AVM RESOLUTION PROFESSIONALS

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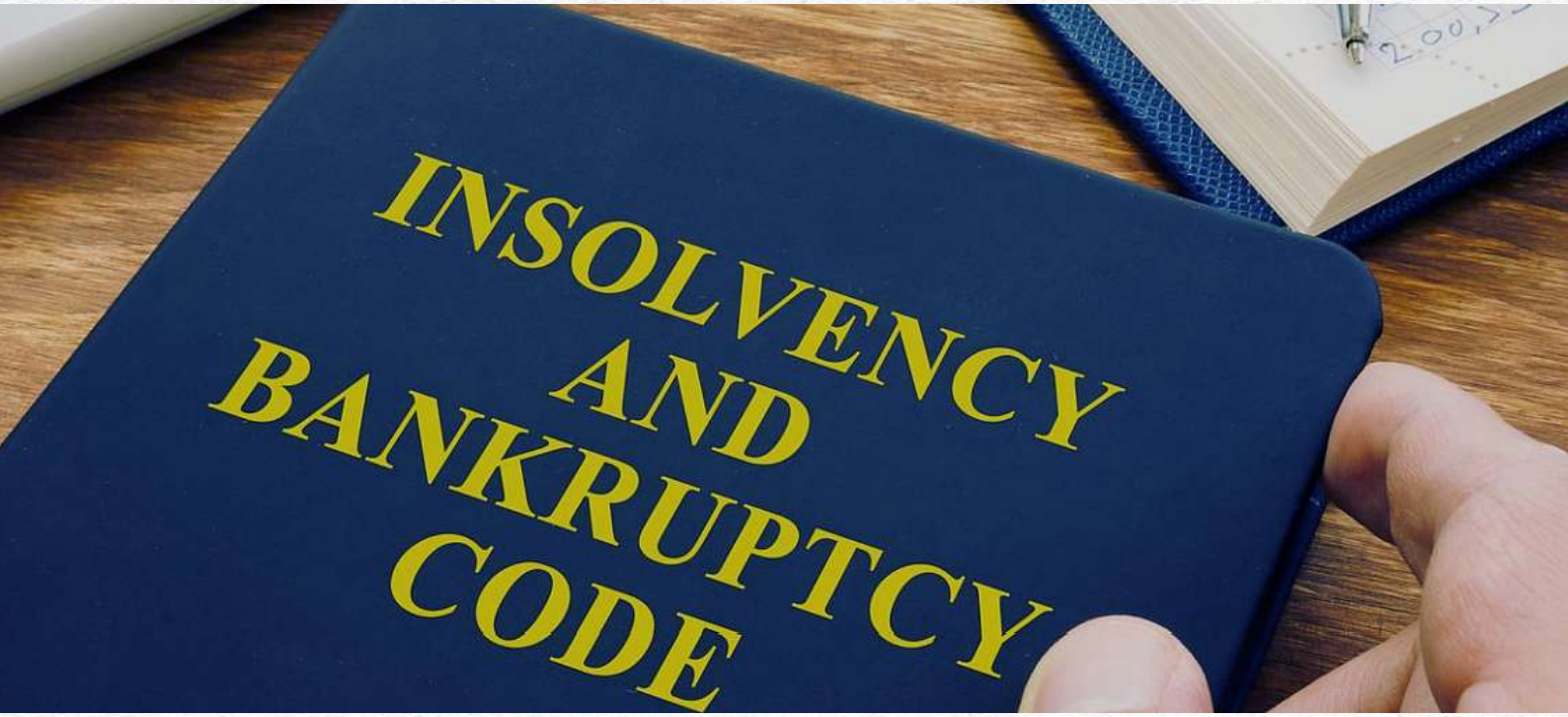


IN FOCUS: PREPACKAGED INSOLVENCY RESOLUTION PROCESS- A NECESSARY TOOL FOR THE REVIVAL OF MSMES?

The virulent pandemic due to the spread of the COVID-19 virus has marked catastrophic effects on every economic order throughout the globe and India is no exception. The pandemic derailed the whole economy and led several companies into serious financial distress. To add to the further distress to the companies during the pandemic phase, the government through the Insolvency and Bankruptcy Code Ordinance, 2020 suspended the filing of an application for initiation of the Corporate Insolvency Resolution Process for almost a year. Several companies which were in financial distress could not opt for the resolution.

Need for an alternative resolution process for MSMEs

One of the worst affected sectors due to the pandemic was the Micro, Medium, and Small Enterprises (MSMEs) sector. MSMEs are the engines of economic growth and equitable development.

WHAT'S INSIDE THIS ISSUE:

They constitute approximately 90% of the total enterprise and around 60-65% of the total employment. They are the second-largest employment generating sector after agriculture. It provides employment to around 11.10 crore people in India. They have contributed significantly to the overall GDP of the nation. With around 36.1 million units MSMEs contribute 6.11% in manufacturing GDP and 23.63% in service sector GDP.

