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Shortcomings under the Insolvency and Bankruptcy Code, 2016

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ABSTRACT

The 2016 Code is a significant step toward providing overarching legislation for the rules connected to Insolvency Laws in India. The 2016 Code aim is to increase foreign direct investment in India by raising the country's rating and score on the Ease of Doing Business Index. It ensures a mechanism that is restricted by time and is also economical for a system of recovering debts. The Corporate Insolvency Resolution Process is a paradigm for insolvency resolution under the control of creditors. The Code provides relief to the creditors but also keeps in mind the interest of the company as well. Despite India's severe infrastructure crises, it seeks to build institutions like the NCLT, NCLAT, and the Insolvency and Bankruptcy Board of India. The Insolvency and Bankruptcy Code has endured several amendments and the landmark judicial pronouncements to make it more efficient and effective.

I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ("**Code**") was enacted by the Central Government *inter alia* with an object to consolidate and amend all the laws relating to reorganisation, insolvency and bankruptcy in India and to maximise the value of assets of such persons.[2] Another reason which led to enactment of the Code was due to continuous rise in the non – performing assets in India and enactment of separate legislations to deal with the insolvency and bankruptcy of corporations, partnership firms and individuals which mostly turned ineffective in timely and proper resolution of the insolvent and/or bankrupt persons. On the other hand, the Indian government, regulators and the banks, have made a lot of effort to curb the quantum of non – performing assets("**NPA**") by enacting legislations like Sick Industrial Companies Act, 1985[3]; The Recovery of debts due to banks and Financial Institutions Act, 1993[4], The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002[5] and various other amendments in the companies act however,

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2 Statement of Objects and Reason of the *Insolvency and Bankruptcy Code*, 2016.
3 *Sick Industrial Companies Act*, 1985.
4 The *Recovery of debts due to banks and Financial Institutions Act*, 1993.
5 The *Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act*, 2002.

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they all seem to be ineffective in resolving and curbing the issues of NPA in the Indian economy.

Moreover, the aforesaid legislations enacted by the Indian Parliament ("**Parliament**") promoted the rights of the creditor(s) on the one hand and on the other is protected the rights of the debtor. Therefore, there remained a lack of jurisdiction in the matter of insolvency and a clarity over the purposes of these legislations which ultimately delayed one or the other proceedings by the creditors by imposition of stay and multiple jurisdictions of the authorities.

Therefore, for the aforesaid reasons, the Parliament thought it was necessary to re – enact the entire insolvency regime in India and to repeal/ amend the existing laws on insolvency and debt recovery. Also, the Code has been given an overriding effect u/s 238 over the other laws so as to give it supremacy over other recovery legislations and uninterrupted application of the objects of the Code.

(A) Research Objectives

This research work seeks to:

- Analyse various important provisions of the Code.
- Study the various issues and challenges that have arisen during these four (4) years in the implementation of the Code since its enactment.
- Analyse the importance of Essar steel case with respect to the 2019 amendment.

(B) Research Questions

- What Important provisions have been introduced in the IBC?
- What are the issues and challenges in the present times regarding the IBC?
- What is the importance of Essar Steel case?

(C) Research Methodology

This research work is based on non-empirical and doctrinal study. It borrows from the literature available on the subject in the form of case laws, books, and published articles. Being non-empirical research by nature, there is a lack of primary analysis on the subject which acts as a limitation for this research work**.** resources such as Manupatra, SCC Online etc**.** The nature of the study is the descriptive, comparative, and analytical, which has been conducted using secondary sources of data.

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II. PROCESS FOLLOWED UNDER THE CODE

Under the Code, a novel procedure has been provided whereby the corporate person is not directly liquidated and a process is initiated to resolve the stress in the corporate person before directing it to the liquidation. In other words, for a company to go into liquidation, first it has to go through the Corporate Insolvency Resolution Process (herein after referred as 'CIRP') wherein the corporate person's future existence is analysed and if it is felt that it will be viable for the company to continue as a going concern provided it meet its debt requirements then the company is not liquidated but it is resolved by inviting the resolution plans from the prospective bidders who are interest in acquiring the corporate debtor along with all its liabilities.

