in the ledger. For instance, in one case, the RP reported PUFE transaction amounting to ₹ 500 crores. However, on examination of debit side of the ledger we noticed that ₹495 cores were returned in the account of the Corporate Debtor. Therefore, RP must improve the overall quality of PUFE applications.

With these words, I would like to close my comments. Thank you all.

Liquidation of Moser Baer India Limited (MBIL)

After MBIL failed to get a resolution plan, the NCLT vide an order on September 20, 2018, approved liquidation of the Company and appointed Mr. Anil Kohli as its Liquidator. Employees' unrest, financial crisis, default dues, and other issues which prevailed during the resolution process were shifted on liquidation.

A premium for insurance of assets of CD including plant and machinery valued above ₹100 crores was due on September 30, 2018, i.e., within 10 days from initiation of the liquidation process. Neither there was fund in the account of the CD, nor the financial creditors were willing to provide required money. Finally, being duty bound to protect and preserve the assets of CD, the Liquidator paid the insurance premium out of his own pocket.

Further, as the Company was not operational, the Liquidator shifted its registered office to a new premises which resulted in saving of ₹14.38 lakh per month. However, paying employee's dues was still a big challenge because neither the Company had funds, nor the creditors were ready to invest money. The Liquidator, with the assistance of a consultant recovered ₹8.96 crores (approx.) inclusive of interest of ₹ 25 lakh(approx.) as a refund from the Income Tax Department. This amount was used to pay wages and salaries of employees for the CIRP period to some extent thereby giving relief to them in the times of distress.

The present case study, sponsored by IIIPI, has been developed by Mr. Anil Kohli in which he has provided a first-hand step by step guide to liquidate a distressed Company even in the most adverse situations.

Read on to know more...

Anil Kohli
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1. Introduction

The Corporate Insolvency Resolution Process (CIRP) of Moser Baer India Limited (MBIL) i.e., the Corporate Debtor (CD) or Company, commenced on November 14, 2017, for which Mr. Devendra Singh was appointed as Interim Resolution Professional (IRP) who was subsequently confirmed as Resolution Professional (RP).

In the last week of CIRP i.e., during the meeting of Committee of Creditors (CoC) held on August 03, 2018, the State Bank of India (SBI), one of the financial creditors, proposed the name of Mr. Anil Kohli, to be appointed as the RP for conducting the CIRP of CD for the remaining period and subsequently, to carry out liquidation process as Liquidator. Subsequently, the Adjudicating Authority (AA) vide order on August 10, 2018, appointed Mr. Anil Kohli as the RP w.e.f., August 11, 2018. On the same day, the CoC decided to liquidate the CD in the interest of all the stakeholders. The AA vide an order on September 20, 2018, approved[1] the liquidation of the CD and appointed Mr. Anil Kohli as its Liquidator.

[1] NCLT, New Delhi: Case No. (IB)-378 (PB)/ 2017.

The Liquidator in this case handled crucial and sensitive issues viz. workmen and employee's issues qua claim, issues with respect to GST, income tax refund, claims and refund from Provident Fund, Income Tax (IT) disputes, and litigations ranging from NCLT to the Supreme Court, which have been described in this case study.

2. Business Profile of Corporate Debtor

Moser Baer India Limited was a leading global tech-manufacturing Company. Established in 1983, the Company had successfully developed cutting edge technologies to become one of the world's largest manufacturers of Optical Storage Media (OSM) devices like CDs, DVDs, and Solid-State Media. The Company had also entered the emerging energy efficiency lighting segment. Over the years the Company diversified its business in the exciting areas of technology and manufacturing and gradually emerged as a market leader in the high growth photovoltaic space. It was the only Company worldwide to receive the prestigious 5-star rating from TOV Rheinland for 3 years in a row[2] (2009 - 2012) maintaining highest standards of quality in manufacturing of PV modules. Moser Baer India had emerged as one of the most credible brands focused on hi-tech manufacturing and, Research & Development (R&D) activities.

3. Reasons behind Financial Crisis of the CD

The Company continued to operate at sub optimal levels due to severe working capital constraints, resulting in adverse impact on cash flow from operations. Due to continued liquidity issues, primarily arising from non-release of sanctioned working capital limits from lenders, the Company was unable to comply with repayment terms of its borrowing arrangement with secured lenders in terms of the Corporate Debt Restructuring Package approved in the year ending on March 31, 2013. As a result, and consequent upon the report submitted by Monitoring Institution (MI), the (Corporate Debt Restructuring Empowered Group (CDR-EG) approved exit of the Company from CDR mechanism on October 10, 2016. The lender banks recalled the entire outstanding amounts owed to them by the Company and initiated recovery measures through notices under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The Company challenged the loan recall notices and the SARFAESI notices. Besides, during pendency of these disputes the Company continued with its efforts to persuade secured lenders for resolution of the debt.

The Company had outstanding Foreign Currency Convertible Bonds (FCCBs) with principal value of USD 88.4 million equivalent to ₹57,327 lakh which were due for redemption along with premium on 21 June 2012. As on March 31, 2017, accrual for premium on FCCB aggregated to ₹56,468 lakhs. The Company tried negotiating with the bondholders to re-structure the terms of these bonds. However, since this was subject to approval of secured lenders, it did not materialise. Followings are reasons behind financial losses and efforts by the management to minimize those losses:

> **"The Company mainly supplied Original Equipment Manufacturer (OEMs), which have strong bargaining power resulting in inability to pass on the increase in cost of production to customers."**

(a) Reasons of Losses or Inadequate Profits Coupled with Market Difficulties: Followings are the main reasons behind loss incurred by the Company:

(i) Production and Technical Problems: The Company mainly supplied Original Equipment Manufacturer (OEMs), which have strong bargaining power resulting in inability to pass on the increase in cost of production to customers.

(ii) Optical Media Industry in the developed markets started witnessing decline in demand for first generation products like CDs and DVDs.

(iii) Progressive growth in alternative-data storage technologies including online and digital storage.

(iv) Continuous increase in the prices of raw materials.

(v) Aggressive competition from Taiwanese/ Chinese players in Optical Media and global

[2] Information Memorandum (Nature of Industry, p. 69) of Moser Bear India Ltd., as on December 13, 2017.

leaders in Solid State Media products and possible circumvention of the anti-dumping measures implemented by the Government of India.

(vi) Regulatory developments in debt/capital markets that could adversely affect the Company's interest costs and debt restructuring.

(vii) Recovery actions by the Company's lenders/ creditors.

(b) Steps taken by the Management for Improvement

(i) Consolidation of all manufacturing facilities to cut down on overheads and to extract supply chain synergies.

(ii) Retrenchment policies to match right size employee base to current level of operations.

(iii) Aggressively entering the markets in Africa and several countries in Latin America for incremental markets and customer acquisition.

(iv) focus on product innovation, increase in its cost competitiveness and on widening of its distribution network.

The above steps positively impacted the Company's operations in the near to medium term but failed in long term or the year ended March 31, 2017. Moser Baer continued to witness financial constraints and internal challenges that impacted its operating performance. The Company had been constantly working on consolidation measures and restructuring of operations with the objective of re-aligning priorities, resources, and capabilities to succeed in the identified areas of growth.

4. Workmen Unrest & Change of Resolution Professional

The Company's main plant was located at Greater Noida, wherein 2,200 workmen were employed. During CIRP period wherein erstwhile RP was managing the affairs of the CD, there was workmen/labour unrest due to various issues i.e., declaration of Lock-out of the Company by management since November 11, 2017, as per Section 68(3) of the U.P Industrial Disputes Act, 1947, and non-disbursement of their salaries/wages for the stated period etc. Besides, workmen's union also filed an application seeking a direction, amongst others, to the erstwhile RP to release the wages of the workers. There were vigorous protests by the workmen which included dharnas, gheraos and suicide attempts which also came in the limelight of media. The workmen had taken over the control of the entire plant of the CD and stationed themselves permanently at the plant. They did not even allow the then RP to visit the plant and take the custody of assets as per the provisions of law. Subsequently, the RP filed an application before the NCLT or Adjudicating Authority (AA), seeking appropriate direction as to whether the lockout of factory premises of the CD was legal or illegal.

"There were vigorous protests by the workmen which included dharnas, gheraos and suicide attempts which also came in the limelight of media."

NCLT vide an order[3] dated January 31, 2018, disposed of the application and inter-alia directed the RP to take into account any application of the workmen with regard to disbursement of salary in view of the fact that lock-out was declared unlawful by the Deputy Labour Commissioner through an ordered dated November 14, 2017. Besides, the NCLT also issued directions to the District Magistrate and the Senior Superintendent of Police (SSP) of the District, Gautam Buddha Nagar including the authorities at the Surajpur Police Station to assist and facilitate the RP in terms of Regulation 30 of Insolvency & Bankruptcy Board of India (IBBI) (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to enable the RP and his team to visit the Plant/Factory of the CD in Greater Noida. Similar directions were issued to the concerned Deputy Commissioner of Police (DCP), Delhi Police to ensure the RP and his team visits registered office of the CD at Okhla Industrial Estate, New Delhi for discharging his duties.

As the objectives of CIRP were not being achieved, the CoC decided to replace the RP with Mr. Anil Kohli who had expertise and experience in handling and liquidating the properties/assets of complex and complicated matters under the SARFAESI Act. He had also ensured successful possession of the Kingfisher Villa, Koutons and Shakti Bhog (flour) among others. Finally, Mr. Kohli was appointed as RP by NCLT on August 10, 2018.

[3] NCLT, New Delhi: Case No. (IB)-378(PB)/2017.

5. Lack of Funds to run the Liquidation Process

The liquidation process of the CD commenced vide NCLT order dated September 20, 2018, for which Mr. Kohli was appointed as Liquidator of CD.

Since the CD was not a going concern, there was insufficient funds to manage the liquidation process. Meanwhile, the insurance of the main plant of the CD valued over ₹100 crore was due for renewal by September 30, 2018, to which a premium of ~₹20 lakh was required. Despite repeated requests made by the Liquidator to the secured financial creditors to fund premium for insurance renewal to safeguard the asset of the CD, the secured financial creditors did not provide required finances.

The problem aggravated further as there is no provision of CoC in the liquidation process. Moreover, there was no provision of Stakeholder's Consultation Committee[4] (SCC) during liquidation of MBIL, as it was introduced by IBBI through a regulation on July 25, 2019. The liquidation of MBIL was carried out under old laws. As the Liquidator was duty bound to protect and preserve the assets of the CD hence the insurance premium cost was funded by the Insolvency Professional Entity (IPE) of which the Liquidator is a partner.

As the Liquidator was duty bound to protect and preserve the assets of the CD hence the insurance premium cost was funded by the Insolvency Professional Entity (IPE) of which the Liquidator is a partner.

This issue of meeting out the initial liquidation expenses which are incurred before the sale of the assets was discussed at various forums. Pursuant to which, IBBI took cognizance of the same and made suitable amendments and inserted Regulation 39B in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 through a notification on July 25, 2019, and Regulation 2A in IBBI (Liquidation Process) Regulations, 2016 through a notification on July 25, 2019.

6. Income Tax Refund

Upon taking charge as Liquidator, a rigorous and dedicated effort was made by the Liquidator and his team for exploring all possible legal avenues to generate funds within shortest possible time to meet out the immediate liquidation expenses prior to the sale of assets. Liquidator faced huge fund crisis to run the process and therefore with the assistance of consultant successfully recovered ₹ 8.47 crores along with interest of ₹ 27 lakhs as a refund from the Income Tax Authorities on October 10, 2018. Out of which the wages and salaries of workmen were paid for the CIRP period to some extent giving relief to them in the times of distress. It was also helpful in meeting out liquidation cost Besides, refund of another 4 crore was received during the later stage of Liquidation process on June 24, 2020.

7. Litigations & Important Orders in the Liquidation Process

7.1. Litigation 1: An application under Section 60(5)(c) of the IBC was filed by the Liquidator to seek indulgence of the NCLT to decide on a question of law on employees' cost, which included the salaries of workers/ employees who continued the rolls during CIRP but were not assigned work due to factory/ plant shutdown caused by labour strike. They were not paid due to litigations and paucity of working capital. The court was asked to adjudicate on whether the Liquidator had jurisdiction to accept their salary claims beyond 270 days i.e., the maximum time permitted under the IBC for CIRP? The NCLT vide order dated September 17, 2018, stated as under:

"*The workers/employees are necessary constituent for running the business of the corporate debtor on day-to-day basis during the moratorium period. Therefore, the RP would be well within his rights to decide the claim made by the employees/workers. In fact, such an intention is implicit in the order on August 10, 2018, passed in CA-295(PB)/2018. Any other view would result in serious prejudice to the rights of the worker/employees or any other claimants. In view of the above, we dispose of this application. The RP is directed to consider the claim of the employees/workers in accordance with law and the expiry of 270 days on August 11, 2018, would not limit his jurisdiction to decide any claim as long as it has arisen respect of 270 days*"

The workmen's union vide FORM-E dated October 16, 2018, submitted a claim for ₹291,04,99,716 for a total of 1,528 workers. Pursuant to which the Liquidator admitted the following claims and rejected others:

[4] Regulation 31A. Inserted d by Notification No. IBBI/2019-20/GN/REG047 dated July 25, 2019 (w.e.f. 25-07-2019).

(a) Claims Admitted by Liquidator:

(i) Wages/Salaries of CIRP period including Provident Fund (PF) dues during CIRP period including employee contribution as CIRP cost.

(ii) PF dues prior to the CIRP period (including employer contribution) for the salaries paid for August 2017 as CIRP cost since salaries/wages were paid during CIRP.

(iii) Salaries/wages including employers' contribution on PF for pre CIRP period i.e., from September 01, 2017, to November 14, 2017.

(iv) Gratuity as applicable

(v) Earned leave claim for the period and working prior to the CIRP period.

(b) Claims Rejected by Liquidator:

(i) Compensation was not admitted for the entire period claimed by the workmen because there has been no termination or retrenchment by the Liquidator. As the employer was ordered to be liquidated and therefore, the employment has only ended in accordance with the provisions of the law. It was admitted for the period as per the proviso to Section 25 FF read with Section 25 FFF of the Industrial Disputes Act, 1947.

(ii) Increment was a promise by erstwhile management but the same was never implemented by the CD.

(iii) Company was in loss hence no bonus claim was accepted and also there was no eligibility under the provisions of Payment of Bonus Act, 1965.

7.2. Litigation-2

(a) **Submissions of the Appellant:** Pursuant to the above, the workmen union assailed the decisions of the Liquidator in toto and appealed the NCLT to pass "appropriate directions to the Liquidator to exclude the amount due to workmen towards Provident Fund and Gratuity from the waterfall mechanism as provided under Section 53 of the Code 2016 and to pay to the Workmen, all the Provident Fund Dues, Gratuity Fund dues, from the Liquidation Estate in priority to all other claims payable by the Corporate Debtor in Liquidation". Besides, the following specific reliefs were also sought form the NCLAT or AA:

(i) Pass directions to the Liquidator to pay to the Workmen 'Severance Compensation' towards Workmen dues in accordance with Section 25FFF of the Industrial Disputes Act, 1947.

(ii) Pass appropriate direction to the Liquidator to pay the arrears towards 'Workmen Dues' dues from September 01, 2017, to September 20, 2018, being less than 24 months preceding the order of Liquidation, in priority to all other debts including debts due to secured creditors, within a period of 30 days of sale of assets.

(b) Response/ Stand of the Liquidator: In response to the appeal, the Liquidator submitted the followings:

(i) PF dues pre-CIRP period: The Liquidator has deposited the PF dues on salaries paid for August 2017 with PF department. In addition, the Liquidator has accepted the claim for PF dues from September 01, 2017, to November 14, 2017, as workmen's dues u/s 53(1) to be paid in pari passu proportion with secured creditors. However, the Liquidator was unable to accede to the request of the workman to pay the balance of PF dues for the pre-CIRP period in priority over other creditors in absence of any specific provision in the IBC.

(ii) PF dues during CIRP period till date of discharge: The said dues have already been approved as CIRP cost and the same shall be paid in priority in terms of the waterfall as provided under Section 53 of the IBC.

(iii) Gratuity: The Liquidator has admitted the said dues and the Liquidator shall disburse the amount as lying in the trust in priority to the workmen and the balance due payment, if any shall be paid to the workmen in terms of Section 53(1)(b)(i) of the IBC. Besides, the Liquidator has accepted the claim for gratuity as workmen's dues u/s 53(1) to be paid in pari passu proportion with secured creditors. That the Liquidator is unable to accede to the request of the workmen to pay the balance of gratuity dues in priority over other creditors in absence of any specific provision in the IBC.

(iv) Compensation: The direction sought with regards to payment of severance compensation and arrears towards due from September 01, 2017, to September 20, 2018, to be paid in priority to all other dues was neither included in Section 326 of the Companies Act, 2013 nor any provision for the same has been provided under the Code and therefore, the Liquidator had not admitted the said claim.

The compensation was not admitted for the entire period claimed by the workmen as there has been no termination or retrenchment by the Liquidator and the employer has been ordered to be liquidated and therefore, the employment has only ended in accordance with the provisions of law. It was admitted for the period as per the proviso to Section 25 FF read with Section 25 FFF of The Industrial Disputes Act, 1947.

(c) Order of the AA/ NCLT: NCLT vide order dated March 19, 2019 allowed the application of the Workmen Union and directed that "provident fund dues, pension funds dues and gratuity fund dues are not treated as a part of the liquidation estate and would not, therefore be recovered by Section 53 of the IBC which provides for waterfall mechanism. The Liquidator has taken a perverse view by unnecessarily referring to explanation-II of Section 53 and Section 326 of the Companies Act, 2013. It is made clear that if there is any deficiency to the Provident Fund, Pension Fund, and Gratuity Fund, then the Liquidator shall ensure that the fund is made available in the aforesaid accounts, even if their employer has not diverted the requisite amount".

"NCLAT held that the Liquidator was duty bound to pay all dues outside Section 53 of the IBC on priority. "The law is clear about the Provident Fund, Gratuity Fund and Pension being outside the liquidation estate," said the court."

The court did not rely on the contention of the Liquidator the meaning of "workmen dues" should be explained as per Section 326 of the Companies Act, 2013 and called it "perverse" view. It held that the Liquidator was duty bound to pay all dues outside the Section 53 of the IBC on priority basis. "The law is clear about the Provident Fund, Gratuity Fund and Pension Fund being outside the liquidation estate. However, the distinct feature of the instant order was that Liquidator was directed to pay total dues of PF and Gratuity in priority and Liquidator to make good the shortfall in funds if any," said the AA.

(d) Appeal in NCLAT: Aggrieved with the NCLT order, the SBI filed an appeal[5] before NCLAT. The NCLAT vide an order on August 19, 2019, dismissed the appeal and upheld the NCLT order. The observations of the Appellate Tribunal are as follows:

(i) The Explanation (iii) below Section 53, for the purpose of meaning of 'workmen's dues', the Appellant cannot derive the meaning as assigned to it in Section 326 of the Companies Act, 2013, including the Explanation below it 18. In view of the aforesaid specific provisions.

(ii) There is a difference between the distribution of assets and preference/ priority of workmen's dues as mentioned

[5] NCLAT, New Delhi: Appeal Number- 396/2019.

under Section 53(1) (b) of the IBC and Section 326(1) (a) of the Companies Act, 2013. It has also been noticed that Section 53(1) (b) (i) which relates to distribution of assets, workmen's dues is confined to a period of twenty-four months preceding the liquidation commencement date.

(iii) While applying Section 53 of the IBC, Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding "workmen's dues", which can be more than Provident Fund, Pension Fund and The Gratuity Fund kept aside and protected under Section 36(4) (iii). On the other hand, the workmen's dues as mentioned in Section 326(1) (a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Section 53(1) (b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013. This apart, as the provisions of the IBC have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013.

(e) Appeal in the Supreme Court: SBI challenged the order of NCLAT in the Supreme Court[6], which is presently pending adjudication. In this appeal, the following legal questions have been raised:

(i) Whether there is any conflict between the provisions of Section 53(l)(b) read with Section 36(4) of IBC, 2016 on one hand, and section 326(1)(a) and explanation (iv) to section 326 of the Companies Act, 2013?

(ii) Whether provisions of Section 53(l)(b) read with section 36(4) of the IBC, 2016 would override the provisions of section 326(1)(a) and explanation (iv) to section 326 of the Companies Act, 2013?

"NCLAT held that the Liquidator was duty bound to pay all dues outside Section 53 of the IBC on priority. "The law is clear about the Provident Fund, Gratuity Fund and Pension being outside the liquidation estate," said the court."

7.3. Miscellaneous Litigations

(a) The Liquidator intimated the workmen that in compliance of order of NCLT dated March 19, 2019, the following payments were admitted as preferential payments:

(i) Total CIRP amount including wages during CIRP period from November 14, 2017, to September 20, 2018, PF contribution during CIRP and Unclaimed FBP, Gratuity and Pre-CIRP PF contribution i.e., PF of Sept'17, Oct'17 and upto 13th November 13, 2017, were cleared.

(ii) Besides, PF contribution of the CD for August 2017 was already deposited.

(iii) Further, claims admitted as per waterfall under Section 53 of IBC will be other than CIRP – (Wages of Sept'17, Oct'17 and upto November 13, 2017, Leave Encashment) and Compensation: i.e., 3 months as per proviso to Section 25 FFF ID Act, were also deposited.

However, the Workmen's Union once again challenged the above decision of Liquidator and filed C.A. No. 767(PB) of 2019, wherein the Workmen Union sought the following prayers:

(i) Pass appropriate directions to the Liquidator to re-visit the calculation sheet as per the statutory position (Payments of Gratuity Act, 1972 and Industrial Disputes Act, 1947)), while calculating Gratuity and severance compensation under Section 25FFF of the Industrial Dispute Act, 1947,

[6] Supreme Court: Appeal No. CA- 258/2020

(ii) Pass appropriate direction to the Liquidator to disburse the workmen dues with respect to 24 months as per Section 53(1)(b) of the Code, 2016 forthwith,

(iii) Pass appropriate directions to the Liquidator to re-arrange the list of workmen as per the stand of Liquidator taken on 25.01.2019.

This petition was dismissed as withdrawn with liberty to approach the appropriate Court of Law.

(b) The workmen union also filed a Contempt Application against the Liquidator being C.A. No. 768 (PB)/2019 for non-compliance of order dated March 19, 2019.

(c) In addition, the workmen union filed C.A. No. 1398 of 2019 before AA/ NCLT to keep intact the dues of workmen in terms of its order dated March 19, 2019. In this matter, the Court through an order on August 21, 2019, directed the Liquidator to take steps to implement the directions issued in Order March 19, 2019, read with Order dated August 19, 2019, passed by the NCLAT. Pursuant thereto, vide order dated September 25, 2019, the NCLT directed the Liquidator to file an affidavit, which was duly filed and accordingly vide order dated October 22, 2019, the NCLT recorded that this satisfies the requirement of law and the application bearing No. C.A. 768 (PB)/2019 does not survive for adjudicating and the same is disposed of.

(d) Subsequently, the Workmen's Union again filed an application seeking recall of order dated August 24, 2020, which was dismissed vide order dated December 04, 2020, by the NCLT.

(e) The workmen have also filed a Writ Petition (Civil) No. 421 of 2019 before the Supreme Court thereby challenging the constitutional validity of Section 327(7) of the Companies Act, 2013 which is pending adjudication.

