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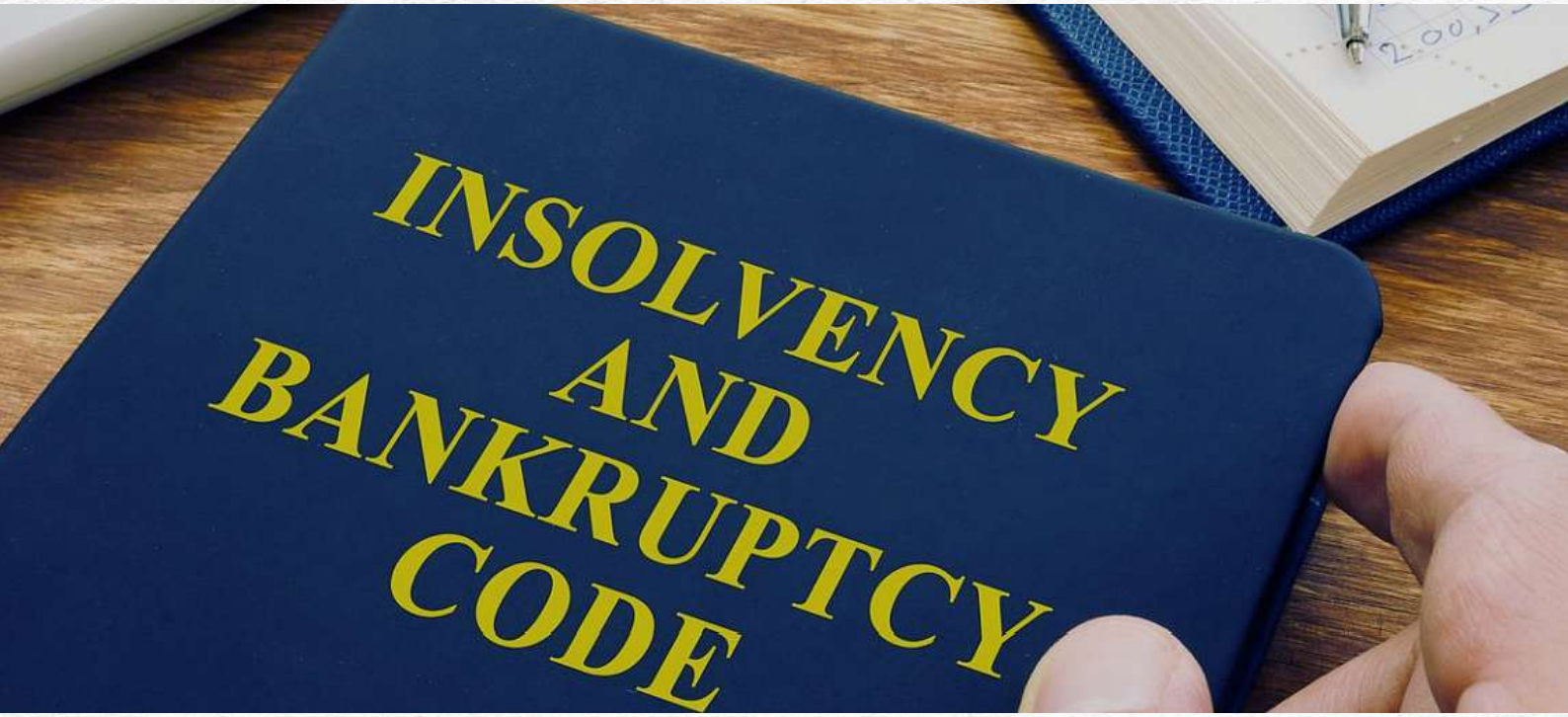


LATEST JUDGMENTS AND IBBI UPDATES

1.Supreme Court Judgments

1.1 EXTENSION OF LIMITATION PERIOD THROUGH ADDITIONAL DOCUMENTS FILED DURING THE PROCEEDINGS UNDER THE IBC

The Supreme Court in the recent case of Dena Bank (now Bank of Baroda) v. C. Sivakumar Reddy and Anr. (Civil Appeal No. 1650 of 2020) has held that an application under the Insolvency and Bankruptcy Code, 2016 ("IBC"/"Code") will be barred by limitation if the same has not been filed within three years from the date of default.

WHAT'S INSIDE THIS ISSUE:

Latest Judgments and IBBI Updates

An appeal was filed under Section 62 of the Code challenging the impugned order passed by the National Company Law Appellate Tribunal ("NCLAT") wherein the NCLAT had set aside the order of the National Company Law Tribunal ("NCLT") which had admitted by the petition under Section 7 of the IBC of the Financial Creditor ("FC"/"Appellant"). The Supreme Court has dismissed the appeal filed and has upheld the decision of the NCLT. It further held that if the debt has been acknowledged by the debtor as per Section 18 of the Limitation Act, 1963, then the application shall not be termed to be barred by limitation. Also, a question w.r.t. the filing of documents in support of the pleadings during the proceedings as an interim application was also dealt with by the Apex Court which will be covered in the latter part of the summary. For better understanding, the facts (in chronological order), issues, arguments advanced by the respective parties, and the observations made by the Court are given below.

Brief facts & timeline of the case:

- 23/12/2011: Loan sanctioned to Corporate Debtor ("CD") worth Rs 45 crore which was to be repaid in 8 years.
- 20/09/2013: Default by the CD in repayment.
- 31/12/2013: Loan account declared as Non-Performing Asset (NPA) by the bank.
- 24/03/2014: CD sent a letter to the bank to restructure its loan which was not accepted by the FC.
- 28/03/2014: Payment of Rs 111 lakh as interest towards the loan account.
- 22/12/2014: FC sent a legal notice to CD and Respondent no. 2 for the payment of Rs 52.12 crore which was not complied by the CD.
- 01/01/2015: FC filed an application for recovery under Section 19 of Recovery of Debts Due to Bank and Financial Institutions Act, 1993
- 05/05/2015: CD again sent a letter to FC for restructuring of the loan account.
- 03/03/2017: CD sent an offer for One-Time Settlement ("OTS") upon payment of Rs 5.5 crore which was not accepted by the FC.
- 27/03/2017: Debts Recovery Tribunal ("DRT") passed an order against the CD for the payment of Rs 52.12 crore along with 16.55% per annum interest from the date of filing till the realization.
- 25/05/2017: DRT issued a recovery certificate w.r.t. the order passed.
- 19/06/2017: OTS was once again offered by the CD and again rejected by the FC.