Under the Code, a CIRP can be initiated by 3 kinds of persons i.e., financial creditors of the corporate debtors; operational creditors of the corporate debtors and the corporate debtor themselves. The application for initiation of CIRP can be filed under section 7 of the Code by the financial creditors of the Corporate Debtor; by the operational creditors of the Corporate Debtor under Section 9 of the Code; and by the corporate debtor themselves under Section 10 of the Code. Under the provisions of the Code, the triggering point for initiation of CIRP is the default in repayment of its debt by the Corporate Debtor. Section 4 of the Code prescribes that in case of corporate persons, if there is a minimum default of 1 (One) Crore[6] then CIRP can be initiated against such corporate persons. The following is a chart providing brief step chart providing the CIRP of corporate debtors under the provisions of the Code:

- Initiation of CIRP
- Moratorium and public announcement
- Appointment of IRP
- Collection and Collation of Claims
- Constitution of Committee of Creditors (COC)
- Appointment of RP
- Resolution plan submitted by Resolution applicants
- Approval of plan by COC
- Approval of plan by Adjudicating authority

III. KEY COMPONENTS OF IBC RESOLUTION PROCESS

(A) Committee Of Creditors

Creditors and/or lenders have a significant interest in the business of the corporate debtor due

[6]The *Insolvency and Bankruptcy Code*, 2016.

to their financial exposures granted to such debtors. Once insolvency proceedings are initiated against the corporate debtor, the creditors become directly interested in the proceedings to safeguard their interest in the security provided by the corporate debtor. As the party with the primary economic stake in the outcome of the proceedings, the involvement of the creditors in the proceedings of the corporate debtor becomes crucial for the successful outcome of its insolvency. As a general proposition, the interests of the lenders are safeguarded by the appointment of an IPs as the in charge of the management of the corporate debtor however, the creditors may lose confidence in proceedings if the IPs make key decisions during the CIRP without consulting them. This becomes more relevant if the creditors do not have adequate confidence in the ability or independence of the IPs.[7] The representations made by the Ips are also fraught by the members of the Committee of Creditors (herein after referred as 'CoC') with caveats and there appears to be no absolute rule controlling such representations even in the most sophisticated jurisdictions. Also, the creditors are often in a good position to provide advice and assistance with respect to the debtor's business and to monitor the actions involved in the CIRP, providing a check against possible abuse of CIRP and excessive administrative costs, as well as a means of processing and distributing information. At the same time, an excessive participation by the lenders in the CIRP, the business affairs and management of the corporate debtor may create an avoidable pressure on IPs appointed as officeholder by the Adjudicating Authority. This situation, if aggravated, may also make the CIRP process hostile resulting into a complete falling of the CIRP of the corporate debtor and leading the corporate debtor into the liquidation process. The nature and extent of participation of creditors permitted by law, stature and the experience of IP helps in maintaining a balance is created between the interest of the creditors and the corporate debtors.

The Code provides for constitution of CoC which includes inclusion of both secured and unsecured creditors, that is, financial creditors of the corporate debtor. The operational creditors of the corporate debtor can become voting members of the CoC only when the corporate debtor does not have financial creditors. The CoC is a key functionary under the provisions of the Code and thus has many duties assigned to it. The CoC is entrusted with the duty to appoint the RP in its first (1) meeting who shall keep them informed about the entire CIRP. Further, the RP is under a legal obligation to obtain their prior approval before taking certain actions mentioned under the Code and applicable rules and regulations. Also, it is the CoC which has the power to approve or reject the resolution plan submitted by the resolution

[7] UNCITRAL Legislative Guide, p.190, para.75.

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applicants for the resolution of the corporate debtor and to eventually determine whether the corporate debtor will be rescued or liquidated.

(B) Corporate Insolvency Resolution Process

Under the Code, if the default[8] is equivalent to or above Rs.1,00,00,000 (Rupees One Crore only), then the CIRP can be initiated against the corporate debtor.[9] The application for initiation of CIRP of the corporate debtor can be filed by either the financial creditor[10] or the operational creditor[11] or the corporate debtor[12]itself. The admission of the application is triggered by the default of the corporate debtor as mentioned under Section 4 of the Code.[13] As soon as a default of Rs. 1,00,00,000/- (Rupees One Crore only) is proved before the Adjudicating Authority, the application filed by the financial creditor of the corporate debtor is admitted under Section 7 of the Code.[14] After the admission of the application, moratorium is imposed on the assets of the corporate debtor and a stay is imposed on all suits pending against the corporate debtor involving its assets.[15] Thereafter, an Interim Resolution Professional (herein after referred as 'IRP') is appointed to manage the business and management of the corporate debtor[16] who afterwards appoints the CoC by requesting all the creditors including the financial creditors of the corporate debtor to submit their claims against the corporate debtor to the IRP and/or the RP in terms with the provisions of the Code and applicable rules and regulations.

It is made clear that the CIRP under the provisions of the Code is not a recovery proceeding against the corporate debtor to recover the dues of the respective creditors of the corporate debtor and the main objective of the Code is to resolve and revive the corporate debtor from the stress it is being facing on account of its debt and default committed thereby.