(f) Income Tax Department filed appeals before the Supreme Court against the Liquidator for payment of its outstanding dues. The Supreme Court vide its order dated July 21, 2020, disposed of the appeals filed by the Income Tax Department, thereby stating that the Company in Liquidation is not in a position to pay its outstanding amount dues including taxes.

8. Sale of Assets

The Liquidator while discharging his duties sold almost all the assets of the CD including the plants at Noida & Greater Noida by July 2019 and realised ~₹325 Crores. However, immediately after the sale, the workmen started threatening the Liquidator as well as the buyers that they will not let the buyers take the possession of the plants of the CD until their claims are settled. The workmen gheraoed the factory premises and held various demonstrations outside the factory premises. They did not allow and even threatened the successful bidders/buyers from entering the premises of the CD who went to take possession of the assets purchased by them. There was very heavy resistance by the workmen for handing over the possession of the assets to the successful bidders/buyers.

"The Liquidator while discharging his duties sold almost all the assets of the CD including the plants at Noida & Greater Noida by July 2019 and realised ~₹325 Crores"

Consequently, the successful bidders/ buyers started pressing the Liquidator to cancel the sale and refund the consideration paid towards the said assets by them. The workmen also filed an application before the AA seeking inter-alia restraint on the Liquidator to distribute entire sale proceeds till the issue of workman dues is not decided by the NCLAT or the Supreme Court.

The Liquidator, as per the directions given by NCLT vide its order dated March 19, 2019, and with the sole objective of resolving the matter i.e., the hindrances being created by the workmen at the plants of the CD, held meetings with the Office bearers of Moser Baer Workers Union including its President and General Secretary. Finally, the Liquidator succeeded to convince them for peaceful handover of the assets of the CD to the buyers.

9. Distribution of Liquidation Proceeds

Liquidator while discharging his duties in the Liquidation Process under the IBC sold all the assets of the CD forming part of Liquidation Estate and received funds from the proceeds. The Liquidation proceeds were distributed amongst the stakeholders including employees and

workers (towards wages/salaries during CIRP period, PF, and Gratuity) and Secured Creditors to satisfy a part of their claims.

The Liquidator had distributed ~₹ 95 crores to the employees/workmen towards their dues for wages/salaries during the CIRP period, PF and Gratuity on priority over all other dues as per the directions of the NCLT vide its order dated March 19, 2019, which was further confirmed by the NCLAT order dated August 19, 2019, since there was no stay by Supreme Court. Accordingly, the gratuity to all the workmen/employees of the CD was paid on priority including the deceased employees, whose gratuity payments were made to their legal heirs, after ensuring all the legal compliances.

Apart from priority payments, proceeds received during liquidation process were distributed amongst the workmen/employees (i.e., workmen's wages other than CIRP period, workmen leave encashment and workmen compensation) and Secured Financial Creditors on pari pasu basis, as per the provisions of section 53(1)(b) of IBC, 2016.

10. Optimization of Staff and Resources

The Liquidator in order to discharge his duties, as envisaged under the IBC and the Regulations thereof, appointed some employees and consultants to the CD on part-time basis for various tasks including recovery from debtors. The Liquidator engaged the services of about 20 personnel who were ex-employees of the CD, senior and middle level management, having critical information of the CD and were capable of assisting in Liquidation Process.

The number of working days for the said employees and consultants was reduced periodically on completion of the specified tasks. Besides, Liquidator also restructured the team to reduce the fixed cost from ~₹15 lakh to ~₹50,000/ per month. Furthermore, in view of the ongoing investigation of Central Bureau of Investigation (CBI), Enforcement Directorate (ED) and other authorities, requisite resources were deployed as and when required for retrieving information/documents to minimize cost.

Moreover, in order to save on costs being incurred on the monthly rentals and incidental expenses for maintaining office the liquidator closed the CD office since not much routine work was being carried due to liquidation process and shifted majority of records to the third agency. However, important documents were retained in the personal office of liquidator and the liquidation process is being carried on from that office. Besides, only two employees were retained for providing support in the area of accounts and HR matters, by working from home, at a reduced remuneration i.e., at of 25% of their existing salary, for all the support services are being provided IPE.

11. Proceedings of Various Investigating Agencies

The Liquidator and his team were subject to proceedings of various investigating agencies including but not limited to:

(a) Directorate of Income Tax (Investigation), under Section 132 of the Act, conducted search & seizure of MBIL Group Companies on several locations in a pre-dawn sweep on August 18, 2019 (Sunday) which continued till the night of August 19, 2019 (Monday). Some documents and hard drives were confiscated by authorities which was later handed over to the team of the Liquidator. The Liquidator and his team extended all possible support to the officials during the search & seizure, and whenever warranted.

Liquidator received summons from the ED on November 29, 2019, for personal appearance, along with certain documents/information in the alleged ₹354-crore bank loan fraud, which was duly complied with.

(b) Summons by Enforcement Directorate (ED): Liquidator received summons from the ED on November 29, 2019, for personal appearance on December 02, 2019, along with certain documents/information in the alleged ₹354-crore bank loan fraud pertaining to MBIL. The Liquidator duly complied with the same and provided all the information/documents as sought by the ED. However, during the course of the personal appearance on November 29, 2019, the Liquidator was handed over with another summon for appearance before the special court on December 23, 2019, which was also complied. On the same day, an application was filed before the court requesting relief for the Liquidator from such appearances. However, the application was not allowed, and the court refused to grant permanent exemption from appearance to the

Liquidator. Accordingly, the Liquidator had to seek exemption from personal appearance on every date of hearing.

(c) Raids by Central Bureau of Investigation (CBI): The Liquidator received a notice from Economic Offences Wing (EOW), New Delhi in respect of Case FIR No. 25/2020 dated February 04, 2020 (registered on a complaint filed by workers of MBIL against the erstwhile Directors of the Company in respect of irregular payment of gratuity) to provide certain information pertaining to the matter. Liquidator through his legal counsel on March 20, 2020, provided certain information as desired by the authorities. The Liquidator was asked to provide some additional information which was also submitted through legal counsel.

Thereupon, raids were carried out by the department and the Liquidator received various communications from CBI, New Delhi w.r.t. Case No. RC-06/19 pertaining to the CD and RC 2232020A0002 pertaining to Moser Baer Solar Limited (subsidiary of the CD) thereby asking to provide certain information in respect of various transactions. Liquidator provided the required documents and information wherever they were available. As required by CBI officials, attendance of one of the authorized representatives of the Liquidator was also provided to them from time to time for providing explanation on certain transactions. The authorized representative of the Liquidator attended the proceedings of CBI on 14 occasions during one quarter. In furtherance, visit of CBI officials to the warehouse of the record keeping Company in Gurgaon engaged by the Liquidator to store physical files/records of CD was facilitated to enable them to retrieve some physical records.

12. Leased Properties of the CD

MBIL had developed the area, constructed buildings, infrastructure utilities and common areas which were sub-leased to two of its group companies namely MBSL & HPVL, the details of which are in Table-1.

Table – 1: Developed Areas Leased by the CD

Particulars	Plot no 66 (sqm)	Plot no 66B (sqm)	Total Area (sqm)
Area (Square Meters)	2,70,201	1,11,217	3,81,418
Subleased			
MBSL 1	-	21,000	
MBSL 2 (MOU)	-	26,350	
Helios	-	19,736	
Sub total	-	67,086	
Balance		44,131	

The balance land as shown in the Table-1 is represented by the space available for walkway, entry, exit, parking, common areas, green areas, and utilities etc., and is not usable for anyone as the available Floor Space Index (FSI) had already been used hence cannot be sold in isolation. The property of MBIL is shown in Map-1.

Map-1: Property of MBIL in Greater Noida

A termination notice cancelling the said lease was served on Helios Photo Voltaic Limited (Helios) vide. letter dated August 23, 2019, and on MBSL vide notice dated March 30, 2019, in terms of provisions of lease deed, for they had defaulted in making rent payments as per the lease deed. The Liquidator filed an application before NCLT for directions to lessees for peaceful handover of the assets leased to them, which is pending adjudication.

13. Assignment of "Not Readily Realizable Assets" (NRRA), Regulation 37a

IBBI vide their notification dated November 13, 2020, inserted a new Regulation 37A w.r.t. assignment of NRRA.

The Liquidator realized that this regulation can be used in the best interest of all the stakeholders and timely completion of proceedings. He accordingly explained the newly inserted regulation to the stakeholders. After lengthy discussions and deliberations, it was decided that an attempt should be made under Regulation 37A, for sale of not readily realizable assets of CD by assigning the rights for litigations to a successful prospective buyer that is eligible under the provisions of the IBC to submit a resolution plan for resolution of the CD. Following is the list of NRRA of the CD:

After lengthy discussions and deliberations, it was decided that an attempt should be made under Regulation 37A, for sale of not readily realizable assets of CD.

(a) Plot No. 66 B, Udhyog Vihar, Greater Noida, Uttar Pradesh measuring 1,11,217 sq. mt. (SEZ Area) along with buildings and utilities leased to Moser Baer Solar Ltd. and Helios Photo Voltaic ltd. (All rights and interest including litigation rights).

(b) Investments in shares & other Securities (Equity, Preference, Debenture, Bonds, etc.) of following subsidiary companies:

  (i) Moser Baer Entertainment Limited,

  (ii) Moser Baer Distribution Limited (Old name Moser Baer SEZ Developer Limited),

  (iii) Moser Baer Investment Limited,

(c) Investments in shares and other securities (Equity, preference, debenture, bonds, etc.) in other companies,

(d) Assignment of Loans (along with rights therein) given to several companies,

(e) Assignment of all current Assets including receivables, Debtor, deposits, advances, attached bank accounts etc.,

(f) Intellectual properties in nature of trademarks, patents, designs, or any other intellectual property of similar nature owned by the Company.

Accordingly, an application was filed by the Liquidator of MBIL seeking permission of NCLT for assignment/sale of NRRA of the CD in terms of Regulation 37 A of the Liquidation Process Regulations, 2016. The request was allowed by NCLT vide its order dated March 31, 2021, read with order dated April 28, 2021.

Subsequently, the Liquidator published a Notice dated May 11, 2021, in leading financial dailies for invitation of Expression of Interests (EOIs) for assignment of NRRA of the CD under Regulation 37A of Liquidation Process Regulations, 2016 on "As Is Where Is, As Is What Is, Whatever There Is And Without Recourse Basis".

Three proposals were received pursuant to the publication of EOI. Thereupon, the representatives of the investors who had submitted their offer and Earnest Money Deposit (EMD) were invited to attend the meeting with stakeholders for discussion and negotiation on their offers with the lenders. The highest offer which was received during the meeting for Assignment of Rights and Interest (including litigation rights) in the NRRA of the CD was ₹11.5 Crores.

However, since NIL value was assigned by the valuers for these assets during CIRP and there was no benchmark for determining the value of the said assets, the Liquidator with the sole objective of maximization of value to the stakeholders, filed an application before NCLT for permission to carry out the valuation of the NRRA of the CD i.e. Plot No. 66 B, Greater Noida along with buildings and utilities thereof since there is no provision for valuation of NRRA in IBC,2016. The said application was allowed by NCLT vide its order dated December 10, 2021and the valuation is in progress.

Resolution of Aditya Estates Private Ltd. (AEPL)

Though small in terms of size and value, resolution of Aditya Estates Private Ltd. (AEPL) provides some interesting aspects of the insolvency process under the IBC. This is such a case in which a foreign bank provided debt to a foreign company operating outside India, which happened to be a related party of AEPL, the Corporate Debtor (CD). The said loan was backed by a corporate undertaking given by the AEPL. The Adjudicating Authority considered this undertaking as corporate guarantee and declared AEPL a Corporate Debtor and the foreign bank a Financial Creditor under the IBC.

NCLT on February 26, 2019, admitted the CIRP application of the ICICI-UK for and ordered initiation of insolvency process for AEPL. The court also appointed Mr. Alok Saksena as Interim Resolution Professional who was subsequently confirmed as its Resolution Professional by the Committee of Creditors. The CD had only a leasehold property in New Delhi, which was its registered office. The liquidation value of the property was estimated to be around ₹306.80 crores which was reduced to ₹153.40 crores after adjusting the liabilities of getting it converted from leasehold to freehold. Ultimately, the Committee of Creditors approved the Resolution Plan of Adani Properties Pvt. Ltd. with 93.01% votes. Thus, the CD was resolved through a Resolution Plan amounting ₹265 crore which is about 138 % higher than the liquidation value.

The present case study, sponsored by IIIPI, has been developed by Mr. Alok Saksena in which he has provided a first-hand step by step guide for resolution of a small sized distressed company having a single property situated in one of the poshest localities of India.

Read on to know more...

Alok Saksena
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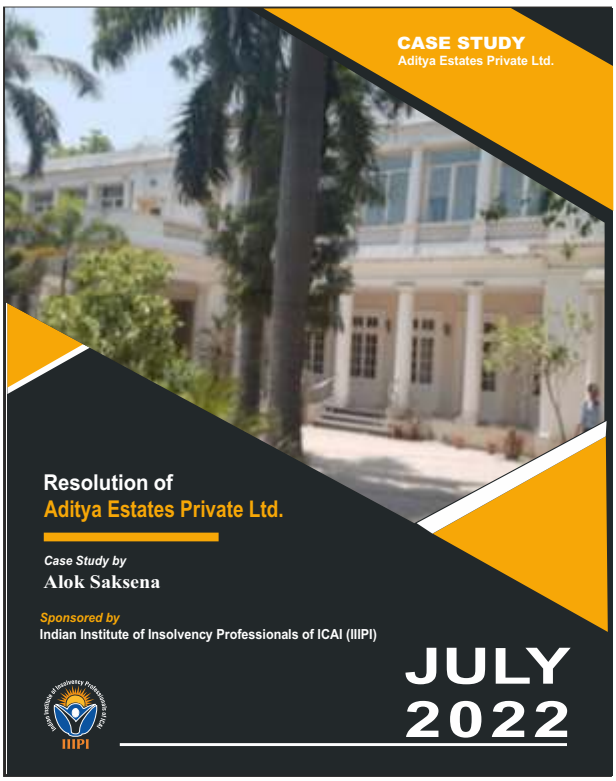
1. Introduction:

The resolution of Aditya Estates Private Ltd. (AEPL) involves complicated legal battles wherein the Corporate Debtor (CD) argued that the property under question stood released as the debt against it which was granted to Duncan Macneill Power India Ltd. (DMPIL) a related party of AEPL was repaid to ICICI Bank- India. This argument was accepted by the Debt Recovery Tribunal (DRT) which passed an order of release of the property to which ICICI Bank-India the creditor filed an appeal in the appellate tribunal. Besides, AEPL also contended that ICICI Bank UK PLC (ICICI-UK) was not a Financial Creditor (FC) under the definition of Insolvency and Bankruptcy Code, 2016 (IBC). The judgement of NCLAT on these issues provides more clarity on various provisions of the IBC.

2. Profile of Corporate Debtor

AEPL, the CD in this case with registered office at House No.3, Bhagwan Das Road, New Delhi-110001 (hereafter, property at B. D. Road) was incorporated by Mr. Aditya Kumar Jajodia in 1984. The company was primarily engaged in real estate sector with owned or leased



properties.

AEPL was a group company of Jajodia Group of Companies, which was primarily engaged in tea growing and manufacturing business. Besides AEPL, the major subsidiaries of the group included Duncan Macneill Power India Ltd. (DMPIL), Assam Oil Company Ltd – UK (AOCL), and Assam Company India Ltd. (ACIL), which was a listed entity and a major tea company of India. The Jajodia Group of Companies fell into financial crisis as its foray into oil sector incurred losses. Besides, downturn in the tea business further increases the financial crisis.

AEPL had provided corporate guarantee to secure repayment of a term loan amounting ₹24.95 crores disbursed by the ICICI Bank-India to DMPIL. It mortgaged the property at B. D. Road to ICICI Bank-India through a Power of Attorney against the loan availed by DMPIL. In a suit filed before the Debt Recovery Tribunal (DRT), DMPIL claimed to have paid entire outstanding of ₹24.95 crores along with interest and sought release of the mortgaged property from ICICI Bank-India. The DRT ordered for release of the property, but ICICI Bank-India challenged the order in Debt Recovery Appellate Tribunal (DRAT), which set aside the order of the DRT on the ground that the entire outstanding payment was not made. ICICI -UK moved Delhi HC against the Release of the Property mortgaged to ICICI Bank -India on the ground that AEPL has provided a corporate undertaking for the liabilities due to AOCL and obtained a stay on such release.

Subsequently, ICICI-UK filed a petition before NCLT, New Delhi under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for enforcing the Corporate Undertaking given by AEPL through ICICI Bank-India against the loan of USD 63 million availed by AOCL. As per this loan agreement the AEPL had undertook to repay the loan in case of default. This undertaking of AEPL was treated as a corporate guarantee to ICICI-UK on the basis of which it was recognized as a financial creditor under the IBC thereby having rights to file application against the CD for commencement of the CIRP.

3. Commencement of CIRP of AEPL

ICICI-UK had given a term loan of USD 63 million to AOCL in 2007. Besides, ICICI Bank-India had provided a loan of ~₹23 Crore to DMPIL, wherein the AEPL had given an undertaking to repay the said loan from sale of its property at B. D. Road. Accordingly, ICICI-UK filed a Corporate Insolvency Resolution Process (CIRP) petition under Section 7 of the IBC in 2018 for initiating resolution process of AEPL. The NCLT Principal Bench, New Delhi admitted the petition and initiated CIRP vide its order[1] in C.P. No. 974 (PB)/ 2018 on February 26, 2019, by holding that ICICI-UK is a Financial Creditor (FC) of the CD. In arriving to these findings, the Bench considered the documents between four parties, namely, ICICI Bank-India, DMPL, ICICI-UK and the CD. The court also appointed Mr. Alok Kailash Saksena as Interim Resolution Professional (IRP) who was later confirmed as Resolution Professional (RP) by the Committee of Creditors (CoC) dated March 26, 2019.

4. Complicated Documentation involved in the Loan Transaction and undertaking by the CD

The admission order took into account the complicated documentation as mentioned below:

(a) Facility Agreement between AOCL and ICICI-UK through which the AOCL had secured a loan of USD 63 million.

(b) Facility Agreement dated December 21, 2007, wherein ICICI Bank-India granted a loan ₹ 24.95 Crores to DMPIL and took a guarantee of the CD along with mortgage of the property at BD Road.

ICICI Bank-India, AEPL and DMPIL entered into a Debt Asset Swap Agreement (DASA), but ICICI-UK was not part of DASA agreement.

(c) ICICI Bank-India, AEPL and DMPIL entered into a Debt Asset Swap Agreement (DASA), but ICICI-UK was not part of DASA agreement. Along with the DASA agreement two more agreements were executed as follows:

i. The CD executed an irrevocable Power of Attorney in favour of ICICI Bank-India, appointing ICICI Bank-India as its Attorney, to sell, transfer, assign and/or otherwise dispose of the property, including through any encumbrance on the property inter alia for satisfaction of the dues owed to ICICI Bank-India as well as the FC namely ICICI-UK.

[1] NCLT, Principal Bench - New Delhi: C.P. No. 974 (PB)/ 2018 dated February 26, 2019

ii. Multi party undertaking executed at New Delhi inter alia between the FC and AOCL wherein AOCL agreed that upon occurrence of event of default, any amount which is in excess of the amount received for the payment of statutory dues and satisfaction of outstanding amount under the transaction document would be used to extinguish the outstanding amount under the facility agreement dated December 21, 2007, signed between the FC and the AOCL.

(d) Article of association of the CD were amended in 2015 after the DASA and multi-party undertaking by incorporating new article 34 where 'lenders' were defined to include loans granted by ICICI Bank-India to DMPIL and loan granted by ICICI-UK to AOCL, and the 'property' was defined as the property at BR. Further, the articles placed restrictions on the CD from directly or indirectly dealing with the property without the written consent of the 'lender'.

(e) The questions before the NCLT were whether ICICI-UK is a party of the agreement between the ICICI Bank-India and the CD? Whether ICICI-UK is directly a party or beneficiary of clauses in DASA? Whether any Right has been created in favour of ICICI Bank to recover its dues from the property of the CD mortgaged to ICICI Bank-India? If that is the case, then ICICI-UK would be covered by the expression of FC as defined in Section 5 (7) & (8) of the IBC. After analysing complex documents created between the parties namely, ICICI Bank-India, DMPIL, CD and ICICI-UK the bench proceeded to decide the issues and the various contentions raised thereon.

(f) The primary contention of the CD was that ICICI-UK was not a signatory to the DASA, which was essentially between ICICI Bank-India, DMPIL and the CD. In this agreement, the CD had mortgaged its property in favour of ICICI Bank-India against a debt of ₹24.95 Crores which it had availed from a sanctioned loan amounting ₹335 Crores. Therefore, ICICI-UK has no right created on the assets of CD by virtue of this agreement. The next contention was that in terms of the undertaking ICICI-UK had access to the sale proceeds of the property only in the event of default between ICICI Bank-India and DMPIL and since the loan was

repaid by DMPIL as per the order of the Debt Recovery Tribunal (DRT), there was no default and consequently ICICI-UK had no right over its property and its dues are not financial debt. It was further contented that even if the DASA and undertaking are deemed to be creating a charge or

CD argued that the loan was repaid by DMPIL as per the order of the Debt Recovery Tribunal (DRT), there was no default and consequently ICICI-UK had no right over its property and its dues are not financial debt.

interest on the mortgaged property at BR, ICICI-UK cannot be termed as a guaranteed holder.

(g) After considering all the contentions, the Bench held that ICICI-UK is not a part of the loan advanced by ICICI Bank-India to DMPIL or part of the DASA agreement. However, it is a party to the escrow agreement. Further, the amendment carried out in the Article of Association of the CD and the undertaking given to ICICI-UK created a right to sell the property and pay the liabilities. It held that ICICI-UK would be a financial creditor qua the CD. As far as the DASA agreement, it was seen that although ICICI-UK is not a part of DASA, it figures as a beneficiary in various paras of DASA. The Hon'ble NCLT also considered the objection that the debt was time barred but it held otherwise after considering the terms of repayment of principal and interest.

5. Challenges to CIRP Admission Order

The suspended director of the CD filed an appeal before the National Company Law Appellate Tribunal (NCLAT) challenging the CIRP initiation order on various grounds, which were raised before the NCLT. The grounds of appeal and decision of NCLAT order[2] in CA(AT) 270/ 2019 dated 5th September 2019 are tabulated below:

[2] NCLAT, New Delhi: Company Appeal (AT) 270/ 2019 dated September 05, 2019

Table-1: NCLAT decisions on various grounds of appeal contended by the suspended Director

Grounds of Appeal	Decision of NCLAT
ICICI-UK is not a signatory to the DASA (which is essentially between ICICI Bank- India and Duncan Macneill for its loan of ₹24.95 crores) and can claim no right under the agreement.	ICICI Bank UK PLC although not a signatory is mentioned as a party. It is immaterial as the CD has undertaken obligations to repay the loan of ICICI Bank UK PLC of USD 63 million.
The payment to ICICI-UK under DASA would arise only in the event of default of loan granted by ICICI Bank-India to DMPIL. Since the entire liability of DMPIL was discharged by the CD, no repayment can be made to ICICI-UK.	NCLAT observed that even as on CIRP Admission date the entire liability of ICICI Bank-India was not discharged as outstanding interest was not fully repaid. .
No separate guarantee was given by CD to ICICI Bank-UK for its loan to AOCL and the reliance on the undertaking is not relevant once the DASA becomes ineffective due to repayment.	NCLAT observed that the liability of ICICI Bank-India was still not fully discharged and that the undertaking created an effective right to ICICI Bank-India and ICICI-UK.
The reliance on Articles of Association cannot create any right under IBC to be treated as a Financial Creditor.	The amendments in the Article of Association whereby it lists ICICI-UK as a 'lender' for its dues from AOCL fortifies the view that it has acknowledged the liability of financial debt to ICICI-UK.