INSOLVENCY TRIVIA

1) If you book a flat with a real estate company, and that company enters the corporate insolvency resolution process, you would be considered as _____.

a) Financial Creditor
b)Operational Creditor

2) If a company wishes to exit a business and can pay-off all its debts in full from the sale proceeds of its assets, it may initiate _____.

a) Voluntary Liquidation
b) Fast track Liquidation

3) Which of the following is the first financial services provider to undergo corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016

a) SRS Microfinance
b) IL&FS
c) DHFL

4) What a resolution professional is to a corporate insolvency resolution process, so is a _____ to a bankruptcy process.

a) Registered Valuer
b) Bankruptcy Trustee

- 01/10/2018: FC issued demand notice in form-3 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("AAA Rules").
- 12/10/2018: FC filed an application under Section 7 of the Code in form-1 of AAA Rules.
- 09/01/2019: FC filed an interim application under Rule 11 of the NCLT Rules, 2016 ("Rules") r/w Rule 4 of AAA Rules for placing on record certain additional documents including the order and recovery certificate issued by the DRT.
- 02/02/2019: CD in its objection stated that the application is barred by limitation.
- 04/02/2019: Adjudicating Authority (AA) allowed the interim application filed and directed the registry to allow the amended petition by the FC along with the additional documents.
- 05/03/2019: FC filed another interim application for amendment in the main petition filed for allowing to file additional documents including a letter dated 03/03/2017, balance sheets, and financial statements.
- 06/03/2019: Interim application admitted by the AA.
- 21/03/2019: Section 7 application was admitted by the NCLT and the Interim Resolution Professional ("IRP") was appointed.
- 06/04/2019: Appeal to NCLAT was filed by Respondent no. 1 under Section 61 of the Code.

Issues:

The Apex Court made three issues which are as follows:

1. Whether the NCLAT has erred in rejecting an application that was filed after three years from the date of default overlooking the fact that there was an acknowledgement of debts on various occasions?

1. Whether the recovery certificate and the order passed by the DRT will give a fresh cause of action to initiate application under Section 7 of the Code?

1. Is there any bar in law to the amendment in the application filed under Section 7 of the IBC or to file any additional documents apart from what was originally submitted in form-1 in the main application?

ANSWER KEY FOR THE PREVIOUS QUIZ

1. b) within 7 days of the of constitution of committee
2. (b) Section 77
3. (b) Resolution Professional
4. (a) Eighteen largest operational creditors by value
5. (a) 45 days from the date of receipt of order of Adjudicating Authority

Arguments by Appellant:

- The Appellant contended that the NCLT took into consideration all the additional documents which the NCLAT overlooked which can be seen from the impugned order passed by it which mentions that there was nothing on record to show or prove that there was an acknowledgement of liability, thereby overlooking all the material documents.

- It also argued that the payment of interest of Rs 111 lakh by the CD to the FC on 28/03/2014 has been ignored by the NCLAT which kept the loan account alive and within three years of this date, i.e., on 03/03/2017, an OTS proposal was sent by the CD to the FC thereby acknowledging the debt.

- The FC in continuation further stated that the final judgement by the DRT was issued in favour of the FC/Appellant on 27/03/2017 and subsequent to this a recovery certificate was issued in favour of the Appellant on 25/05/2017 for the realisation of the amount. Hence, the application under Section 7 which was filed on 12/10/2018 was within limitation and was within three years which was to expire on 25/05/2020.

- Moreover, it was contended by the FC that the CD in its financial statements for the year 2016-17 and 2017-18 had acknowledged the liability which is a valid acknowledgement as per Section 18 of the Limitation Act, 1963 and thus, will extend the limitation as also dealt in- in the case of *Laxmi Pat Surana v. Union of India & Ors. (Civil Appeal No. 2734 of 2020).*

- Lastly, it was stated that there exists a jural relationship between the CD and the FC as evident from various documents and from the fact that the CD paid Rs 111 lakh as an interest to the loan account.

Arguments by Respondent:

- The Respondent vehemently stated that the NCLAT is the final forum for the determination of the facts. In furtherance to the same, it was argued that the NCLAT order reveals that there was nothing on record to prove that there was an acknowledgement of liability.

- The CD contended that the letter for restructuring the loan or the OTS proposal or the balance sheet or the financial statements will not be termed as acknowledgement as the same was done in the guise that the FC is willing to restructure the loan. Also, the payment of interest was in the year 2014 which was four years prior to the filing of an application under Section 7, hence, the limitation cannot be extended.

- It was also argued that the appeal to the Supreme Court is filed on the basis of the documents which were filed at the belated stage of the proceedings which stands contrary to the provisions of the Code.

- Further, CD buttressed upon Section 7 (3), (4) & (5) of the Code and stated that the NCLT went against these provisions in a way that it had allowed the FC to file additional documents at a later stage and had admitted the petition after four months from the filing. He also argued that the Code provides that the FC has to furnish a record of default filed with the Information Utility or any other evidence supporting his claims which the NCLT has to ascertain within 14 days and if any defect is there in the application the same has to be rectified within 7 days. However, in the present case, the FC was allowed to file additional documents at a later stage by the AA which is contrary to the provisions of IBC

- Moreover, the CD also agreed regarding the applicability of Section 18 of the Limitation Act, 1963 on the proceedings under IBC but argued that were there sufficient documents placed on record to extend the limitation. It further referred to Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (Civil Appeal No. 6347 of 2019) to state that the foundation for the plea of extension of the limitation should be there in the pleadings and the same cannot be developed later.

- It also referred to the case of Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. & Anr. (Civil Appeal No. 4952 of 2019) to state that the OTS proposal if not accepted will not be called as an acknowledgment of liability.

- The CD argued that the application under Section 7 of the Code was filed on 12/10/2018 which was five years after the date of default and hence, the same should be rejected on the grounds of it being barred by limitation. Furthermore, there were no averments in the pleadings regarding the acknowledgment of debts and thus, the extension of limitation should not be allowed. Lastly, it was contended that the petition was based on the recovery certificate and the DRT final order, hence, there can't be a reckoning limitation from the date of recovery certificate.