Section 6 of the Code provides that three (3) types of persons can initiate CIRP, i.e., a financial creditor, an operational creditor, or the corporate debtor itself. The Code defines a financial creditor as "a person to whom financial debt is owed".[17] Financial debt, in turn, is defined as a "debt along with interest, if any, which is disbursed against the consideration for the time value of money"[18], and then the said section goes on to provide an inclusive definition for which

[8]The *Insolvency and Bankruptcy Code*, 2016.
[9]The *Insolvency and Bankruptcy Code*, 2016, s. 4.
[10]The *Insolvency and Bankruptcy Code*, 2016, s. 7.
[11]The *Insolvency and Bankruptcy Code*, 2016, s. 9.
[12]The *Insolvency and Bankruptcy Code*, 2016, s. 10.
[13] Sumant Batra, *Corporate Insolvency: Law & Practice*, 2017, p. 208; *Innoventive Industries Ltd. v. ICICI Bank*, 2017 SCC OnLine NCLAT 70.
[14]*In re Punjab National Bank*, 2017 SCC OnLine NCLT 1423.
[15]The *Insolvency and Bankruptcy Code*, 2016, ss.4, 13 and 14.
[16]The *Insolvency and Bankruptcy Code*, 2016, ss. 16 and 17.
[17]The *Insolvency and Bankruptcy Code*, 2016, s. 5 (7).
[18]The *Insolvency and Bankruptcy Code*, 2016, s. 5 (8).

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transactions are covered in the broader meaning of "financial debt".[19]Thus it is understood that, a financial creditor is a person with whom the debtor enters into a financial contract (for instance, a loan or debt security), and that is strictly the nature of their business relationship.

Section 12 of the Code further provides that the CIRP needs to be completed within One Hundred and Eighty (180) days from the date of admission of the application.[20]However, a further period of Ninety (90) days may also be granted to the IRP/RP to complete the CIRP upon making such application to the Adjudicating Authority, prior end of the CIRP in the manner provided under the Code.[21] Also, after the enactment of 2019 Amendment Act, the maximum time period for completion of the CIRP after all the extension and exclusion of time from the CIRP has been limited to Three Hundred and Thirty (330) days.[22]

IV. SHORTCOMINGS UNDER THE PROCESS

(A) No defence provided by the code for default of the amount

Section 7 of the Code empowers the financial creditor to make an application for initiation of CIRP as soon as default takes place by the corporate debtor.[23]However, Section 7 of the Code does not provide for the defences which might be taken by the corporate debtor before the Adjudicating Authority in regard to the default in question and the amount of default which is being in contest or for the reasons as to the circumstances why the default has occurred.[24]

In *M/s. Innoventive Industries Ltd.* v. *ICICI Bank &Anr.*,[25] it was held by the Hon'ble National Company Law Appellate Tribunal, New Delhi ("**Hon'ble Appellate Tribunal**") that the Adjudicating Authority (AA) is not required to look into any other factor apart from the occurrence of default, completion of application filed under Section 7 of the Code and any disciplinary proceeding against the proposed IRP.[26]

But in ***Jagdambey International v. Visa Powertech Pvt. Ltd.***[27], the Adjudicating Authority stated that the entire locus of the applicant under the Section 7 application stands on the premise that the defaulting company owes a financial debt as defined under the Code[28]. Therefore, the corporate debtor can raise the objection that it does not owe any financial debt to the creditor

[19]*Ibid.*
[20]The *Insolvency and Bankruptcy Code*, 2016, s. 12.
[21]*Ibid.*
[22]*Ibid.*
[23]*Bank of Baroda v. Amrapali Silicon City Pvt. Ltd.*, 2017 SCC NCLT (814)
[24]*Essar Projects India ltd v. MCL Global Steel Pvt. Ltd*, 2017139 CLA (180)
[25]*M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr*, 2017 139 CLA (335)
[26]*Ibid.*
[27]*Jagdambey International v. Visa Powertech Pvt Ltd.*,CP (IB)- 4023/I&BP/MB/2018.
[28]*Ibid.*

who filed the present application under Section 7 of the Code. In the case of *B.K. Educational Services Private Limited v. Parag Gupta and Associates*[29], it was held that Section 238A of the Code provides that the Limitation Act, 1963 ("**Limitation Act**") shall apply to the Adjudicating Authority, Appellate Tribunal, Debt Recovery Tribunal etc. If the default has occurred three (3) years prior to filing of the application with the Adjudicating Authority then the same will be barred by limitation. It cannot pass a decree as to the debt owed and the Adjudicating Authority only has to ascertain as to whether there has been a default or not in terms of the Code. Once a default in terms of Section 4 of the Code is established and all other requirements under Section 7 of the Code are fulfilled, the CIRP has to be triggered.[30]