The tribunal vide an order dated September 05, 2019, dismissed the said application to which the suspended director filed a civil appeal in the Supreme Court on September 30, 2019 but failed to get any relief.

6. Public Announcement, Claims and CoC

Public Announcement for initiation of CIRP was made on March 01, 2019. Creditors had filed their claims which were submitted to NCLT and CoC was constituted as tabulated below:

Table -2: Constitution of the CoC

Name	Voting Share
ICICI Bank UK PLC	89.52%
ICICI Bank Limited	3.38%
Sprit Infrapower & Multiventures Pvt. Ltd.	6.99%
Shailja Commercial Trade Frenzy Limited	0.11%

AEPL, the CD had only one property at B. D. Road. It had no other assets and no income. The said property was under perpetual lease from the Land & Development Office (L&DO), Government of NCT of Delhi. Therefore, the resolution of the CD was centred around the said property and its value. This property was spread on 3.44-acre plot in posh Luytens' Delhi with a colonial bungalow constructed during British period which passed through the ownership of several kings and business stalwarts. It finally came under the ownership of the suspended director's family through the controlling interest in the CD.

7. Valuation and Challenges

Valuers were appointed by the RP within the stipulated timeline who arrived at an average liquidation value of ₹306.80 crores. Both valuers have stated that buyer/ auction purchaser is liable to pay L&DO transfer fees (unearned increase) and conversion from leasehold to freehold. Once such payment to L&DO is considered from buyer/ auction purchaser the valuation shall reduce by 50%. Accordingly, Average Liquidation Value stood at ₹153.40 crores. Therefore, the valuation had two values i.e., average liquidation value of ₹306.80 crores and net value of ₹153.40 crores after payment of liabilities to convert it from lease hold to free hold.

8. EOI and Final List of PRA

Form G was issued within the prescribed timelines and following list of Property Resolution Applicants (PRAs) was issued.

Table-3: List of Property Resolution Applicants (PRAs)

S. No.	Name of Prospective Resolution Applicant
1	Adani Properties Private Limited.
2	Mr. Anil Rai Gupta.
3	Dalmia Cement (Bharat) Limited.
4	Mr. Malvinder Singh.
5	Mr. Narayana Murthy.
6	Panch Tatva Promoters Private Limited.
7	Mr. Paras Pramod Agarwal.
8	Veena Investments Private Limited.
9	Welspun Logistics Limited.

A consultant was appointed to evoke the interest in resolution applicants. Considering that the property was located at a prime locality which required interest from very High Net Worth Individuals (HNWI), the consultant approached several HNWI locally and globally.

9. Resolution Plans

Adani Properties Private Limited (APPL) and Veena Investments Private Limited (VIPL) submitted their resolution plans within the prescribed timelines. The other resolution applicants had reservations on the complex documentation and on the issue of leasehold land which was under perpetual lease. They expressed the view that land should ideally be converted to freehold by the CD with the support of interim finance and thereafter resolution process should be commenced. The RP explained to the resolution applicants that IBC was a time bound process and the issue of conversion from perpetual lease to freehold was a time-consuming process which cannot be done within the timelines of CIRP. He also informed that there was no restriction on change of shareholding of the CD and it may only entail paying certain transfer fees which should be factored in.

> **"On request of CoC, to make the plan unconditional as per the requirements of IBC, APPL revised their offer from ₹400 Crores to ₹265 Crores, net reduction of ₹135 Crores."**

There were several challenges in preparing the Information Memorandum (IM) and the Data Room as the suspended management was not particularly co-operative. The Data Room required a huge documentation of the property since its first origin of the perpetual lease dated way back to 1920 C.E. There were series of transfers and mutations and the same needed lots of efforts in collating, analysing the linked documents and putting in the organised manner to ensure resolution applicants had all the information and least number of queries arose.

We had intense negotiations on the plan submitted by APPL and VIPL, which consumed a lot of time. The negotiations centred around the issue of conversion of property from perpetual leasehold to freehold and the various cost associated with the same. These issues being critical were elaborately discussed between the resolution applicants. The approach of APPL was to initially offer ₹400 crores with a condition that L&DO Charges for conversion of the perpetual leasehold to freehold, transfer fees, along with other charges would be paid from the said 400 crores. On request of CoC, to make the plan unconditional as per the requirements of IBC, APPL revised their offer from ₹400 Crores to ₹265 Crores, net reduction of ₹135 Crores. This reduction was to be attributed to conversion cost, taxes, transfer fees etc., so as to perfect the titles. This reduction was independently verified by the CoC through an external agency.

Table 4: Comparison of the two resolution plans

Highlights of APPL's Resolution Plan	Highlights of VIPL's Resolution Plan
1. Initially offered ₹400 crores with a condition that L&DO Charges along with other charges would be paid from the said ₹400 crores. 2. On request, of CoC, to make the plan unconditional and remove the uncertainty of payment to L&DO and other agencies, APPL revised their offer from ₹400 Crores to ₹265 crores, net reduction of ₹135 crores. All Amount was to be paid upfront.	1. Offered ₹225 crores with a condition that L&DO Charges along with other charges would be paid from the said ₹225 crores. 2. The plan proposed that the L&DO Charges ought to be waived and not levied on the Resolution Applicant and in case the said charges are not waived, the plan would stand withdrawn.

Thereafter, the CoC took a prudent decision of de-linking the L&DO Charges and other charges from the financial proposal of the plan.

In case of VIPL, the offer of ₹225 crores was along with the condition that L&DO Charges along with other charges would be paid from the said ₹225 Crores. The plan proposed that the L&DO Charges ought to be waived and not levied on the RA and in case the said charges are not waived, the plan would stand withdrawn. After detailed discussion, the CoC concluded that VIPL's plan was conditional, non-compliant and uncertain.

10. CoC's Decision on the Resolution Plan

The CoC decided that Resolution Plan of VIPL, was non-compliant, conditional, and uncertain and was not considered any further and was not to be put up for voting.

In case of APPL, the CoC took an independent assessment from reputed advisors on the reduction of ₹135 crores. The independent assessment estimated the conversion cost around ₹140 crores and therefore the reduction from ₹400 crores (including L&DO Charges) to ₹265 crores (Excluding L&DO Charges) was found to be reasonable. The same was put up for voting. Furthermore, the Resolution Plan of APPL was found compliant based on section 29A Affidavit and further verification of affidavit conducted by specialised agency. The plan met all the conditions of Section 30 and the regulations and found to be financially viable as well.

11. Comparison of Approved Plan with Liquidation Value

Finally, the property at B. R. Road fetched ₹265 crore through resolution plan which was ₹111.6 above its liquidation value. Thus, the value of approved plan was about 138 % higher than the liquidation value. The recovery was around 44% of the admitted claims of financial creditors amounting ₹593.55 crore). There was no Operational Creditor (OC) in this case. The voting patter for approval of the Resolution Plan is as follows:

Table-5: Voting Pattern for Approval of Plan

S.No.	Name of FC	Voting Share %	Voted
1	ICICI Bank UK PLC	89.52%	For
2	ICICI Bank Limited	3.38%	For
3	Sprit Infrapower & Multiventures Private Limited	6.99%	Against
4	Shailja Commercial Trade Frenzy Limited	0.11%	For

Since 93.01% votes were casted in favour of the plan and only 6.99% were against the plan, it was approved with more than requisite majority i.e., 66% votes in favour of the plan.

12. Objections of Dissenting Creditor

Dissenting Creditor, Sprit Infrapower & Multiventures, raised objections before the Adjudicating Authority (AA)/ NCLT on the ground that the Resolution Plan of APPL was initially of ₹400 crores and later revised to ₹265 crores which was below the liquidation value of ₹306.80 crores. Therefore, it can not be approved. The AA, after detailed discussion on the issue of valuation, taking into account the report of the valuer, and the independent assessment held that the net liquidation value excluding L&DO Charges was ₹153.40 crores (as per the valuers, who had reduced the liquidation value of ₹306.80 cores by 50% for unearned charges towards L&DO and other charges). Therefore, the resolution plan offering ₹265 crores excluding L&DO Charges and other charges was higher than the liquidation value. Thus, the objections of the dissenting creditor were overruled by the AA.

13. Approval of the Resolution Plan

The AA relied upon the decision of the Supreme Court in the case of *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors*[3] in and held that the commercial wisdom of COC shall prevail and cannot be interfered upon, and the Resolution Plan can also be lower than the liquidation value. The AA therefor rejected the contentions of the dissenting creditor and approved the Resolution Plan of APPL. No appeal was filed against the order of approval of the Resolution Plan.

[3] Supreme Court: Civil Appeal No. 4242 of 2019.

Thus, the CIRP process was concluded within the 270 days. Subsequently, Interim Management Committee (IMC) was formed, comprising of five members with the RP as its Chairperson for effective implementation of the Plan. Accordingly, all payments were done, and CD was handed over to Resolution Applicant to bring a successful resolution towards closure.

14. Learnings for Insolvency professional

The Fair value and Liquidation value of the CD can be done showing different values based on different situations. There need not be a single value as it is understood. In the instant case there were two valuation (i) firstly, on an as is where is basis wherein the valuer considered the perpetual lease and the payment against L&DO Charges [estimated and uncertain] (ii) secondly, the valuation considered the conversion of lease hold into free hold. This brings various options at the table of the CoC in evaluating the resolution plans.

The Fair value and Liquidation value of the CD can be done showing different values based on different situations.

The second learning would be evaluating the complex documents which establish the rights of the creditors and classify it as a Secured Financial Creditor. In the instant case on the face of the documents it appeared that ICICI-UK was not a FC. It was not a secured creditor as well. The issue of ICICI-UK was decided by the AA and the appellate authorities, but it required further evaluation by the RP to treat it as a Secured Financial Creditor. This decision of RP was also separately challenged by the erstwhile promoters, but the AA found no infirmity in the same.

Legal Framework

Here are some important amendments, rules, regulations, circulars, notifications, and press releases related to the IBC Ecosystem in India.

REGULATIONS

IBBI Notified IBBI (Insolvency Professionals) (Amendment) Regulations, 2022

IBBI through a notification on July 04, 2022, has amended various clauses of IBBI (IP) Regulations, 2022. These amendments are related discipline and disclosure related issues. The amendments have been made in Clause 8A by inserting Clause 8B, 8C, 8D, 15 A, 25 B, 25 C, 27 B and 27 C, etc.

Source: *Notification No. IBBI/2022-23/GN/REG088, dated July 04, 2022.*

IBBI Amends IBBI (Insolvency Professional Agencies) (Amendment) Regulations, 2022

IBBI through a notification has amended Regulation 8 of the above-mentioned Regulation as "The disciplinary proceedings shall be conducted in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017."

Source: *Notification F. No. IBBI/2022-23/GN/REG089 dated July 04, 2022.*

IBBI Regulations Amended for Expeditious Redressal of Grievances Filed against IPs

The Insolvency and Bankruptcy Board of India (IBBI) has amended the IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017, and the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, to redress grievances filed against insolvency professionals. These amendments are aimed to bring forth a streamlined and swift complaint handling procedure and to avoid undue burden on the service providers. The new rules are expected to curtail delays and ensure swift and result-oriented enforcement mechanism and provide for revisions in timelines related to enforcement process to address issues related to delay in the current mechanism.

Source: *IBBI Notification No. IBBI/2022-23/GN/REG087, dated June 14, 2022.*

IBBI notified IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2016 (CIRP Regulations)

Insolvency and Bankruptcy Board of India (IBBI) through IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2016 (CIRP Regulations) dated June 14, 2022, has made it mandatory for Operational Creditors to furnish extracts of Form GSTR-1, Form GSTR-3B and e-way bills etc. "These documents will also to be submitted as part of the claims submitted to the Resolution Professional to help collation of claims," said IBBI. The amendment also requires corporate debtors and creditors to provide additional information and documents. Besides, it includes a definition of significant difference in valuations during CIRP and enables the committee of creditors to make a request to the Resolution Professional regarding the appointment of a third valuer.

Source: *IBBI Notification No. IBBI/2022-23/GN/REG084, dated June 14, 2022.*

IBBI notified IBBI (Information Utilities) (Amendment) Regulation 2022

In the IBBI (Information Utilities) Regulations, 2017, regulation 2, sub-regulation (1), after clause (l), the clause "(la) "record of default" means the status of authentication of default issued in Form D of the Schedule" has been inserted. Besides, amendments had been made in Regulation 20, 21, 41 and Form C etc.

Source: *IBBI Notification No. IBBI/2022-23/GN/REG085 dated June 14, 2022*

IBBI amends IBBI (Liquidation Process) Regulations 2016

IBBI issued IBBI (Liquidation Process) (Amendment) Regulations, 2022 on April 28, 2022. Through this amendment, explanations have been added in the Regulation 2 A, 21A, 31A, and Regulation 44. The 'Explanation' inserted in the first three Regulations reads "It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of

the IBBI (Liquidation Process) (Amendment) Regulations, 2019."

Source: *The Gazette of India, CG-DL-E-28042022-235410, IBBI Notification No. No. IBBI/2022-23/GN/REG082 dated April 28, 2022.*

CIRCULARS

Application under Rule 4, 6 or 7 of Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016

It has been decided that, the IBBI will forward the application for initiating insolvency received by it in terms of rule 4, 6 or 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016, to the Information Utility (IU) and on receipt of the said application, the IU shall: (a) inform other creditors of the Corporate Debtor by sharing the application; (b) issue notice to the applicant, requiring it to file 'information of default' in the specified format under Insolvency and Bankruptcy Board of India (Information Utility) Regulations, 2017 (IU Regulations); and (c) process the 'information of default' for the purpose of issuing ROD as per the IU Regulations.

Source: *Circular No. IBBI/IU/51/2022, dated June 15, 2022.*

IBBI allows 6 attempts in 12 months for applicant to pass Limited Insolvency Examination (LIE) and Valuation Examination

Regulation 3 of the IBBI (Insolvency Professionals) Regulations, 2016 empowers IBBI to conduct the Limited Insolvency Examination (LIE). The said Regulations inter-alia empowers IBBI to determine the syllabus, format and frequency of the examination, to be published at least three months before the examination. IBBI also conducts Valuation Examinations in terms of rule 5 of the Companies (Registered Valuers and Valuation) Rules, 2017 (Valuation Rules). The said rule inter-alia empowers IBBI to determine the syllabus, format, and frequency of the examination, to be published at least three months before the examination.

In order to bring in objectivity and improvements in the scheme of above examinations, frequency of attempt in an LIE or valuation examination for every candidate, shall be determined after taking into account a cooling off period of 2- months between each consecutive attempts of such candidate, thereby making a total of 6 attempts in a period of 12 months.

Source: *Circular No. EXAM-13016/1/2022-IBBI, dated June 06, 2022*

IBBI rescinds seven Circulars issued between 2018 to 2021

IBBI through a circular on May 23, 2022, has pronounced its decision to rescind seven Circulars it had issued in line to the IBBI (Mechanism for Issuing Regulations) Regulations, 2018 and under Section 196 of the IBC, 2016. "It was observed that certain circulars are no longer required on account of being already provided in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or IBBI (Insolvency Professionals) Regulations, 2016.

Source: *Circular No. IBBI/CIRP/3/2022 dated May 23, 2022.*

Withdrawal of Circular issued on August 26, 2019, regarding applicability of the IBBI (Liquidation Process) (Amendment) Regulations, 2019 (notified on July 25, 2019)

The Board had earlier issued a Circular on August 26, 2019, clarifying that the provisions of the IBBI (Liquidation Process) (Amendment) Regulations, 2019 (Amendment Regulations 2019) were applicable only to liquidation processes, which commenced on or after July 25, 2019. The Board had notified that the IBBI (Liquidation Process) (Amendment) Regulations, 2022 to clarify that provisions of regulations 2A, 21A, 31A and 44 as amended / inserted by the Amendment Regulations 2019 apply only to the liquidation processes commencing on or after July 25, 2019. Above mentioned Circular dated August 26, 2019, has been withdrawn.

Source: *Circular No. IBBI/LIQ/2/2022 dated May 06, 2022.*

GUIDELINES

IBBI released Final Panel of IPs for second half of 2022

In pursuance to the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2022, IBBI has released the Final Panel of Insolvency Professionals (IPs) for appointment of Interim Resolution Professionals (IRPs),

RPs, Liquidators and Bankruptcy Trustees on June 30. This panel will be valid for the period from July 01, 2022, to December 31, 2022. The lists of eligible IPs have been prepared according to 15 Zones vitz. New Delhi, Ahmedabad, Allahabad, Amravati, Bengaluru, Chandigarh, Cuttack, Chennai, Guwahati, Hyderabad, Indore, Jaipur, Kochi, Kolkata, and Mumbai. IBBI prepares and releases such panels for two times in a year.

Source: *https://www.ibbi.gov.in/uploads/whatsnew/5404bf25b85905cd52691c09abf8b402.pdf*

PRESS RELEASES

Smt. Anita Shah Akella appointed ex-officio Member of IBBI

In exercise of the powers conferred by clause (b) of sub-section (1) of Section 189 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government has appointed Smt. Anita Shah Akella, Joint Secretary, Ministry of Corporate Affairs as ex-officio member in the Insolvency and Bankruptcy Board of India (IBBI) to represent the MCA in IBBI Board.

Source: *S.O. 3069(E), [F. No. 30/03/2016-Insolvency Section] dated July 05, 2022.*

Shri Jayanti Prasad takes charge as Whole-time Member of Insolvency and Bankruptcy Board of India

Shri Jayanti Prasad took charge as Whole-time Member of Insolvency and Bankruptcy Board of India in New Delhi, on July 05, 2022.

Shri Jayanti Prasad, a 1986 batch Indian Audit and Accounts Service officer, superannuated as Deputy Comptroller & Auditor General (Human Resources and International Relations). Before joining IBBI, he had accomplished thirty-five years of experience in the civil services, national and international assignments, having held key positions within the Office of Comptroller and Auditor General of India and in the United Nations (UN). He was the Chief Auditor at the UN for six years, serving at diverse locations like Somalia, Kenya, Geneva, Angola, Iraq, New York etc. He also served as the Custodian under The Special Court (TORTS) Act, 1992 in the Department of Financial Services, Ministry of Finance, Government of India.

Shri Jayanti Prasad holds a Master of Science degree in the subject of Physics from the University of Lucknow. He has been awarded numerous awards for academic excellence including award of Gold Medals from the Governor of Uttar Pradesh and the Hon'ble Prime Minister of India for topping at Graduate and Post Graduate levels. He has also been awarded by the UN in recognition of contributions as Chief Auditor for the Oil for Food Program resulting in significant impact and cost savings to the UN. In addition to being an officer of the Indian Audit and Accounts Service, he holds membership of Institute of Public Auditors of India.

Source: *Press Release No. IBBI/PR/2022/30, dated July 05, 2022.*

IBBI celebrates 'Azadi ka Amrit Mahotsav'

Azadi Ka Amrit Mahotsav (AKAM) is an initiative of the Government of India to celebrate and commemorate 75 years of progressive India and the glorious history of its people, culture and achievements. Since the beginning of AKAM celebrations, which started on March 12, 2021 by the Hon'ble Prime Minister Shri Narendra Modi, IBBI organized several activities and events as part of the Utsav, including: (a) Awareness Programmes in 75 districts of the country, (b) International Research Conference on Insolvency and Bankruptcy, (c) National Online Quiz on IBC, 2016, (d) Publication - "Insolvency - Now and Beyond", (e) Technical Session on "5 Years of IBC - Achievements and Way Forward", and (f) Conference on "Entrepreneurship Liberty: Freedom of Entry, Competition and Exit" and IP Conclave.

Source: *Press Releases No. IBBI/PR/2022/24, dated June 03, 2022.*

IBBI invites comments from the public on the Regulations notified under the IBC, 2016 by December 31, 2022

Keeping in view the importance of public comments, IBBI invites comments from the public, including the stakeholders, on the regulations already notified under the Code till date. The comments received between May 06, 2022, and December 31, 2022, shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It will be the endeavor of the IBBI to notify modified regulations by March 31, 2023 and bring them into force on April 01, 2023.

Source: *Press Releases No. IBBI/PR/2022/21, dated May 06, 2022.*

IBC Case Laws

Supreme Court of India

Vallal Rck Vs. M/S Siva Industries and Holdings Limited and Others. Civil Appeal No. 1811-1812 of 2022, Date of Judgment: June 03, 2022

The Apex Court Emphasized the Need for Minimal Judicial Interference by the NCLAT and NCLT in The Framework of IBC.

Facts of the Case

These appeals were filed by appellant against the judgment of the NCLAT-Chennai Bench, whereby it dismissed the appeals filed by the appellant, challenging the two orders passed by the NCLT – Chennai, which rejected the application filed by the Resolution Professional 'RP' under Section 12A of IBC, 2016 read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, for withdrawal of the application filed under Section 7 of the IBC in view of the settlement plan submitted by the appellant. The appellant also challenged the order passed by the NCLAT whereby the NCLAT had dismissed the appeal of the appellant against the order passed by the NCLT directing initiation of liquidation proceedings in respect of M/s Siva Industries and Holdings Limited (Corporate Debtor 'CD').

The facts of the case are that IDBI Bank had filed an application under Section 7 of the IBC seeking initiation of CIRP against the CD. After the CIRP process was initiated, the RP presented a resolution plan before the CoC which was not approved as it did not receive 66% votes and then the RP filed an application for initiating liquidation. Subsequently, the Appellant filed a settlement application under Section 60(5) IBC to offer a one-time settlement plan. Thereafter, the CoC considered and approved the Settlement plan. Consequently, the RP filed an application seeking withdrawal of CIRP. However, the NCLT rejected the said application stating that the Settlement Plan was only a Business Restructuring Plan and initiated the liquidation process.

The main question for consideration in the present appeals was as to whether the NCLT or NCLAT can sit in an appeal over the commercial wisdom of the Committee of Creditors 'CoC' or not.

Supreme Court's Observations

The Apex Court referred to Section 12 A of the IBC, 2016, which deals with withdrawal of applications admitted under Section 7, 9 or 10, the Apex Court noted that the provision was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 after much deliberation by the Insolvency Law Committee. The Committee had recommended that an exit should be allowed provided the CoC approves it by 90% voting share.

The Apex Court observed that the recommendation was made as the Committee reckoned that the intent of the IBC is to discourage individual actions for enforcement and settlement. In the light of the same, it had opined that the settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted. Pursuant to the insertion of Section 12A in the IBC, Regulation 30A was added to the Regulations, 2016 which laid down the detailed procedure for withdrawal of application. It further noted that in *Swiss Ribbons Private Limited and Anr. Vs. Union of India and Ors*., validity of Section 12A was upheld. Moreover, the Apex Court in its various judgments had already held that commercial wisdom of CoC is not to be interfered with by NCLT and NCLAT. Further the Court held that, in this case the proceedings of the meetings of CoC clearly showed that there were wide deliberations amongst CoC members while considering the settlement plan as submitted by the appellant and suitable amendments were also made in the same. Subsequently the plan was approved by 94.23% votes.

Order

The Apex Court allowed the present appeals and quashed and set aside the impugned judgment and order passed by the learned NCLT and NCLAT. The application filed by RP before NCLT for withdrawal of CIRP was also allowed.