To revive and resolve the distressed MSMEs, an alternative mechanism was required in place of CIRP, which involves a lot of Judicial intervention. The Insolvency Law Committee on the Pre-Packaged Insolvency Resolution Process was constituted to design a pre-pack framework within the basic structure of the Insolvency and Bankruptcy Code, 2016, for the Indian market. On suggestions of the committee, an Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (Ordinance) was promulgated through which the Pre-packaged insolvency framework was formally introduced in the Indian insolvency regime.

Understanding Pre-packaged Insolvency Resolution Process

The Pre-packaged Insolvency Resolution Process (PPIRP) is the next big change in Indian Insolvency Regime. The process is time-efficient, low cost, and more informal as compared to CIRP. An expeditious and swift mechanism for the revival of MSMEs was contemplated and pre-pack seems to be the answer to this issue. It is believed that promoters/management of MSMEs will have the best understanding of its revival, hence the visible shift from CIRP's stringent creditor in control model to the blend of the debtor in possession and creditor in control model can be seen under the ordinance. The report of the Committee of the Insolvency Law Committee on Pre-Packaged Insolvency Resolution Process stated that the process must have the rigor and discipline of IBC, i.e., to say that the basic structure of the code must be followed while designing the pre-pack, which includes adequate checks and balances to ensure there is no abuse of the design.

Applicability of Prepacked Insolvency Resolution Process

As per the Ordinance, the pre-pack insolvency resolution process is only available to the corporate persons which are classified as MSMEs i.e., the corporate debtor shall be an MSME as per Section 7(1) of Micro, Small and Medium Enterprises Development Act, 2006. To be eligible for the pre-package resolution process following requirements must be met.

i. Corporate Debtor has committed a default of at least ₹10 lakh;
ii. Corporate Debtor is eligible to submit a resolution plan under section 29A of the Code;
iii. Corporate Debtor has not undergone a PPIRP during the three years preceding the initiation date;
iv. Corporate Debtor has not completed a CIRP during the three years preceding the initiation date;
v. Corporate Debtor is not undergoing a CIRP; and
vi. Corporate Debtor is not required to be liquidated by an order under Section 33 of the Code.

INSOLVENCY TRIVIA

1)What is the time limit within which the first meeting of committee of creditors should be held?
i)Within 14 days of constitution of committee.
ii)Within 7 days of constitution of committee.

2)Under which Section of IBC is an Insolvency Professional criminally liable?
i) Secion 75
ii) Section 77

3)Who shall determine the amount of claim due to a creditor?
i)Committee of creditors.
ii)Resolution professional.
iii)Corporate Debtor

4)In case of committee with only operational creditors, the committee shall consist of:
i)First fifteen operational creditors by date of claim.
ii)Operational creditors having claim over 20% of the total claim of debt.

5) What is the time limit to appeal to the Supreme Court?
i) 45 days from the date of receipt of order of Adjudicating Authority
ii) 60 days from the date of receipt of order of Adjudicating Authority

As mentioned, the Pre-Packaged insolvency process is a blend of debtor and creditor in possession system. Hence, the process can be understood in two phases. First, before the initiation of the resolution process, and second, after the initiation of the resolution process.

The first phase is a more informal process where the consensus-based method is adopted. To begin with, the Corporate Applicant is required to convene a meeting of Unrelated Financial Creditors (UFCs) to seek their assent. For such a meeting, notice is required to be served at least five days before the date of the meeting. The UFCs representing not less than 66% in value of debt due to such creditors shall approve the appointment of RP and the terms of his/her appointment. Subsequently, a special resolution is required to be passed by the Corporate Debtor (CD) for initiation of the Prepack Insolvency process and a Base Resolution Plan (BRP) is proposed by the CD. Once the requirement of preparing BRP is completed, an application for initiation of PPIRP is to be filed with the Adjudicating Authority (AA) which is NCLT in this case. AA, on receipt of the application, shall admit the application if the application is complete or reject the same if it is incomplete within 14 days.

Post initiation phase begins with the admission of the application by the AA. The Prepacks Resolution Process is envisaged to be completed within 120 days from the date of commencement i.e. from the date of the admission application, which is significantly less than the 270-day time limit allowed under CIRP. Additionally, one of the stark differences between the CIRP and PPIRP is that in the latter the management of the CD stays with the Corporate Debtor, and a duty is cast upon them to ensure “protect and preserve the value of the property”.

Once the Resolution Plans are invited, they are evaluated and the Resolution Plan securing the highest marks is taken as Base Alternative Plan (BAP) which will be compared with the BRP submitted by the Corporate Debtor itself. At this stage two resolution plans, i.e BRP and BAP are analyzed and the Committee of Creditors (COC) have certain options:

i) Select Base Resolution Plan, if there is no other plan received

ii) Select Base Alternative Plan, if received, and is significantly better than the BRP

iii) Select Base Resolution Plan, if BAP is not significantly better than BRP

The test for ‘significantly better’ is yet to be determined, however with the tick size and scoring system, one can analyze and evaluate the plans to understand if there is a significant improvement over the other. Therefore, it is evident that there is a definite shift in approach from CIRP based resolution process for MSMEs.Keeping in mind the importance of MSMEs and several prevalent issues with these entities including, low cash flows, lack of capital, lesser expertise compared to a large corporate, etc there was a definite need for such time-bound, expeditious, and semi-informal method with the minimum amount of court intervention.