Observations, Decision, and Conclusion:

The Supreme Court has made various observations which are as follows:

- The Court observed that the statute is to be read as a whole, in its context and what is to be seen is that for curing what mischief the Code was enacted. It stated that from the bare reading of Section 7 (3) to (5) of the Code, it is concluded that there exists no bar in the filing of the documents at any time after the filing of the application until a final order is made by the AA. It also stated that the time period of 14 days is a directory and not mandatory.

- The Apex Court concluded that the ratio laid down in Babulal's case cannot be applied to the present case as in the previous case apart from the date of NPA there was no other date which was pleaded for the extension of limitation or acknowledgment of liability,

However, in the present case further documents were filed w.r.t. to letter for OTS, interest payment receipt, balance sheets, and recovery certificate to prove the acknowledgment and hence, the extension which the FC was seeking was termed to the valid.

The Court also pointed out that even if it is assumed that averments in the pleadings cannot be made at the fag end of the proceedings still the same will not help the Respondents as the application for filing additional documents was filed before the admission of the application within 2/3 months of filing the main application. On the same, it was also observed that the AA is not precluded from considering the additional documents during any stage of the proceedings but before the final decision.

- The Court also observed that the NCLAT overlooked the fact that the recovery certificate issued by the DRT on 25/05/2017 will give the fresh cause of action to initiate an application under the IBC.

Hence, the Court concluded that the AA was justified in its approach of considering the additional documents while extending the limitation. Lastly, it was held by the Court that the FC was entitled to initiate proceedings under Section 7 of the Code till 3 years from the date of issuance of recovery certificate, i.e., till 24/05/2020. Thus, the appeal was allowed and the decision of NCLAT was set aside.

1.2 RESOLUTION PLAN ONCE APPROVED BY NCLT CANNOT BE CHALLENGED BY OC

The Supreme Court in the recent case of Pratap Technocrats (P) Ltd. & Ors. v. Monitoring Committee of Reliance Infratel Limited & Anr. (Civil Appeal N0. 676 of 2021) has held that once the resolution plan complies with Section 30(2) of the IBC and is approved by the Committee of Creditors (COC) which is subsequently passed by the Adjudicating Authority (AA) as per Section 31 of the Code, the same cannot be challenged on the grounds of it being impairing the rights of the Operational Creditors.

An appeal was filed by the Appellant (Operational Creditor (OC)) under Section 62 of the Code against the impugned judgment of the NCLAT which has upheld the decision of the AA approving the resolution plan.

The Appellant contended on the following grounds:

- That, the Appellant categorically stated that they were not made aware of the CIRP details with regards to the disposal of funds against their claim and were not treated on a fair and equitable basis.

- That, the liquidation value and the fair market value of the Corporate Debtor (CD) were not taken into account and the amount of Rs 800 crore which was the value of the preference shares was not taken into consideration and did not form a part of the payments to be made to the OCs

- That, the realizable value was only 19.62% of the claims submitted by the OCs as against 91.98% by the Financial Creditors (FCs).
- That, some of the FCs were excluded and this will have a significant impact on the distribution of funds under the resolution plan.

Countering the above, the Respondent argued on following:

- That, the IBC provides for provision specifically for the OCs such as payments of debts to the OC to be equal or more than the amount to be given under the liquidation as under Section 53 or priority in payment as per the terms of Section 53. So, if the provisions are to be strictly complied with then the liquidation value to be paid to the OC will come around zero, meaning thereby that the OCs still were paid more than the FCs, i.e., 19.62% as against 10.32% of the FCs.

- That, the exclusion of the FCs has no significance to the requisite majority required under the Code to pass a resolution plan which is a non sequitur to the decision of the FC approving the resolution plan.

- That, the equitable treatment is to be given to the creditors belonging to the same class and not different classes, and hence, in no manner, OCs can be treated equally with the FCs.

- That, the sum of Rs 800 crore forms part of liquidation value which the Appellant had failed to notice.

- That, the resolution plan once approved cannot be challenged as the same has the backing of commercial wisdom of the COC which cannot be challenged.

The Court observed that the realizable value of the preference shares for the CD is included in the determination of the liquidation value of the CD as per the Affidavit filed by the Monitoring Committee. The Apex Court further concluded that the liquidation value to the unsecured OC will remain zero even if Rs 800 crore is included in the corpus of the liquidation value as per priority in payments as per Section 53(1) of the IBC. It also held that the removal of some FCs from the COC has no bearing on the successful implementation and approval of the resolution plan as the same was approved with a 100% voting share of the COC.

Lastly, the Court observed that the jurisdiction available with the AA is only to check whether the resolution plan complies with Section 30(2) of the Code and further concluded that the NCLT doesn't have equity-based jurisdiction under the IBC, i.e., it has to see whether the amount realizable to the OCs as per the resolution plan is in compliance with the provisions of the Code and thus, it shall be considered as fair and equitable to the creditors. Hence, in the present case, the resolution plan was said to be in compliance with Section 30(2) of the Code, and thus, the appeal was dismissed in favor of the Respondent.

2. NCLAT Judgments

2.1 APPLICATION AGAINST A SOCIETY IS NOT MAINTAINABLE AS IT IS NOT A CORPORATE CORPORATE PERSON UNDER THE CODE

In a recent judgment by the National Company Law Appellate Tribunal (NCLAT) dated August 3, 2021, in the case of Asset Reconstruction Company (India) Ltd. v. Mohammadiya Educational Society (Company Appeal (AT) (Insolvency) No. 495 of 2019), the NCLAT held that the societies registered under local laws or Societies Registration Act, 1860 will not come under the definition of Corporate Person and thus, an insolvency petition cannot be admitted against it.

Hearing the appeal, the Appellant challenged the impugned order of the Hyderabad NCLT which rejected the application filed under Section 7 because the Respondent is not a body corporate. Appellant contended that the Respondent is a society and is governed by A.P. Societies Registration Act, 2001 (new Act), Section 18 of which renders a member to be a body corporate having perpetual succession and a common seal and thus, the Respondent can come under the definition of Corporate Person under Section 3(7) of the Code.