***Case Review**: - Appeals Allowed.*

Kotak Mahindra Bank Limited Vs. A. Balakrishnan & Anr. Civil Appeal No. 689 of 2021, Date of Judgment: May 30, 2022

The holder of a recovery certificate would be a "Financial Creditor" under Section 5 (7) of the IBC and would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of certificate.

Facts of the Case

The present appeal was preferred by the Appellant 'Kotak Mahindra Bank Ltd.' (KMBL) owing to the default of payment by the M/s Prasad Properties and Investments Pvt. Ltd. (Corporate Debtor 'CD') and three borrower entities. The Facts of the case are that Ind and Bank Housing Limited (IBHL) had sanctioned separate credit facilities to three borrower entities and due to default IBHL had classified the facilities availed as Non-Performing Asset in Nov. 1997. Subsequently, three civil suits were filed by IBHL before Hon'ble High Court of Madras against CD and borrower entities to recover the amounts due. Following the pendency of the suits, the Appellant and IBHL entered into a Deed of Assignment dated 13th October 2006, whereby IBHL assigned all its rights, interest, title, estate, claim and demand to the debts due from borrower entities to Appellant.

Subsequently, a compromise was entered between KMBL and borrower entities on 7th August 2006. The judgment dated 26th March 2007 of High Court had recorded the compromise between the parties and made CD liable to pay the amount of approx. ₹29 crores to KMBL, however the same was defaulted. Thereby KMBL issued a Demand Notice, Possession Notice and Winding up Notice under SARFAESI Act & Companies Act against the CD and Borrower entities. Further aggrieved by continuous defaults of payment, three applications under Debt Recovery Act for issuance of Debt recovery certificate were filed, which were allowed by Debt Recovery Tribunal.

Meanwhile other proceedings between the parties, with regard to a contempt petition filed by KMBL as well as dismissal of applications filed for issuance of Recovery Certificate, and subsequent grant of relief in a review application followed from 2008 to 2017. With respect to the aforementioned Recovery Certificates, on 5thOctober, 2018, KMBL filed an application under Section 7 of the IBC, claiming to be a Financial Creditor, before the NCLT seeking the initiation of CIRP against the CD claiming an amount of approx. ₹836 crores. The Appellant submitted that the court in the case of *Dena Bank Vs. C. Shivakumar Reddy & Anr* had held that if a claim fructified into a final judgment and order/decree, a fresh right may be accrued to the creditor to recover the amount specified in the Recovery Certificate. However, CD submitted that the cause of action had merged into the order of issuance of the Recovery Certificate by the DRT, thus, by application of the doctrine of merger, the debt does not survive.

Supreme Court's Observations

The Apex Court considered various provisions of the IBC and its earlier judgments in the matter of *Dena Bank Vs. C. Shivakumar Reddy & Anr and Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Co. (Ltd.)* and stated that since the Limitation Act would be applicable to applications filed under Sections 7 and 9 of IBC, thus, the applications would fall within the residuary Article 137. It further stated that a final judgment and an order/decree would be binding on the judgment debtor, and once a claim would be fructified into a final judgment and order/decree, and a certificate of recovery would be issued authorizing the creditor to realize its decretal dues, a fresh right would be accrued to the creditor to recover the amount of the final judgment or as specified in the Recovery Certificate.

Further, the Court held that within the meaning of clause (8) of Section 5 of the IBC, a liability with respect to a claim arising out of a Recovery Certificate would be a "financial debt". Consequently, within the meaning of clause (7) of Section 5 of the IBC, the holder of the Recovery Certificate would be a "Financial Creditor", and the holder of such a certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Order

The Apex Court allowed the present appeal and quashed and set aside the impugned judgment and order passed by the learned NCLAT. The Court further clarified that it has not touched the elaborate arguments advanced by the rival parties upon the merits of the matter and has only decided the legal issues.

Case Review: - Appeal Allowed.

Indian Overseas Bank. Vs. M/S RCM Infrastructure Ltd. and Anr. Civil Appeal No. 4750 of 2021, Date of Judgment: May 18, 2022

SARFAESI proceedings cannot be continued against Corporate Debtor once CIRP is admitted and moratorium is ordered.

Facts of the Case

This appeal was filed against the judgment passed by the NCLAT - New Delhi dated 26th March 2021 whereby it dismissed the appeal filed by the appellant - Indian Overseas Bank, which was in turn filed challenging the order dated July 15, 2020 passed by NCLT - Hyderabad Bench in an Interlocutory Application, vide which the NCLT had allowed the application filed by the former Managing Director of the M/s RCM Infrastructure Ltd. (Corporate Debtor 'CD') and set aside the sale of the assets of the CD.

The Facts of the case are that the Indian Overseas Bank had extended certain credit facilities to the CD, which it failed to repay and eventually, SARFAESI proceedings were initiated against the CD. The Bank took symbolic possession of two secured assets mortgaged exclusively with it in exercise of powers conferred on it under Section 13(4) of the SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002. An E-auction notice came to be issued by the Bank to recover the public money availed by the CD. At this stage, the CD filed a petition under Section 10 of the IBC before NCLT. NCLT, on January 03, 2019, admitted the petition and a moratorium was also notified. But even thereafter, the Bank continued the auction proceedings and accepted the balance 75% of the bid amount and completed the sale. NCLT, allowing the application filed by Corporate Debtor, passed an order setting aside the sale. NCLAT dismissed the appeal filed by the Bank and therefore it approached the Apex Court.

The bank contended that (1) the sale in question was complete on its confirmation on December 13, 2018 and as such, the admission of the petition on January 03, 2019 by the learned NCLT would not affect the said sale (2) merely because a part of the payment was received subsequently after initiation of CIRP, it will not deprive the Bank from receiving the said money in pursuance to the sale which has already been completed.

Supreme Court's Observations

The Apex Court made reference of its decisions in *Vidhyadhar Vs. Manikrao & Another, Arvind Kumar Vs. Govt. of India & Others* and *Kaliaperumal Vs. Rajagopal & Another* and stated that however, the balance amount was accepted by the appellant Bank on March 08, 2019, the sale under the statutory scheme as contemplated under Rules 8 and 9 of the Rules would stand completed only on March 08, 2019, which date falls much after January 03, 2019, i.e., on which date CIRP commenced and moratorium was ordered. As such, the Apex court was unable to accept the argument on behalf of the appellant Bank that the sale was complete upon receipt of the part payment.

Further in view of the provisions of Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the CD in respect of its property including any action under the SARFAESI Act is prohibited. It was of the view that the appellant Bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated, and the moratorium was ordered.

Order

The Apex court dismissed the present appeal in view of the above observations and upheld the orders passed by NCLAT and NCLT.

Case Review: - Appeal Dismissed.

New Okhla Industrial Development Authority Vs. Anand Sonbhadra, New Okhla Industrial Development Authority Vs. Manish Gupta & Anr. Civil Appeal No. 2222 of 2021 and 2367-2369 of 2021, Date of Judgment: May 17, 2022

The Apex Court was of the view that in the lease in question, there has been no disbursement of any Debt (Loan) or any sums by the appellant to the Lessee. The appellant would, therefore, not be a Financial Creditor within the ambit of Section 5(8) of IBC.

Facts of the Case

The Appellant 'NOIDA' filed appeal No. 2222 OF 2021 against the judgment passed by the NCLAT, wherein NCLAT had held that the NOIDA is an Operational Creditor 'OC' under IBC and cannot be considered as a Financial Creditor 'FC' of the Corporate Debtor 'CD' under the provisions of the Code. The appellant 'NOIDA' initially submitted Form 'B' and claimed as an OC in regard to the dues outstanding under the lease. Subsequently the appellant filed claim in Form 'C' and claimed as FC. Finally, the matter was considered by NCLT which held that there was no financial lease in terms of the Indian Accounting Standards and there was no financial debt. By the impugned order, NCLAT affirmed the view taken by the NCLT.

Further, appeals 2367-2369 of 2021 were filed against an interim order passed by the NCLAT staying the order passed by the NCLT, whereby NCLT had directed to admit the appellant as a FC, and it also directed to admit the whole of the claim of the appellant. In view of the order passed, which is the subject matter of Appeal No. 2222/2021, NCLAT found it fit to pass an order staying the order passed by the NCLT. Hence the present appeals.

The common question in both the appeals were whether the appellant is entitled to be treated as a FC within the meaning of the IBC.

Supreme Court's Observations

The Apex Court made inquiry into the various rules of the Indian Accounting Standards which define the characteristics of a financial Lease and referred to Rule 63 of the IAS which states that a lease will be a financial lease if the term of the lease is for a major part of the economic life of the underlying assets, even if the title is not transferred. The Apex Court held that the lease in question is for a period of ninety years and the principle of the economic life of the underlying asset which is the "land" is inapposite in the present case.

The Apex Court further held that it may not be possible to hold that the lease is for a major part of the economic life of the land. It cannot be said that at the expiry of 90 years the land will cease to be economically usable. Therefore, we cannot accept the argument of the appellant that after 90 years appellant would not get the empty parcel of land and the land would not be of any commercial use to the appellant after the expiry of the lease.

The Apex Court further examined the contention of NOIDA based on Rule 62 and 65 of IAS which states that a lease may be classified as a financial lease if it transfers substantially all the risks and rewards incidental to the ownership of the underlying asset and held that all rewards incidental to the ownership are not transferred to the lessee by NOIDA and thus the conditions of Rule 62 and 65 do not meet in the present scenario and therefore, NOIDA cannot be considered as a FC under Section 5(8)(d) of IBC.

The Apex Court also examined the case of NOIDA in view of Section 5(8)(f) of the Code which classifies a creditor as a FC in the case of a debt. The Court negated the contention of NOIDA and held that in view of the facts of the appeals, it is unable to hold that the lessee has raised any amounts from the appellant. The question, therefore, of considering the last limb of Section 5(8) (f), namely, whether it has commercial effect of a borrowing could not arise. But it is safe to say that the obligation incurred by the lessee to pay the rental and the premium cannot be treated as an amount raised by the lessee from the appellant.

Order

The Apex court dismissed the appeals in view of the above observations and stated that NOIDA is an OC.

Case Review: Appeal Dismissed.

Anand Murti Vs. Soni Infratech Private Limited Civil Appeal Nos 7534 of 2021, Date of Judgment: April 27, 2022

Facts of the Case

The Appellant (Anand Murti) filed the present appeal feeling aggrieved and dissatisfied with the impugned order

on November 22, 2021 passed by the National Company Law Appellate Tribunal, New Delhi 'NCLAT' by which the NCLAT dismissed the appeal preferred by the Appellant, which was filed against the order passed by the National Company Law Tribunal - Delhi Bench (Adjudicating Authority 'AA') dated November 22, 2019 according to which an application was filed by respondent number 2 against the Corporate Debtor (M/S Soni Infratech Pvt Ltd) for initiation of CIRP under Section 7 of the IBC, and appointed an IRP. The respondent number 2 had booked a flat in the housing project launched by the Corporate Debtor, subsequently, vide a letter dated July 31, 2018, the booking was cancelled, and respondent number 2 demanded refund of the amount of ₹32,27,591/- from the Corporate Debtor. The IRP was directed to initiate the CIRP as per the provisions of the IBC.

The Appellant, aggrieved by the NCLT order had filed an appeal before the NCLAT wherein the NCLAT, vide its order on December 19, 2019, passed an interim order directing the IRP not to constitute the Committee of Creditor (CoC). The Appellant had agreed to settle the matter with the respondent number 2 before the NCLAT, further submitting that the housing project had been completed to the extent of 70-75%, and that the funds/private financier for the same had been arranged as well to complete the project. To this, the NCLAT, vide order on January 31, 2020, had directed to the Appellant to file proposed settlement terms/plan, which the Appellant filed on February 13, 2020. Meanwhile, the Appellant had also settled the matter with respondent number 2. Despite this, the NCLAT, vide order on February 26, 2020, modified the interim order dated December 19, 2019, and directed the IRP to constitute the CoC on the ground that the settlement occurred only between the Appellant and the respondent number 2 sans all the allottees. The Appellant, thereafter, approached the Apex Court, and the Court vide order on March 05, 2020, permitted the Appellant to approach the NCLAT for modification of the February 02, 2020, to present the settlement plan covering all the allottees.

In pursuance to the directions issued by the NCLAT dated 29.09.2021, a meeting of various stakeholder was conducted on October 23, 2021, in which the "Modified Resolution Plan" was submitted by the Promoter of the Corporate Debtor, who had also filed an undertaking on an affidavit. Yet, the NCLAT vide the impugned order November 22, 2021, rejected the modification claim on the grounds that there was no settlement with all the homebuyers, and that there was trust deficit amongst the homebuyers, and passed the order.

Supreme Court's Observations

The Apex Court taking into consideration the undertaking filed by the Promoter, and also the fact that there were 7 out of the 452 homebuyers, who had opposed the Settlement Plan, held that it would be in the interest of the homebuyers if the Appellant/Promoter will be permitted to complete the project, and that he has agreed, firstly, that the cost of the flat would not be escalated, secondly, that the project would be completed within a stipulated timeline. The Appellant also undertook to refund the amount paid by the seven objectors. The Apex Court also held that there could be a possibility that if the CIRP is permitted, the homebuyers will have to pay a much higher cost, inasmuch as the offer made by the resolution applicants could be after taking into consideration the price of escalation.

Order

The Apex Court in view of the above observations quashed the NCLAT order dated November 22, 2021, and treated the affidavit filed by appellant to be an undertaking. The Appellant has been permitted to complete the project, and the modification application before the NCLAT accordingly stands allowed. Accordingly, the pending applications shall stand disposed of, and that there shall be no orders as to costs.

Case Review: - Appeal Allowed.

Sunil Kumar Jain and Ors. Vs. Sundaresh Bhatt and Ors. Civil Appeal No. 5910 of 2019, Date of Judgment: April 19, 2022

Wages/salaries of only those workmen/employees who worked during the CIRP are to be included in the CIRP costs.

Facts of the Case

The Appellant (Workmen/employees of M/s ABG Shipyard Limited (Corporate Debtor 'CD') filed present

appeal feeling aggrieved and dissatisfied with the impugned order on May 31, 2019 passed by the National Company Law Appellate Tribunal, New Delhi 'NCLAT' by which the NCLAT dismissed the appeal preferred by the appellants, which was filed against the order passed by the National Company Law Tribunal - Ahmedabad Bench (Adjudicating Authority 'AA') on April 25, 2019 not granting any relief to them with regard to their claim relating to salary, which were claimed for the period involving the CIRP and the prior period.

The CD was admitted to CIRP process vide order dated 01.08.2017 and on 23.10.2017, Company Application No. 348 of 2017 was filed before the AA, to direct the Resolution Professional to make payment to the employees and the workmen. Subsequently, on 09.3.2018, the appellants filed Company Application No. 78 of 2018 in the above before AA, to direct the RP to utilize the number of ₹9.75/- crores approx. to be received from the Indian Coast Guard solely for employees/workmen whereby the AA directed to deposit ₹2.75 crores out of the above amount with the Registry of the NCLT towards disbursement of the outstanding salaries/wages to the appellants, subject to the outcome of IA No. 348/2017 and disposed of Application No. 78/2018.

Subsequently, as no resolution plan could be agreed upon, the RP filed an application for liquidation which was approved by the AA and simultaneously while disposing of Application No. 348/2017 did not grant the relief claimed by the appellants. Aggrieved by the order passed of the AA, the appellants filed appeal before NCLAT, who by its order disposed of the appeal declining to interfere with the order passed by the AA, however, allowed the appellants to file their individual claims before the Liquidator. Further if claim of one or another workmen/employee is rejected, it will be open to them to move before the AA.

Supreme Court's Observations

The issue before the Court was with respect to wages/salaries of the workmen/employees during the CIRP period and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund. The Apex Court while referring to the provisions of the Code, observed that while considering the claims of the concerned workmen/ employees towards the wages/ salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the CD was a going concern and that the concerned workmen/employees actually worked during the CIRP. Further, considering Section 36(4) of the IBC whereby the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.

Order

The Apex Court in view of the above observations partly allowed the appeal and directed the Appellants to submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the CD as a going concern and that they actually worked during the CIRP. The Liquidator was directed to adjudicate such claims in accordance with law and on its own merits, irrespective of the fact whether the RP who himself is now the Liquidator. If the above is found is true, then the wages and salaries to be considered and included in CIRP costs and they will have to be paid as per Section 53(1)(a) of the IBC in full before distributing the amount in the priorities as mentioned in Section 53 of the IBC.

Case Review: Appeal Dismissed.

High Court

Jasani Realty Pvt. Ltd. Vs. Vijay Corporation Commercial Arbitration Application (L) No. 1242 of 2022, Date of Judgment: April 25, 2022

Facts of the Case

This Appeal was preferred by Jasani Realty Pvt. Ltd. (Applicant) under Section 11 of the Arbitration and Conciliation Act (ACA), 1996, wherein the Respondent (Vijay Corporation) failed to appoint an arbitral tribunal for which the Applicant had invoked an arbitration agreement through a notice dated December 10, 2021, calling upon the Respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between both the parties under the loan agreements. The

Respondent had provided financial assistance to the Applicant of an amount of approximately ₹4.5 crore in the usual course of business for which a loan agreement referred to as "Agreement No.1", dated April 23, 2015, was signed by both the parties. However, the business scenario got changed, thereby, creating a negative impact during the subsistence of Agreement No.1. Consequentially, another agreement, "Agreement No. 2", dated July 05, 2016, was executed between the parties, under which the repayment of the borrowing was extended from June 30, 2015, to March 31, 2017.

Earlier, there were defaults on the part of the Applicant in the payment of the loan instalments. In discharge of the liability towards the Respondent, the Applicant had issued a cheque, dated September 07, 2021, to the Respondent of an amount of approximately ₹31 crore. The cheque was dishonoured when it was presented for payment which led to the Respondent approach the NCLT to initiate proceedings on October 12, 2021, against the Applicant under Section 7 of the IBC, 2016. Eventually, the Applicant appeared in the proceedings and adjournments were also sought. However, no order was passed by the NCLT admitting the petition as per the provisions of the sub-section (5) of Section 7 of the IBC. The Respondent had also filed an affidavit opposing the petition filed by the Applicant on the ground that the application is an afterthought and an attempt on the part of the Applicant to dilute the prior proceedings before the NCLT. It is to be considered, whether a mere filing of a proceeding under Section 7 of the IBC, 2016, would amount to an embargo on the Court considering an application under Section 11 of the Arbitration and Conciliation Act, 1996, to appoint an arbitral tribunal?

High Court's Observations

In view of the observations of the Supreme Court (SC) in the matter of *Indus Biotech Private Limited Vs. Kotak India Venture (Offshore) Fund ("Indus Biotech")*, the High Court was of the view that Section 8 of the ACA application was not filed by the Applicant in the present case before the NCLT. It is in the context of Section 8 application being filed by Indus Biotech, for referring the dispute to arbitration, the Supreme Court observed that though the Corporate Debtor files for an application under Section 8 of the ACA an independent consideration of the same by the NCLT de- hors the application filed under Section 7 of the IBC and the material produced with it will not arise. The Adjudicating Authority (NCLT) is duty bound to advert to the material available before it, along with the application under Section 7 of the IBC filed by the Financial Creditor to indicate the default along with the version of the Corporate Debtor.

The court was not convinced with the respondent's contention that necessarily the Applicant ought to have filed an application under Section 8 of the ACA before the NCLT and having not filed such application, the present Section 11 application ought to be held to be not maintainable. It further observed that accepting such a submission would lead to an anomalous situation that a mere filing of the Section 7 application would be required to be construed to oust remedy which the law has otherwise provided to enforce an arbitration agreement and redress its claims under the agreed arbitration procedure. Thereafter, if the Section 7 IBC proceedings are admitted, the provisions of Section 238 of the IBC would get triggered to override the application of all other laws wherein the CIRP would commence against the Corporate Debtor as per the provisions of Section 13 of the IBC which would be proceedings in rem.

Order

The High Court in view of the above observations allowed the application by appointing an arbitral tribunal for adjudication of the disputes and differences risen between the parties under the agreements in question. Further, a formal order appointing an arbitral tribunal would not be required to be made as after the judgment was reserved, the parties had settled the disputes stating an arbitration was not warranted.

Case Review: Disposed of.

National Company Law Appellate Tribunal (NCLAT)

Partha Paul (Erstwhile Director of M/S. Multiple Hotels Pvt. Ltd.) Vs. Kotak Mahindra Bank Ltd. and Anr. Company Appeal No. 1138 of 2019, Date of Judgment: June 10, 2022

Facts of the Case

The present appeal was preferred by the Appellant 'Partha Paul' (Erstwhile Director of the Corporate Debtor namely Multiple Hotels Pvt. Ltd.) under Section 61 of the IBC, 2016, against the impugned order dated October 04, 2019, passed by the NCLT, Kolkata Bench (the Adjudicating Authority or AA). Kotak Mahindra Bank (Respondent-1/ R-1 or Bank) had sanctioned facilities for amount of ₹3 crore to M/s. Camelia Educate Services Ltd. (CESL) and ₹8.5 crore each to M/s. Multiple Educational & Manpower Development Trust (MEMDT) and Camellia Educate Trust (CET) respectively in 2012 to further the objectives of the Trust in development of educational services. On disbursement of the loan, an agreement dated November 11, 2012, was executed by and between the borrowers and the bank to the tune of ₹20.80 crore. Furthermore, the CD executed a Corporate Guarantee Agreement in lieu of the above said loans apart from offering its properties in mortgage.

The appellant contended that despite regular payments of Equated Monthly Instalments (EMI), the R-1 failed to provide them the statement of accounts and started disputing on the order of satisfaction of the EMIs in terms of the agreement executed in respect of the financial facilities. He also alleged that the Bank did not honoured orders of settlement passed by the Debt Recovery Tribunal (DRT), Kolkata on December 14, 2018, but initiated multiplicity of proceedings in different avenues of law for the purpose of fulfilling their own mala fide intention and to take over the management of the trust and also of the Appellant's company. However, the R-1, argued that the CD had defaulted the payment of the loan therefore a petition was filed under Section 7 of the IBC, 2016 for initiating insolvency process. As the CD did not turn up despite several opportunities, the NCLT passed an ex-parte judgement for commencement of CIRP.

NCLAT's Observations

NCLAT observed that the impugned order of NCLT dated October 04, 2019, was passed ex-parte. Furthermore, the loan facility was granted to the Trust at an extremely high rate of 25% per annum. The amount was sanctioned to the borrowers for the furtherance of the objective of the Trust for development of education services, and that the Corporate Guarantee Agreement was executed apart from properties being mortgaged for ₹20.80 crore. Further, the Court observed that the CD had paid to the Bank ₹28 crore from 2013 to December 2018.

NCLAT observed that the Bank/R-1 was engaged in forum shopping to the multiple 'Courts/ Tribunals' just to harass the Guarantor as it has moved the High Court of Calcutta to coerce the trust into paying of its debts and involving the Appellant in time consuming and expensive litigation. Citing previous judgements of the Supreme Court, the NCLAT said, "it is a settled law that the practice of Forum Shopping be condemned as it is an abuse of law". Citing the Supreme Court judgement in the matter of *Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors and Cables Limited* (2018), the NCLAT stated, "the provision of the IBC, 2016 is not intended to be a substitute to be a recovery forum,".

Order

NCLAT set aside the order of the NCLT and ordered to remand back the matter with a direction to the AA to give a patience hearing to the Appellant. Additionally, there would be no order as to costs, and interim order, if any, passed by the Tribunal would stand vacated.

