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Research Article

An Overview of the Working of Insolvency and Bankruptcy Code, 2016 with reference to Insolvency Professionals

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Abstract: Financial resources are a prerequisite for starting any kind of business as they have the potential to make or break any business idea, all alone. Finance invested into a business can be either ownedor borrowed wherein borrowed financial resources generally come from banks, financial institutions, money lenders, family, relatives etc.

Any business idea when converted into a reality, generates incomes and profits, provides employment opportunities, goods and services to the society, revenue to the Government and growth and development for the economy, thus impacting economy as a whole. However, it is not important that all business ideas succeed. The obvious consequence of failure of a business is financial distress and resultant inability to honour debt obligations.

The insolvency and bankruptcy laws aim to help individuals and business entities, unable to honour debt obligations. In India, Insolvency and Bankruptcy Code, 2016 was enacted as a result of dedicated efforts to overhaul the erstwhile regime which consisted of multiple and fragmented legislations, creating numerous fora for recovery claims.

One of the pillars of the Code are the Insolvency Professionals- persons equipped with certain educational qualifications, skills, knowledge, training and experience, who undertake various processes given in the Code. These professionals are often considered the nervous system of the framework. Since theCode's implementation, the Board has taken numerous initiatives to encourage the enrolment in and development of the profession.

However, in spite of the coveted position given to them under the Code as well as the trust and confidence reposed in them, some professionals end up harassing the stakeholders and exploit their position by indulging in malpractices and professional misconduct for their personal gains.

Equally unfortunate is the fact that some professionals are being subjected to harassment at the hands of the corporate debtors, their employees, shareholders etc. through intimidation, threats, violence, blackmailing and even abduction. Their professional lives have become a matter of concern for their loved-ones.

In such a situation where the Code is still in its early phase, undergoing amendments, the need of providing protection from as well as to, the insolvency professionals is ever important. Because only then the Government could actually achieve what it all aimed to achieve from this Code.

The present paper throws a light on the history and need of insolvency and bankruptcy laws in India and a brief outline of the role and duties of insolvency professionalsunder IBC, 2016. The main focus is on theharassment by and of, the insolvency professionals. The paper puts forth certain recommendations to deal with both sides of the coin.

Keywords: Business, Creditors, Insolvency, Bankruptcy, Insolvency Professionals, Victimisation, Harassment etc

1. Introduction

Every economic activity contributes towards the overall growth and development of the economy by providing goods and services to the consumers, employment opportunities, taxes to the Government.These activities can be categorised as- primary including agriculture and allied activities; secondary relating to manufacturing goods and tertiary encompassing provision of services. While some economies are backed by all the three sectors, few are dependent on two or even just one of these.

Financial resources are extremely important in a business since it can make or break a business.

It is neverpossible that a business would always prosper and earn profits. Ideas and businesses may face difficulty or fail because they are unable to compete in the market or adapt to changing environment or provide good quality goods and services or any other reason. The obvious consequence is the inability and subsequent failure to repay debts. Thus, a need arises to either salvage such businesses or shut them down to salvage the precious limited resources tied up in the business.

The Government has the responsibility to ensure that the available limited resources are used in an effective and efficient manner. Any wastage of resources, either human or financial should be prevented as it is detrimental to the economy. And to prevent thiswastage, an economy requires a robust and strong insolvency and bankruptcy framework.Insolvency is the inability to honour one's debt obligations, that is, to repay the principal amount, pay interest owed on debt, and dues like wages, taxes, feesetc. Bankruptcy refers to the Court's declaration stating that a person or business is bankrupt and theliabilities are discharged by selling of the assets. Effective and efficient insolvency and bankruptcy laws help in achieving ease of doing business for a country by providing adequate

recourse to the creditors to initiate insolvency proceedings for recovery of their dues. The framework ensures development of the debt markets which is indispensable for economy'soverall growth and development.

The Insolvency and Bankruptcy Code, 2016 was enacted in India, consolidating the numerous legislations that prevailed for the insolvency and bankruptcy of individuals and companies. Till December 31st, 2019, 2,542 corporates have filed for insolvency resolution under the Code, out of which, till September, 2019, 743 corporates have completed the process either through insolvency resolution or liquidation while 498 corporates have initiated voluntary liquidation process (Indian Department of Economic Affairs, 2020, p. 133).