On the contrary, the Respondent contended that it is not a corporate body and an application under the IBC is not maintainable (non-applicable) against it as the same doesn't fall under Section 2 of the Code. It further contended that it is registered as per the Societies Registration Act, 1860 (old Act) and thus the status of being a body corporate as per Section 18 of the new Act does not apply to them. Further, it was argued that the Respondent is not incorporated under any special Act nor from the interpretation of words "any other person" it can be construed that society is considered as a body corporate and hence, clause (d) of Section 3(7) will not be applicable.
Appellant also argues that Section 32 of the new Act provides for repeal and saving clause and it says that if anything was done under the old Act or any other Acts, the same would be deemed to have been done as per the new Act and hence, Section 18 shall apply to the Respondent.

The Appellate Tribunal observed that as per Section 2 of the Code, Respondents are not a company incorporated under the Companies Act, 2013 or a company under other Special Acts as they are the societies as per the old Act which in no way be construed to be a Company or a Limited Liability Partnership. Further, it was observed that even if the Respondents are treated as a body corporate under Section 18 of the new Act, then also in no way it can be construed that it is incorporated and such incorporation is with limited liability. Thus, the NCLAT on a conjoint reading of Section 2 and Section 3(7) of the Code observed that the Respondents are not the Corporate Persons as per the Code and hence, applications against the societies are not admissible under the IBC.

2.2 NCLAT DOES NOT HAVE THE RIGHT TO REVIEW ITS OWN JUDGMENT

Recently, NCLAT made an interesting observation regarding their power to review the judgment of NCLAT under the Insolvency and Bankruptcy Code, 2016 (IBC/Code). An Interlocutory Application (IA) has been filed by Applicant- M/s Vistra ITCL (India) Limited under Rule 31 read with Rule 11 of the NCLAT Rules, 2016 for seeking clarification to an observation passed by Hon'ble Appellate Tribunal in Deccan Value Investors L.P. vs Dinkar T. Venkatasubramanian & Ors.

In the present case, the Appellant is the Successful Resolution Applicant in respect of Corporate Debtor 'Amtek Auto Limited'. The Resolution Professional filed IA No.225/2020 under Section 30(6) read with 31(1) of I&B Code for approval of Resolution Plan. Meanwhile, another IA was filed by the Appellant before Hon'ble Apex Court seeking withdrawal of Resolution Plan which was duly dismissed by the Hon'ble Apex Court. Therefore, Appellant cannot backtrack from the offer (Resolution Plan) they made due to the Supreme Court order against them. Hence, the only question for consideration before the NCLAT is whether the Appellate Tribunal had the power to revisit the finding observed in the judgment in question.

NCLAT, in this application, noted that the outcome of the present Appeal may affect the legal rights of Vistra and observed that the Committee of Creditors (COC) are trying to indirectly agitate an issue that is already settled in the impugned order. The Appellate Tribunal relying on the judgment in "Action Barter Pvt. Ltd. V/s SREI Equipment Finance Ltd. & Anr." held that there are no provisions in the IBC that permit them to review the judgment passed by this Tribunal.

The Appellate Tribunal finally mentioned that the clarification Application which has been filed is just not for clarification of the Judgment passed by the NCLAT but for review of the Judgment resulting in reopening/rehearing the issue and such practice may not be done for want of provisions to review in IBC.

2.3 A PERSON CANNOT FORCE THE LIQUIDATOR TO SELL THE PROPERTIES OF THE CD TO HIMSELF UNDER THE CODE.

NCLAT in the case of Vijisan Jewels Pvt. Ltd. v. Cimme Jewels Limited (Company Appeal (AT) (Insolvency) No. 2014 of 2021) has held that an entity to whom the property of the Corporate Debtor (CD) was leased out cannot force the Liquidator to sell the same to it, in case the CD is in liquidation.

The Appellant in the present case has challenged the impugned order of the Adjudicating Authority (AA) under Section 61 of the Code which has rejected the request of the Appellant to buy out the property of the CD which it was using for its business operations. The Appellant contended that the property which it was using for its business operations is given to it under a lease and license agreement where around 100 employees were working and if the pro-

-perty is sold or in an auction given to any other bidder then the employment of those 100 employees will be at stake. Therefore, the Appellant requested to seek directions to keep hold of the property. It further contended that the value of the property was around Rs 12.68 crore (pre-covid) for which the Appellant initially wanted to pay Rs 13 crore in 60 installments which was rejected by the liquidator and further went on to say that due to the covid and its repercussion the valuation is changed and hence, the appellant was still offering Rs 12.68 crore, the original value, of the property to keep hold of the property.

The AA rejected the request and directed the Appellant to vacant the possession of the property and deposit the arrears due. NCLT also permitted the Appellant to participate in the e-auction of the property in the liquidation process.

Respondent /Liquidator contended that the Appellant is neither a stakeholder nor a bidder who had participated in the auction for the property. He further contended that the Appellant is an illegal occupant on the property of the CD and further referred to the judgment of the NCLAT wherein the Appellate Tribunal has held that being a tenant on a property does not gives right to the tenant to seek directions under Section 47 of the Code. He further went on to say that the Appellant is trying to mislead the proceedings and harass the liquidator which is directly impacting the liquidation proceedings and affecting the objectives of the Code. the NCLAT observed that the Appellant ought to have vacated the proper-

-ty of the CD which they have failed to even after two months of leverage granted. It was further observed that IBBI (Liquidation) Regulations, 2016 do not allow a person to force the liquidator to sell the property to a specific person. Also, it was observed that the Appellant has no locus standi the leave and license agreement was not renewed, and hence, the Appellant cannot force the sale of the property to itself. Lastly, the Appellate Tribunal observed that the appeal is frivolous and hence, the same was dismissed.

2.4 NCLT HAS THE POWER TO APPROVE A RESOLUTION PLAN EVEN IF THE SAME WAS APPROVED BY THE COC AFTER THE PASSING OF THE LIQUIDATION ORDER.

NCLAT in the case of West Bengal Financial Corporation v. Bijoy Murmuria RP, Dimension Steel & Alloys Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 536 of 2021) upheld the decision of the Adjudicating Authority (AA)/ NCLT which admitted the application of the Resolution Applicant for the approval of the resolution plan after the exhaustion of timeframe of Corporate Insolvency Resolution Process (CIRP).