1. That the company is solvent.

Application under Section 7 of the Code cannot be rejected merely on the ground that the debtor is solvent. The triggering point for admission of application under this Section is default has been committed by the corporate debtor. There has to be specific denial of default by the corporate debtor if he has to contest the application otherwise the same demands admission.[31]

(B) Power of Adjudicating Authority to direct changes in the resolution plan

The issue which the stakeholders of the corporate debtor were facing under this new regime was that the CoC has been given an adjudicating power under Section 30 of the Code whereby they had to approve the resolution plan by a majority of not less than 66% (Sixty Six percent).[32] Owing to this reason a lot of resolution applicants complained that the CoC has made decisions arbitrarily and in an irrational manner which has hampered the revival of the corporate debtor which in result *inter alia* defeated the objective of the Code so as to speak.[33]

1. When the ADJUDICATING AUTHORITY has the power to interfere with the decision of the CoC.

It is necessary for the resolution plan to be approved by the Adjudicating Authority as the fate of the defaulting corporate debtor cannot be left in the hands of the creditors. Therefore, a safeguard has been provided under Section 31 of the Code whereby the resolution plan approved by the requisite majority of the CoC has to be approved by the Adjudicating Authority if such resolution plan approves the criteria mentioned under Section 30 of the Code *read with*

[29]*B.K. Educational Services Private Limited v. Parag Gupta and Associates*, 2017 Civil Appeal No.23988
[30]*Bank of India v. Tirupati Infraprojects Pvt. Ltd.*, 2017 IB-104(PB); *IFCI Limited v. Era Housing & Developers (India) Limited*, 2017 (IB)-489(PB).
[31]*ICICI Bank Ltd. v. Jyoti Buildtech Pvt. Ltd.*, 2018 Company Petition No. (IB)-1362(PB), NCLT Delhi.
[32]The*Insolvency and Bankruptcy Code*, 2016, s. 30.
[33]*M/s. Bhaskara Agro Agencies v. M/s. Super Agri Seeds Pvt. Ltd.*, 2018 Company Appeal (AT) (Insolvency) No. 380 ; *State Bank of India v. Orissa Manganese and Minerals Ltd.*, 2018 CA (IB) Nos. 371,398, 402, 470.

applicable rules and regulations.

The Hon'ble Supreme Courtin the matter of *K Sashidhar*v. *State Bank of India*[34]*inter alia* held that the legislature has consciously made 'commercial wisdom' of the CoC non-justiciable. What the Adjudicating Authority/ Appellate Tribunal can examine while approving the resolution plan is the standard of fairness followed therein and applied in the whole process.[35]

Further, the Code nowhere expressly authorises "the Adjudicating Authority to sit over the judgment on the resolution of CoC in rejecting the resolution plan. The Code, through Section 31 provides that the authority to the Adjudicating Authority to approve the resolution plan when approved by CoC and can reject if it does not conform to the requirements referred under Section 30 (2) of the Code but not to sit over judgment on the resolution plan approved by the CoC in rejecting such resolution plan".[36]

2. In absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the plan.

In the absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the resolution plan.[37] The Code nowhere expressly authorises the Adjudicating Authority to sit over the judgment on the resolution of CoC in rejecting the resolution plan for the revival of the corporate debtor.[38] The Code, through Section 31 provides that the jurisdiction of the Adjudicating Authority to approve the resolution plan when approved by CoC and can reject if it does not conform to the requirements referred under Section 30 (2) of the Code but not to sit over judgment on the resolution plan which has been duly approved by the CoC in rejecting the resolution plan.[39]

3. Clarification made by the August, 2019 Amendment Act.

The Adjudicating Authority, the Appellate Tribunal and the Supreme Court passed an erroneous ruling in the proceeding for approval of resolution plan in the matter of ***Essar Steel Ltd.***[40] whereby the courts passed an order of amendment in the resolution plan proposed by the resolution applicant on the ground that discrimination has been made in the distribution of payment of debt. The legislature without delaying the judgements and clarified the provision