Insolvency and Bankruptcy Code, 2016 provides for establishment of various authorities and institutions for its effective implementation as well as oversight. One such institution is that of Insolvency Professionals. The professionals, often termed as the *nervous system* of the framework, are individuals with certain level of educational qualifications, skills, knowledge, expertise required to don various roles given in the Code. The nature and magnitude of responsibilities entrusted to them justifies the use of term *professionals.* It will be safe to say that the insolvency professionals are carrying the weight of Code's success on their shoulders.

Insolvency professionals are considered an indispensable element of insolvency regime not only in India, but around the world. The *European Bank for Reconstruction and Development* states that it is almost impossible to imagine an insolvency process without an insolvency professional, who in many respects, is the lynch pin of the process that links the debtor, creditors and courts (Kapoor &Arun, 2017).

However, it is highly unfortunate to state that these professionals are misusing the confidence and trust reposed in them by the economy for their personal gains. Since the enactment of the Code, insolvency professionals have indulged in malpractices like mis-statements in registration application, charging exorbitant professional fees, disobeying the orders of the authorities, ignoring the duties enlisted in the Code etc. Negligence and lapses on the part of insolvency professionals delays the insolvency process. The stakeholders like corporate debtor, financial creditors, operational creditors, employees etc. have to undergo increasing distress.

Equally shocking is the fact of harassment of insolvency professionals at the hands of the stakeholders of insolvency and bankruptcy process. They are often considered as the *outsiders* who have no association with the corporate debtor, whatsoever and are still put in-charge of its operations. The professionals are intimidated and abused. Some stakeholders go to the extent of abducting the insolvency professionals for ensuring recovery of their dues. One such incident with a Mumbai-based professional in September 2017 caused a stir, making professional questions their career choices.

The need of enacting IBC, 2016 was to have a comprehensive code and repeal the old, multiple and fragmented laws. The new regime is heavily dependent on the knowledge, skills and expertise of the insolvency professionals. Keeping in mind this particular fact as well as the effect of the global pandemic of COVID-19 on the economy, the need of insolvency professionals is paramount.

2. Research Objective

The paper attracts the attention of the readers towards the new insolvency regime in India – Insolvency and Bankruptcy Code, 2016 in general. The need of introducing a comprehensive code is discussed in brief. The focus area is the institution of insolvency professionals, established under IBC, 2016. The paper aims to highlight their roles, duties and responsibilities. The research question is the harassment by as well as of, insolvency professionals.

The research objectives are as:

General Objective:

1. Providing a brief outline of the new insolvency regime as well as its urgent need

Specific Objectives:

1. Highlight the role, responsibilities and functions of the insolvency professionals
2. Throw light on instances of professional misconduct by insolvency professionals
3. Focusing on victimisation of insolvency professionals
4. Putting forth recommendations to curb any and every kind of harassment and for encouraging and developing the profession of insolvency professionals

3. Research Methodology

The author for the research paper has relied on secondary sources of data, that is, data which is already available in the form of Government reports, academic research articles, journal publications, news articles, web sources etc. Using secondary data for research results in time and cost efficiency.

Committee reports, academic research, journal, publications by professional bodies, articles by law firms, news articles, websites, interviews etc. have been used for writing the present paper.

4. Need of Insolvency and Bankruptcy Laws in India

The earlier laws on insolvency and bankruptcy were multiple and fragmented, leading to multiple forums with overlapping jurisdictions for debt recovery. Presidential Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 were in existence from over a century without any major amendment. Companies Act, 1956 provided for liquidation of companies, only in cases of winding up.

Sick Industrial Companies Act, 1985 was established with the intention to revive sick or possibly sick units. Board for Industrial and Financial Reconstructionheard the revival applications. However, it applied only to industrial companies. The debtor's management itself would decide whether company is sick or not. Debtor was allowed to be in control of the management as well as company assets even after being declared sick. Further, High Courts were empowered to pass winding up orders. But on numerous instances, they would reopen the case to look for a ray of hope of revival.

The Justice V. B. Eradi Committee of 1999 suggested to repeal SICA, 1985 and transfer all the cases filed before BIFR to the National Company Law Tribunals to be established under the amended Companies Act, 1956. However, the recommendations were never implemented.