Case Review: Appeal Allowed.

Amit Gupta Vs. Anil Kohli & Anr. Company Appeal (At) (Ins) No. 445 of 2021 Date of Judgment: June 10, 2022

Facts of the Case

This Appeal was filed by Mr. Amit Gupta, the Appellant, in his capacity as the Successful Resolution Applicant (SRA), under Section 61 of the IBC, 2016 against the order passed by the National Company Law Tribunal (NCLT) Mumbai Bench, the Adjudicating Authority (AA), on April 30, 2021.

The SRA was required a loan amounting ₹77 Crore to satisfy the conditions of the Resolution Plan for which he

approached the HDFC Bank. The HDFC Bank asked the assets of the Corporate Debtor to be free from all sorts of encumbrances to approve the loan. Subsequently, the SRA approached the AA with a prayer that he should be permitted to make payments of the balance amount within two months after the lifting/ removing all attachments, charges, encumbrances, and liens from the assets & properties of the Corporate Debtor and imposing commercial interest @12% per annum from the date it become due & payable. The AA dismissed the application on the ground that it was not vested with the jurisdiction to entertain the prayer.

Further, it was also submitted that the Resolution Plan was approved by an order of AA dated November 26, 2019. However, due to an inadvertent typographical error in the Order, a rectified order was issued on January 27, 2020. In this rectified order the time for making the total payment from the date of approval of the Resolution Plan was reduced from 30 months to three months about which the Appellant was informed on February 11, 2022. Accordingly, the Appellant requested the NCLT to pass an order directing that the time period mentioned for making full payment be reckoned from the date of rectified order i.e., January 27, 2020. The Appellant was also aggrieved with the AA as it had directed him to pay interest @12% per annum from the date it become due and payable as per the Resolution Plan, which, according to him, was contrary to the terms of the Resolution Plan and also contrary to the Magnate of the IBC, 2016. The Appellant also cited disruptions caused by Covid-19 pandemic to seek relief from the Appellate Tribunal. However, citing several previous orders of the Supreme Court, the respondents contended that the relief sought by the Appellant amounts to amendment in the Resolution Plan and it is the responsibility of the SRA to get the properties of the CD free from charges and attachments etc.

NCLAT's Observations

The NCLAT observed that the liability for prior offences etc., particularly removing/lifting attachments/liens/ charges/encumbrances existing prior to commencement of CIRP needs to be dealt with in accordance with the provisions of Section 32(A) of the IBC, which says that such liabilities of a Corporate Debtor shall cease. It observed that the object of the IBC would be defeated if the responsibility for prior offences is put on the SRA, and he should get a clean slate. Citing the judgement in the matter of *CoC Essar steel India Ltd. Vs. Satish Kumar Gupta & Ors.*, the Court concluded that the SRA cannot suddenly be faced with undecided claims. It further observed, "After the Resolution Plan submitted by him is accepted. It is the responsibility of the Resolution Professional to compile the claims submitted to him or observed from record and put the same in the Information Memorandum, so that the Prospective Resolution Applicant have a full idea of its own liability".

On the issue of whether the interest rate be reduced to be made at par with RBI (Reserve Bank of India) base rate for lending to banks with additional 2% margin subject to a limit of 12% per annum or otherwise, the NCLAT observed that since the appellant had already paid the full amount by then there was no question of going back. Hence, the NCLAT approved a rate of interest of RBI base rate for lending to Banks + 2% margin as per the rate of interest applicable between January 27, 2020, to November 15, 2021, subject to a limit of 12% per annum.

Order

The Resolution Professional and the representatives of the Committee of Creditors (CoC) who are the Chairman/ Members of the Monitoring Committee should assist the Resolution Applicant in sorting out the issues pending at various forums be it Excise Authority, Enforcement Directorate etc. The SRA will pay rate of interest of RBI Base rate for lending to banks + 2% margin as per the rate of interest applicable between January 27, 2020, to November 2021 subject to a limit of 12% p.a.

***Case Review**:* Appeal is partially allowed.

Hero Fincorp Ltd. Vs. Liquidator of Tag Offshore Ltd. Comp. App. (At) (Ins.) No. 908 of 2020, Date of Judgment: April 29, 2022

Facts of the Case

This appeal has been filed by the Appellant, a financial creditor of TAG Offshore Limited (Corporate Debtor 'CD'), under section 61 of the IBC, 2016 assailing the judgment of the NCLT-Mumbai Bench (Adjudicating Authority 'AA') passed in Miscellaneous Application filed by Appellant.

The facts of the case are that after the order for liquidation of the CD on September 26, 2019, Mr. Sudeep Bhattacharya (liquidator) informed the Appellant (Hero Fincorp Ltd.) vide e-mail on October 02, 2019, which had charge of vessel Tag 22, that two vessels, namely Tag 6 and Tag 22, assets in the liquidation estate, came close to each other and cause damages. This email was also sent to United Bank of India, which had the charge of vessel Tag 6. The liquidator also mentioned in the email that he contacted a salvage company, namely K.E. Salvage for securing the two vessels for protection. The Appellant submitted that vide e-mail on October 03, 2019, it communicated to the liquidator its willingness to contribute fund for securing the vessel tag 22 and to initiate the job. After completion of the securing operation, K.E. Salvage submitted tax invoice October 09, 2019, amounting to ₹14.75 lacs for services provided.

The Appellant further submitted that it had issued a notice October 09, 2019, to the liquidator indicating its intention to exit from the liquidation process and realise its charge in Tag 22 since it had obtained the statutory remedy for enforcement of mortgage for the vessel by invoking the Admiralty Jurisdiction of the High Court of Bombay and High Court of Andhra Pradesh before the initiation of CIRP of the CD. After issuing the notice and on not receiving any response from the liquidator, the Appellant preferred Misc. Application on November 13, 2019, seeking directions from the AA to allow the Appellant to exit the liquidation process and keep the vessel Tag 22 out of liquidation estate and for including the expenses incurred in securing the two vessels. The Appellant stated that subsequently the AA passed orders in Misc. Application on February 06, 2020, holding that the expenses incurred for securing the vessel cannot be treated as liquidation process expenses and the Appellant should bear the entire expenses incurred by the liquidator in protecting the charge of the Appellant. However, the AA allowed the Appellant to keep its charge of Tag 22 out of the liquidation estate as requested under section 52 of the IBC subject to clearance of proportionate CIRP costs and payment of expenses incurred by the liquidator in securing the vessel Tag 22. On being aggrieved by the said order the Appellant has preferred this Appeal.

NCLAT's Observations

The Appellate Tribunal was of the view that the liquidator acted after receiving consent from the Appellant for preservation and protection of vessels much after the Appellant had invoked Admiralty Jurisdiction of Hon'ble Bombay High Court to realise its security charge in vessel Tag 22. Subsequently, when invoice received from K.E. Salvage Company was sent for payment to the Appellant by the liquidator, the Appellant went for litigation against making payment of said invoice. The Appellate Tribunal did not consider this action of the Appellant logical and in accordance with the actions taken by it to realise its charge in Tag 22. NCLAT did not find any error in the Impugned Order regarding payment to be made by the Appellant, of its proportionate share in the expenses incurred in securing vessel Tag 22 along with securing vessel Tag 6.

Further after the salvage operation was undertaken, the Appellant not only refused to pay the cost of securing and protecting the vessel Tag 22 and engaged the liquidator in protracted litigation. The Appellate tribunal noted that the action taken by the liquidator in protecting and preserving Tag 22 was for the benefit of the Appellant and the litigation undertaken by the Appellant caused expenditure which has ultimately cut into the value of the liquidation estate, thereby affecting the financial interest of the creditors/stakeholders.

Order

The Appellate Tribunal in view of the above observations dismissed the appeal and passed order that the Appellant shall pay a cost of ₹1 lakh as litigation expenses to the liquidator, which shall go into the liquidation estate. Both, the proportional share of the Appellant in securing the two vessels Tag 22 and Tag 6 and the litigation cost shall be paid by the Appellant within 15 days of this judgment.

Case Review: Appeal Dismissed.

Manish Jain Vs. Sh. Rakesh Bhatia Company Appeal (At) (Insolvency) No. 49 of 2022, Date of Judgment: April 19, 2022

Facts of the Case

This Appeal has been preferred under Section 61 of the IBC, 2016, to challenge the Impugned Order on

November 16, 2021 passed by the NCLT- New Delhi (Adjudicating Authority 'AA') dismissing the I.A. filed by the Appellant Mr. Manish Jain (Ex-Director of M/s. P.K. Sales Company Private Limited (Corporate Debtor 'CD')) under Section 60(5) of the Code for 'Contempt' against the Liquidator/the Respondent alleging wilful disobedience of the Order dated 08/01/2020 passed by the Coordinate Bench of the AA.

The impugned order stated that, vide order dated January 08, 2020, AA had directed the Liquidator to not proceed to confirm the sale of the assets of the company until the permission is obtained. This order was passed on the submission made by the Appellant that a scheme under Section 230- 232 of the Companies Act should be considered before proceeding towards liquidation. Subsequently, the present application for initiation of contempt proceedings was filed on the ground that the liquidator had sold away the assets of the company. The main point was that, even after 2 years the applicant did not proceed to file any scheme and petition under Section 230-232 of the Companies Act and was dragging the matter. As there was no scheme/petition filed by the Applicant, the action taken by the Liquidator in regard to the assets of the company should not be considered as 'contempt' and dismissed the IA.

The Appellant stated that the Liquidation Order was passed against the CD and the Appellant along with the sister concern i.e., M/s. P.K. Industries and Dreamland Realtors Private Limited entered into an OTS with the FC for ₹30 Cr. on August 17, 2019. Further the Appellant on indifferent intervals till February 20, 2021, paid a total sum of ₹11 Crores. /- to the FC. He further requested vide email to the Liquidator to file before the AA for necessary approval to revive the CD as he was constrained to file the same before the AA which was opposed by the Liquidator despite the settled law. He also filed an application to bring on record the additional documents pertaining to the payment made to the FC in accordance with the OTS and sent email requesting the Liquidator to forward the Settlement Scheme in the interest of the stakeholders. However, despite the same the liquidator sold the assets of the CD at much lesser price. The Respondent submitted that the AA had vide its order dated July 15, 2020, had given permission to him to liquidate the assets and subsequently the Appellant had through email requested the Liquidator to arrange for physical inspection of the property. He complied with the order of the AA and disposed of the assets conducting a public auction.

NCLAT's Observations

The Appellate Tribunal was of the view that there was no Scheme which was formalised under Section 230 of the Act. Further the Appellate tribunal raised a query as to whether any 'Scheme' was formalised or 'Debt Restructured' with consent as provided under Section 230(2)(c) of the act and filed before the AA or before Appellate Tribunal, the Appellant drew attention towards the OTS settlement facility. However, the CD did not pay the amount even after extension was granted. The Appellate Tribunal stated following, that the Scheme under Section 230 of the Act was never formalized, that the date extended by the High Court of Delhi was lapsed, more than two years were lapsed subsequent to the Order of the Appellate Tribunal, that the Order dated July 15, 2020 attained finality, the Liquidator only complied with the terms of the Order dated July 15, 2020 and lastly there is no Scheme which has been filed till date under Section 230-232 of the Act. Hence, it cannot be said that the action of the Liquidator in selling the asset by public auction, be termed as contempt or any breach of the Order of the AA.

Order

The Appellate Tribunal in view of the above observations dismissed the appeal.

Case Review: Appeal Dismissed.

Sharavan Kumar Vishnoi Vs. Upma Jaiswal & Ors., Company Appeal, (At) (Ins.) No. 371 of 2022, Kumari Durga Memorial Sansthan Vs. Shravan Kumar Vishnoi & Ors., Comp. App. (At) (Ins.) No.374 of 2022, Date of Judgment: April 05, 2022

Facts of the Case

These two Appeals have been filed against the same order dated March 02, 2022, passed by the NCLT – Allahabad Bench (Adjudicating Authority 'AA') in IA No. 59 of 2022. It was filed by Ms. Upma Jaiswal seeking a direction to the Resolution Professional to place the Resolution Plan submitted by the Appellant before the Committee of Creditors 'CoC' whereby the AA after hearing the parties stated that when these provisions are read together along

with the relevant judgement of the Supreme Court, what appears is that the RP is a facilitator and not a gatekeeper. The AA further noticed that in these circumstances, the ends of justice would be met if we direct the RP to place all Resolution Plans along with his opinion on the contravention or otherwise of the various provisions of law before the CoC which should take a considered view in the matter, if not already done.

The Appeal being Company Appeal (AT) (Ins.) No.371 of 2022 was filed by the Resolution Professional challenging the order. The RP submitted that according to his opinion, the plan submitted by Ms. Upma Jaiswal was not eligible as per Section 29A of the IBC and that due to the said difficulty, he was unable to place the plan before the CoC for approval.

In Company Appeal (AT) (Ins.) No.374 of 2022, it was contended that the plan submitted by the Appellant was considered by the CoC. The CoC asked the Appellant to increase its plan value, which was done. It was submitted that at this stage, the AA ought not to have directed the plan of Ms. Upma Jaiswal to be considered by the CoC.

The Resolution Applicant- Ms. Upma Jaiswal refuted the submissions of the Appellants and contended that the question as to whether the plan submitted by her is to be rejected or approved is a question which needs to be decided by the CoC. The RP at best can give his opinion with regard to eligibility of the Resolution Applicant whether it conforms to Section 29A and other provisions of the Code or not. Further the RP of its own cannot withhold any plan and refuse to submit the same before the CoC.

NCLAT's Observations

The Appellate Tribunal took note of the judgement passed by the Hon'ble Supreme Court in the matter of *ArcelorMittal India Private Limited Vs. Satish Kumar Gupta*- (2019) whereby it had stated that the RP is not to take a decision regarding the ineligibility of the Resolution Applicant. It has only to form its opinion because it is the duty of the RP to find out as to whether the Resolution Plan is in compliance of the provisions of the Code or not, the RP can give his opinion with regard to each plan before the CoC and it is for the CoC to take a decision as to whether the plan is to be approved or not.

Further, in the impugned order, the AA noticed that the direction issued to the RP to place all the Resolution Plans along with his opinion on the contravention or otherwise of the various provisions of law. The aforesaid direction clearly indicates that the RP is free to submit his opinion with regard to contravention or otherwise of the various provisions of law. The aforesaid observations took care of the duties and responsibilities of the RP. The RP can give his opinion with regard to each Resolution Applicant and further steps are to be taken by the CoC as per the direction issued by the AA.

Order

The AA in view of the above observations dismissed both the appeals and was of the view that various issues regarding ineligibility or eligibility need not be gone into in this Appeal. It is only after the CoC's decision if any question arises regarding eligibility that can be gone into before the AA in accordance with the law.

Case Review: Appeals Dismissed.

National Company Law Tribunal (NCLT)

Orbit Towers Private Limited Vs. Sampurna Suppliers Private Limited Company Petition No: C.P (Ib) No. 2046/Kb/2019, Date of Order: July 04, 2022

Guarantor, after paying dues to the Creditor, is entitled to initiate Corporate Insolvency Resolution Process against the Principal Borrower under 'Right of Subrogation' of Indian Contracts Act 1872.

Facts of the Case

This petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC or Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was filed by Orbit Towers Private Limited (Financial Creditor) to initiate Corporate Insolvency Resolution Process (CIRP) against Sampurna Suppliers Private Limited (Corporate Debtor). The Corporate Debtor availed a loan of ₹10 crore from the Indian Bank to which the Financial Creditor, due to its business association with the Corporate Debtor, had

provided a corporate guarantee in favour of Indian Bank and also created an equitable mortgage by depositing the title deeds of one of its properties situated in Kolkata. The Corporate Debtor was obligated to repay the loan amount of ₹.10,00,00,000/- along interest and to obtain release of the Financial Creditor's property at Kolkata. Since he was not able to do so, Financial Creditor paid ₹. 8,45,19,907/- to the bank being the corporate guarantor. Thereafter, the Corporate Debtor paid ₹.2,60,00,000/- to the Financial Creditor towards part discharge of its liability and a sum of ₹.5,85,19,907/- remained due and payable. The question of law in this matter is when the liability of the principal borrower i.e., the Corporate Debtor in this case, has been discharged by the Corporate Guarantor i.e., the Financial Creditor in this case, then can the Corporate Guarantor step into the shoes of the Creditor and initiate CIRP against the Principal Borrower.

NCLT's Observations

Sections 140 and141 of the Indian Contracts Act, 1872 talk about "right of subrogation". It is the substitution of another person in place of the Creditor, so that the person substituted will succeed to all the rights of the creditor with reference to the debt. The guarantor's right to be placed in the creditor's position on the discharge of the principal debtor's obligation, to the extent that the Guarantor's property or funds have been used to satisfy the Creditor's claim and to affect such discharge is called the Guarantor's right of subrogation. The Guarantor who performed the obligations of the Principal Debtor which are subject to his guarantee is entitled to stand in the shoes of the Creditor.

The Guarantor may, therefore, sue the Principal Debtor having got and invested with all rights of the Creditor. It was observed by the Hon'ble NCLT that any agreement of guarantee between the Indian Bank and the Guarantor is sufficient for the purpose of bestowing all the rights of the Bank upon the Financial Creditor once the Financial Creditor has discharged the liability of the Corporate Debtor towards Indian Bank. In this matter, the Financial Creditor who executed an agreement of guarantee with the Indian Bank for the financial obligations and loan facilities granted to the borrower/ the Corporate Debtor, is fully empowered to proceed against the Corporate Debtor, as the Financial Creditor.

Order

Since the amount has admittedly been paid by the Guarantor/Financial Creditor to Indian Bank and the said amount was much above the threshold limit fixed by the Code for filing a petition under Section7 of the Code, which was not repaid by the Corporate Debtor despite requests and demands made by the Financial Creditor, the court admitted the petition.

Case Review: - Petition is admitted.

IBC News

IBBI Invites stakeholders' comments on proposed changes in CIRP aimed to reduce delays and improve resolution value

Besides proposing amendments to the Regulation 40 A of the CIRP Regulations which provides the timelines for various activities in a CIRP, the Discussion Paper published by the IBBI on June 27, 2022, also proposes to amend Section 53 of the IBC, provisions relating to the minimum entitlement to dissenting creditors and repeat the valuation exercise, among others.

The key proposals include (i) reduction of timelines for inviting Expression of Interest (EoI), (ii) Increase in the timelines for preparation of Information Memorandum (IM) (iii) Reduction of timelines for 'Avoidance-Transactions' related matters (iv) Casting duty on the Resolution Professional to make a strategy for the marketing of assets of Corporate Debtor (v) mandatorily geo-tagging of immovable assets of Corporate Debtor (vi) Providing an opportunity to Committee of Creditors (CoC) to interact with valuers (vii) Linking of the payment made to the dissenting Financial Creditor to the realizable amount at the time of Liquidation (viii) Providing timely information to creditors with respect to initiation of CIRP and last date for filing claims, etc. IBBI believes that proposed amendments would aid in faster completion of processes, remove ambiguities, aid, and facilitate IPs thereby increasing value and realization for stakeholders. The stakeholders can submit their comments electronically on IBBI website by July 17, 2022.

Source: *ibbi.gov.in, June 27,2022*

https://www.ibbi.gov.in/uploads/whatsnew/9a71f15c9b21a7dd626a8ca47846a113.pdf

NCLT allows Insolvency Process against Personal Guarantor of Deccan Chronicle Holdings Ltd.

NCLT, Hyderabad bench vide its order on June 24, 2022, admitted an insolvency petition filed by L&T Finance Limited (Financial Creditor) against the Personal Guarantor, who is also the promoter of Deccan Chronicle Holdings Limited (DCHL). The court also rejected the

contention of the Personal Guarantor that the petition was barred by limitation. The company is facing CIRP due to a default of ₹ 62.96 crores on a loan amounting ₹ 25 crore availed in 2013.

Source: *livelaw.in, July 04,2022*

https://www.livelaw.in/news-updates/nclt-hyderabad-insolvency-of-bankruptcy-codecorporate-insolvency-resolution-process-cirp-personal-gauartor-deccan-chronicle-holdingslt-finance-ltd-202873

Spanish company Abenewco1, a unit of Abengoa heading towards bankruptcy

Spanish engineering and energy group Abengoa has begun insolvency proceedings for its main unit- Abenewco1, after its request for $261.2 million State Aid was rejected by the Spanish Government. Reportedly, the rejection of the loan is because there was no guarantee of the viability of the company and the repayment of the loan. For expanding into clean energy from its traditional infrastructure projects, the company had taken massive loans earlier.

Source: *reuters.com, June 29,2022*

https://www.reuters.com/business/energy/spain-rejects-state-aid-abengoa-unit-bringing-it-closer-bankruptcy-2022-06-28/

Singapore-based crypto hedge fund files for Cross Border Insolvency in the USA

Crypto hedge fund- Three Arrows Capital (3AC) has filed for Chapter 15 bankruptcy in the USA. Filing for bankruptcy under Chapter 15 will provide protection to the entity's US assets by stopping the creditors from seizing its assets while a liquidation is under progress in the British Virgin Islands. A British Virgin Islands court ordered the liquidation of Three Arrows Capital earlier this week. A slump in digital currency prices, which has seen billions of

dollars getting wiped-off the market in recent weeks, has hurt 3AC and exposed a liquidity crisis at the company.

Source: *reuters.com, July 02,2022*

https://www.reuters.com/markets/us/c rypto-hedge-fund-three-arrows-fileschapter-15-bankruptcy-2022-07-01/

IBBI moves to incorporate Parliamentary Panel's observations on "sale of selected business units or assets" of CD under CIRP

The Insolvency and Bankruptcy Board of India (IBBI) has proposed an amendment to allow resolution of part assets / businesses of corporates facing insolvency proceedings. This is in line to the observations made by the Parliament's Standing Committee on Finance. The Committee had observed that the bidders may be interested in selected business units or assets, rather than the entire business. A combination of bidders taking different business units or assets may well be far superior to one bidder acquiring the entire business, observed the Committee.

As per the proposed amendment by the IBBI, the possibility of resolution of part assets / businesses of corporates could be explored by resolution applicants and creditors only when no resolution plan is received withing the timeline specified for submission of such plan. The reform is reportedly in line with the similar practices in foreign jurisdictions. Presently, sale of part assets / businesses of corporates is allowed in case of liquidation but not in resolution.

Source: *thehindubusinessline.com, June 28, 2022*

https://www.thehindubusinessline.com/economy/corporate-insolvency-overhaul-ibbi-plans-to-allow-part-sale-of-assets-or-business-under-resolution-process/article 65575831.ece

Insolvency Law Panel against any exemption to SEBI from Moratorium under IBC, 2016

In its recent report submitted to the Ministry of Corporate Affairs, the Insolvency Law Committee (ILC) has recommended against giving any special dispensation to the Securities and Exchange Board of India (SEBI) from the moratorium under Section 14 under IBC, 2016. This recommendation has reportedly come on as a representation of the SEBI to the MCA seeking exemption from the provisions of moratorium during the Corporate Insolvency Resolution Process (CIRP).

