

# Insolvency Professionals, Resolution Process, and the Courts: A Call for a Management Education



*Insolvency profession is the fulcrum of the insolvency and bankruptcy process. The Insolvency and Bankruptcy Code 2016 (IBC 2016) provides legal and administrative process in which insolvency professionals are expected to function. Indian courts time and again gave enough judicial backing and support on the critical role played by the insolvency professionals. Be that as may, a continuing management education will help the insolvency profession to understand the nuances of running and sustaining a business and thus furthering the cause of IBC 2016.*

**Read on to know more...**



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## 1. Insolvency Professionals under the IBC 2016

The Indian insolvency and bankruptcy regimes remained complex and inconsistent till 2016.<sup>1</sup> In response to decades of suggestions for an overhaul of the insolvency regime,<sup>2</sup> the Indian Insolvency and Bankruptcy Code, 2016 (IBC, 2016 or Code) was introduced before the Indian Parliament. The newly introduced umbrella legislation reformed the insolvency ecosystem and replaced a multitude of archaic legislations, some of which dated as far back as 1924.<sup>3</sup> The IBC introduced a number of reforms to the insolvency process, including a time-bound resolution process, a reduced scope of judicial intervention and a creditor in control regime.<sup>4</sup>

<sup>1</sup> INTERNATIONAL FINANCE CORPORATION & INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, *Understanding the IBC: Key Jurisprudence and Practical Consideration*, 11–12 (2020).

<sup>2</sup> VIDHI CENTRE FOR LEGAL POLICY, *Understanding the Insolvency and Bankruptcy Code, 2016*, 11 (2019); *Swiss Ribbons Pvt. Ltd. and Another v. Union of India* And Others, (2019) 4 SCC 17.

<sup>3</sup> See Sreyan Chatterjee, Gausia Shaikh & Bhargavi Zaveri, *An Empirical Analysis of the Early Days of Insolvency and Bankruptcy Code, 2016*, 30 NAT'L LAW SCH. OF INDIA REV. 89 (2018); Abhishek Saxena & Akshay Sachthey, *The Insolvency and Bankruptcy Code, 2016 - A Fresh Start for India's Insolvency Regime*, 10 INSOLVENCY & RESTRUCTURING INT'L 22 (2016).

<sup>4</sup> VIDHI CENTRE FOR LEGAL POLICY, *supra* note 2, at 8.

The IBC created the profession of Insolvency Professionals (IPs) and adopted a two-tier model for their regulation.<sup>5</sup> IPs perform the accounting functions in insolvency proceedings and ensure compliance with insolvency's due process.<sup>6</sup> Within Corporate Insolvency Resolution Process (CIRP), an IP can be appointed as an Interim Resolution Professional (IRP) and a Resolution Professional (RP),<sup>7</sup> while they also discharge the functions of a liquidator during liquidation proceedings.<sup>8</sup> The provision of insolvency professionals allow the Courts to streamline the bankruptcy process by delegating responsibilities to the practitioners and ensuring better utilisation of judicial time.<sup>9</sup> Within IBC, 2016, the IPs perform the key role of ensuring symmetry of information between debtors and creditors, the correct collection and evaluation of bids, satisfying the National Company Law Tribunal (NCLT) of compliance with due process and acting as a liquidator amongst others.<sup>10</sup> The RP is one of the most important actors in a insolvency resolution process. While acting on the directions of the Committee of Creditors (CoC), RP acts as the face of the entire corporate debtor (CD).<sup>11</sup>

## 2. Administration and Regulation of Insolvency Professionals

The Bankruptcy Law Reforms Committee (BLRC), which is responsible for drafting the Code, acknowledged that insolvency professionals were an integral part of the insolvency resolution process.<sup>12</sup> Given that the insolvency processes within the Code are largely conducted through IPs, they have been referred to as the backbone and the fulcrum of the (insolvency) process.<sup>13</sup>