ANSWER KEY FOR THE PREVIOUS QUIZ

1. False
2. Unrelated Financial Creditors
3. Two years
4. False
5. False

DECODING:ORATOR MARKETING PVT. LTD. V. M/S SAMTEX DESINZ PVT. LTD

In the recent judgment by the Supreme Court in the case of M/s Orator Marketing Pvt. Ltd. v. M/s Samtex Designs Pvt. Ltd. (Orator's case), the Court held that the loan disbursed without interest shall be categorized as financial debt as per Section 5(8) of the IBC. An appeal was filed by the Appellant/ Financial Creditor (FC) under Section 62 of the IBC against the impugned order of the NCLAT. The bone of contention was that “whether the interest-free loan can be termed as financial debt or not under the Code".
Before analyzing the judgment and the rationale behind the same, it is pertinent to see the facts, decision, and rationale of the NCLT and the NCLAT in the present matter.

NCLT's Decision (Orator's Marketing Pvt. Ltd. v. M/s Samtex Desinz Private Limited, Company Petition No. (IB) - 908(ND)/ 2020)
An application was filed by the FC under Section 7 of the Code against the Corporate Debtor (CD) for default in repayment of the loan. The debt was assigned to the FC via an assignment agreement between the FC and the original lender, who had given the loans on an interest-free basis. The Respondent argued that since there is no interest component attached to the loans disbursed, the same cannot be treated as financial debt under the Code, and hence, the petition for the same cannot be admitted.

The Adjudicating Authority (AA) while hearing the matter had observed that for admitting an application under Section 7, there needs to be the financial debt owed to the Creditor. It further referred to the definition of the “financial debt” under Section 5 (8) of the IBC which runs as *“financial debt means a debt along with interest, if any, disbursed against the consideration for the time value of money".*

The NCLT referred to various judgments of the NCLAT and concluded that for a debt to be considered a financial debt there has to be an interest component attached to it along with the component of the time value of money. Hence, the AA rejected the application of the FC and stated the transaction as a loan and not the financial debt.

NCLAT's Decision (M/s Orator Marketing Pvt. Ltd. v. M/s Samtex Desinz Pvt. Ltd., Company Appeal (AT) (Ins.) No. 1064 of 2020)
The Appellant had vehemently argued that the balance sheet of the CD reflects that the loan was due and this is sufficient to prove that it is a financial debt. It further referred to the judgment of the Supreme Court in the case of Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors. (Pioneer's case) which observed that if the money is not with the lender then the same would qualify as financial debt. Thus, in the present case, the money was not with the FC and hence, it will be considered as financial debt. Also, since the money was lent to meet the financial requirements of the CD, the same would be considered as a commercial effect of borrowing for the CD and thus would be governed by Section 5 (8) (f) of the Code.

NCLAT in its judgment has categorically held that the definition of financial debt under the Code requires that the loan should have an interest component attached to it otherwise the same shall not be called financial debt. The NCLAT has put their reliance on various judgments of the NCLAT & NCLTs wherein it was held that for a debt to qualify as financial debt it should be along with interest and should be disbursed against the consideration for the time value of money.

It further rejected the reliance placed by the Appellant on the Pioneer's case and observed that in the Pioneer's case it was observed that even if the money is no longer with the lender but the borrower is bound to give the flat to the lender then the same would be considered to be given in consideration for the time value of money and thus, would be considered as financial debt. But, in the present case, the loan was given without any interest and thus, there is no consideration for the time value of money, and for this reason, the application was rejected by the NCLAT. Lastly, the Appellate Tribunal also rejected the argument of the FC which states that there was the commercial effect of borrowing. The NCLAT observed that even though the loan was for meeting the financial requirements of the CD and was having the component of the commercial effect of borrowing, but the same does not have the time value of money as there was no interest attached to the loan. The NCLAT further went on to say that the time value of money should be for the creditor's benefit and not the debtor.

The Supreme Court's Decision

The Appellant challenged the judgment on the ground that both the NCLAT & NCLT have failed to construe the definition of financial debt and have read it in isolation and out of context. FC further argued that the Code should be read in full and if any issue arises then the legislative intent and the object is to be looked at, hence, the interest-free loan should qualify as financial debt. It was also contended that the NCLAT & NCLT overlooked the words “if any” in section 5(8) of the Code which provides for the definition of financial debt which means a debt along with interest, if any, disbursed against the consideration for the time value of money. Also, it was argued that if any loan wherein there is no component of interest involved, the principal amount shall alone will qualify to be the financial debt.

The Court referred to the judgment of Privy Council in the case of *Dilworth v. Commissioner of Stamps* and interpreted the word “means” in the definition of financial debt as “means and includes”, thereby giving an extensive meaning to the definition and making an observation that the transaction entered into by the parties have the commercial effect of borrowing and thus, is a financial debt. The Court also referred to the case of *Anuj Jain, IRP of Jaypee Infratech v. Axis Bank Ltd.* , and concluded that the facts of both the case are distinguishable and the ratio of the former cannot be used in the latter case as in the former there was third party security given by the CD for the advances to be received by the borrower but in the present case, the loan was given to meet out the working capital requirements of the CD, thereby, having the commercial effect of borrowing which makes the particular loan/debt as financial debt. Further, reference was made to the case of *Prabhudas Damodar Kotecha v. Manhabala Jeram Damodar*, wherein the golden rule of interpretation was applied and it was concluded that unless the statute expressly provides for exclusion of something, the words should be given a comprehensive meaning. Hence, in the present case also unless Section 5 (8) of the Code expressly states out that the interest-free loans are not to be considered as financial debts, the same cannot be excluded from the definition under Section 5 (8).