The Section 14 of the IBC, 2016, puts a blanket ban on all government authorities to initiate or pursue any action/ enforcement during pendency of the CIRP. However, the government has been granted the power under Section 14 (3) (a) to provide certain exemptions. "The exemption under Section 14(3)(a) (exemption from moratorium) should be exercised only in exceptional circumstances, which may not hinder the smooth conduct of the CIRP and hence, should not be relaxed until found necessary from the implementation experience of the code," recommended the ILC. According to media reports, SEBI had sought the exemption on the ground that in several cases; the interests of public shareholders were being put at risk by these companies. There have been cases where companies continued to be listed on the stock exchanges during the CIRP and did not comply with the listing rules. Besides, the ILC has suggested that an effective insolvency law must protect the value of the insolvency estate against diminution by the actions of multiple stakeholders to insolvency proceedings.

Source: *economictimes.com, June 23, 2022*

https://economictimes.indiatimes.com/news/economy/policy/sebi-cant-initiateproceedings-against-companies-under-ibc-says-panel/articleshow/92396507.cms

A written contract cannot be treated as a pre- requisite to prove the existence of a financial debt: NCLT Mumbai

In the matter of *Gateway Offshore Private Limited and Anr. Vs. Runwal Realtors Pvt. Ltd.*, the NCLT Mumbai denied admitting "written contract" of monetary transaction as evidence to prove existence of Financial Debt. The Appellant, Gateway Offshore Private Limited and Anr., had provided ₹4.44 crore with 9% rate of interest to the Corporate Debtor in the form of a financial facility. Rejecting the CIRP filed by the Appellant, the Court said, "it failed to bring on record any other evidence in the form of a loan agreement, promissory note, contract or any document to substantiate their claim that there was a financial debt and a default of the same,".

Source: *livelaw.in, June 23,2022*

https://www.livelaw.in/news-updates/nclt-mumbaiinsolvency-and-bankruptcy-codecorporateinsolvency-resolution-process-cirp-corporate-debtorfinancial-debt-202166

Give mediation a fair chance: Dr. Ashok Haldia, Chairman, IIIPI

In an Opinion piece published in the prestigious daily business' newspaper The Mint, Dr. Ashok Haldia has strongly supported introduction of a mediation framework to govern mediation at every stage of insolvency and bankruptcy process - before and after the commencement of CIRP, including verification of claims, assets, third parties, resolution plans, avoidance action and the like.

"Suitable steps should also be taken to lay down mediation-related provisions that cover the enforceability of mediated settlements and the roles, rights and responsibilities of insolvency professionals, other stakeholders, etc, as such an exercise would grant out-of-court mediation the requisite legal back to ensure discipline and proper enforcement," contended Dr. Haldia. He also hailed the Mediation Bill of 2021 as "a step in the right direction". "It requires disputants to try and settle civil or commercial disputes through mediation before approaching any court, within a mandated period," he added. Referring the international experience on mediation in insolvency process, particularly that of the USA, Dr. Haldia opined that the mediation could be used under the IBC, too.

Source: *livemint.in, June 24, 2022*

https://www.livemint.com/opinion/online-views/letspromote-mediation-as-a-way-to-resolve-ibc-delays11656002273450.html

Limitation Period to be counted from date of acknowledgment in each balance sheet

Ordering commencement of CIRP against GIT Textiles Manufacturing Ltd., the NCLT Kolkata Bench has ruled that under Section 18 of the Limitation Act, 1963, there should be fresh computation of limitation period of three years from the date of acknowledgment in each balance sheet. "Since the last acknowledgments was made on March 31, 2019, the limitation period would last up till March 31, 2022," said the Court rejecting the argument of the company management that limitation period had already lapsed.

Source: *livelaw.in, June 25,2022*

https://www.livelaw.in/newsupdates/national-company-lawtribunal-nclt-insolvency-andbankruptcy-code-corporate-debtorinterim-resolution-professional-gittextiles-202319

Cross-Border Insolvency Law to make India an attractive destination for Cross-Border Investment: Ravi Mital, Chairman, IBBI

Shri Ravi Mital, Chairman, Insolvency and Bankruptcy Board of India (IBBI) said "A model law on Cross Border Insolvency in India is almost ready. We also want to learn from and incorporate international experiences on some issues". He was addressing the Inaugural Session of the International Webinar on "Cross-Border Insolvency and Global Lessons for India" as Chief Guest organized by Indian Institute of Insolvency Professionals of ICAI (IIIPI) jointly with International Insolvency Institute (III), USA on June 17.

Shri Mital said, "We appreciate that the model law on Cross-Border Insolvency will have great benefits for our country and help in making India an attractive investment destination,". Shri Mital assured Indian banks that the model law will provide the required protection to their interests adding that the law would enable foreign representatives to have the same benefits in our country. CA (Dr.) Debashis Mitra, President, ICAI, Mr. Evan J. Zucker, Counsel & III's NextGen Chairperson, and Dr. Ashok Haldia, Chairman, IIIPI also expressed their views in the Inaugural Session. The Inaugural session was followed up with a special address by Ms. Jaicy Paul, Chief General Manager (SARG), SBI, and a Panel Discussion in which several insolvency experts from USA, UK and India shared their perspectives.

Source: *iiipicai.in, June 17,2022*

https://www.iiipicai.in/wp-content/uploads/2022/06/IIIPI-Press-Release.pdf

IBBI invites inputs/ suggestions from public for effective and expeditious resolution of Real Estate Projects

IBBI has invited specific suggestions for bringing improvements, if any, in the process of resolution of real estate projects vis-à-vis homebuyers for better and effective resolution of such real estate project from public. The inputs/ suggestions/views can be email to IBBI in approximately 200 words by July 05, 2022. The indicative list of issues provided by IBBI includes issues related to

participation in the process, claims, conduct of process, resolution, and liquidation.

Source: *ibbi.gov.in, June 15,2022*

https://www.ibbi.gov.in/uploads/whatsnew/a1e856bda89902ae079dc713cc82c5c0.pdf

U.S. Commercial Electric Vehicle Maker, Electric Last Mile Solutions Inc (ELMS), Files for Chapter 7

Bankruptcy EV manufacturer, Electric Last Mile Solutions Inc (ELMS), has announced to file Chapter 7 bankruptcy. The decision came forth as the Troy, a Michigan-based company, disclosed a probe by the U.S. Securities and Exchange Commission, and withdrew its previously issued business outlook in March 2022. The EV maker previously laid off about 24% of its staff as it focused on its core business.

Source: *dnaindia.com, June 13,2022*

https://www.dnaindia.com/automobile/report-ev-manufacturer-electric-last-mile-solutionsfiles-for-bankruptcy-2960059

SC directs NCLATs and NCLTs not to "sit on appeal" if minimum 90% of creditors agree on "Settlement Plan" of Corporate Debtor

The Supreme Court (SC) has ruled that if 90% or more of the creditors agree on a "Settlement Plan" filed by promoter/s of the Corporate Debtor on the ground that it would be in the interest of all the stakeholders to withdraw CIRP as per Section 12A of the IBC, 2016; NCLT or NCLAT "cannot sit in appeal over such commercial wisdom of Committee of Creditors (CoC)".

An application was filed by IDBI Bank Ltd. (Financial Creditor) under Section 7 of the IBC, 2016 for commencement of CIRP against M/s Siva Industries and Holdings Ltd, which was admitted by NCLT, Chennai on July 04, 2019. During CIRP, the financial creditors and promotes of the Corporate Debtor agreed on a "Settlement Plan" to settle the Corporate Debt. Accordingly, an application was filed by the Resolution Professional under Section 12A of the IBC, 2016 seeking withdrawal of the CIRP. However, the NCLT, Chennai rejected the application. The same was rejected by the NCLAT as well.

Relying on the SC judgement in the matter of *Ajay Kumar Jagatramka Vs. Jindal Steel and Power Limited* (2021), the Apex Court emphasized on minimum judicial interference by the NCLATs and NCLTs in the framework of IBC, 2016. "The interference would be warranted only when the Adjudicating Authority or the Appellate Authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules," said the SC.

Source: *livelaw.in June 3, 2022*

https://www.livelaw.in/top-stories/supreme-court-ibc-section-12acommittee-of-creditors-settlement-plan-cirp-withdrawal-nclt-nclat-v-200825

GST and IBC, 2016 will help India to achieve $5 trillion: Chief Economic Advisor (CEA) to Government of India

India's CEA Shri V. Anantha Nageswaran has asserted that the Covid-19 pandemic and the contemporary geopolitical conflicts have shadowed recent structural reforms such as the Goods and the Service Tax (GST) and the IBC, it will benefit the economy in future. "They will begin to manifest their benefits and advantages in advancing India's potential growth in decades to come. That is why India is now forecasted by the IMF to cross US dollar 5 trillion by 26-27. And if the dollar GDP of the country doubles every seven years, we will be at $20 trillion GDP by 2040 with a per capita income of close to $15,000," he projected. "We need to understand that the medium-term fundamentals of the Indian economy remain solid," said Shri Nageswaran in an event hosted by Department of Economic Affairs (DEA) to mark the Azadi Ka Amrit Mahotsav celebrations of the Ministry of Finance and MCA.

Source: *thehindu.com, June 8, 2022*

https://www.thehindu.com/business/Economy/gst-insolvency-and-bankruptcy-code-reforms-to-pushgrowth-after-clouds-recede-says-chief-economic-advisor/article65507693.ece

NCLT rejected insolvency petition of Noida's Wave City Centre under Section 10, imposes ₹1 crore penalty

Wave Mega City Centre (WMCC) of Noida had approached NCLT under Section 10 of the IBC, 2016, to

initiate the CIRP of its own flagship project at 6.18 lakh square meters land spread between Sector 25 and 32 in Noida. "It was an attempt on the part of the CD to play fraud on thousands of homebuyers, the Noida Authority, and the government authorities," said the Court and directed the Central Government to investigate into alleged siphoning of the money from the project. The homebuyers have collectively contributed ~₹1,400 crore into the ~ ₹ 3,800 crore. However, they were neither provided possession nor refund.

Source: *hindustantimes.com, June 8, 2022*

https://www.hindustantimes.com/cities/noida-news/tribunal-junks-insolvency-plea-by-wave-groupimposes-1-crore-penalty-101654712242173.html

Recovery Certificate Holder comes under category of Financial Creditor, ruled Supreme Court

The Supreme Court has held that liability with respect to a claim arising out of a Recovery Certificate under the Recovery of Debts and Bankruptcy Act, 1993, would be a "Financial Debt" within Section 5(8) of the IBC, 2016. Furthermore, the holder of this Recovery Certificate would be a "Financial Creditor" under Section 5(7) of the IBC, 2016. The court also allowed the holder of such a Recovery Certificate to initiate Corporate Insolvency Resolution Process (CIRP) as a Financial Creditor (FC) within a period of three years from the date the recovery certificate is issued.

The concerned view was taken by a two-judge Bench of the Supreme Court in *Dena Bank Vs. C. Shivakumar Reddy and Anr,* which was further affirmed by a three-judge Bench. Assailing the order of the NCLAT, which had set aside the order of the NCLT Chennai, the Bench allowed the appeal filed by Kotak Mahindra Bank Ltd. admitting the application which was filed under Section 7 of the IBC and initiated CIRP. The application was filed within a period of three years from the date on which the Recovery Certificate was issued; therefore, it was considered within limitation. According to various provisions of the IBC, when a Corporate Debtor ends up committing a default, a Financial Creditor or an Operational Creditor or the Corporate Debtor itself may initiate CIRP. In the case of Dena Bank, it was affirmed by the Court that all the relevant provisions of the IBC and earlier judgments were relied upon; and it was not consistent with the earlier judgments of the Apex Court. The submission as per Section 19(22A) of the Debt Recovery Act, also did not find favour with the Court.

Source: *livelaw.in, May 31, 2022*

https://www.livelaw.in/top-stories/supreme-court-ibc-recoverycertificate-claim-financial-debt-cirp-200465

SBI Sets Up Marketing Team to Showcase its Stressed Assets Undergoing Resolution

Under its Stressed Assets Resolution Group (SARG) vertical, SBI has set up a marketing team to reach out to a broader investor base and to showcase its stressed assets undergoing resolution under the IBC, 2016. According to the Bank's annual report, SARG is also monitoring the transfer of eligible assets to NARCL (National Asset Reconstruction Company Ltd) to ensure smooth migration of identified assets. The report also stated that resolution under IBC is a market-oriented mechanism where a higher number of bidders for a stressed Corporate Debtor results in better valuation and maximisation of recovery for lenders.

Source: *thehindubusinessline.com, June 01,2022*

https://www.thehindubusine ssline.com/money-and-banking/sbisets-up-marketing-team-toshowcase-stressed-assetstoinvestors/article65485097. ece

Article 1 of Limitation Act, 1963 deals with "suits relation to accounts" hence not applicable on IBC processes: NCLAT

NCLAT Principal Bench, New Delhi has held that Article 1 of Limitation Act, 1963 is not applicable to the petition filed by the Operational Creditor under Section 9 of the IBC, 2016. The court also accepted the argument of the respondent that only Article 137 of the Limitation Act, 1963 is applicable in such a case.

The appellant had challenged the order of NCLT Mumbai which had rejected his claim on the ground that the petition was filed on the basis of invoices which were prior to three years from the date of filing the petition under Section 9 of the IBC. Therefore, it was barred by limitation. According

to the appellant, he had been providing transport services to the respondent. In the course of time the respondent owed dues about ₹76.04 lakhs running across 174 invoices. After the reconciliation efforts turned futile, the appellant filed petition under Section 9 of the IBC. On the issue of limitation, appellant content that the parties maintained a running account and the same is reflected in the ledger account of the respondent. NCLAT relied on the Supreme Court judgements in the matter of *K Educational Services Pvt. Ltd. Vs. Parag Gupta* and *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries* wherein it was held that the period of limitation for filing an application under Section 7 or 9 of the IBC is to be decided as per Article 137 of the Limitation Act not as per the Article 1 as the later deals with accounts.

Source: *livelaw.in, May 25,2022*

https://www.livelaw.in/ibc-cases/nclat-insolvency-and-bankruptcy-codearticle-1-of-limitation-act-operational-creditor-200088

CIRP cannot be initiated against a Corporate Debtor solely on the basis of the un-paid interest: NCLT

Corporate Debtor had paid the principal amount of ₹1.5 crores to the financial creditor during the pendency of the CIRP application and only an amount of ₹64 lakh was left to be paid towards the interest. However, the financial creditor filed for the insolvency of the corporate debtor contending that the term "financial debt" as defined under Section 5(8) of IBC includes the interest component. The Bench observed that CIRP cannot be initiated against a corporate debtor solely on the basis of the un-paid amount of interest, where the entire principal amount has already been discharged by the Corporate Debtor.

Source: *livelaw.in, May 27,2022*

https://www.livelaw.in/ibc-cases/nclt-insolvency-andbankruptcy-code-corporate-insolvency-resolution-process-cirp-corporate-debtor-200228

Consider Legislative Change for Payment Mechanism to Operational Creditors: NCLAT to Govt. & IBBI

Expressing concerns towards nil and almost negligible payment to operational creditors under the resolution plan, the NCLAT has urged the Central Government and IBBI to consider legislative change.

"We are consistently receiving the Plans, where Operational Creditors either not paid any amount towards their claim or paid negligible amount, sometime even less than 1%. In the present case, the operational creditors have been given only miniscule of their admitted claim to the extent of only 0.19%," observed the NCLAT in the matter of *Damodar Valley Corporation Vs. Dimension Steel and Alloys.* In this case, the appellant opposed the Resolution Plan on the ground that it was not in compliance with the provisions of Section 30(2) of the Code as a fair and equitable treatment was not accorded to the operational creditor. However, the responded argued that there was no violation of any provision of the Code as the distribution under the plan is the commercial wisdom of the CoC which cannot be interfered by NCLT.

Source: *livelaw.in, May 27,2022*

https://www.livelaw.in/ibc-cases/nationalcompany-law-appellate-tribunal-nclat-insolvencyand-bankruptcy-board-of-india-ibbi-damodarvalley-nclt-cirp-resolution-plan-200229

Central Govt. Issued SOP to Customs and CGST departments to expedite filing of claims in IBC cases

The Standard Operating Procedure (SOP) has been issued by the Central Board of Indirect Taxes & Customs (CBIC) on May 23, to all Principal Chief Commissioners/ Chief Commissioners of Customs/ Customs (Preventive)/ Customs & CGST, and CGST. Besides, CBIC has nominated the Additional Director General, DGPM as the Nodal Officer for the receipt of information regarding initiation of the insolvency resolution processes and dissemination of the same to the field formations for necessary action at their end in terms of the provisions of the IBC.

"GST and Customs authorities have been classified as Operational Creditors and are required to submit their claims against corporate debtors when the CIRP is initiated and public announcement inviting claims is made by the Insolvency Professional," said the letter issued to officials. The Nodal Officer will be in regular touch with IBBI on one side and with Principal Chief Commissioners/ Chief Commissioners on the other through email and Whats App etc. CBIC has also issued a

"Format" to its Zonal Offices for submitting information on IBC cases.

Source: *ibbi.gov.in, May 23, 2022*

https://www.ibbi.gov.in/uploads/whatsnew/d43197e20e9644e00e26c5e036e0a269.pdf

NOIDA is an Operational Creditor but not a Financial Creditor, said, Supreme Court

In a landmark verdict on May 17, 2022, the Supreme Court has held that the New Okhla Industrial Development Authority (NOIDA) is an Operational Creditor (OC) but not a Financial Creditor (FC) under the IBC 2016. The authority had filed a bunch of appeals in the Supreme Court against various judgements of NCLT and NCLAT wherein it was considered as OC. However, the SC dismissed the appeals of the Authority.

"We are of the view that, in the lease in question, there has been no disbursement of any debt (loan) or any sums by the appellant to the lessee. The appellant would, therefore, not be a Financial Creditor within the ambit of Section 5(8) of the IBC," concluded the Supreme Court in its 186 pages' judgement. "Lease deed recites that the leasehold property forms part of the land acquired under the Land Acquisition Act and developed by the lessor for the purposes of setting up of an 'urban and industrial township," noted the court. The court relied on the definition of "Financial Creditor" in Section 5 (7), "Financial Debt" in Section 5 (8), and "Operational Creditor" in Section 5 (20) of the IBC. "We would proceed on the basis that, while the appellant is not a financial creditor, it would constitute an operational creditor," said the court, while dismissing the appeals of NOIDA.

Source: *businessstandard.com, May 17,2022*

https://www.business-standard.com/article/current-affairs/noida-notfinancial-creditor-but-operational-creditor-under-ibc-sc-122051701510_1.html

Arbitrator to decide on Rejected Claims made after ICD: Delhi HC

Delhi High has held that the arbitrator would decide on the claims made by the Resolution Professional in the insolvency proceedings if they arose after the Insol. Commencement Date (ICD). The Court also held that extinguishment of claims that arose after the ICD is a contentious issue which is to be decided by the arbitrator when the parties decide on an arbitration agreement. Furthermore, Section 11 is confined to the examination of the existence of the arbitration agreement and the Court is bound to appoint the arbitrator when there is an arbitration agreement.

Source: *livelaw.in, May 18,2022*

https://www.livelaw.in/newsupdates/delhi-high-courtarbitration-and-conciliation-actinsolvencyand-bankruptcy-codeinsolvency-commencement-dateicd-arbitrator-cirp-199489

Bank cannot continue the proceedings under the SARFAESI Act once the CIRP was initiated, and the moratorium was ordered: Supreme Court

In the matter of *Indian Overseas Bank Vs. M/s RCM Infrastructure Ltd.,* legal question before the Supreme Court was whether a Bank can continue the proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) once the Corporate Insolvency Resolution Process (CIRP) is initiated and moratorium is ordered. The Court ruled that the provisions of section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the CD in respect of its property including any action under the SARFAESI Act, is prohibited.

Source: *ibbi.gov.in, May 23,2022*

https://ibbi.gov.in//uploads/legalframwork/b46a5d25454c3f37977acf994f5152ed.pdf

NCLT does not have jurisdiction to adjudicate upon an audit conducted under RBI guidelines

The promoter of SREI Infrastructure Finance Ltd. and SREI Equipment Finance Ltd., which are going through insolvency under IBC, had challenged the audit of these two companies by lenders. NCLT observed that the audit was commissioned by the lenders under the aegis of an RBI Circular. The court placed reliance on the judgment of Supreme Court in *Central Bank of India Vs. Ravindra &*

ors., (2002), wherein it was held that the RBI has the authority of issuing binding directions. Accordingly, the court held that NCLT has no jurisdiction to stop an audit commissioned under RBI circulars.

Source: *livelaw.in, May 20,2022*

https://www.livelaw.in/ibc-cases/nclt-kolkata-insolvency-and-bankruptcy-code-ibc-rbiguidelines-srei-infrastructure-finance-ltd-sifl-kpmg-audit-corporate-insolvency-resolutionprocess-cirp-199700

Google's Russian unit to file for bankruptcy after local authorities seized its bank accounts, assets, and property

According to company's spokesperson the global technical giant has no finds to pay its employees, suppliers, and vendors. Apparently, the sleuths had seized 1 billion Roubles ($15 million) from Google as it could not restore the access to its YouTube account. However, it is unclear whether the seizure of this fund has led Google to file for insolvency. Google's Russia unit has about 100 employees.

Source: *wionews.com, May 20,2022*

https://www.wionews.com/world/googlesrussian-unit-files-for-insolvency-no-funds-to-pay-salaries-to-employees-480509

Joint auction under IBC and SARFAESI Act, is valid for value maximisation: NCLAT

"When NCLT is satisfied that a joint sale shall bring maximization for the assets of the Corporate Debtor as well as guarantor, the suspended director cannot be prejudiced in any manner," said NCLAT in the matter of *Ayan Mallick Vs. Pratim Bayal*. The tribunal upheld NCLT Kolkata's order that a joint order under the provision of IBC 2016 and SARFAESI 2002 is permissible.

In this case, the suspended director of the Corporate Debtor had filed an appeal before the NCLAT under Section 61 of the IBC against an order passed by NCLT Kolkata on February 01, 2022, opposing the joint auction. The suspended director had demanded the court to quash the e-auction notice in this regard on the ground that the joint e auction notice was bad in law as the property of the guarantor is not under any insolvency or liquidation proceedings. It was also contended that the banks have already taken possession of the land under the SARFAESI Act and therefore, the Liquidator cannot publish a joint e auction notice.

Source: *livelaw.in, May 17,2022*

https://www.livelaw.in/ibc-cases/nclat-insolvencyand-bankruptcy-code-sarfaesi-nclt-suspendeddirector-corporate-debtor-joint-auction-199379

Financial Creditors May Directly Initiate Insolvency Proceedings against Personal Guarantors: SC

The Supreme Court has held that the financial creditors specially banks may now initiate insolvency proceedings directly against the personal guarantors of corporate debtors, irrespective of pending proceedings in the Court against the Corporate Debtor under the IBC, 2016. The Apex Court has, thus, dismissed appeal against the NCLAT order, in the *State Bank of India Vs. Mahendra Kumar Jajodia.*

The Court also reaffirmed the right of the lenders to decide the recourse against borrowers/obligors independently, without linking the exercise of rights in insolvency against the guarantor to initiate insolvency against the borrower. It further held that it did not see any convincing reason to entertain the appeals, and that the NCLAT's judgment does not warrant any interference. In January 2022, the NCLAT in the matter of SBI Stressed Asset Management Branch Vs Mahendra Kumar Jajodia (Personal Guarantor to Corporate Debtor) had ruled that there would be no prohibition against the insolvency and bankruptcy proceedings against a personal guarantor in the absence of proceedings against the Corporate Debtor. This judgement will be helpful for banks to initiate insolvency proceedings against promoters who have given guarantee to corporate loans. According to an estimate guarantee amounting to about 1.6 lakh crore have so far been given by promoters of top companies facing huge debts.