The BLRC argued in favour of a two-tier regulation of the IPs through the IBBI and Insolvency Professional Agencies (IPAs).<sup>14</sup> Under the present code an insolvency professional has to be a member of IPA and enrolled with IBBI.<sup>15</sup> The IPA develops code of ethics and professional standards according to the IBC and the regulations enacted

thereunder. The IPAs also audit the functioning of its members, disciplines them and take action against them if and when necessary.<sup>16</sup>

In turn, the IBBI registers IPAs<sup>17</sup> and exercises oversight on their functioning as disciplinarians and regulate the conduct of the IPs.<sup>18</sup> At the same time, IBBI is also entitled to regulate the affairs of the IPs.<sup>19</sup> In the case of *IBBI Vs. Wig Associates*, the NCLAT noted that: "IBBI can monitor the performance of the Insolvency Professionals and in appropriate cases, may pass any direction as may be required for compliance of the provisions of the Code."<sup>20</sup>

Section 208 of the Code sets out the functions of an insolvency professional in reference to four sets of proceedings:

- (i) A fresh start order process under Chapter II of Part III of the Code;
- (ii) Individual insolvency resolution process under Chapter III of Part III;
- (iii) Corporate Insolvency Resolution Process under Chapter II of Part II;
- (iv) Individual Bankruptcy Process under Chapter IV of Part III and;
- (v) Liquidation of a CD firm under Chapter II of Part II.

The Code<sup>21</sup> along with the Regulations<sup>22</sup> provided thereunder, provides a Code of Conduct that the IPs are required to follow.<sup>23</sup> Further regulations are enacted by the IPAs based on the IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

### 2.1. The role and duties of resolution/insolvency professionals

IPs discharge their functions during CIRP as IRP or RP. The Code requires an IP to assume the office of an IRP

<sup>5</sup> Anirudh Burman & Rajeshwari Sengupta, *Regulating Insolvency Professionals under the IBC: Tracing Pathways To Regulation Based on A Study Of Professional Development*, NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY (2019).

<sup>6</sup> *Id.*

<sup>7</sup> Section 5(47), Insolvency and Bankruptcy Code, 2016.

<sup>8</sup> Section 33, Insolvency and Bankruptcy Code, 2016.

<sup>9</sup> Burman and Sengupta, *supra* note 5.

<sup>10</sup> *Id.*

<sup>11</sup> AKAANT KUMAR MITTAL, *INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE* 587 (first ed. 2021).

<sup>12</sup> BANKRUPTCY LAW REFORMS COMMITTEE, *The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, 3.4.2 (2015).

<sup>13</sup> Mukulita Vijaywargiya, *Insolvency Professionals and the Code of Conduct, in INSOLVENCY AND BANKRUPTCY CODE: A MISCELLANY OF PERSPECTIVES* 141 (2019).

<sup>14</sup> BANKRUPTCY LAW REFORMS COMMITTEE, *supra* note 12 at 3.4.3 & 4.2.

<sup>15</sup> Section 3(19), Insolvency and Bankruptcy Code, 2016.

<sup>16</sup> INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, HANDBOOK ON ETHICS FOR INSOLVENCY PROFESSIONALS, ETHICAL AND REGULATORY FRAMEWORK, <https://ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf>.

<sup>17</sup> Section 199-201, Insolvency and Bankruptcy Code, 2016.

<sup>18</sup> See, Section 203-205, Insolvency and Bankruptcy Code, 2016.

<sup>19</sup> See: Section 220, Insolvency and Bankruptcy Code, 2016 r/w Regulation 11, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

<sup>20</sup> *Insolvency and Bankruptcy Board of India v. Wig Associates Pvt. Ltd.*, 2018 SCC OnLine NCLAT 386.

<sup>21</sup> Section 208(2), Insolvency and Bankruptcy Code, 2016.