[34]*K Sashidhar v. Indian Overseas Bank & Ors.*, AIR 2019 SC (1329).
[35] Prateek Gattani, "Rejected Resolution Plan: NCLT Jurisdiction", *Taxmann*, 2018,p. 218; *Small Industries Development Bank of India v. Tirupati Jute Industries Ltd.*, CP (IB) NO. 508 (KB) OF 2018.
[36]*Vijay Gupta v. Steel Konnect (India) Pvt. Ltd. & Ors.*, 2018 SCL 146 (0016).
[37]*Darshak Enterprise Pvt. Ltd. v. Chhaparia Industries Pvt. Ltd. & Ors.*, 2017 Company Appeal (AT) (Insolvency) No. 327; *Venkatesan Sankaranarayanan v. Tecpro Systems Ltd*., Company Petition (IB) No. 197/PB OF 2017.
[38]*In re Manoj Kumar Agarwal*, C.P. (IB) NO. 1686 (MB) 2017.
[39]*ArcelorMittal India (P.) Ltd. v. Abhijit Guhathakurta*, CP NO. 1832/IBC/NCLT/MB/MAH/2017.
[40]*Committee of Creditors of Essar Steel v. Satish Kumar Gupta and Ors*, (2020) 8 SCC 531.

and application of law by the 2019 Amendment Act.[41]

(C) Discrimination between different classes of Creditors

The Code clearly distinguishes between the two (2) classes of creditors i.e., operational creditors and the financial creditors of the corporate debtor when it comes to making application for initiation of CIRP under the Code. Under the scheme of the Code, the financial creditors are further divided into secured creditors[42] and unsecured creditors[43]. Under Section 5(20) of the Code and Section5(21) of the Code, an operational creditor is defined as to include employees, workmen, government authorities whose debts are due and payable etc. The question which still exists is whether the resolution applicants can also discriminate in their resolution plans with regards to the distribution to be made to these classes of creditors. If one tries to answer the above disputed question reasoning the argument on pillar of equality, then there would exist a contradiction in his approach with the object of the Code. This is so because keeping these classes of creditors on the same footing will be against the principle of security-based lending. principle recognises the need for prioritising or giving preferential treatment to the creditors who have security for their respective debt. The simple object behind such a principle is that the creditors when advance payment for the purpose of debt, they charge interest for the same and the component of interest includes the value of rise, time value of money and other reasons. Whenever a debtor advances a security for its loan, he is mitigating the value of risk of such creditor and because of that factor, the creditor gets an upper hand over other creditor. When the creditor's debt is secured, it is assumed that there must have been a compromise in the amount of interest charged to the extent and the quality of security advanced. Therefore, it would be very right to conclude that there exists an inherent distinction between these classes of creditors. Therefore, whenever a resolution plan discriminates between these two classes of creditors of the corporate debtor, the resolution plan cannot be rejected on the ground of discrimination. No distinction was made between these classes of creditors before the Code came into picture. Financial creditors are the members of the CoC and the reasons which the BLRC gives behind such exclusive power to CoC is that they consider that the financial creditors will have more expertise and knowledge when compared to the operational creditors in analysing the feasibility and viability of a resolution plan. It is a myth that the Code secures the right of the operational creditors to get minimum payments.

[41] The *Insolvency and Bankruptcy Code (Amendment) Act*, 2019, s. 6.
[42]The *Insolvency and Bankruptcy Code*, 2016.
[43]*Ibid*.

(D) An ambiguity with respect to the powers of the resolution professional

The Code makes provision for the appointment of the IRP under Section 16 of the Code and the RP under Section 22 of the Code. Section 18 of the Code provides the duties of IRP. The clause (b) of this section grants a power to receive and collate the claims of the creditors of the corporate debtor pursuant to the public announcement. The IRP after collating the claims constitutes the CoC which thereafter appoints the RP. Either the IRP himself is made the RP or the CoC appoints a new person as the RP.[44]There has been much of a debate to the fact that whether the IRP should have the power to reject the claim of the creditors or not. The creditors are aggrieved by the fact that they are left remediless if their claim is rejected by the RP. Again, if the resolution plan after the CIRP is rejected then the company goes into liquidation and then they do not get complete payment.

1. Definition of claim

Under the Code, an application for initiation of CIRP can be filed only by financial creditors, operational creditors, or the corporate debtor itself. However, post the commencement of CIRP, other creditors apart from financial creditors and operational creditors are also entitled to file their proof of claims.

2. Administrative or Adjudicatory powers to Resolution Professional.

The Code vests RP with administrative power as opposed to judicial power which are overseen by the CoC and by the Adjudicating Authority.[45] RP has no jurisdiction to decide and/or reject the claim is only required to collate the same[46] and has no power to determine it or adjudicate upon it.[47]However, not giving him the adjudicatory power leads to a lot of confusion with regards to the mechanism of the Code. If he is not given with the power to reject the claim of any creditor, then any creditor with any contingent liability will give a claim of any amount leading to an unwanted confusion.