The Appellant/ Applicant has challenged the impugned order of the AA which has admitted the application for consideration of

the resolution plan. The Appellant argued that since the resolution plan was brought to the Committee of Creditors post the period of time given for CIRP under the Code and also later than the order of liquidation of the CD, the application for the same should be rejected. It was further argued that the Appellant who was a member of the COC opposed the consideration of the plan by the COC, but the COC considered it and gave it a further time to modify the plan.

The Appellate Tribunal rejected the application of the Appellant and upheld the decision of the AA. The NCLAT in its decision has expressed the sense of displeasure with regards to the conduct of the Resolution Professional and the COC for non-completion of the CIRP within the timeframe but held that given the circumstances where the voting has already taken place for the approval of the resolution plan and the same got approved also, the application of the Applicant cannot be admitted. It further emphasized that the objective of the Code is to revive the CD and maximize the value of stressed assets of the CD and thus the liquidation should be the last resort. Hence, the application for passing of liquidation order was rejected by the NCLAT and the NCLT, and the delay in submission of the resolution plan was condoned.

2.5 ADJUDICATING AUTHORITY HAS THE POWER TO DIRECT INQUIRY AND INVESTIGATION AS PER COMPANIES ACT, 2013.

The NCLAT in the case of Panchapakesh Swaminathan Ex. Managing Director of Shri Sakthi Papers India Pvt. Ltd. v. R. Raghavendran RP of Shri Sakthi Papers India Pvt. Ltd. (Company Appeal (AT) (CH) (Insolvency) No. 27 of 2021) was faced with the question that "can an Adjudicating Authority (AA) under the IBC order for inspection of books (under Section 206 of Companies Act, 2013 (Act), make an order for inquiries (under Section 207) and ask for submission of the final report (under Section 208) if the AA is of the view that the affairs of the company/ Corporate Debtor (CD) were conducted in a fraudulent manner".

NCLAT referred to the decision in M. Srinivas v. Smt. Ramanathan Bhuvaneshwari by the Appellate Tribunal itself and observed that the NCLT possesses inherent powers as under Rule 11 of the NCLT Rules, 2016 to send the matter for investigation by the Central Government after giving the parties a reasonable opportunity of hearing.

The Appellate Authority further referred to the judgment of the Hon'ble Supreme Court in the case of Karnatak Embassy Property Developers (p) Ltd. v. the State of Karnataka ((2020) 13 SCC 308) wherein the SC was posed with the question that does the AA under the IBC has the powers to inquire about the affairs of the CD if it was done fraudulently. The Supreme Court held that the AA has the power as per Section 66 of the Code to inquire into the affairs of the CD if the same was carried fraudulently.

Hence, the NCLT has the jurisdiction to inquire into the fraud involved in the transactions of the CD but will not have the jurisdiction to adjudicate upon the disputes w.r.t fraud. The same was held in the case of Beacon Trusteeship v. Rartcon Infracon Private Limited ((2020) 158 CLA 382 (SC)).

Hence, in the present case, the NCLAT found out that there were serious irregularities which were found in the forensic audit report of the CD, thus, the decision of the AA wherein the AA has ordered for inspection, inquiry, and submission of the report was upheld and the appeal was dismissed.

2.6 POWER OF LIQUIDATOR TO SELL THE CORPORATE DEBTOR AS A GOING CONCERN

In a very important judgment of M/s. Mohan Gems & Jewels Private Limited vs Vijay Verma (Respondent 1) and Insolvency and Bankruptcy Board of India (Respondent 2), the NCLAT uphold the validity of Regulation 32 (e) and (f) of IBBI Liquidation Process Regulations, 2016 (Liquidation Process Regulations) and the power of liquidator to sell the Corporate Debtor as a going concern. Regulation 32 talks about the sale of assets by the liquidator and Clause (e)&(f) of Regulation 32 provides for the sale of assets of Corporate Debtor as a going concern and the business of the Corporate Debtor as a going concern respectively.

Prior to this, an appeal was preferred against the impugned order of the NCLT, Principal Bench,New Delhi wherein the Adjudicating Authority (AA) came down heavily on certain Regulations which were inserted in the Liquidation Process Regulations namely clauses (e) & (f) of Regulation 32. As per the AA, these regulations which were inserted vide a Notification dated 22.10.2018 is against the spirit and scheme of the Insolvency and Bankruptcy Code, 2016 (IBC/Code). The AA further said the “Selling assets or undertakings shall not stretch out to the sale of the corporate debtor. If this process of the sale of the corporate debtor is approved, it will become third window (of restructuring options), besides that, it is in violation of company legislation.”

3. NCLT Judgments

3.1 THE NCLT DIRECTS ATTACHMENT OF PROPERTIES OF THE CD, ITS RELATED PARTIES, AND THE PROMOTERS.

In the eye-opening and much-awaited judgment, the NCLT Mumbai in the case of Union of India v. Videocon Industries Limited (CP 288-295/MB/2021) has directed the Respondents/ Promoters of the Corporate Debtor (CD) (Videocon Industries Limited) to disclose on affidavit the whereabouts of their properties and has also directed the CDSL & NSDL, CBDT, IBA to attach the securities owned or held by them or the Respondent companies, to attach the assets and bank accounts & lockers held by them respectively.

The Petitioner has made the following contentions and had shown various eye-openers:

1. The balance sheet of the CD showed positive reserves and a surplus of Rs 10,028 crores in the year 2014 which got reduced to negative 2972 crores in the financial year 2019. Also, the figures for secured loans got increased by 8437 crores during the same period.

2. The dead investments made by the company got increased from 5626 crores to 9635 crores. Also, the P&L Account of the CD showed a negative figure of 5347 crores in March 2019 which categorically shows that the CD was derailed and was having negative net worth.

3. The operating income of the CD got reduced from 18967 crores in the year 2014 to 909 crores in the year 2019. Further, the promoters had also pledged 40.59% of the stakes in the CD to the bank and other financial institutions which shows that the promoters hardly had any interest left in the CD.

4. The Respondents didn't even oppose the initiation of CIRP against them.

5. In the transaction audit, the amount receivables (2891 crores) to the Respondents was shown to be settled for an amount of 1209 crores which clearly shows the mismanagement on the part of the CD. Also, the same was not done with the consent of the board of directors of the CD or the joint lender forum of Respondent no. 1 but was done only by taking the approval of Mr. Venugopal Dhoot.

Hence, it was submitted that the settlement transaction was done to benefit the related parties than the latter would have received in case of distribution of assets under Section 53 of the IBC.