<sup>22</sup> Regulations 7(2) r/w First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

<sup>23</sup> For more details see: Vijaywargiya, *supra* note 13.

within fourteen days of the commencement of insolvency proceedings.<sup>24</sup> If an IRP is proposed within the application for initiation of CIRP, the NCLT shall appoint the same.<sup>25</sup> If no such recommendation is provided, the NCLT shall approach to the IBBI for recommending the names of potential IRP.<sup>26</sup>

**On the day of the first meeting, the CoC is required to appoint an RP who conducts the entire CIRP process under close supervision from the CoC.**

One of the primary duties performed by an IRP is the assumption of powers vested in a CD's Board of Directors<sup>27</sup> and manage the operations of the CD as a going concern.<sup>28</sup> The IRP is further required to collect all information about the assets, finances and operation of the CD for determining its financial position,<sup>29</sup> to collate such claims and constitute the CoC.<sup>30</sup> Within seven days of constitution of the CoC, they are required to conduct their first meeting.<sup>31</sup> On the day of the first meeting, the CoC is required to appoint an RP<sup>32</sup> who conducts the entire CIRP process under close supervision from the CoC.<sup>33</sup>

Along with protecting and preserving the assets of the CD and maintaining its continued business operations,<sup>34</sup> the duties performed by the RP can be categorised under four broad areas:<sup>35</sup>

- (i) Convene and conduct the meetings of the CoC;<sup>36</sup>
- (ii) Conduct an evaluation of claims against the CD, keep an updated list of claims<sup>37</sup> and determine the voting share to be assigned to each creditor in the manner specified by the Board,<sup>38</sup>
- (iii) Prepare information memorandum and provide access to the relevant documents and information to every corporate applicant,<sup>39</sup> and invite resolution plans for the CD;<sup>40</sup>
- (iv) Report any avoidable transactions to the NCLT.<sup>41</sup>

## 2.2 Other important duties of the IRP and RP are as follows:

- (i) Invite expression of interests (EoIs) from resolution applicants (RAs) for submitting resolution plans in accordance with the requirements set forth in the Code;<sup>42</sup>
- (ii) Appointing various professionals to conduct the CIRP;<sup>43</sup>
- (iii) Issue the public announcement inviting claims within 3 days of appointment<sup>44</sup>
- (iv) Where required, enter into, amend or modify contracts<sup>45</sup>

## 3. Insolvency Professionals, Resolution Process, and the Courts

### 3.1. Decisions of Supreme Court

In the case of *Essar Steel Vs. Satish Kumar Gupta*,<sup>46</sup> the Supreme Court elaborated the role of a RP in a CIRP proceeding:

<sup>24</sup> Section 16(1), Insolvency and Bankruptcy Code, 2016.

<sup>25</sup> Section 16(2), 16(3)(b), Insolvency and Bankruptcy Code, 2016; See: *Sharvan Kumar Vishnoi v. Crown Alba Withing Instrument (P) Ltd.*, 2018 SCC OnLine NCLAT 621.

<sup>26</sup> Section 16(3)(a), Insolvency and Bankruptcy Code, 2016, See: Insolvency and Bankruptcy Board of India, Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2020, (issued on November 23, 2020).

<sup>27</sup> Section 17, Insolvency and Bankruptcy Code, 2016.

<sup>28</sup> Section 20, Insolvency and Bankruptcy Code, 2016.

<sup>29</sup> Section 18, Insolvency and Bankruptcy Code, 2016.

<sup>30</sup> Section 21, Insolvency and Bankruptcy Code, 2016.

<sup>31</sup> Section 22(1), Insolvency and Bankruptcy Code, 2016.

<sup>32</sup> Section 22(2), Insolvency and Bankruptcy Code, 2016; Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides the eligibility requirements of a Resolution Professional, Also see: Section 29A, Insolvency and Bankruptcy Code, 2016 for a list of people ineligible to be a resolution applicant.

<sup>33</sup> Section 23(1), Insolvency and Bankruptcy Code, 2016.

<sup>34</sup> Section 25(1), Insolvency and Bankruptcy Code, 2016; In *Gujarat Urja Vikas Ltd. v. Amit Gupta*, 2019 SCC OnLine NCLAT 1157 the NCLT restrained the termination of an agreement which would have terminated the continued nature of the corporate debtor as a going concern; See: *Bank of New York v. Zenith Infotech Ltd.*, (2017) 5 SCC 1.