Again in 2000, the Advisory Group on Insolvency Laws, of the Standing Committee on International Financial Standards and Codes, RBI suggested a comprehensive bankruptcy code which discusses provisions relating to reorganisation, corporate insolvency leading to winding up and liquidation of corporate entities and cross-border insolvency, as well as the repeal of SICA, 1985.Unfortunately, these recommendations as well were ignored.

Ultimately, the Companies Act, 1956 got some major amendments leading to an almost new Companies Act, 2013, primarily based on the recommendations of J. J. Irani Committee, further based on Dr. N. L. Mitra Committee recommendations.

Recovery of Debts due to Banks and Financial Institutions Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were the two legislations enacted to help solve the problem of growing NPAs. However, they somewhat aggravated the problem in the debt market with a particular class of creditors having more recovery powers than others. It also led to multitude and overlapping of recovery claims (Sengupta, Sharma & Thomas, 2016).

Till the enactment of a comprehensive law on insolvency and bankruptcy, the Supreme Court and High Courts were unnecessarily burdened with recovery claims initiated by different creditorsunder different laws. In *M/s Bharat Heavy Electricals Limited v. M/s Arunachalam Sugar Mills Ltd.,2011 SCC OnLine Mad 581,*the Madras High Court had to decide on the default of debt payments of the respondent and its sister concern wherein legal actions were initiated against them before different fora. A bank being a major secured creditor filed an application for recovery beforeDebt Recovery Tribunal under RDDBFI, 1993. Another creditor filed a petition for company's winding up before the High Court. One secured creditor entered into a Memorandum of Understanding to sell the debtor's assets and pay off secured creditors. The lessor of a machinery's lease agreement invoked the arbitration clause. An unsecured creditor filed a civil suit. In *Asset Reconstruction Co. India P. Ltd. v. Shamken Spinners Ltd., AIR 2011 Del 17*, the debtor company filed a reference with BIFR under SICA, 1985 while a secured creditor applied for the enforcement of security interest under SARFAESI, 2002. The Calcutta High Court was posed the question as to whether a winding up petition could be filed by a secured creditor before it when another creditor had already initiated action before DRT under RDDBFI Act, 1993. (*Jeevan Diesels and Electricals v. HSBC, APO 254 of 2014 and CP 845 of 2013).*The ultimate consequence was delay of insolvency proceedings and thus use of these tactics by the debtor company to have time on their hands.

NPAs rising at an unprecedented rate was a major headache for the financial sector. By the end of December, 2015, when BLRC was studying the existing insolvency regime, NPAs of public sector banks stood at Rs. 3.61 lakh crores (Rathore, Malpani and Sharma, 2016).

The country was in urgent need of an effective and efficient regime which provides recourse to all categories of creditors. It was not enough to prevent multiplicity of laws or legal forums to initiate actions. What was needed was a law which reduces the problem of NPAs and promotes ease of doing business in the country.

5. Scope of Insolvency and Bankruptcy Code, 2016

The dilapidated situation of Indian insolvency and bankruptcy regime was promoting difficulty in doing business instead of ease. The laws were multiple and fragmented leading to number of forums and thus multiplicity of legal actions. Actions initiated under one legislation overrode the jurisdiction of a forum under the

other. The Supreme Court and High Courts were unnecessarily burdened to decide which forum has the overriding jurisdiction.

On August 22nd, 2014, the Ministry of Finance set up a committee known as the *Bankruptcy Law Reforms Committee*, under the Chairmanship of T. K. Vishwanathan. The sole objective of the Committee was to revamp the insolvency and bankruptcy laws to improve ease of doing business and acceleratedevelopment of debt and capital market. The Committee was supposed to work on the lines of the work done by the Financial Sector Legislative Reforms Commission headed by Justice Srikrishna.

The final report was presented in November, 2015, followed by the introduction of Insolvency and Bankruptcy Bill, 2015 in the Lok Sabha on December 21st, 2015. The Lower House gave the green signal to the Bill on May 5th, 2016 while the Upper House approved it on May 11th, 2016. Finally, the Presidential assent was received on May 28th, 2016.