6. The auditor noted that out of 49 receivables and payable transactions/entries, 46 of them were related to the CD or the promoters of the CD and for the same, there was no consent taken from the board of directors.

7. The CD has waived off 634 crores without any reasonable justifications which existed as sundry debtors in the financial year 2017-18.

8. Also, for the first financial quarter of the year 2018, the CD written off 1413 crores from the books to the heading "exceptional items" for which the entry was made one month before the quarter ending while the actual recording of the write off entries was done after the end of the first quarter when the CIRP was admitted against the CD and Resolution Professional (RP) was appointed and without the latter's consent also.

9. That the provisions of Section 241(2)(m) of the Companies Act, 2013 are independent of Section 14 of the Code and the Central Government has the right under Section 242 to order for inquiry if it is of the opinion that the affairs of the CD are not conducted in a proper manner. Further, it was also submitted that "the affairs of the company are being conducted" under Section 241(2) of the Companies Act, 2013 will include the past, present & future acts of mismanagement and since in the present

case, the CD was still alive as the RP was conducting the affairs of the CD the past acts will be categorized as past continuous acts and will be covered.

10. It was also contended that the application under 241 & 242 of the Companies Act, 2013 would not be affected by the moratorium under Section 14 of the Code as the same is for the CD and not against the CD. Section 14 only bars suits/ proceedings against the CD. Also, it was contended that the present application is to secure and restore the assets back to the respective owners and to catch hold of the wrongdoers.

Lastly, the NCLT observed that the banks and other financial institutions have given loans to a sinking ship and have come forward to file the petition under Section 7 of the Code which certainly raises eyebrows of the common man in the public. Hence, the Tribunal was pleased with the submissions made by the Petitioner and have ordered to seize the properties of the respondents/promoters of the CD.

3.2 DEMAND NOTICE HAS TO BE ACCOMPANIED BY AN INVOICE TO PROVE THE EXISTENCE OF DEBT AND DEFAULT

Hon'ble NCLT- New Delhi, (Court-III) in the matter of Tudor India Pvt. Ltd. v. Servotech Power Systems Limited ((IB)-209/ND/2021) has observed that if the demand notice is sent under Section 8(1) as per Form 3 r/w Rule 5(1)(a) of the IBBI (Application to the-Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Rules") along with the invoices, then the same will not have any illegality as under the Insolvency & Bankruptcy Code, 2016.

The Operational Creditor (OC) has raised a specific query, i.e., how the demand notice based on invoices issued in Form 3 complies with Rule 5 of the Rules. The OC argued that the word "or" in-between clause (a) and (b) of Rule 5(1)(a) which provides for demand notice by OC gives a choice to the OC for selecting the appropriate form.

OC referred to the case of Neeraj Jain v. Cloudwalker Streaming Technologies Private Limited (Company Appeal (AT) (Ins.) No. 1354 of 2019 wherein the NCLAT has held that if the demand notice is been sent in Form 3 then the OC has to mandatorily submit a document to prove the existence of operational debt which can be an invoice or any other document proving the existence of a debt. The NCLAT in the same case has observed that the phrase "deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved" does not provide discretion to the OC to deliver demand notice without invoices for the transactions to the CD wherein there was an issuance of the invoices.

The NCLT in the present case observed that the OC has sent the invoice along with the demand notice in Form 3 r/w Rule 5(1) of the Rules thereby concluding that the decision in Neeraj Jain's case will not apply to the factual matrix of the present case.

The AA further read Form 3 & 4 and observed that the demand notice sent under both forms includes the word "invoice" thereby meaning that the invoice is necessary to be attached if the same has been issued. Further, the NCLAT differentiated between Form 3 & 4 and observed that the content of the prior form provides for submission of comprehensive details about the total amount of debt, record with the information utility, default date, securities held, the calculation for the amount of default, right of the CD to respond to the demand notice with the notice of dispute within 10, etc. whereas the latter form doesn't provide for any such submission and is an escape route for the OC from disclosing such material facts which are relevant for the CD.

Hence, the NCLT held that the attachment of invoice with the demand notice as a document to prove the existence of debt and default is necessary and termed it as a relevant document.

3.3 AA HAS THE POWER TO DIRECT THE SUCCESSFUL RESOLUTION APPLICANT TO RESUBMIT THE PLAN IF THE PLAN IS NOT REJECTED ON THE GROUNDS OF IT BEING COMMERCIALLY UNVIABLE.

In a curious case of Alpha Alternative Holdings Pvt. Ltd. v. Union Bank of India & Ors. (IA/329(AHM) 2021 in CP(IB) 497 of 2019) NCLT, Ahmedabad has observed that if the resolution plan is not rejected on the ground that it is commercially unviable then the Successful Resolution Applicant will be given a chance to re-submit the resolution plan.

The plan was rejected by the Committee of Creditors (COC) on two grounds, i.e., first, that it was submitted by an entity other than the applicant who had submitted an expression of interest, second, that the assets could not be properly evaluated by the Resolution Professional (RP) as the same was in the custody of the Official Liquidator and RP has no access to them.
The Adjudicatory Authority (AA) observed that the objection w.r.t. the fact that the plan was submitted by another entity apart from the Applicant is rejected as the Applicant had through an email informed the COC about the plan to be submitted by the consortium. Further, the NCLT w.r.t. the second objection has observed that the access to assets has been allowed to the RP, and thus, the new negotiations should be there between the COC and the Applicant. Hence, it was finally observed that the Applicant ought to have been called by the COC to resubmit his offer. The NCLT referred to the case of COC of Essar Steel India Limited v. Satish Kr. Gupta and concluded that if the resolution plan has not been rejected on the commercial ground but technical ground, then the AA has the right under Rule 11 to take decision w.r.t. resubmission of the plan by the Successful Resolution Applicant to keep the Corporate Debtor as a going concern.

3.4 OUSTED BOARD MUST ASSIST, COOPERATE, AND FURNISH REQUISITE INFORMATION TO THE RESOLUTION PROFESSIONAL

In the recent matter, the NCLT, Allahabad emphasized on the duty of the ex-management to furnish information and assist the Resolution Professional (RP) in managing the affairs of the Corporate Debtor in order to enable the RP to complete the CIRP expeditiously.