3. Regulation 13 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 ("IRPCP Regulations") is against the parent act.

Regulation 13 of CIRP Regulations is titled as 'verification of claims' mandates that the IRP/RP shall verify the claims submitted to him/her within a period of seven (7) days from the

[44]The *Insolvency and Bankruptcy Code*, 2019, s. 21.
[45]*Swiss Robbins (P) Ltd. v. Union of India*, 2019 SCC 4 (17).
[46]*M/s. Roma Enterprises v. Mr. Martin S.K. Golla Resolution Professional*, Company Appeal (AT) (Insolvency) No. 232 of 2018.
[47]*PTC India Financial Services Ltd.v. Venkateswarlu Kari*, Company Appeal (AT) (Insolvency) NO. 450 of 2018.

last date of receipt of claims. This has led to a practice where though the Code itself doesn't expressly empower an IRP/RP to verify and admit/reject claims like a liquidator has been under Chapter III of the Code, an IRP/RP does in fact delve into the merits of a claim and adjudicate upon its authenticity and veracity and determine the quantum of the claim that is to be admitted. Therefore, it would not be wrong to say that Regulation 13 of CIRP Regulations is ultra vires the Code and hence can be argued as unconstitutional. Hence, subordinate legislations cannot override the parent statute.

V. AMENDMENT ACT OF 2019 OF THE CODE TO NULLIFY THE EFFECT OF THE NCLAT ORDER

The legislature after realising that the code is being interpreted in a drastic manner passed an instant amendment to the code to clarify the meaning of the provisions of the code. The amendment made various points clear such as the importance of speedy completion of CIRP, the importance of commercial wisdom of CoC, meaning of equitable treatment to operational creditors.

(A) Strict adherence to 14 days' time for disposal of CIRP application.

In pre amendment days the courts and tribunals were very flexible with the approach of time bound completion of certain processes. In *J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co.*[48], the Appellate tribunal went on to say that the 14 days' time period for disposal of application for CIRP is directory in nature and not mandatory. The legislature under the amendment clarified the position stating the importance of completion of CIRP process and application disposal in given time. Extension can only be made in exceptional circumstances.

(B) TIME LIMIT FOR COMPLETION OF CIRP EXTENDED TO 330 DAYS INCLUSIVE OF TIME FOR LITIGATION.

When the code was introduced time limit for completion of CIRP was 180 days with an extension of 90 days making it to a maximum of 270 days. The Amendment provides that the CIRP must

"Mandatorily be completed within an overall timeline of 330 days from the insolvency commencement date (including all or any extensions granted as well as any litigations and related legal proceedings). Additionally, for an ongoing CIRP, in case the 330-day overall timeline has already been breached at the time the Amendment comes into force, the

[48] J.K. *Jute Mills Co. Ltd. v/s Surendra Trading Co.*, Company Appeal (AT) No. 9 of 2017.

Amendment provides for an additional relaxation of 90 days as a transitionary measure."

Voting by an authorised representative

"This amendment will not only facilitate a simplified voting process for classes of creditors but will help the authorised representative to effectively participate in the CoC proceedings and cast his vote on behalf of the financial creditors he represents."

(B) Distribution under the resolution plan

Prior to the amendment, the code provided for payments of minimum debt to operational creditors to the extent whet they would have gotten if the company were to be liquidated. The amendment introduced two comparisons for minimum payment to OCs – Liquidation Value & Resolution Value. § 30(2)(b) provides that the OCs should receive higher of either the Liquidation Value or the Resolution Value in the resolution plan. The amendment also provides that as it is clarificatory in nature, they will be retrospective in their application.

(C) Resolution plan will bind all the stakeholder of the corporate debtor

Under the Code, when a goal's plan is endorsed, it is authoritative on all partners. The Amendment means to catch this soul by explicitly giving that a goals plan will likewise be official on the Central Government, State Governments, or any nearby position to whom an obligation in regard of instalment of levy is owed. This alteration will lessen delays brought about by the legislature or any nearby power raising requests post-endorsement of a goals plan and clarifies that once a goals plan is affirmed, it is official on them too.

(D) Liquidation by Committee of Creditors

The amendment clarifies that the CoC could take the choice to liquidate the company person any time when the CoC is ingrained and before the confirmation of the resolution set up, as well as at any time before the preparation of the Information Memorandum.

(F) Powers of the Committee

In addition to giving new powers to the CoC to liquidate the company somebody, the modification additionally clarifies the scope of power of the CoC and its role throughout the CIRP. The Essar Order had severely curtailed the powers of the CoC vis-à-vis consultation and negotiation with bidders whereas evaluating any Resolution set up. The CoC will valuate such manner of distribution by taking under consideration the order of priority amongst creditors as per the Liquidation water in section 53 of the Code, as well as the priority and price of the safety interest of a secured creditor.