<sup>35</sup> See: *Dhananjay Kumar et al., Liability of Insolvency Professionals: Roles, Duties, and Liabilities, in INSOLVENCY NOW & BEYOND: A THOUGHT LEADERSHIP DOCUMENT ON INSOLVENCY REGIME*, 120-121, <https://ibbi.gov.in/uploads/publication/e9dd73743324522f79d302ca72029094.pdf>.

<sup>36</sup> The IRP is required to conduct the first meeting of the CoC where the RP is appointed; Regulation 17, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Thereafter, the RP is required to conduct the meetings of the CoC: Section 24(2) & (3), Insolvency and Bankruptcy Code, 2016, Regulation 18-24, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; In *Vijay Kumar Jain v. Standard Chartered Bank*, (2019) 20 SCC 455 the Supreme Court noted that every participant is entitled to a notice of every meeting of the Committee of Creditors and such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed at such meetings.

<sup>37</sup> Section 25(2), Insolvency and Bankruptcy Code, 2016.

<sup>38</sup> Section 24(7), Insolvency and Bankruptcy Code, 2016.

<sup>39</sup> Section 29, Insolvency and Bankruptcy Code, 2016.

<sup>40</sup> Section 30, Insolvency and Bankruptcy Code, 2016; As per Section 30(2) & 30(6), the RP is also required to assess the resolution plan in terms of the regulations of the Code, and submit the plan to the NCLT.

<sup>41</sup> Section 43-51, Insolvency and Bankruptcy Code, 2016.

<sup>42</sup> Section 25(2)(i), Insolvency and Bankruptcy Code, 2016.

<sup>43</sup> Regulation 27, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; The RP is required to appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor.

<sup>44</sup> Regulation 6, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

<sup>45</sup> Section 20 r/w 23(2), Insolvency and Bankruptcy Code, 2016.

<sup>46</sup> *ESSAR STEEL INDIA LTD. COMMITTEE OF CREDITORS V. SATISH KUMAR GUPTA*, (2020) 8 SCC 531.

“The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decided by the Committee of Creditors.”

The Supreme Court in the case of Arcelor Mittal clarified that given the powers and duties of the RP in relation to CoC, the role is only administrative in nature. The Court noted:

“A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to “decide” whether the resolution....

Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him

with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.”<sup>47</sup>

The administrative role of the RP as held in the case of Arcelor Mittal was upheld in the case of Swiss Ribbons, where the Supreme Court clarified:

“It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers... Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim... It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial power.

The resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority.”<sup>48</sup>

**RP is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the CoC, who may or may not approve it, held Supreme Court in the case of Arcelor Mittal.**

Once an RP assumes control of the CD, the erstwhile directors are ousted from management of the CD. The Code states that their powers stand suspended and be exercised by the resolution professional.<sup>49</sup> The management and the directors cannot maintain any petitions or appeals on behalf of the CD.<sup>50</sup> The Supreme Court confirmed this position in Innoventive Industries:

“According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company.”

<sup>47</sup> ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1.

<sup>48</sup> SWISS RIBBONS PVT. LTD. AND ANOTHER V. UNION OF INDIA AND OTHERS, supra note 2.

<sup>49</sup> Section 17(1)(b) r/w 23(2), Insolvency and Bankruptcy Code, 2016; National Plywood Industries Ltd. Resolution Professional v. JSVM Plywood Industries Ltd., (2021) 9 SCC 401.

<sup>50</sup> Burn Standard Co. Ltd. v. United Bank of India, 2017 SCC OnLine Cal 9863.