An application is preferred by Mr. Sumit Shukla (Resolution Professional of Trimurti Concast Pvt Ltd) before the Adjudicating Authority (AA) under Section 19 (2) & Section 60(5) of Insolvency and Bankruptcy Code, 2016 (IBC/Code) read with Rule 11 of the NCLT Rules, 2016. In the said application the Applicant pleaded before the AA to issue necessary directions to the suspended management and the directors of the Corporate Debtor (CD) in furtherance of smooth and expeditious conduct of the resolution process of the CD. Further, the RP also stated that such non-cooperation hinders the RP in discharging his statutory duties and in managing the affairs of the Corporate Debtor.

Before the filing of this application, the RP contacted the erstwhile management, directors, statutory auditors on several occasions asked for the furnishing of certain records, information, documents, clarifications, etc.

Even after many reminders through emails, video conferencing the concerned persons did not provide any information. Due to such non-responsiveness by the ex-management, the RP was not able to perform his duties, specifically providing the requisite document to the valuers. Further, during the two meetings of the Committee of Creditors (CoC), the statutory auditors were specifically called to attend the meetings. However, the statutory auditors did not attend the meeting and failed to provide the requisite documents for CIRP

After hearing the arguments of the Applicant, the Adjudicating Authority produced Section 19 of the Code and said that the sub-clause (1) of the section clearly puts the onus of the management of the CD to extend all necessary assistance and cooperation to the RP as and when required by him. Therefore, considering this application the NCLT held that ex-management are collectively as well as independently, must furnish information and assist the RP in managing the affairs of the Corporate Debtor in order to enable the RP to complete the CIRP expeditiously.

4. Important IBBI Updates

4.1 CBDT AMENDS INCOME TAX RULES FOR TAX VERIFICATION PURPOSES DURING CIRP

The Central Board of Direct Taxes (CBDT) recently amended several Income Tax rules allowing Interim Resolution Professional, Resolution Professional, and Liquidator (Professionals) to verify the income tax returns submitted by the company under Corporate Insolvency Resolution Plan. The aim of the said notification is to ensure better and seamless filing of returns and compliances for the companies under the CIRP by providing authority to the Professionals

By exercising the powers conferred to the CBDT under clause (c) and clause (cd) of section 140 and clause (viii) of sub-section (2) of section 288 read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Income-tax (24th Amendment) Rules, 2021 was brought in which through which following amendments have been made to give effect to the said provisions.

1. Insertion of Rule 12AA which states that for the purpose of clause (c) or clause (cd), as the case may be, of Section 140, any other person shall be the person, appointed by the Adjudicating Authority for discharging the duties and functions of an interim resolution professional, a resolution professional, or a liquidator, under the Insolvency and Bankruptcy Code, 2016 (IBC) and the rules and regulations made thereunder.

2. The second major change was made by the insertion of Rule 51B which provides for for the appearance of Authorised Represent-

-ative in certain cases and states that for the purposes of clause (viii) of sub-section (2) of Section 288, any other person, in respect of a company or a limited liability partnership, shall be the person appointed by the Adjudicating Authority for discharging the duties and functions of an interim resolution professional, a resolution professional, or a liquidator, as the case may be, under the IBC and the rules and regulations made thereunder.

Earlier, under the Income Tax Act, the verification process requires the declaration to be signed by the authorized person stating that the disclosures given in the income tax return are true and complete. Through this amendment, the Professionals can also undertake such declarations. Therefore, this Notification provided clarity on the role to be undertaken by these Professionals and helps in better compliance.

4.2 IBBI HAS RELEASED DISCUSSION PAPER ON CORPORATE INSOLVENCY RESOLUTION PROCESS

Recently, the Insolvency and Bankruptcy Board of India invited public comments on several important matters related to Insolvency Resolution Process. This article summarises these Discussion Paper and important points of consideration for public comments.

The article is divided into three parts discussing the major issues highlighted in the Discussion Paper.

Under this paper, the IBBI sought public comments on several issues related to CIRP. Majorly the paper is divided into three segments which are as mentioned:

a. Code of conduct for Committee of Creditors

b. Restrictions on request for resolution plans and use of swiss challenge in CIRP

c. Treatment of live bank guarantees and line of credit as claims in a CIRP

A) Code of Conduct for Committee of Creditors (CoC)

The Committee of Creditors is a quintessential part of any CIRP process. The creditor in control model of the CIRP under Insolvency and Bankruptcy Code, 2016 (IBC/Code) further puts additional responsibility in the hands of the creditors to ensure the successful resolution of a Corporate Debtor (CD). The CoC has powers commensurate with its responsibilities. It can decide a haircut of any magnitude to any or all stakeholders required for rescuing the firm; and to seek and choose the best resolution plan from the market, unlike other avenues that allow creditors to find a resolution only from existing promoters.

The CoC performs the statutory role and the magnitude of its importance has been pronounced in the landmark judgments of the Supreme Court.

In Swiss Ribbons case extensively talked about the 'commercial wisdom of the CoC' and stated that the commercial decisions of the committee must be left to its wisdom. Further in Essar Steels India Case, it was observed by the Hon'ble Apex Court that the CoC must take a business decision based on ground realities by a majority which then binds all stakeholders, including dissenting creditors. The Code envisages an exalted status for the CoC in commercial decision making strictly based on the ground realities and even the Adjudicating Authority (AA) has a limited role in approving the resolution plans approved by CoC.

Need for the Code of Conduct

The CoC has been entrusted with a lot of responsibility in the resolution process from approving the Resolution Professional to the finalization of the resolution applicant and several other powers. However, there have been several instances where the CoC has failed to perform on its objective and has indulged in unethical and self-interest practices. The Discussion Paper also mentions such instances where the Adjudicating Authority and the Appellate Court where the conduct of the CoC was in question. On the behest of the commercial wisdom of the CoC, the committee virtually created a bulwark against such conducts and has been acting on their whims and fancies.

B) Restrictions on revision in request for Resolution Plans and use of swiss challenge in CIRP

The second part of the Discussion Paper deals with the issue related to Revision of request for Resolution Plan (RFRP) multiple times, and submission of unsolicited plans causing delay and uncertainty, and the idea of using challenge mechanisms such as the swiss challenge in the CIRP for value maximization.