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VI. SUPREME COURT'S DECISION ON ESSAR DISPUTE

ESSAR STEEL CASE[49]

In the infamous Essar Steel case, the Hon'ble Appellate Tribunal passed an order on 04 July, 2019[50] reprimanding the power of the CoC to solely decide on the distribution pattern has been in light as the same is being challenged by the CoC in appeal. The Essar Steel dispute started with releasing of a press release by the RBI whereby, the Central Bank referred the matter of twelve (12) major defaulters in the country to the Adjudicating Authority for CIRP. Essar Steel Limited challenged this press release of RBI as ultra vires o its power. However, that dispute was separately settled and thereafter CIRP was ultimately initiated against Essar Steel Limited ("**ESL**").

(A) Role of the Resolution Professional

There has been much of a dispute regarding this issue whether the RP should have the power to reject a resolution plan or not. Questions and debates emerged as to the scope of duty of the resolution professional. It is the responsibility of the resolution professional (RP) to:

- "Manage the affairs of the corporate debtor (CD) as a going concern during corporate insolvency resolution process (CIRP),
- Appoint and convene meetings of the CoC, so that they may decide upon resolution plans, and
- Collect, collate and finally admit claims of all creditors, which must be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated by the Committee of Creditors (CoC).
- The role of the resolution professional is not adjudicatory but administrative."

(B) Role of CoC in CIRP

The question has ultimately been solved by the Apex Court by clearly demarcating between the power of the CoC to take commercial decisions and the power of the Adjudicating Authority to take Legal Decisions. The SC pointed and noted specifically the role of the committee of creditors which comprises of the Financial Creditors:

[49] *Committee of Creditors of Essar Steel v. Satish Kumar Gupta and Ors*, (2020) 8 SCC 531.
[50] *Committee of Creditors of Essar Steel (India) Ltd. through State Bank of India v. Satish Kumar Gupta and Others*, 2019 SCC OnLine NCLAT 38.

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- "It is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the corporate debtor by accepting a particular resolution plan."[51]
- The insolvency resolution is ultimately in the hands of the majority vote of the CoC. It may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.[52]
- What is left to the majority decision of the CoC is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors.[53]

(C) Scope of Jurisdiction of the NCLAT and the Adjudicating Authority

In the Essar case, Binani Industries Case, Bhushan Steel Judgment, the Adjudicating Authority and the Appellate Authority went outside its scope by giving orders which modified the resolution plan. Even after the Apex Court's ruling in *K. Sasidhar v. Indian Overseas Bank*[54], the confusion never settled and ultimately in this judgment clarity has been made with regards to the scope of Jurisdictional power given to Adjudicating Authority and NCLAT:

- ❖ "The limited judicial review available to Adjudicating Authority has to be within the four corners of section 30(2) of the Code. In respect of the NCLAT, it has to be within parameters of section 32 read with section 61(3) of the Code. Such review can in no circumstance trespass upon a business decision of the majority of the CoC.[55]
- ❖ There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the CoC, but the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including OCs. while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has considered the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including OCs has been taken care of. If the Adjudicating Authority finds, on a given

[51] *Committee of Creditors of Essar Steel v. Satish Kumar Gupta and Ors,* (2020) 8 SCC 531, para 31
[52] *Ibid*, para 36
[53] *Ibid*, para 40
[54] *K Sashidhar v. Indian Overseas Bank & Ors.*, AIR 2019 SC 1329.
[55] *Committee of Creditors of Essar Steel v. Satish Kumar Gupta and Ors, (2020) 8 SCC 531*, para 43

set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the CoC to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the CoC while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the CoC has paid attention to these key features, it must then pass the resolution plan, other things being equal."[56]

(D) What is equitable treatment?

The amendment provides that either the liquidation value or the resolution value whichever is higher should be paid at the time of resolution. The amended Regulation 38 does not lead to the conclusion that financial creditor's (FC) and Operational Creditor's (OC), or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of OCs rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of OCs, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.[57]

(E) Extinguishing of rights of creditors against guarantors.

The NCLAT gave a ruling contrary to the SC judgment in *State Bank of India v. V. Ramakrishna* while holding that the debt extinguishes with the approval of resolution plan and the creditors have no right to move against the personal guarantors for the satisfaction of the debts. The SC clarified the position of law by holding-"Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors."[58]

(F) Constitutional Validity challenged of the Amendment Act on the ground that it has been enacted only for curing the defect in the NCLAT order in the case of Essar Steel.