Further, the personnel and management of the CD is required to extend assistance and cooperation to the RP, failing which the RP can approach the NCLT for issuing the requisite direction to the CD personnel.<sup>51</sup>

### 3.2. NCLT & NCLAT decisions on RP

The RP acts as an officer of the court<sup>52</sup> and the management of the CD is required to extend support to him/her.<sup>53</sup> The NCLAT explained this important principle in further detail in the case of Mamta Banani:<sup>54</sup>

“A Resolution Professional has a duty among other things to invite the prospective Resolution Applicant who satisfies the requirements as prescribed by him with the approval of the 'Committee of Creditors' keeping in mind the complexity and scale of operation of the business of the 'Corporate Debtor' and other conditions as may be prescribed by the IBBI to place forward the Resolution Plans, project such plan to the 'Committee of Creditors' etc. He is an Officer of the Court and he is to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him. He has an absolute duty to secure the best prize in the given circumstances and he is not made liable because his perception is wrong, of course, with the rider that unless it is not a reasonable one.”

**He has an absolute duty to secure the best prize in the given circumstances and he is not made liable because his perception is wrong, of course, with the rider that unless it is not a reasonable one.**

The NCLT in the case of Asset Reconstruction Company held that since a RP acts as an officer of the court, any hindrance to his working would amount to contempt of court.<sup>55</sup> Further dealing with the scope of a RP's duty, the NCLAT in Encore Asset Reconstruction Company noted that as long as the title of an asset is retained by the CD, it is the duty of the IRP to take control of the underlying assets. The IRP is expected to fulfil this mandate even when the possession of the asset is not retained by the CD<sup>56</sup>. With the appointment of the RP by the CoC, the IRP is required to

hand over the custody of the assets as well as other records that have been taken into custody.<sup>56</sup>

### 3.3. Legal and judicial protections given to RPs

An IP is protected from any coercive action for any decisions and actions conducted during CIRP, provided that he was acting in good faith.<sup>57</sup> In Basavaraj Koujalagi, NCLT Kolkata argued that if an IP is not protected against coercive action, it would impede his ability to make independent decisions:

“To hold otherwise will set a wrong precedent, and insolvency professionals shall not be able to take independent decisions, leading to a failure of the system. Such an approach should, therefore, be shunned. Actions taken in good faith by a public servant always enjoy protection under the law, and the IBC is no different, providing for the same under Section 233 of the Code.”<sup>58</sup>

The Guwahati High Court in *Amit Pareek Vs. State of Assam*, further elaborated on the scope of Section 233 and the contours of acting in good faith:

“However, the provision of Section 233 of the IBC, which provides immunity from any suit, prosecution or other legal proceeding for anything done under the IBC or the rules or regulations made thereunder cannot be said to be restricted only to the offence committed under the Code.

If the act is done in good faith than the petitioner or any other official envisaged by the provisions of Section 238 of the IBC shall be immune from criminal or civil proceeding for any act done under the Code. There is no doubt that "good faith" or "bad faith" is certainly a question of fact and is subject to proof. When a person is immune from prosecution in respect of any act done in good faith, and such immunity is sought to be taken away by way of filing a proceeding or suit, the person bringing the proceeding needs to allege the relevant facts in the FIR or complaint, which can be attributed to motive or absence of good faith of any person, inasmuch, as the immunity under the statute provided in order to protect the certain class of person from prosecution in respect of their official act done under the IBC cannot be taken away in a light manner.”<sup>59</sup>

<sup>51</sup> Section 19 r/w Section 23(2), Insolvency and Bankruptcy Code, 2016; See: Navin Srichand kanjwani v. Prashant Verma, 2020 SCC OnLine NCLT 8105.

<sup>52</sup> Numetal Ltd. v. Satish Kumar Gupta & Anr., I.A. Nos. 98 & other IAs in CP (IB) No. 40 of 2017 order dated 19.04.2018.

<sup>53</sup> Section 19, Insolvency and Bankruptcy Code, 2016.

<sup>54</sup> Canara Bank v. Mamta Binani, RP of Aristo Texcon and Ors., MANU/NL/0001/2022.

<sup>55</sup> Asset Reconstruction Co. Pvt. Ltd. v. Shivam Water Treaters Pvt. Ltd., MANU/ND/0902/2019.

<sup>56</sup> Rajendra K. Bhutia vs. Maharashtra Housing and Area Development Authority, MANU/NC/5463/2018.