One of the main objectives of the Code is the time-bound resolution of the CD and the same is reflected in the Preamble of the Code. Further, the Code envisages a 180 days time limit for the completion of the CIRP Process with a one-time extension of 90 days as per Section 12 of the Code. The Supreme Court also in several cases stressed the need for expeditious resolution within the prescribed time period. As with the long CIRP process the value of the entity diminishes and can potentially lead to liquidation.

One of the increasing difficulties in the CIRP is the resolution of the entity within the timeline. The data provided in the IBBI Quarterly newsletter clearly provides an insight into the exceeded time period required to complete a CIRP. Also, of all the CIRP completed till June 30,2021 the average time period to complete a process is 482 days which is almost double the maximum time prescribed.

Regulation 36B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) contains a provision regarding a request for resolution plans.

It provides for a minimum of 30 days for prospective resolution applicants to submit the plans and allows for revision/ modification of the request for resolution plan (RFRP) subject to the 30-day timeline but there is no cap on the number of revisions that may be allowed in a resolution plan. These have the effect of delaying resolution. There are also cases where the resolution applicants revise the resolution plans multiple times, with or without the consent of the CoC, leading to delays in completing the process. The CoC in furtherance of maximizing the assets of the company entertain these plans and hence, there is a constant delay in the completion of the resolution process. With such delays, there is a higher risk of the company leading into liquidation.

Need for Swiss Challenge Method

The Swiss challenge method can prove to be a vital change in the value maximization of the assets of the firm and to ensure time-bound completion of the process. It is a bidding process wherein a bidder (the original bidder) makes an unsolicited bid to the auctioneer. Once approved, the auctioneer then seeks counter proposals against the original bidder's proposal and chooses the best amongst all option. As far as applicability of the swiss challenge method is concerned, a careful reading of sub-section 3 (a) of Regulation 39 of CIRP Regulations (which talks about the approval of resolution plan by CoC) ascertains that there is no express prohibition on the use of Swiss challenge method during a CIRP

Further, in the Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process the sub-committee noted that the swiss challenge is a time-tested mechanism and has proven to be highly effective in value maximization and ensuring transparency of the process. Even the Adjudicating Authority has advocated for the Swiss challenge method to be adopted. One such instance is the case of Bank of Baroda v. Mandhana Industries Ltd has where AA ordered the RP to conduct the Swiss Challenge under CIRP. It may be mentioned that the applicant emerged as the successful resolution applicant and the resolution plan was approved.

Thus, keeping in mind the need for RFRP and the swiss challenge method along with the desired statutory basis for the same, the IBBI has sought the public comments on following issues:

i. Should there be any restrictions on the number of revisions in the RFRP?
ii. Should the swiss challenge mechanism be available in the CIRP regulations?

C) Treatment of live bank guarantees and line of credit as claims

This section of the Discussion Paper deals with the issue of considering bank guarantees and line of credit as claims during a CIRP. One of the most essential parts of the CIRP process is the formulation of a list of creditors. An Interim Resolution-Professional has been conferred with the responsibility under Clause (b) of Section 18 of the Code to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15. Even the Hon'ble Supreme Court emphasized on this role in the landmark case of Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors and stated that "All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the CD". In light of the mentioned provisions and case laws, there have been instances of ambiguity that whether a letter of credit or a live bank guarantee can be included as a claim under CIRP.

Bank Guarantees and Letters of Creditors are similar kinds of instruments that require the issuers to make certain payments to beneficiaries in case the applicant fails to adhere to the contract agreed upon. The issuers then proceed to recover the payment from the applicant through means available to them. The right to payment arises under Bank Guarantees and Letter of Creditors as an indemnity only and only when the debtor defaults on his contract with the beneficiary and the banks had to honor their commitment.

Due to the nature of these instruments, certain ambiguities need clarification. As far as Code is concerned, the following scenarios are possible:

i. Where the LC/BG was invoked by the beneficiary before the insolvency commencement date (ICD) of the CD.
ii. Where the LC/BG remains live and remains uninvoked during CIRP.
iii. Where the LC/BG is invoked by the beneficiary during the corporate insolvency resolution process.

Thus keeping in mind the treatment of LC and BG in a CIRP Process and several complexities involved, the IBBI has sought the following public comments:

- Do you agree to the treatment of LC/BG in scenario 1? If No, provide reasons/issues and alternatives available?
- Do you agree to the treatment of LC/BG in scenario 2? If No, provide reasons/issues and alternatives available?
- Do you agree to the treatment of LC/BG in scenario 3? If No, provide reasons/issues and alternatives available?

A bankruptcy judge can fix your balance sheet, but he cannot fix your company.

Gordon Bethune

Unemployment, foreclosures, bankruptcy - the cure is not more government spending, but helping businesses create jobs.

-Brian Sandoval

IBC Statistics

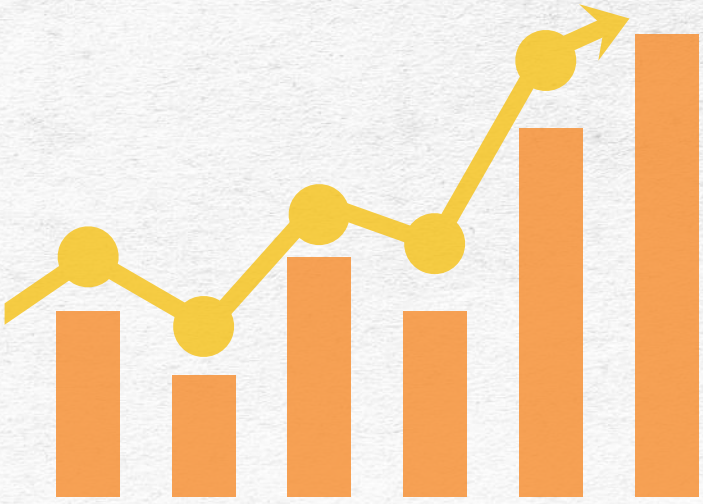
The CIRP Process under IBC came into force in December 2016.

- Since then, the total no. of CIRPs initiated are 4541 till the last quarter. (June 2021).

- Of these 2859 have been closed, of which 653 have been closed on appeal or review or settled.

- 461 applications have been withdrawn and 1349 cases have ended in order for liquidation.

- Around 51% percent of CIRP applications have been preferred by the Operational Creditors, followed by the Financial Creditors with 42% and remaining applications were initiatied by the Corporate Debtors.



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