Source: *thehindubusinessline, May 11,2022*

https://www.thehindubusinessline.com/money-and-banking/sc-allowsbanks-to-directly-initiate-insolvency-proceedings-against-personal-guarantors/article 65404775.ece

NCLT has power to pierce the 'Corporate Veil' in order to ascertain the Real Successful Bidder

NCLT Delhi Bench has held that it is empowered to pierce the 'corporate veil' in order to ascertain the real successful bidder, and that the statutory privilege of the separate personality of the company must be used for the legitimate purpose only. It also warned that whenever fraudulent or dishonest use is made of the legal entity, the individual will not be allowed to hide behind the curtain of the corporate personality. The Bench set aside the e-auction and directed the Liquidator to re-auction the property after obtaining fresh valuation.

Source: *livelaw.in, May 11,2022*

https://www.livelaw.in/ibc-cases/nclt-delhi-section-9-of-the-insolvency-and-bankruptcy-act-corporate-veil-ibbi-liquidation-process-regulations-corporate-insolvency-resolution-process-cirp-argentium-international-pvt-ltd-section-29a-of-the-ibc-liquidator-198807

Ministry of Ports, Shipping and Waterways Revises Guidelines for Resolution of PPP Projects

A new set of guidelines have been released by the Ministry of Ports, Shipping and Waterways for the resolution of Public Private Partnership (PPP) projects, which had been abandoned midway by the concessionaire. As per the guidelines a port can make partial payment amounting to the value of useful work completed by concessionaire for projects under construction and takeover the project. The ports have also been empowered to bid for abandoned projects undergoing insolvency proceedings at the NCLT. The matter came in the limelight after several projects sanctioned under PPP mode were stranded in either pre-COD (Commercial Operation Date) or post-COD stage. Union Minister Shri Sarbananda Sonowal stated that these guidelines would restart the halted progress of the projects.

Source: *business-standard.com, May 12, 2022*

https://www.business-standard.com/article/economy-policy/govt-revises-payment-insolvency-rules-for-stuck-ppp-port-projects-122051101406_1.html

NCLAT cancels sale of CD as Going Concern as buyer failed to pay sale consideration within 90 days

The NCLAT Bench observed that 90 days' period provided in the Liquidation Process Regulation is the maximum period for the Auction Purchaser to deposit the consideration amount, failing which the Regulation expressly mentions that the sale shall be cancelled. It was held that "when the Consequence of non-compliance of the provision is provided in the statute itself, the provision is necessary to be held to be mandatory".

Source: *livelaw.in, May 14,2022*

https://www.livelaw.in/ibc-cases/nclat-ibbi-liquidation-process-regulations-section-7-of-theinsolvency-and-bankruptcy-code-nclt-corporate-insolvency-resolution-process-cirpcorporate-debtor-199154

USA based company which owns Nuclear Power Plant, files for Bankruptcy

Chapter 11 bankruptcy has been filed in the U.S. Bankruptcy Court for the Southern District of Texas, by The Woodlands, a unit of Talen Energy Supply which owns Susquehanna Nuclear Plant in the Salem Twp where about 900 people work. The company runs 18 power generation facilities, and the petition has been filed to reduce its $4.5 billion debt load and bring in $1.65 billion in new equity from certain bondholders. In a statement the company has clarified that the bankruptcy process would not affect the employees' jobs.

Source: *standardspeaker.com, May 11,2022*

https://www.standardspeaker.com/news/business/nuclear-plant-owner-talen-energysupply-files-for-bankruptcy/article_4c254e22-e091-5c58-956d-a3660e691de3.html

CIRP cannot commence on dues of Salary Arrears and Remuneration owing to their Time-Barred Status: NCLAT

The matter is related to Omega Laser Products B.V, a Dutch company, and a shareholder of its Indian arm. The appellant filed for a petition under Section 9 of the IBC, 2016, against the NCLT order wherein it stated that the CIRP cannot be initiated on the payment of salary arrears and remunerations as they are time-barred.

The appellate tribunal held that the former MD's plea shall be time-barred by limitation for commencing insolvency against the Indian arm as it had been filed beyond a period of three years. It also held that there was no acknowledgement of the debt by the Board of Corporate Debtor with respect to Section 18 of the Limitation Act, 1963, and that the majority of the claims were barred by time. Relying on one of the judgments of the Supreme Court, the tribunal held that "It is not within their domain under IBC to 'decide the issue of the fixation of the salary of the MD' but to ascertain if there is any 'dispute' regarding the issue.

Source: *businessstandard.com, May 13, 2022*

https://www.businessstandard.com/article/economy-policy/petition-forinsolvency-gets-time-barred-if-filed-after-3-yearsnclat-122051200908_1.html

Insolvency Professionals have so far flagged over ₹2.2 trillion of Avoidance Transactions by the suspended managements: IBBI

As per the recent data released by the Insolvency and Bankruptcy Board of India (IBBI), 777 applications for Avoidance Transactions have been filed by the Insolvency Professionals (IPs) in their capacities as Resolution Professionals (RPs) and Liquidators under the Insolvency and Bankruptcy Code (IBC), 2016. The Code mandates the RPs and Liquidators to investigate the past transactions of the Corporate Debtors (CDs) and see if their pre-CIRP transactions were in order or not. If established as Avoidance Transaction, the NCLT may order to annul the transaction and refund of the money to the CD's account. In a particular case about 758 acres of land out of 858 acres valued at ₹5500 crore has been given back to a company which is undergoing resolution.

IBBI data further show 312 cases were admitted in tribunals for bankruptcy resolution in the March quarter of 2022, close to twice the number of cases admitted in the June quarter of 2021. In the June quarter, 165 cases were admitted, followed by 167 in September and 238 in December. A sector wise analysis shows that about two fifth of all the cases admitted to tribunals belong to the manufacturing sector, 20% belong to real estate, 11% to construction industry and 10% belong to retail trade, indicating that these are pain points in the economy. Under the IBC regime, 480 distressed companies were rescued till March 2022 of which a third were in deep distress, IBBI said. The rescued companies had assets worth ₹1.31 trillion.

Source: *livemint.in, May 04,2022*

https://www.livemint.com/companies/news/bankruptcy-administratorsflag-rs2-2-trillion-worth-dubious-deals-ibbi-11651590390514.html

No Conflict between the Two Special Acts owing to Attachment of Property: NCLT

Concerning the attachment of property, the NCLT Chennai held that there stands no conflict between the Prohibition of Benami Property Transaction Act, 1988, and the Insolvency and Bankruptcy Code, 2016, as the two are special acts as well. The RP was handed over the immovable property along with the equipment and machinery as per the order admitting the Section 7 application by which CIRP was initiated. NCLT also observed that since liquidation has commenced, moratorium has ended. NCLT also observed that since liquidation commenced, moratorium has ended.

Source: *livelaw.in, May 5,2022*

https://www.livelaw.in/ibccases/insolvency-and-bankruptcy-codenclt-chennai-prohibition-of-benamiproperty-transaction-act-cirp-corporatedebtor-attachment-of-property-198384

Karnataka High Court Dismissed a Writ Petition Challenging Constitutional Validity of Some Sections of IBC, 2016

Karnataka High Court in a judgment on April 5, 2022, has dismissed a petition challenging the constitutional validity of Section 95, 99 and 100 of the IBC, 2016. The application was filed by the Financial Creditor, Piramal Capital & Housing Finance Limited, before the NCLT, Bangalore, through the Resolution Professional under Section 95 of the Code for initiation of insolvency process against the Personal Guarantor. The Court considered that the IBC provides a particular eligibility criterion which an RP must possess, and a Code of Conduct must be followed which governs their actions.

Source: *livelaw.com, May 05,2022*

https://www.livelaw.in/law-firms/deals/insolvencyand-bankruptcy-code-2016-karnataka-high-court-nclt-dua-associates-198333

Primary objective of the IBC process is resolution of a distressed firm, but the recovery percentage also needs to be kept in mind: SBI, MD

SBI's Managing Director, Swaminathan J., has drawn attention of stakeholders on recovery percentage along with resolution, which is the primary objective of the IBC. The sight of recovery is not supposed to be lost as well, he stated, for if the narrative shifts towards haircuts, then it is possible that the lenders may not take any action, which would lead to a halt, leading stressed units towards liquidation. He also focused on the need to look for other players who would provide distressed asset or private debt funding to give interim finance to borrowers.

Source: *economictimes.com, May 01,2022*

https://economictimes.indiatimes.com/industry/banking/finance/banking/resolutionprimary-objective-of-ibc-but-need-to-be-mindful-of-recovery-too-sbi-md-swaminathanj/articleshow/91233611.cms

Cross Border Insolvency Resolution Framework will be a landmark step to redefine India's business and economic relations with the rest of the world: Shri Rao Inderjit Singh, Hon'ble Union Minister

Shri Rao Inderjit Singh, the Hon'ble Minister of State for Statistics and Programme Implementation (Independent Charge), Planning (Independent Charge) and Corporate Affairs, has praised the significant contribution of the IBC in reducing the NPAs of the banking industry and promoting entrepreneurship in Indian economy.

"IBC has assumed larger significance post the COVID - 19 pandemic and has been instrumental in saving both lives and livelihoods," said Shri Singh in his inaugural address to the International Conference on April 30 jointly organized by IBBI and IIMA. "The proposed Cross Border Insolvency Resolution Framework will be a landmark step to redefine India's business and economic relations with the rest of the world," he added. Shri Singh also highlighted the successful journey of the IBC by establishing a framework and effective ecosystem for insolvency resolution in the economy. The minister lauded the scintillating contributions of Judiciary, Government agencies, Regulators, and stakeholders of the IBC ecosystem in swift and effective implementation of the Code.

On this occasion Shri Rajesh Verma, Secretary, Ministry of Corporate Affairs, M. Rajeshwar Rao, Deputy Governor, RBI, Shri Ravi Mital, Chairperson, IBBI, Prof. Errol D' Souza, Director, IIMA were also present.

Source: *indianexpress.com, May 02,2022*

https://indianexpress.com/article/cities/ahmedabad/international-conference-on-insolvency-bankruptcy-ministersays-ibc-provided-effective-ecosystem-for-insolvency-resolution-7896864/

Conduct a SWOT analysis to investigate IBC's strengths and weaknesses: Secretary MCA

Shri Rajesh Verma, Secretary of the Ministry of Corporate Affairs (MCA) has said that there is presently no framework to track the outcome of insolvency and bankruptcy regime. "It is crucial to continue to study the impact of the insolvency framework created by IBC and conduct a SWOT analysis to investigate (its) strengths and weaknesses," said Shri Verma addressing an international conference organized by IBBI and IMA. "It is important that we have a rigorous and evidence-based research to public policy," he added. He also informed that the MCA, in a month or two, will examine on how to encourage resolution more than liquidation.

Source: *economictimes.indiatimes.com, April 30,2022*

https://economictimes.indiatimes.com/news/economy/policy/need-framework-to-study-impact-ofinsolvency-law-corporate-affairs-secretary-rajesh-verma/articleshow/91202894.cms

RP is not entitled for any professional fees during the period of stay on CIRP: NCLAT

In this matter, CIRP of the CD was initiated on March 03, 2018. Subsequently, the CoC was constituted. However, the Supreme Court through an order on September 02, 2019, set aside the insolvency process. NCLT Mumbai approved the bill of the RP amounting ~ ₹30 lakhs which was challenged by the Indusland Bank in NCLAT. The bank contended that the RP was not entitled for fee during pendency of the case while the RP argued that he incurred expenditure during this period as well. The NCLAT observed that the RP was not entitled for any fee from the date the Supreme Court admitted the case to the date of final judgement setting aside the CIRP.

Source: *livelaw.in, April 29,2022*

https://www.livelaw.in/news-updates/section-61-of-the-insolvency-and-bankruptcy-codenclat-nclt-mumbai-resolution-professional-insolvency-proceedings-corporate-debtor-197813

German Tennis Champion Becker Jailed for over two years in UK Bankruptcy Case

Boris Becker, the 54-year-old six-times Grand Slam champion was found guilty of transferring money to his ex-wife Barbara and estranged wife Sharlely after his 2017 bankruptcy. He was jailed for two years and six months by a London court on April 29, for hiding hundreds of thousands of pounds of assets after he was declared bankrupt. He was previously convicted of tax evasion in Germany in 2002, for which he received a suspended prison sentence.

Source: *thewire.in, April 29,2022*

https://thewire.in/world/former-tennis-champion-becker-jailed-in-uk-bankruptcy-case

Provisions of IBC are essentially intended to bring the CD to its feet and are not of money recovery proceedings as such: Supreme Court

Rejecting the appeal of a Financial Creditor against the Corporate Debtor (CD), the Supreme Court has said that the intent of the appellant had only been to invoke the provisions of the IBC so as to enforce recovery against the CD. The court emphasized that time and again, it has been expressed and explained that the intent of the Code is essentially to bring CD on its feet and not recover the debt.

In this case, the account of the Girnar Fibres Ltd. (Girnar), the Corporate Debtor was declared NPA by the State Bank of India on February 28, 2002. Thereafter it was declared sick by BIFR under SICA Act 1986. Subsequently, debt of Girnar was assigned to Invest Asset Securitization and Reconstruction Pvt. Ltd. (Invest Asset) by SBI on September 22, 2011, and the reference filed by Girnar was dismissed by BIFR on May 04, 2016. Thereafter, Invest Asset filed the Section 7 application against Girnar on October 01, 2018, which was dismissed by NCLAT on the ground of limitation.

Source: *livelaw.in, April 28,2022*

https://www.livelaw.in/news-updates/supreme-courtinsolvency-and-bankruptcy-code-nclat-moneyrecovery-proceedings-invest-asset-securitisationand-reconstruction-pvt-ltd-state-bank-of-india-bifrgirnar-fibres-ltd-girnar-npa-197751

Sale of Bhushan Power & Steel Ltd. under the Reformed Bankruptcy Law Goes into Litigation

Differing views between two government departments i.e., Enforcement Directorate (ED) and Ministry of Corporate Affairs (MCA), have turned one of the biggest sales of steel company into a litigation of about $6.3 billion, delaying the entire process. The court has given a week to the two departments to sort out the differences. ED had petitioned against the sale in the top court which got the plans of JSW Steel Ltd. held up which paid $2.58 billion to settle about $6.3 billion debt of the bankrupt firm. India's Solicitor General, Tushar Mehta, who represents the Union Government, has assured court to come with a clear stand on the issue.

Source: *bloombergquint.com, April 19,2022*

https://www.bloombergquint.com/business/top-indian-judge-rues-bureaucracy-boggingdown-bankruptcy-deal

NCLT Initiates CIRP for National Steel and Agro Industries Ltd

The NCLT, Mumbai, has admitted a petition filed by the Bank of India under Section 7 of the IBC 2016 to initiate CIRP of National Steel & Agro Industries Ltd. Subsequently, the CIRP of the company has commenced as per the order dated April 11, 2022. The Corporate Debtor failed to repay an amount of approx. Rs 127/- crores which stood as total dues as on May 30, 2019. The loan account of the Corporate Debtor was declared as NonPerforming Asset (NPA) on September 30, 2018. As the petition was pending adjudication, the Bank of India entered into an Assignment Agreement with JM Financial Asset Reconstruction Company Ltd. (Financial Creditor) on September 29, 2021, to assign the financial debt.

Adjudicating Authority observed that the Financial Creditor had assured that the Credit facilities were sanctioned as well as disbursed to the Corporate Debtor who, otherwise, had defaulted in paying the debt. Thus, the two essential qualifications, that is, existence of debt and default for admission of a petition under Section 7 of the IBC, were fulfilled.

Source: *livelaw.in, April 17,2022*

https://www.livelaw.in/ibc-cases/nationalcompany-law-tribunal-national-steel-agroindustries-ltd-section-7-of-the-insolvency-andbankruptcy-code-196809

Ministry of MSMEs makes policy proposal to keep MSMEs above Unsecured Financial Creditors in IBC processes

Millions of India's small businesses may be ranked above unsecured financial creditors in the bankruptcy resolution process if a policy proposal by the Union ministry for Micro, Small and Medium Enterprises (MSME) is approved.

As per the new MSME policy draft, when company enters insolvency, priority will be given to the payment of dues over other unsecured payments after settlement of the employees' dues. The draft policy has been prepared to promote competitiveness, cluster development, dedicated credit, technology upgradation, infrastructure, procurement of products and financial assistance to MSMEs. Presently, little is left for the operational creditors including MSMEs if the corporate debtor undergoes huge haircut. The dues of the financial creditors are settled on priority as they are prioritized under the IBC processes. However, putting MSMEs above unsecured financial creditors and paying their dues after dues to secured financial creditors are settled, gives the small businesses the charge on settlement money. The new MSME policy may also include certain measures and regulations to amend the MSME Development Act. The change aims to bring major relief to MSMEs as the sector waits for dues totalling up to hundreds of crores of rupees in the companies undergoing bankruptcy resolution.

Source: *livemint.com, April 18,2022*

https://www.livemint.com/politics/policy/msmes-dues-may-get-priorityin-bankruptcy-resolution-cases-11650222790779.html

Bank of India Files Insolvency Plea for Future Retail

Bank of India has filed a CIRP petition under Section 7 of the IBC to initiative insolvency proceedings for Future Retail Ltd. (FRL) due to non-payment of dues amounting ₹ 5,322.32 crore. FRL is part of ₹ 24,713 crore deal announced by the Future Group in August 2020, under which it is to sell 19 companies operating in retail, wholesale, logistics, and warehouse segments to Reliance Retail Ventures Ltd. If Future Retail gets admitted by NCLT, it will allow other potential buyers, such as Amazon, to bid for the company. The Future-Reliance deal is yet to be sorted due to legal challenges posed by Amazon.

Source: *economictimes.indiatimes.com, April 14,2022*

https://retail.economictimes.india times.com/news/ industry/bank-of-indiamoves-nclt-against-future-retail-filesinsolvency-plea/90848360

Quantum of Debt Not to be Considered at the Stage of Admission of a Petition under Section 7 of the IBC

NCLAT while adjudicating an appeal filed in the matter of Rajesh Kedia v Phoenix ARC Pvt. Ltd. has held that the mere requirement for admitting a petition under Section 7 of the IBC is that the minimum outstanding debt must be more than the threshold amount provided for under the IBC for the purpose. The primary issue that the Bench observed was if the Adjudicating Authority was justified in admitting the Section 7 Application of Appellant or not. The Bench opined that it is not within the domain of the Adjudicating Authority to decide the 'amount of debt' at the stage of admission of an application under Section 7 of IBC.

Source: *livelaw.in, April 16,2022*

https://www.livelaw.in/ibc-cases/nclat-justice-ashokbhushan-section-7-of-the-insolvency-and-bankruptcy-code-196779

Alleging ₹296 crore default, HDFC files petition to initiative CIRP of SITI Networks

HDFC has filed a petition under Section 7 of the IBC, for CIRP of SITI Networks Ltd, country's leading multi-system operator, for an alleged default of approximately ₹296 crore. The Mumbai bench of the NCLT over the petition issued the notice to the SITI Networks, the Essel group firm said in a regulatory filing. On March 30, 2022, SITI Networks informed that it had been made vigilant about the petition made by the HDFC. Formerly known as SITI Cable Network, the company provides cable services at around 600 locations reaching to over 11.3 million digital customers.

Source: *economictimes.indiatimes.com, April 16, 2022*

https://telecom.economictimes.indiatimes.com/news/hdfc-moved-nclt-against-sitinetworks-claiming-default-of-rs-296-crore/90871711

As Sri Lanka Forex Crisis deepens, Colombo Stock Exchange closed for over a Week

With dwindling foreign reserves, $25 billion in foreign debt, and on the brink of bankruptcy, the Colombo Stock Exchange will remain closed for a week starting from April 18, 2022, to provide investors with an opportunity to develop more clarity and understanding related to the contemporary conditions in Sri Lanka. This would help them to make informed investment decisions in future. The Securities and Exchange Commission of Sri Lanka (SEC) said in a press release that the stock market will remain shut for five business days temporarily.

Source: *indiatoday.in, April16, 2022*

https://www.indiatoday.in/world/story/colombo-stock-exchange-week-sri-lanka-forex-crisis1938301-2022-04-16

Hyderabad to get new NCLAT Bench for Telangana and Andhra Pradesh

The National Judicial Data Centre is set to come up to Hyderabad which will be the headquarters for all the judicial data in the country. Besides, the city will also get Appellate Tribunal for NCLTs in Telangana and Andhra Pradesh.

The Chief Justice of India, N V Ramana, provided his approval for setting up the National Judicial Data Centre in Hyderabad on Friday. He also expressed his desire to do something for young advocates in his tenure by setting up a training academy to support them in the initial days. He said, "If the state and other institutions extend their support, I would give the final shape to it during my tenure." The CJI also suggested to promote alternate dispute redressal methods such as arbitration, mediation, and conciliation for which he also called upon advocates, bar council and bar associations to help reduce the burden of cases on judiciary and called upon senior judges to keep in perspective the diversity of communities and religions while recommending names of judges for the HC.

Source: *timesofindia.com, April 16,2022*

https://timesofindia.indiatimes.com/city/hyderabad /hyderabad-to-be-headquarter-for-all-judicial-datain-country-may-get-nclttribunal/articleshow/90870624.cms

Tata Steel Mining gets NCLT's go ahead to acquire Rohit Ferro-Tech through resolution plan

In a regulatory filing, Tata Steel has submitted that NCLT's Kolkata Bench has approved the resolution plan submitted by its wholly owned subsidiary Tata Steel Mining Limited, for the acquisition of debt-laden Rohit Ferro-Tech Limited. The judgement was pronounced by the NCLT, Kolkata orally on April 07, 2022. Last year on June 06, the resolution plan of Tata Steel Mining Ltd. for acquisition of Rohit Ferro-Tech Ltd. through insolvency process was approved by the CoC. Tata Steel is also in the process to acquire Odisha based Stork Ferro and Mineral Industries for Rs 155 crore in an all-cash deal.

Source: *economictimes.indiatimes.com, April 07,2022*

https://economictimes.indiatimes.com/industry/indl-goods/svs/metalsmining/nclt-approves-tata-steelminings-resolution-plan-for-rohitferrotech/articleshow/90705202.cms

CoC not the Resolution Professional can decide Eligibility of a Resolution Applicant under Section 29A of the IBC: NCLAT

The NCLAT has held that a Resolution Professional (RP) is not supposed to take a decision regarding the ineligibility of the Resolution Applicant under Section 29A of the IBC. It directed the RP to place all the Resolution Plans before the CoC. Challenging the rejection of her plan by the RP on the ground of being illegible, the Resolution Applicant contended that the question as to whether the plan submitted is to be rejected or approved is a question which needs to be decided by the CoC. Citing the Supreme Court judgement in the matter of *ArcelorMittal India Private Limited Vs. Satish Kumar Gupta,* (2019), the NCLAT held that the resolution plan can be placed before the CoC.

Source: *livelaw.in, April 06,2022*

https://www.livelaw.in/ibc-cases/national-company-law-appellate-tribunal-nclat-section29a-of-the-insolvency-bankruptcy-code-resolution-professional-resolution-applicant-196003

Application under Section 95 (1) of IBC is not maintainable against legal heirs of the Personal Guarantor: NCLT Kolkata

In a landmark judgement, the NCLT Kolkata Bench has ruled that legal heirs of a Personal Guarantor (PG) to Corporate Debtor (CD) are not liable for the dues. The court dismissed the petition filed by the Financial Creditor against the PG under Section 95 (1) of the IBC.