Thus, the Court concluded that if the loan is interest-free, the same shall be construed as financial debt as under the Code and the person owning the debt shall qualify to be FC. Lastly, the Court set aside the orders of the NCLAT & NCLT and ordered the AA to revive the Section 7 petition of the FC with the findings of the present case.

Polarity on Interest as Essential Element of Financial Debt

Though the judgment of the Supreme Court has established the position of law, however, there are certain decisions of the NCLAT which have opined to the contrary of what was held in this case. NCLAT at various instances in the case of Vishwanath Singh v. M/s Visa Drugs and Pharmaceutical Limited, Shreyans Realtors Private Limited & Anr. v. Saroj Realtors & Developers Pvt. Ltd. and B.V.S Lakshmi v. Geometrix Laser Solutions Pvt. Ltd. has held that it is quintessential for the FC to prove that the amount disbursed as the loan was given against the consideration for the time value of money and payment of interest. The term “and” between payment of interest and consideration for the time value of money clearly depicts that the component of interest is mandatory for a loan to be considered as financial debt.

On the contrary, NCLAT in few cases has held that the interest is not an essential component of the financial debt as the word “if any” depicts that it's optional and further went on to say that for a debt to qualify as financial debt it must have to be disbursed against the consideration for the time value of money.

Interest, a component of Time Value of Money.

According to the Insolvency Law Committee Report, time value of money means compensation for the time during which the money was disbursed by the lender to the borrower which can either be in a form of interest or factoring of discount in payment. As per the Dictionary of Banking (2nd Edition), the time value of money is the difference in the value to be received today in comparison to a greater value in the future.

Supreme Court in the Pioneer's case has observed that the application under Section 7 of the IBC remains incomplete if there was no disbursal and the consideration was not for the time value of money. Further, in the case of Mr. K.N. Mahesh Prasad v. M/s Medinnbelle Herbalcare Pvt. Ltd., the NCLAT dismissed the application of a creditor stating it to be denuded of an element of the time value of money.

The NCLAT in the case of Narendra Kumar Agarwal v. Monotrone Leasing Pvt. Ltd has held that the inter-corporate loan given to the borrower for a period of 90 days at 15% interest was termed as financial debt and it was also observed that the interest constituent of the loan is the time value of money and thus, the application was admitted. Also, in Monica Ramesh Shah v. Al Fara'A Properties Pvt. Ltd, the Appellate Tribunal has held that the fact that an allottee gets a flat of a higher amount in respect of the less money he is lending (as compared to the value of flat) shows that there is the time value of money and further went on to say that the purchase/ agreement to purchase of an existing flat will not make a person a financial creditor as there will be no element of the time value of money.

Critical Analysis of the Orator's case

The decision given by the Supreme Court has led to a lack of clarity on the point that “is interest an essential component of financial debt or not”. The judgment has brought ambiguity on various aspects as stated below which needs instant deliberations.

- As noticed from various judgments and the Insolvency Law Committee report, the time value of money includes the interest component. Hence, when the Supreme Court concluded that the interest component is not required to file an application under Section 7 for a loan, then it is directly implying that the same is also not required for the time value of money. Thus, a requirement of the time value of money to constitute a financial debt is impaired.
- As per the factual matrix of the present case, the application was filed for the realization of Rs 1.56 cr which was only the principal amount thereby implying that the disbursed amount was not given in against consideration for the time value of money

- Supreme Court also neglected the point basing which the NCLAT gave its judgment, i.e., the consideration should be for the benefit of the FC and not the CD. Hence, in this present case, when the interest-free loan was given, it was not for the benefit of the FC as there is no consideration for the time value of money.
- Supreme Court only relied upon clause (f) of Section 5 (8) and has failed to take into consideration the principal part of the definition of financial debt which provides for fulfilling the requirement of the time value of money.

Thus, the decision by the Supreme Court has created negative implications as the court only based its reasoning on Section 5(8)(f) and has ignored the substantial definition of financial debt. This reasoning has created ambiguity in understanding the importance of a substantial part of the definition which requires clarification on “interest” being an important component of the time value of money.

LATEST IBC JUDGMENTS & UPDATES

CORPORATE PERSONS UNDER THE CODE DON'T INCLUDE SOCIETIES.

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 the Act 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. 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.

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 will be construed as a body corporate and hence, clause (d) of Section 3(7) will not be applicable.

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.

AA HAS THE RIGHT TO SHAPE THE DIRECTION OF THE CIRP PROCEEDINGS IF THE COC IS NOT DOING IT DILIGENTLY.