<sup>57</sup> Section 233, Insolvency and Bankruptcy Code, 2016; See: Bank of Baroda v. Varia Engineering Works Ltd., IA/4679 (AHM) 2021 in CP(IB)/149 (AHM) 2017, Order dated 19.07.2021; Basavaraj Koujalagi and Ors. v. Sumit Binani, Liquidator of Gujarat NRE Coke Ltd., MANU/NC/1084/2021.

<sup>58</sup> Section 233, 238 Insolvency and Bankruptcy Code, 2016. BASAVARAJ KOUJALAGI AND ORS. V. SUMIT BINANI, LIQUIDATOR OF GUJARAT NRE COKE LTD., supra note 58.

<sup>59</sup> Amit Pareek v. State of Assam, MANU/GH/0319/2021.

The NCLAT in *S. Rajendran Vs. Jonathan Mouralidarane* dealt with the powers of the RP in reference to collation of claims and held that:

“We are of the opinion that the ‘Resolution Professional’ had no jurisdiction to “determine” the claim as pleaded in the Appeal. He could have only “collated” the claim, based on evidence and the record of the ‘Corporate Debtor’ or as filed by Jonathan Mouralidarane (‘Financial Creditor’). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the ‘Resolution Professional’ should not have moved in appeal, as in any manner, he will not be affected.”<sup>60</sup>

In the case of the *B.R Traders Vs. Venkataramanarao Nagarajan & Ors*, NCLAT noted that once the CoC has been constituted, the RP cannot entertain more applications for including a financial creditor in the CoC.<sup>61</sup>

The Court in *Puneet Kaur Vs. KV Developers*, noted that the RP is required to collate and prepare claims including the ones which have not been submitted by the creditors. The records of the CD reflecting the claims of creditors should be included in the information memorandum:

However, we are of the view that the claim of those homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution as is seen in the present case. To mitigate the hardship of the Appellant, we thus, are of the view that ends of justice would be met, if direction is issued to Resolution Professional to submit the details of homebuyers, whose details are reflected in the records of the Corporate Debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration.<sup>62</sup>

<sup>60</sup> Mr. S. Rajendran, Resolution Professional of PRC International Hotels Private Limited v. Jonathan Mouralidarane, CA(AT)(Ins) No. 1018/2019; INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, IBC: A Code for Corporate Governance, 10(2019).

<sup>61</sup> Asset Reconstruction Company (I) Limited and Ors. vs. Koteswara Rao Karuchola and Ors., MANU/NL/0533/2019.

<sup>62</sup> Puneet Kaur and Ors. v. KV Developers Private Limited and Ors., MANU/NL/0363/2022.

#### 4. Professional standards and misconduct of RPs

An insolvency professional functions within the dual regulatory authority of the IBBI and the IPA. The IBBI (Insolvency Professionals) Regulations, 2016, provide a Code of Conduct which is required to be followed by IPs and is adoptable by the IPA to ensure proper regulation of the IPs. Following are the broad categories in reference to which IBBI regulates the conduct of the IPs.<sup>63</sup>

- (i) Integrity and objectivity
- (ii) Independence and impartiality
- (iii) Professional competence
- (iv) Representation of correct facts and correcting misapprehensions
- (v) Timelines
- (vi) Information Management
- (vii) Confidentiality
- (viii) Occupation, employability and restrictions
- (ix) Remuneration and costs
- (x) Gifts and hospitality

The Code of Conduct has been interpreted to aid in the construction of the provisions and mandate of the Code. In the case of *Vijay Kumar Jain*, the Supreme Court held that the RP has an obligation to maintain confidentiality while conducting CIRP, and he can take an undertaking to this effect from the members of the CIRP process.<sup>64</sup>