In this case, the Financial Creditor had provided a credit of about ₹103.90 crore to the CD (Kilburn Chemicals Ltd.) to which Sandip Kumar Jalan was PG. As the due was not paid, the Financial Creditor filed application for initiation of CIRP of the CD which was admitted by the NCLT. During pendency of the CIRP the PG passed away. The Financial Creditor issued a demand notice to the legal heir of PG. The court ruled that under Section 5 (22), PG refers to an induvial who gives surety in a contract of grantee on behalf of the CD. Also, as per regulation 3 (1) (a) (e) of Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor Regulation, 2019 does not include legal heirs.

Source: *livelaw.in, April 10,2022*

https://www.livelaw.in/ibc-cases/nclt-section-7-of-the-ibcinsolvency-resolution-process-196275

Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

First Schedule

[Under Regulation 7(2)(h)]

Code of Conduct for Insolvency Professionals

(*…Continue from previous edition*)

Representation of correct facts and correcting misapprehensions.

11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.

12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority, or any stakeholder, as applicable.

Timeliness

13. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations, and guidelines thereunder for insolvency resolution, liquidation, or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

14. An insolvency professional must not act with mala fide or be negligent while performing his functions and duties under the Code.

Information management

15. An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.

16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

17. An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.

18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled.

19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

20. An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

Confidentiality

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation, or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

Occupation, employability, and restrictions

22. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

[37][Clarification: An insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each.]

[38][23. An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.

....to be continued.

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[37] *Inserted by Notification No. IBBI/2021-22/GN/REG077, dated 22nd July 2021 (w.e.f. 21.07.2021).*

[38] *Substituted by Notification No. IBBI/2019-20/GN/REG045, dated 23rd July 2019 (w.e.f. 23.07.2019). Before substitution, clause 23, stood as under:*

"An insolvency professional must not engage in any employment, except when he has temporarily surrendered his certificate of membership with the insolvency professional agency with which he is registered."

IIIPI News

Shri Ravi Mital, Chairperson, IBBI, addressing the International Webinar on "Cross Border Insolvency and Global Lessons for India" organized by IIIPI jointly with III, USA on June 17, 2022.

CA. (Dr.) Debashis Mitra, President-ICAI, addressing the International Webinar on "Cross Border Insolvency and Global Lessons for India" organized by IIIPI jointly with III, USA on June 17, 2022.

Shri Sudhaker Shukla, WTM, IBBI, addressing Webinar on "Guidance on Quality Control for IPs & Peer Review Policy" organised by IIIPI on July 07, 2022.

CA. Aniket Talati, Vice President, ICAI, addressing Webinar on "Guidance on Quality Control for IPs & Peer Review Policy" organised by IIIPI on July 07, 2022.

CA. Subodh Kumar Agrawal, Past President, ICAI, addressing Webinar on "Guidance on Quality Control for IPs & Peer Review Policy" organised by IIIPI on July 07, 2022.

Shri Dinkar Venkatasubramanian, IP, addressing a Webinar on "Successful CIRP of Amtek Auto Ltd" organized by IIIPI on July 1, 2022. Shri Venkatasubramanian has been Resolution Professional for CIRP of Amtek Auto Ltd.

Shri RP Nagrath, Former Judicial Member, NCLT, Chandigarh Bench addressing the "Awareness Programme about Insolvency Profession with special reference to Graduate Insolvency Programme" organised by IIIPI in association with the IBBI as part of '*Azadi Ka Amrit Mahotsav* (AKAM) in Chandigarh on June 02, 2022.

A snapshot of the inaugural day of 05th Batch of LIE (Weekday) from 17th to 21st May 2022.

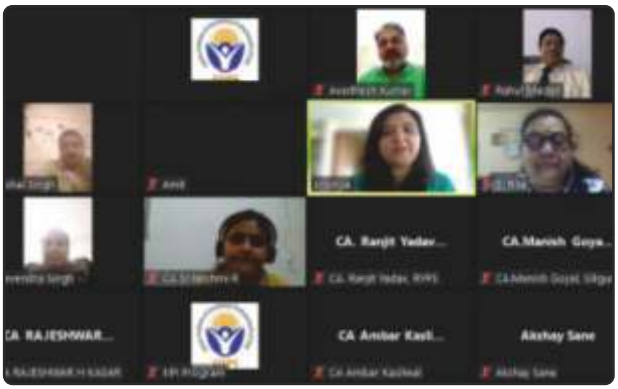
Adv. Ashish Makhija, IP, addressing the International Webinar on "Landmark Judgments under IBC" organized by IIIPI on June 23, 2022.

Mr. D. R. Chaudhuri, MD, NeSL at webinar on "Office Infrastructure and Usage of Technology by IPs" organized by IIIPI on May 13, 2022.

A snapshot of the Webinar on "Ethics in Insolvency Profession" organized by IIIPI on May 27, 2022.

CA. K. V. Jain, IP. addressing the webinar on "Office Infrastructure and Usage of Technology by IPs" organized by IIIPI on May 13, 2022.

A snapshot of Webinar on "Case Study on Ruchi Soya Industries Ltd." organized by IIIPI on May 05, 2022.



LIE Preparatory Classroom (Virtual) Program was organised by IIIPI jointly with Committee on IBC, ICAI from April 22, 2022. The "Weekend Batch" was conducted over five weekends while "Weekday Batch" was from 17th to 21st May 2022.

A snapshot of the Webinar on "Corporate & Ancillary Law: Know How of IPs" organized by IIIPI on April 28, 2022.

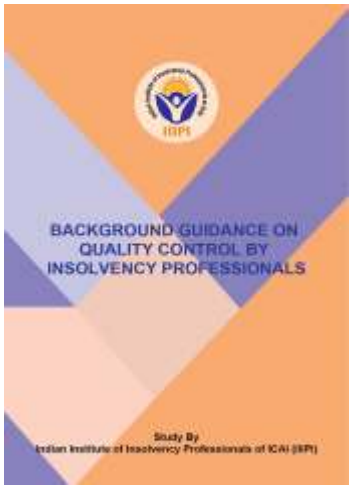
Webinar on "Avoidance Transaction under IBC - Best Practices" organized by IIIPI on April 15, 2022.

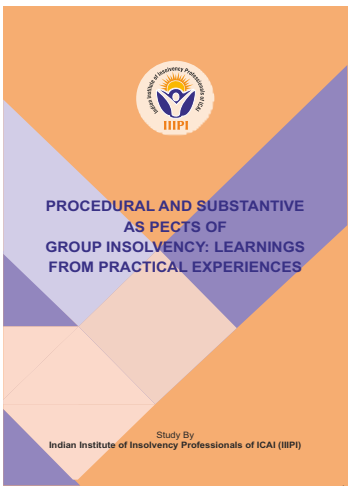
A snapshot of 7th Batch of EDP on Managing Corporate Debtors as Going Concern under CIRP from 26th April 2022 to 30th April 2022.

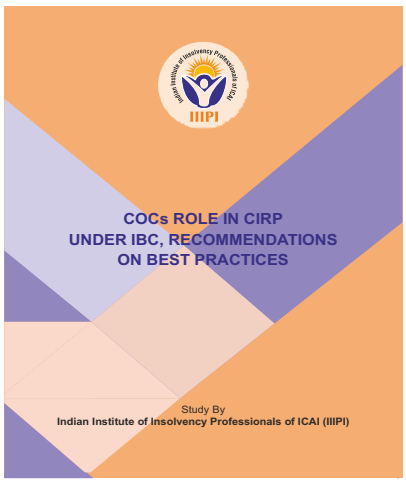
Webinar on Successful CIRP Case Study- Bhushan Steel Limited Organized on April 08, 2022.

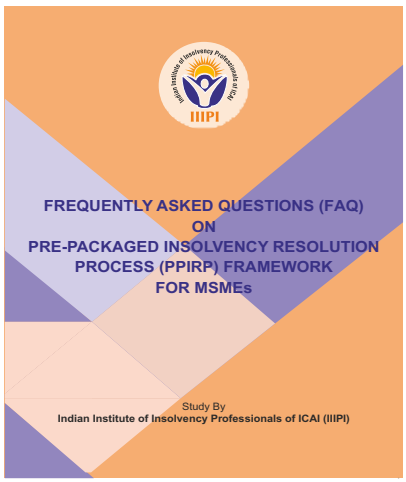
IIIPI's PUBLICATIONS

IIIPI has published five research publications based on the Reports submitted by various Study Groups. The Study Reports of some other Study Groups are under process. The soft copies (downloadable PDF) of all these publications are available on IIIPI website (https://www.iiipicai.in/publications/).






COCs ROLE IN CIRP
UNDER IBC, RECOMMENDATIONS
ON BEST PRACTICES
Study By
Indian Institute of Insolvency Professionals of ICAI (IIIPI)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FOR MSMEs
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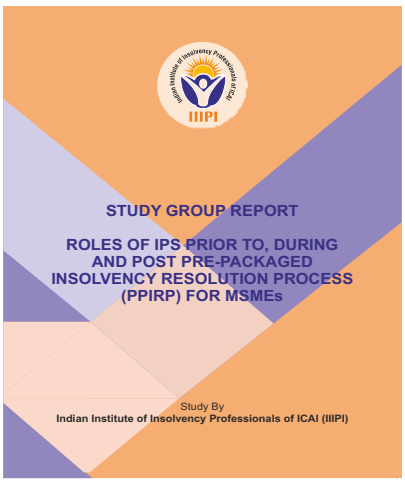
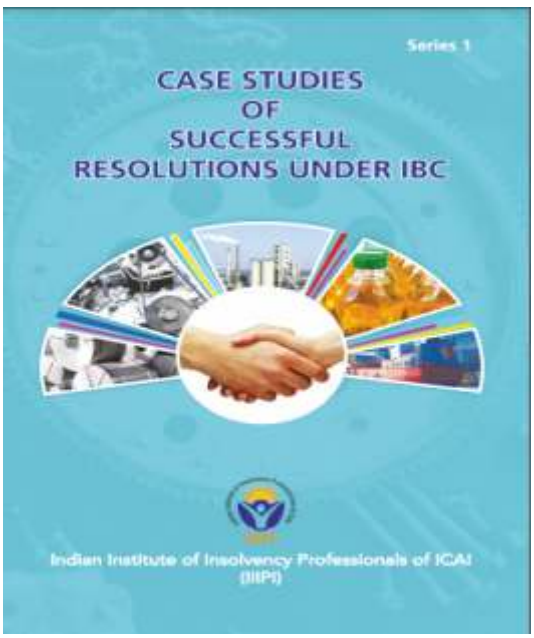

STUDY GROUP REPORT
ROLES OF IPS PRIOR TO, DURING
AND POST PRE-PACKAGED
INSOLVENCY RESOLUTION PROCESS
(PPIRP) FOR MSMEs
Study By
Indian Institute of Insolvency Professionals of ICAI (IIIPI)


Series 1
CASE STUDIES
OF
SUCCESSFUL
RESOLUTIONS UNDER IBC
Indian Institute of Insolvency Professionals of ICAI
(IIIPI)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'Model cross-border insolvency law almost ready'

A robust regime expected to enhance India's image as the most improved jurisdiction for insolvency resolution

KR SRIVATS
New Delhi, June 18

The model law on cross-border insolvency is almost ready and is under consideration of the government, Ravi Mital, Chairman, Insolvency and Bankruptcy Board of India (IBBI), has said.

More attractive

The enactment of the cross-border insolvency law will make India an even more attractive destination for cross-border investments as the insolvency regime in India would become predictable for foreign companies, Mital said at an international webinar on 'Cross Border Insolvency and Global Lessons for India', organised by the Indian Institute of Insolvency Professionals of ICAI (IIIPI), jointly with the International Insolvency Institute, US.

He also highlighted that as part of its 'Make in India' programme, the government wants to attract foreign companies to set up manufacturing facilities. Mital said the government is keen to introduce a globally accepted and well-regulated cross-border insolvency law.

Based on UNCITRAL law

The new comprehensive framework is likely to be largely patterned on the UNCITRAL model law on cross-border insolvency, which has been adopted by the US, the UK, Japan and Singapore. The UN Model law is now proposed to be tweaked to suit the Indian context and requirements.

"There is a clear need for a cross-border insolvency framework in India. Our country is considering adapting the model law (UNCITRAL model law) with certain India-specific modifications. We understand the model law will have great benefits for our country," Mital said.

> There is a need for a cross-border insolvency framework. India is considering adapting UNCITRAL model law with certain India-specific modifications
>
> RAVI MITAL, Chairman, IBBI

Mital noted that the UNCITRAL model is the most widely accepted framework for dealing with insolvency issues and more than 40 countries have adopted it.

He said that global experience demonstrates that cross-border investment decisions are influenced by the insolvency laws of a country.

The proposed Indian law will permit the country to refuse recognition of foreign proceedings or provisions if anything is contrary to domestic public policy. Therefore, priority will be given to domestic proceedings and, thus, there will be protection of domestic creditors, he said.

'Will guide coordination'

"It will also empower Indian insolvency representatives to access foreign jurisdictions and get recognition and cooperation. It will enable foreign representatives have the same benefits in India. The model law will guide coordination between courts and insolvency professionals in foreign jurisdictions," Mital said.

Mital noted that the IBC, as it exists, does cover situation of cross-border issues through Sections 234 and 235 of the Code. "Our adjudicating authorities have facilitated cross-border insolvency in several cases and Jet Airways is one of those cases that exemplify the need for a regime that deals with situations where a corporate debtor may have creditors and assets dispersed across various jurisdictions. We have also seen issues of cross-border in the Videocon Industries case," he said.

Debashis Mitra, ICAI President, said that cross-border insolvency has a great future and highlighted that more than 60 per cent of insolvency professionals in India are chartered accountants. He said the IIIPI has been an active participant in the law-making process relating to cross-border insolvency.

Fair, transparent law

Ashok Haldia, Chairman, IIIPI, said that the intensity of collaboration between trade and industry in India and the US extends even to small and medium enterprises. "That being the case, there is is a desperate need for resolution of cross-border insolvency in an effective manner -- fairly and transparently. The IBC does provide the framework for cross-border insolvency. That has, however, hardly been taken recourse to," he said.

The Corporate Affairs Ministry has already received public comments on the proposed legal framework for cross-border insolvency under the IBC. The adoption of a cross-border insolvency regime is expected to enhance India's image as the most improved jurisdiction for insolvency resolution.

Services

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62,
NOIDA, UP – 201309

Office Hours: 09:30 AM to 06:00 PM (Monday to Friday), except closed holiday.
(Presently the office is following staggered timing due to COVID19, which are;
I. 9:00 am to 5:30 pm, ii. 9:30 am to 6:00 pm, iii. 10:00 am to 6:30 pm)

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☎ **0120-2975680/81/82/83**

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8	CPE	iiipi.cpe@icai.in
9	Change of Address/ e-mail/contact number/any other required changes	iiipi.updation@icai.in

FEEDBACK

Dear Reader,

The Resolution Professional is aimed at providing a platform for dissemination of information and knowledge on evolving ecosystem of insolvency and bankruptcy profession and developing a global world view among practicing and aspiring insolvency professionals in India.

We firmly believe in innovations in communication approaches and strategies to present complicated information of insolvency ecosystem in a highly simplified and interesting manner to our readers.

We welcome your feedback on the current issue and the suggestions for further improvement. Please write to us at iiipi.journal@icai.in

Editor

The Resolution Professional

Help us to Serve You Better

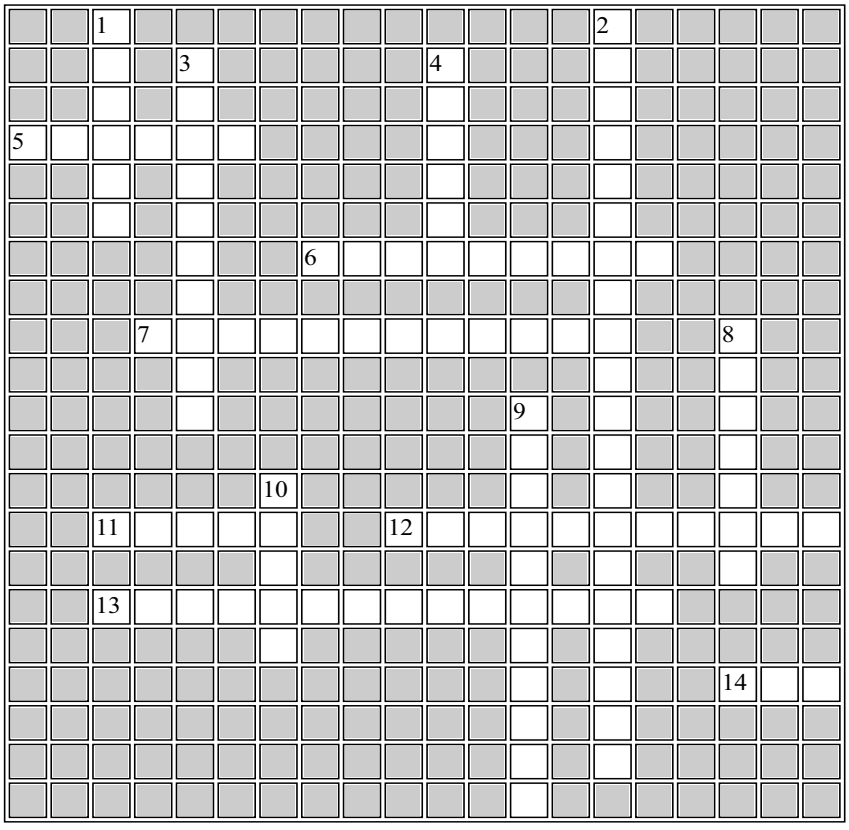
Launch of Mentorship Program

Indian Institute of Insolvency Professionals of ICAI (IIIPI) on July 15, 2022, launched Mentorship Program and Mentorship Portal for the benefit of Insolvency Professional (IP) members of IIIPI. Shri Ritesh Kavdia, Executive Director, Insolvency and Bankruptcy Board of India (IBBI), graced this occasion as Chief Guest and also addressed the Webinar on Common Issues on Monitoring/ Disciplinary.

Role of an Insolvency Professional (IP) as one of the key pillars under Insolvency and Bankruptcy Code, 2016 (IBC) is multi-disciplinary and onerous at times. An IP is required to drive the CIRP under the supervision of Committee of Creditors (CoC), with an aim to deliver resolution of distressed asset as going concern in a time bound manner, while ensuring value maximization and balancing rights of various stakeholders. As IRP/RP, an IP assumes the powers of Board of Directors while acting as *de facto* Chief Executive Officer (CEO) of the company and manages its business as a going concern. It was felt imperative to provide mentorship to the new entrants in insolvency profession to ever evolving challenges and for providing initial handholding by the experienced IPs. IIIPI had constituted a Study Group to examine the issue which recommend a draft framework for the Mentorship Program applicable to the members of IIIPI. The policy document and portal can be accessed on IIIPI's website under e-Services. Salient features of Mentorship Program are as follows:

1. It's voluntary and pro bono involving no financial consideration between the mentor and mentee.
2. IIIPI acting as facilitator for providing online portal for usage by its members in the capacity of mentor/mentee, setting the guidelines, etc.
3. Mentor to provide initial guidance and handholding to mentee for complying with technical/ professional/ethical requirements, regulatory compliances, best practices, and quality related aspects.
4. Mentors should have experience of managing and completed at least three CIRP or Liquidation assignments. A maximum of five mentees at a time can be assigned to one mentor.
5. Mentees, to become eligible, should have been appointed as IRP/RP/liquidator by the order of Adjudicating Authority/NCLT in at least one assignment.
6. The period of Mentorship Program, post allocation of mentor, shall be for a period of six months.
7. Mentors to provide a confidentiality undertaking in respect of information received from/exchanged with mentees.
8. Mentees shall be awarded with a certificate from IIIPI of having completed a Mentorship Program successfully. Mentors to receive certificate of appreciation from IIIPI after having successfully completed mentorship for at least three mentees.

IBC Crossword



Across

5. The Supreme Court in the matter of *Vallal Rck Vs. M/s. Siva Industries and Holdings Limited and Ors.* (2022) directed NCLATs and NCLTs not to "sit on appeal" if minimum, …..% of creditors agreeon "Settlement Plan" of Corporate Debtor.
6. In which city of India, Head Quarter of country's National Judicial Data Centre is being set up.
7. Which Real Estate Company in Noida was recently slapped with ₹1 crore penalty by NCLT, to playfraud on thousands of homebuyers, the Noida Authority, and the government authorities.
11. An Operational Creditor intended to initiate a CIRP against the Corporate Debtor needs to deliver ademand notice in which Form as per IBC (Application to Adjudicating Authority) Rules, 2016.
12. IBBI is fully clothed with jurisdiction to regulate payment of remuneration of IRP and RP. This judgement of NCLAT is related to .....….Pvt. Ltd.
13. Who was the Chairman of Joint Parliamentary Committee on Insolvency and Bankruptcy Code, Bill 2015.
14. The moratorium period under the Fresh Start Order process lasts for… days.

Down

1. Which Section of the IBC, mandates an IRP/RP to manage operations of the CD as a Going Concern.
2. If a company is able to pay all its debts from the sale proceeds and wishes to exit the business, which remedy is available for it under IBC, 2016.
3. After approval Resolution Plan is not a confidential document. This ruling of the NCLAT is related to…..(2022).
4. What is the period (in years) of limitation for suits related to possession of immovable property.
8. Which Chapter of the US Bankruptcy Law deals with Cross Border Insolvency.
9. In which case, the NCLAT has allowed joint auction of assets of the Corporate Debtor and Guarantor under IBC and SARFAESI Act.
10. The first meeting of the Committee of Creditors (CoC) should be held within ……..days of its constitution.

Answer Key: IBC Crossword, April 2022

1. Nine	2. 12A	3. Pre-Pack	4. Nine	5. Jet Airways	6. 29 A (h)
7. 26-Nov	8. 562	9. Form D	10. Fifteen	11. Twenty	12. Res Judicata
13. Thirty	14. Three				

GUIDELINES FOR ARTICLE SUBMISSION

THE RESOLUTION PROFESSIONAL, the quarterly peer-reviewed referred research journal of the Indian Institute of Insolvency Professionals of ICAI (IIIPI), an RNI verified Title (DELENG19833/ F. No.: 1364856/08.04.2021), invites research-based articles for its upcoming editions on a rolling stock basis. The contributors/authors can send their article/s manuscripts for publications in The Resolution Professional as per your convenience at iiipi.journal@icai.in. The same will be considered for publication in the upcoming edition of THE RESOLUTION PROFESSIONAL, subject to approval by the Editorial Board. The articles sent for publication in the journal should conform to the following parameters:

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- The article should:
  - Contribute towards development of practice of Insolvency Professionals and enhance their ability to meet the challenges of competition, globalisation, or technology, etc.
  - Be helpful to professionals as a guide in new initiatives and procedures, etc.
  - Should be topical and should discuss a matter of current interest to the professionals/readers.
  - Should have the potential to stimulate a healthy debate among professionals.
  - Should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of. It may also preferably highlight the emerging professional areas of relevance.
  - Should be technically correct and sound.
  - Headline of the article should be clear, short, catchy and interesting, written with the purpose of drawing attention of the readers. The sub-headings should preferably within 20 words.
  - Should be accompanied with abstract of 150-200 words. The tables and graphs should be properly numbered with headlines, and referred with their numbers in the text. The use of words such as below table, above table or following graph etc., should be avoided.
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  - The authors must provide the list of references at the end of article.
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