NCLAT in its recent order in the case of Anil Kumar, EX IRP v. Allahabad Bank (Company Appeal (AT) (Insolvency) No. 786 of 2020 has upheld the impugned order of the Adjudicating Authority where the latter had exercised the inherent power given under Rule 11 of NCLT Rules, 2016.

The appeal was filed by the ex-IRP of the Corporate Debtor (CD), whose services as an IRP got terminated on the directions of the NCLT and later replaced by the new IRP. The Appellant contended that since no majority decision was reached into the appointment of IRP/RP because of the issues arising out of uncertainty in the classification of creditors, he could not work in the given time frame for successfully conducting the Corporate Insolvency Resolution Process (CIRP).

The Adjudicating Authority while taking cognizance of the matter as per Rule 11 observed that there was conflict, and no consensus was reached by the majority of creditors in value for appointing the IRP/RP and thus it became important to break the “stalemate between the Financial Creditors” by appointing an independent IRP/RP.

NCLAT while dealing with the appeal, framed the issue questioning the ambit and applicability of Rule 11 vis-a-vis Section 22 & 27 of IBC, i.e., can NCLT use its inherent powers to bypass Section 22 & 27. The Respondent in its contentions had put focus on the words “as may be necessary for meeting the ends of justice” as given under Rule 11. It further argued that the timeline for the completion of CIRP was reaching fast and given the stalemate between the secured and unsecured creditors, the meeting of the Committee of Creditors (COC) could not be held thereby giving an impression that the time period for CIRP would get over without the constitution of COC.

The Appellate Tribunal observed that the appointment of RP and its replacement shall be done only when the ingredients of Section 22 & 27 of the IBC are met, which in the present case was not made out. However, the NCLAT concluded that the AA had rightly invoked its jurisdiction as it was conscious of the fact that the appellant could not provide leadership to the CIRP. Further, it also held that since there was a clash between the secured and unsecured creditors and the timeline for completion of CIRP was running out, the AA to shape the CIRP proceedings has rightly invoked the jurisdiction of Rule 11 for appointing the new IRP/RP. Hence, the appeal got dismissed.

A RESOLUTION PLAN CANNOT BE CHALLENGED AFTER IT HAS RECEIVED APPROVAL OF THE COC.

In a recent case by the NCLAT in the matter of Mr. Chandraiah Subramaniyam v. Digiam Ltd. & Ord. (Company Appeal (AT) (Insolvency) No. 522 of 2021), the Appellate Tribunal rejected the application of the Financial Creditor (FC) stating that once the Resolution Plan is prepared and approved, the Corporate Insolvency Resolution Process (CIRP) conducted against the CD stands final and cannot be challenged.

The FC argued that his claim was rejected by the Resolution Professional (RP) and subsequently by the Adjudicatory Authority (AA) and then the High Court of Gujarat. Further, an interim application was filed by the FC before the AA which erroneously rejected the application of the FC stating the same to be non-maintainable. In the application, the FC also contended that the AA failed to look into the fact that the loan given to CD was of huge amount, and hence, the same should not have been rejected.

The Appellate Tribunal upheld the decision of the AA and concluded that after the approval of the Resolution Plan the Appellant cannot challenge the CIRP and the approved Resolution Plan and with this note rejected the appeal filed by the FC.

100 OR MORE OR 10% OF THE ALLOTTEES REQUIRE FOR APPLICATION AS AN FC.

National Company Law Tribunal (NCLT/AA), Mumbai Bench in the case of Mrs. Rajshree Vora & Ms. Prach Vora v. Makwana Properties Private Limited (C.P. No. 3398/IBC/MB/2019) has rejected the application filed by the Financial Creditor (FC) under Section of the IBC. The brief facts about the case are that the FC had in the year 2016 through an investment agreement decided to invest Rs 95,15,940/- in the real estate project of the Corporate Debtor (CD). For this, the slabs were made as per the scheduled payment. But, the CD even after 18 months of the said agreement had not started the project. As per clause 10 of the agreement, it was agreed between the parties that FC shall be the investor and if within 18 months plus 6 months grace period the other party does not receive LOI/IOA/CC in relation to the construction in the real estate project then the investor shall have the right to terminate the said agreement with 15% p.a. interest. As agreed, the FC sent the legal notice for claiming its money back which the CD till the date of filing of the case has not returned.

CD argued that the petition falls within the ambit of Section 12 & 18 of RERA which talks about withdrawal from the project and claiming the amount invested if there is a delay on the part of the CD. Further, it contended that the project was hampered with circumstances that were beyond the control of the CD. The NCLT after considering various clauses under the investment agreement concluded that the said agreement is not an agreement between the investor and the CD but between the homebuyer and the CD for the purchase of a flat. It further observed that the payment schedule in the agreement is typically the homebuyer agreement as only in such agreements one can find the schedule of payment depending upon the level of construction work done. The AA finally concluded that the FC is basically an allottee as per the RERA.

Further, the AA went into the question of whether such FC is entitled to file an application under Section 7 of the Code or not. For this, the NCLT referred to the proviso of Section 7 of the IBC and concluded that an application under Section 7 of IBC can only be filed by the FCs (being allottees under a real estate project) jointly by not less than 100 allottees or 10% of the total number of allottees, whichever is less. Hence, the AA concluded that the FC did not meet the benchmark for initiating an application under Section 7 as an allottee as he applied singly for the commencement of CIRP, and thus the petition was dismissed.