The Code empowers IBBI to entertain complaints against the functioning of any IPA or IP.<sup>65</sup> On receipt of such complaint, the Board upon inspection would issue a show cause notice to the insolvency professional.<sup>66</sup> The Board shall constitute a Disciplinary Committee (DC) which shall decide upon the complaint.<sup>67</sup> The Code gives wide ranging powers to the DC which can suspend or cancel the registration of the insolvency professional,<sup>68</sup> and impose heavy fines to repatriate the amount of loss.<sup>69</sup> There are numerous examples where RPs are given punishment for negligence and misconduct, some examples are discussed below.<sup>70</sup>

<sup>63</sup> First Schedule, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation 2016; See: Vijaykumar Iyer & Abhishek Sood, Insolvency Professionals and the Code of Conduct, in INSOLVENCY AND BANKRUPTCY CODE: A MISCELLANY OF PERSPECTIVES 151 (2019).

<sup>64</sup> VIJAY KUMAR JAIN V. STANDARD CHARTERED BANK, supra note 36.

<sup>65</sup> Section 217, Insolvency and Bankruptcy Code, 2016 r/w Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

<sup>66</sup> Section 219, Insolvency and Bankruptcy Code, 2016.

<sup>67</sup> Section 220, Insolvency and Bankruptcy Code, 2016.

<sup>68</sup> Section 220(2), Insolvency and Bankruptcy Code, 2016.

<sup>69</sup> Section 220(3)-(5), Insolvency and Bankruptcy Code, 2016.

<sup>70</sup> For IBBI orders, please see: <https://ibbi.gov.in/en/orders/ibbi>

For example, in March 2022, the IBBI's DC adjudicated a complaint where the RP had withdrawn the insolvency costs and fees without the approval of the CoC. Citing Regulation 34 of the CIRP Regulations, the DC held that the fees and costs towards CIRP cannot be paid without the approval of the CoC. Found to have operated in contravention of the Code and the regulations framed thereunder, the DC suspended the concerned IP from taking any new assignments for the period of one year.<sup>71</sup>

In another complaint, it was alleged that the RP engaged to different firms for conducting the same task in the CIRP. The DC ordered that the RP shall have to arrange to refund ₹14,57,193 and also suspended him for one year.<sup>72</sup> In another case, the complaint accused that he had outsourced his primary duty of verifying claims. The DC ordered the payment of a penalty equivalent to the fees paid to the outsourced agency.<sup>73</sup> In 2018, for a gross violation of his duties and misleading the NCLT, the DC cancelled the registration the IP and debarred him from seeking registration for 10 years.<sup>74</sup>

**Since almost all the IPs are drawn from consultancy and advisory, the capability and instinct required towards running enterprises require a comprehensive continuing management education at multiple levels.**

## 5. A Call for Management Education

A review of the IBC 2016 and the judicial decisions brings three critical factors. One, IP's role in the resolution process is legally and judicially well established and understood. Two, IPs role is ever expanding and covers several areas of expertise such as finance, business, law government engagement, accounting etc. Third, being the fulcrum of the resolution process, the multi-tasking nature of IP's work profile require a concerted effort to learn and understand running of a business enterprise. Since almost all the IPs are drawn from consultancy and advisory, the capability and instinct required towards running



enterprises require a comprehensive continuing management education at multiple levels. I propose the following:

**First level:** Once an IP is IPAs, the person must enrol and go through a non-evaluated basic management course which also includes ethics and professional standards.

**Second level:** After 5 years of experience as an IP, and as part of continuing education, the IP must enrol for a mid-level experience sharing evaluated management course which includes engaging in research with academia.

**Third level:** After 10 years of experience as an IP, and as part of continuing education, the IP must go through a senior management program covering experience sharing and the lessons learnt for furthering the code based and professional reforms to bring process efficiency in the resolution process.

India has many management institutes. This will be a good collaborative engagement between academia and insolvency professionals.

<sup>71</sup> Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/83/2022, order dated March 14, 2022.

<sup>72</sup> Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/85/2022, order dated March 31, 2022, Also see: Insolvency and Bankruptcy Board of India, IBBI/DC/107/2022, order dated June 31, 2022.

<sup>73</sup> Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/80/2021, order dated December 9, 2021.

<sup>74</sup> Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/07/2018, order dated December 23, 2018.