The Preamble to the IBC Code states that it is an act for:

(a) consolidating and amendingerstwhile insolvency and bankruptcy laws
(b) maximising value of assets
(c) promoting entrepreneurship
(d) improving credit availability
(e) balancing interests of all the stakeholders
(f) establishing Insolvency and Bankruptcy Board of India

The Code provides for the insolvency resolution of companies along with voluntary liquidations. The corporate persons may also opt for fast track insolvency resolution process. For individuals and partnership firms, the provisions relate to insolvency resolution and bankruptcy. However, the same have not been notified.

The very first case for insolvency resolution was filed in December, 2016 (Indian Department of Economic Affairs, 2017, p. 93). The first insolvency resolution order was passed for Synergies-Dooray Automotive Ltd.(*MamtaBinani v. Edelweiss Asset Reconstruction Company Ltd. &Ors., 2017 SCC OnLine NCLT 20883*). As of June, 2017, 2050 cases hadbeen filed for insolvency and bankruptcy before AA. In the quarter October-December, 2019, the number of corporate insolvency resolutions admitted were 562 which depicted a 30.29% surge in the insolvency cases (John, 2020, Corporate section). The total realisable value by the end of December, 2019 from CIRP was a whopping 1,57,762.51 crores (Indian Department of Economic Affairs, 2020, p. 133). In 2018-2019, the recovery of stressed assets by the commercial banks under IBC stood at 56%. According to the Economic Survey, the average time taken for insolvency resolution has come down to 340 days under IBC as compared to 4.3 years under the earlier regime (Indian Department of Economic Affairs, 2020, p. 135).

The new insolvency regime has actually proved fruitful to the Indian economy by improving its *Ease of Doing Business* ranking. In 2017, out of 190 countries, India ranked 130th. While in 2020, it came up to 63rd spot. The recovery rate was just 26.5% in 2018. But it rose to 71.6% in 2019, all thanks to numerous efforts towards insolvency resolution. The time taken in resolving insolvency was 4.3 years when IBC was introduced. But in 2019, it came down to 1.9 years. In fact, India is one of the top 10 economies improving the most in Doing Business (World Bank Group, 2020).

These statistics stand as a testament to the positive implications of the introduction of insolvency and bankruptcy regime in India.

When compared with economies like United States of America and United Kingdom, the scenario is as:

Country	**Ease of doing business (2020)**	**Ease of resolving insolvency (2019)**	**Recovery Rate**	**Time (years)**
USA	6	3	81%	1.0
UK	8	14	81%	1.0
India	63	108	71.6%	1.6

The reason behind humongous difference in the ranking is the fact that the US and UK insolvency regimes are well established and are in place from late 1970s-1980s.Even though India has shown tremendous improvement under IBC, it still has a tread on a long path (Kattadiyil&Mehboob, 2020).

6. Role, Powers and Functions of Insolvency Professionals under Insolvency and Bankruptcy Code, 2016

Insolvency Professionals (IP), the nervous system of any insolvency regime are professionals who put the plan into action. Without them, the law is just a bundle of meaningless provisions. The professionals, while performing the processes, don various roles- protector and valuer of debtor's assets, manager of debtor's affairs, intermediary between the debtor, creditors and AA, convenor for creditor's meetings etc.

Across the world, these professionals are referred to using different terms like Private Trustees in USA, Insolvency Practitioners inUK. In Canada, the term used is Licensed Insolvency Trustee while in India, we call them Insolvency Professionals (Kapoor &Arun, 2017).

The United Nations Commission on International Trade Law's Legislative Guide on Insolvency Laws highlights their role as:

"Insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially."

In India, BLRC highlighted the professionals' importance at length. IPs are the operators of the insolvency and bankruptcy process and provide the necessary communication amongstcreditors, debtor and AA. If an IP is knowledgeable and experienced, understands the work and undertakes it properly, the intervention of the adjudicator will be to the minimum. And if the IP fails in his/her duties, ultimately the adjudicator will be the one carrying out the entire process (Bankruptcy Law Reforms Committee, 2015).