The SC was clear in holding the amendment as valid and stated that it cannot be declared

[56] *Committee of Creditors of Essar Steel v. Satish Kumar Gupta and Ors,* (2020) 8 SCC 531, para 46
[57] *Ibid*, para 56
[58] *Ibid*, para 66

unconstitutional only in the ground that it has come in place to settle the Essar Steel matter. The Amendment Act cannot be struck down on the ground that it has been enacted only for curing the defect in the NCLAT order in the case of Essar Steel."[59]

(G) Constitutional Validity of Section 12 after the insertion of maximum time limit of 330 days.

The reason for this amendment stems from the experience that has been plaguing the legislature ever since Sick Industrial Companies Act (SICA) was promulgated. Though SICA and other successor enactments provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which these statutory measures proved to be abject failures in resolving stressed assets. It is therefore essential to have time-bound decisions to reinstate this legislative intent.

(H) Constitutional Validity of Section 30 of the Code.

Section 30(2)(b) of the code prescribes a minimum payment which needs to be given to the operational creditors at the time of resolution. The 2019 amendment act prescribed that the OCs should get a minimum of either the liquidation value or the resolution value, higher of the following, if distributed in the manner prescribed under Section 53 of the code.

(I) Retrospective Operation of the Amendment Act

The court held that *"An appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason, also, Explanation 2 to Section 30(2)(b) of the Code is constitutionally valid, not having any retrospective operation so as to impair the vested rights.*

VII. CONCLUSION AND SUGGESTION

The Code is a time-bound process for restructuring and revival of a corporate debtor, which involves the Committee of Creditors, Interim Resolution Professional/ Resolution Professional and the Adjudicating Authority. The Code is a welcoming legislation, which has brought in a positive perspective of improving credit culture in India by creating a 'creditor driven regime' and the role played by judiciary in achieving the same is noteworthy.[60]

The Code is a mechanism for resolution or liquidation of a corporate debtor and once the Adjudicating Authority admits an application under Section 7, 9 or 10; CoC gets to decide the fate of the corporate debtor. "Revival or liquidation of a corporate debtor, as decided by CoC

[59] *Ibid*, para 73
[60] *Swiss Ribbons (P.) Ltd. v. Union of India*, [2019] 152 SCL 365 (SC).

is subject to judicial approval and many a times there have been instances wherein CoC's authority was challenged with respect to rejection of a resolution plan. Whenever judiciary has been asked to intervene in the decision-making process by the affected parties, tribunals and courts have been kind enough to interpret the language of the Code as envisaged by legislature".[61]

No enactment is without challenges, and the Code is no special case to this. What is significant, in any case, is the capacity of the partners to gain from the errors of the past and put in aggregate endeavours for the powerful execution of the Code later on. The necessity, considering the difficulties looked by the Code, is to always screen its presentation and include more noteworthy partner cooperation directly from the phase of the confining of the administrative strategy.

Notwithstanding these advantages, the Code, being the first far reaching indebtedness and Chapter 11 enactment in quite a while, has met with a decent number of difficulties, which have been examined throughout the paper alongside the arrangements, any place sufficient. For example, the issue of absence of legal foundation to manage the expanding bankruptcy cases has still not been tended to in spite of the Supreme Court's perceptions in such manner in *Swiss Ribbons* v *Association of India*.[62] The nearness of escape clauses in the law, which could be, and are being in a few cases, abused by errant people to evade the reason for the Code, is likewise a test which should be managed at their individual levels by all partners.

No enactment is without challenges, and the Code is no special case to this. What is significant, be that as it may, is the capacity of the partners to gain from the missteps of the past and put in aggregate endeavours for the viable execution of the Code later on. The necessity, considering the difficulties looked by the Code, is to continually screen its presentation and include more noteworthy partner support directly from the phase of the confining of the administrative arrangement.

The first and foremost objective of any insolvency law is to maximize the value of assets. Since the aim of an insolvency statute is to revive a stressful business so as to ensure repayment of borrowed sums to its creditors, achieving maximum value of assets to facilitate higher distributions to creditors should be one of the paramount considerations of insolvency proceedings. Secondly, the proceedings should be formulated in a way so as to infuse confidence in the creditors. A "sound insolvency and creditor/debtor rights framework is

[61]*IDBI Bank Limited vs. Jaypee Infratech Limited*, 2018 SCC OnLine NCLT 9556.
[62]*Swiss Ribbons (P.) Ltd. v. Union of India*, [2019] 152 SCL 365 (SC).

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crucial to promoting access to finance because it provides a predictable, transparent, and efficient framework to resolve debts in the context of business distress or failure."

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