RESOLUTION PROFESSIONAL DOESN'T HAVE THE POWER TO ACCEPT A CLAIM AFTER 90 DAYS FROM THE COMMENCEMENT OF CIRP.

NCLAT in the case of Mukul Kumar, RP of KST Infrastructure Ltd. v. M/s RPS Infrastructure Ltd. (Company Appeal (AT) (Insolvency) No. 1050 of 2020 observed that the Resolution Professional (RP) has no power to decide upon the claims post the period of 90 days from the commencement of the Corporate Insolvency Resolution Process (CIRP).

The Appellant, in this case, had filed an appeal challenging the impugned order of the Adjudicating Authority (AA) which accepted the interim application of the Respondent requesting for admission of the claim. The Appellant/RP contended that the Respondent had submitted its claim after a delay of 287 days from the last date of submission of claims. He further contended that the resolution plan was approved by the Committee of Creditors (COC) and is pending for approval by the AA and if at this stage the claims are included then it would interrupt the CIRP deadlines and will defeat the purpose of the Code for a faster resolution. He further contended that the claim arose from an arbitral award dated 2019 and the Respondent was sleeping over his rights to realize the claims and hence, the claims should not be admitted at this stage.

The Respondent argued that the ground for the delay in filing of the claim should not impair the right of the creditor in realizing the same. Also, it referred to the judgment of the Supreme Court in the matter of Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajgopal, wherein the court held that the timelines given under the Code is directory and not mandatory. The Respondent further contended that they were not aware of the initiation of the CIRP and the manner of notifying the CIRP was not done properly by the IRP. Lastly, it argued that the RP should have been more diligent in accessing the books of accounts of the Corporate Debtor (CD) and should have noticed the fact that there was a liability in favor of the Respondent.

The NCLAT heard the arguments of both the parties and observed that the paper publication about the CIRP was done properly by the IRP and thus, the defense taken by the Respondent is not valid. It further held that the RP was diligent enough to ascertain the creditors and everything was done by him as per the provisions of the Code.

Further, the Appellate Tribunal while setting aside the order of the AA observed that the AA was wrong in stating that the RP should not have rejected the claims of the Respondent solely because it was filed after the approval of the resolution plan by the COC. The NCLAT observed that the RP can at the max accept a claim as per Regulation 12(2) of the IBBI (Application to AA) Regulations, 2016 till the period of 90 days from the commencement of CIRP but once this period is completed the RP is not obliged to accept the claim. Lastly, the NCLAT held that the RP has no discretion for admitting the claims once the extended period is completed. Thus, the order of admitting the claims of the Respondent by the AA is set aside as the claims were filed after a delay of 287 days from the last date of submission of claims.

NCLT HAS THE POWER TO APPROVE THE RESOLUTION PLAN POST ORDER OF LIQUIDATION FOR THE REVIVAL OF THE CD.

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 the 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 NCLT 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.

ONCE THE RESOLUTION PLAN IS APPROVED BY THE NCLT, IT CANNOT BE AMENDED

In a recent order by the NCLT- Kochi Bench in the matter of Jose Pradeep v. CA Jasin Jose, The South India Bank Ltd. & Ors. in (IA/37/(KOB)/2021) in (IBA/21/KOB/2019)), the NCLT upheld the principle laid down by the Hon'ble Supreme Court in the case of Rahul Jain v. Rave Scans Pvt. Ltd. (Civil Appeal No. 7940 of 2019) wherein the Court has held that once the resolution plan has been approved by the NCLT, it is considered to have attained finality and no further changes can be made to the same.

In the present case, the Applicant, who happens to be the Successful Resolution Applicant, through the interim application has sought for modification to be made in the Resolution Plan in the clause which provides for repayment schedule to the creditors. Further, the Applicant seeks a grant of time for 90 days considering the fact that once such grant of 2 weeks has already been given to him on account of his ill-health due to covid and post-covid illness.

The Respondent on the other hand stated that in the 9th meeting of the Committee of Creditors (COC), it was mutually decided that the Applicant may be given time for 30 days or 19.03.2021 as a curing period for completing the payment for successful implementation of the plan. Respondent no. 2 further stated that in the 10th COC meeting it was agreed that the Applicant will be liable to pay 10% of the total agreed amount before 30th November 2021 or 30 days, whichever is later, to the Financial Creditors (FC) from the date of approval of the Resolution Plan by the Adjudicating Authority (AA). Respondent contended that the payment made by the Applicant is less than 10% of the total amount, and thus, the Applicant failed to obliged the content of the Resolution Plan. It further argued that the decision regarding extension of 90 days as grace period was rejected in the 9th COC meeting and it was mutually decided, as can be seen from the minutes of the meeting, that in case the Applicant fails or defaults in repayment then the Applicant shall be given a grace period of 30 days or time till 19.03.2021 for repayment and hence, the contention of the Applicant for giving a grace period of 90 days was challenged. The NCLT concluded that the Applicant has failed to honor its commitment under the Resolution Plan as the payment made was less than 10% of the total agreed amount. The AA further observed, that the application for the extension of time after one such extension of 2 months was not acceptable on the part of the Applicant and hence, the present application was rejected. The AA lastly referred to the case of QVC Exports Pvt. Ltd. v. United Tradeco FZC (Company Appeal (AT) (Insolvency) No. 1351 of 2019) wherein the NCLAT has held that once the Resolution Plan is approved, it attains finality and then no alteration is permissible to the same even by the NCLT using its inherent power.