When BLRC was working on revamping theframework, the importance of IPs, on the lines of professionals under erstwhile regime – Official Receiver, Official Assignee, Liquidators etc., was discussed. The need was to establish a separate specialised body of such professionals. However, they should be regulated by some professional self-regulatory body to ensure growth and promotion of the profession as well as standards of performance. The bodies shall further be regulated and supervised by a nodal agency overseeing the entire framework. No person shall be allowed to act as an IP until and unless he/she is a member of a professional body registered with the nodal agency (Bankruptcy Law Reforms Committee, 2015). The provisions regarding IPs underIBC, 2016, fortunately follow this particular track.

Insolvency and Bankruptcy Board of India has been established as a nodal agency for oversight of the Codealong with regulation and supervision of IPs, IPAs and IUs as its main function.

Insolvency Professional Agency (IPA) is a body registered with the Board which enrolsIPs as its members. These agencies are regulating an already established profession. The rationale is to uphold standards of performance, promote development of the profession through already available and established resources and promote competition to improve performance. Thus, the Institute of Chartered Accountants of India, Institute of Company Secretaries of India and Institute of Cost Accountants of India was allowed to establish their own IPAs. Keeping in mind the objectives, the Board prepared IBBI (Insolvency Professional Agencies) Regulations, 2016 discussing eligibility, application for and grant of registration, surrender or cancellation, disciplinary proceedings provisions.

Insolvency Professional Entities (IPEs) are a company/limited liability partnership/registered partnership firm wherein majority of the directors or partners, as the case may be, are Insolvency Professionals. The ideais provision of support services to the IPs associated with the Entity. The recognition is granted by the Board as perChapter V of IBBI (Insolvency Professional) Regulations, 2016.

Under IBC, 2016, IPs have to perform various roles, depending upon the process being performed. If the process being followed is CIRP, they are known as Resolution Professional, including an Interim Resolution Professional. The IP is known as a Liquidator if the process is liquidation. When involved in bankruptcy of individuals and partnership firms, they are known as Bankruptcy Trustee. If it is Fresh Start Process or Insolvency Resolution Process for individuals, they are known as Resolution Professionals.

Notwithstanding the role being performed, the professionals shall abide by the Code of Conduct given under Section 208(2):

(a) Taking reasonable care and diligence
(b) Complying with the requirements and terms and conditions of the concerned IPA
(c) Allowing the IPA to inspect records
(d) Submitting a copy of every proceeding's records before the AA to the Board and theconcerned IPA

The detail with which the role, functions and duties of the insolvency professionals is laid down under the Code signifies the importance accorded to these professionals in the entire framework. Referring to them as

professionals itself displays the nature of skill, knowledge and experience expected from them. When the Code was introduced and implemented, the existing members of ICAI, ICSI and ICMAI as well as advocates with 15 years' experience were given an edge and allowed to enrol themselves as IPs. However, the Board predicted the future demand of these professionals and thus, the IBBI (IP) Regulations were amended to allow an individual to enrol as such a professional if the Graduate Insolvency Programme (GIP),as may be approved by the Board, is completed. The Board finally constituted a Working Group to recommend GIP's structure. The recommendations were accepted as it is and GIP was introduced, first of its kind, 2-year programme on insolvency delivered by the Centre for Insolvency and Bankruptcy of the Indian Institute of Corporate Affairs. The course is a mixture of residential class room programme consisting of Preparatory Phase, Specialization Phase and Personal Development,and internships with Insolvency Professionals, banks and FIs, a law firm providing insolvency resolution services and IBBI (Working Group on Graduate Insolvency Programme, 2018).

The Board formulated the IBBI (Insolvency Professional) Regulations, 2016 which acts as a guide for the professionals. It lays down the provisions for eligibility requirements, grant of registration, issue and surrender of authorisation for assignment as well as recognition of IPEs. It also provides for a detailed Code of Conduct under First Schedule.

Due consideration of objectives of the new insolvency and bankruptcy regime made it crystal clear to the Board that in the coming times, the AA will be bombarded with applications under various provisions of the Code. So, the need of the hour is to develop and encourage the profession in whatever way possible. The Board, from its end, formulated the Regulations, allowed professional bodies like ICAI, ICSI to establish their IPAs, granted recognition to numerous IPEs, laid down a detailed code of conduct etc.

But what is the ground reality? What is the actual situation of IPs? Are they abiding by the code of conduct given in the Regulation of 2016 as well as the one laid down by the concerned IPA? Are IPs able to smoothly function and fulfil their duties without any troubles, disagreements or non-cooperation?