THIS EDITION'S SPECIAL: INTERVIEW OF MR. JAGDISH SINGH NAIN

In this edition of our Newsletter, we bring a conversation with Mr. Jagdish Singh Nain, who is an Insolvency Professional and a partner at AVM Resolution Professionals LLP. Mr. Nain shares with us about his experience before joining AVM and his thoughts on the profession of Insolvency Professional and about the IBC Law in general. He is an Ex-Senior Banker and has more than 30 years of working experience. He took premature voluntary retirement from Bank of Baroda and, thereafter joined the private corporate sector at a senior position. He is CAIIB, Law Graduate. He has vast knowledge and understanding of Bank Credit, Restructuring of Stressed Assets, and Risk Management.

Q. Kindly provide us with your brief introduction and your association with AVM Resolutions Professionals LLP so far.

I am a law graduate from Delhi University (Law Faculty Center). I have extensive experience of 27 years in the banking sector, having served as a senior banker. I joined Bank of Baroda after my graduation and was primarily dealing with tasks related to loans and advances and risk management. My last posting in the banking sector was in BKC- Mumbai in the corporate office of Bank of Baroda. After my stint in the banking arena, I associated myself with the private sector and joined a company engaged in the manufacturing of components of heavy vehicles. Due to the recession of 2008 company faced certain losses and was debt-heavy ultimately leading to the initiation of the insolvency process of the company and hence, I got the first-hand experience of the Insolvency Process there itself. Therefore, I have seen both sides of the table. Later, I cleared the Limited Insolvency Examination and enrolled myself as an Insolvency Professional. During my practical training programme I met certain fellow Insolvency Professionals and collectively decided to take forward the idea of creating an Insolvency Professional Entity and from there my association with AVM Resolution Professional LLP started. I currently advise the partners on various issues and have expertise in Bank Credit, Restructuring of Stressed Assets, and Risk Management.

Q. We are in the fifth year of IBC now. What are your thoughts on the Code?

There is not even an iota of doubt that IBC is an excellent piece of legislation. For the first time, we have umbrella legislation under which all laws related to insolvency and bankruptcy are codified and channelized. This gives a lot of clarity and certainty to all the stakeholders and avoids multiplicity of proceedings.

Having said that, the timeline for completion of the resolution process, as envisaged by the Code of 180 days from the initiation date of the application with a one-time extension of 90 days has not come to fruition. At present, there is hardly any CIRP process that is finished within the timeline. As per the data provided by IBBI also, the average time period is more than 400 days, which is against the objective of the Code. This delay is due to a number of reasons which include time taken in litigation, over-burdening of cases, and insufficient infrastructure to deal with so many applications being filed before the Adjudicating Authority.

Q.Another important change in IBC is the liability of Personal Guarantor to Corporate Debtor, what are your thoughts on the same?

One of the biggest changes that can be seen, is in the seriousness and behavior of the corporates towards their creditors and lenders, which was missing in previous insolvency regimes. This change in the mindset of these ‘Big Players’ is due to the shift to the creditor-in-control model and is a very welcome step

Earlier corporates may have not given sufficient due to their creditors or due to lack of teeth in the law they would somehow escape the liability, however, under IBC, the situation has changed and there is a definite change in the way corporates behaves.

Q. You have vast experience in the field of banking and in the private sector, how different is practice under IBC as compared to being a senior banker.

To be honest, all the segments are very different from each other and require different approaches. For instance, in the Banking sector, my major task was the assessment of the requirements of the borrowers and to monitor that genuine financing and lending is taking place. Whereas, in the private sector my major task was to assess the requirement of the company regarding financing, credit, risk management, etc

As far as IBC is concerned, I am certainly benefiting a lot from my previous experience in banking and as well as the private sector. Since banks are the major stakeholder in most of the CIRP processes I understand various issues faced by the banks and at the same time, the corporate debtor (company) also have their set of challenges. Also, understanding the role Resolution Professional and a troubleshooter is paramount, my prior experience helps in that aspect as well, along with the better understanding and assessment of the resolution process and guiding the team on the concerned issues.

Q. Recently, govt notified the Prepack Insolvency for MSMEs. How do you see this reform in coming years and your comments on the present ordinance?

An alternative process for the MSME was the need of the hour. It's a unique sector as compared to large corporate entities, where the asset base is not very high. Also, the bankers are not very inclined to accept the Resolution Plans of MSMEs under CIRP, and hence, they go into liquidation, leading to minimal realization. The structure of an MSME is very different from a large corporate, they are small personnel entities. This creates a lack of expertise and understanding to successfully revive an entity.

The government came up with the Debtor in possession model, which I believe is an excellent decision as in the case of MSMEs, the person most suited to understand the revivability of an MSME are its promoters. Hence, when the promoters will provide a Base Resolution Plan, in most cases it will no doubt be the most viable plan.

Q. Another important change in IBC is the liability of Personal Guarantor to Corporate Debtor, what are your thoughts on the same?

As far as Personal Guarantor to Corporate Debtor (PG to CD) is concerned, I can see one specific practical problem, which I believe needs to be addressed by our regulator. As per the IBBI Regulation related to Personal Guarantor to Corporate Debtors a person appointed as Resolution Professional (RP) for the Corporate Debtor (CD) cannot be appointed as an RP in case of Personal Guarantor to Corporate Debtor. This particular situation creates a problem in accessing information related to the assets of the personal guarantor. As the information available to the RP for CD is a lot more as compared to RP for PG to CD. Since RP in case of PG to CD has to start from point zero in order to access information, and there is limited information available in case of Personal Guarantor (PG), and there is hardly any mechanism from where the information related to assets of Personal Guarantor is available, unlike in case of Corporate Debtor, hence it frustrates the realization process from the Personal Guarantor.

In such a case the RP appointed for PG to CD doesn't provide any value addition for the banks, who are the usual stakeholders. Interestingly, RP is allowed to act as a liquidator in case the Corporate Debtor goes into liquidation and the idea behind such a rule is that RP is already abreast with the functioning of the company and has all the relevant information available.

Hence, I believe, with the same analogy of RP being appointed as Liquidator similarly, an RP of a Corporate Debtor should be allowed to act as an RP in case of PG to CD. This will ensure more expeditious resolution and augmented chances of recovery and realization.

Q.What are the challenges an Insolvency Professional faces in any resolution process? Challenges in terms of dealing with the ousted board and management, Committee of Creditors, etc.

In every profession, there are certain challenges that you face as a professional, and the insolvency resolution process is no different. But yes, one of the major issues which an IP face is the lack of co-operation of the ousted board and management of the company, i.e the promoters, and directors of the company. In any company, promoters are the first person to know that there is potential financial distress in their company, hence, they deliberately try to dispose of the assets of the company and create hindrances in having access to the information related to the company. In such a scenario it becomes even more difficult to realize the value of the creditors.

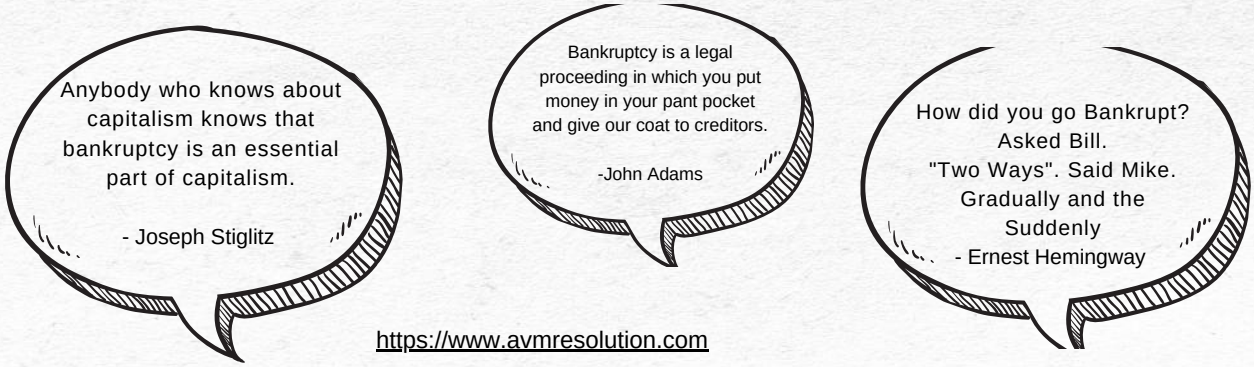
Apart from disposing of the properties, management doesn't provide complete information. Although a provision is provided under Section 19 of the Code where a remedy is available if the CD doesn't cooperate with the IRP or RP. However, we have seen even after resorting to such a remedy there is very little cooperation from the ousted management.

Further, managing the affairs of the committee of creditors and explaining to them the whole process and their active participation is both challenging as well exciting prospects, where you need to manage and lead the COCs in the insolvency resolution process. An Insolvency Professional is a unique profession where you have to acquire a lot of skills to successfully revive a company. An IP needs to act as a CEO of a company and is required to perform various tasks to ensure that the company is revived.

Q. With so many years of experience what you would suggest for all our young professionals. Some necessary traits, ethics, and habits are required to succeed in this profession.

My advice to all my young friends, who are reading this article, is that no matter which field you belong to, you must inculcate the habit of actively updating yourself about your profession and maintaining a healthy work ethic for a successful career.

If we talk about the profession of Insolvency and restructuring, there are almost daily updates in this legislation. As we are still in the nascent stages of IBC and it's an evolving economic law, there are bound to be several amendments, changes, modifications happening very often. Hence, it is imperative for a young professional to be updated and have in-depth knowledge of the subject matter. When you will acquire knowledge, there won't be any doubt you will have a successful career in your respective profession.



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