When it comes to the IPEs, till date, the Board has de-recognised 43 entities for their failure to comply with the regulations under Chapter V of IBBI (IP) Regulations, 2016 (IBBI, 2020, Service Provider section). In just two days in November, 2019, the Board derecognised 19 IPEs for their failure to comply with Regulation 12(1)(a) (IBBI, 2018, Orders section). It clearly showcases the strict attitude of the Board towards lapses on the part of IPEs.

With regard to insolvency professionals, let's see what has been the scenario.

7. Harassment byInsolvency Professionals

The Insolvency Professionals are the nervous system of the Code. Their duties and functions are specified in detail in IBC, 2016. They are responsible to takecustody and control of the debtor's assets, protect and preserve them, manage the corporate debtor's operations, cooperate with its employees and management, prepare, verify and update the claims of creditors, constitute a Committee of Creditors and conduct its meetings, collect and collate information and prepare information memorandum, file for extension of time-limit for completion of insolvency resolution process, file for the avoidance transactions etc.

The very fact of using the term *professionals* for these people signifies the nature and level of qualifications, skills, knowledge and experience required to perform the duties and functions involved.The rationale behind establishing IBBI was to provide a regulatory body to grant registration to and regulate the profession of, Insolvency Professionals. And the insolvency regime of India alone is not heavily dependent upon these professionals. Across the globe,countries with well-established insolvency laws place a humongous degree of reliancewith regard to effective and efficient implementation of those laws, on these professionals.

However, unfortunately, with 3,134 insolvency professionals registered with the Board till June 19th, 2020 and 2,163 out of them holding an Authorisation for Assignment, the instances of malpractices by these professionals are on the rise (IBBI, 2020, Services Providers section). All the stakeholders- financial creditors, operational creditors, corporate debtor, AA, IBBI, Government, repose a great degree of faith and trust in them. Once the insolvency process initiates, the assets of the debtor are put in the control and custody of these professionals. And in case of corporate debtors, the management of the affairs as well. But when these professionals exploit that faith and trust for their personal gains, they are harassing the stakeholders.Instead of helping out the debtor of its financial difficulty, debtor is further pushed into it. Creditors, in spite of receiving hope of recovery of their dues, are further distressed. Employees are clueless over the future of their jobs.

In a nutshell, the insolvency process, instead of helping out the stakeholders, pushes them into more troubles and tensions.

7.1 Instances of Harassment by Insolvency Professionals

Negligent and irresponsible work-ethic, private communications or colluding with creditors or resolution applicants, accepting bribes, charging professional fees at exorbitant rates, non-filing of avoidance transactions, disclosure of confidential information without approval are common instances of harassment of corporate debtors by insolvency professionals.

At the first step of filing registration application, D. R. Lebaka, an IP enrolled with IPA of ICSI, tried to dupe the Board as well as the concerned IPA by suppressing information as to criminal proceedings pending against him (IBBI, 2020, Orders section).

The IRP/RP of ElectrosteelSteels Ltd. was held guilty of unprofessional conduct and non-adherence to the time-limits of the process by the Board for his failure to admit the claim of an operational creditor after repeated filings which derailed the process by adversely affecting the resolution plan. Further, non-admittance of the creditor's claims delayed the entire process and thus, the Board ordered deposit of $1/10^{th}$ of the professional fees received for his services, as a penalty (IBBI, 2018, Orders section).

An Indo-Malaysian venture, United Seamless accused its RP of collusion with a bidder and favouritism towards it by undervaluing the company's assets. It was second such complaint against the NCLT-appointed professional. The first complaint was filed bya financial creditor on the ground of collusion with the audit firm to help a resolution applicant acquire the company (Sukumar, 2018, News section).

Rakesh Wadhwa, an IRP was found breaching standard norms for conducting meetings and extending the professional services beyond the stipulated time-period. Besides, the claims of a financial creditor were ignored, leading to exclusion fromCoC which is testimony of ignorance of an IRP/RP's role and duties under the Code (Das, 2018, Markets section).

In November, 2019, the home buyers of Noida-based Granite Gate project sought removal of its IRP for his failure to work in a transparent manner and submit details of the forensic audit as well as the information memorandum to the financial creditors (Shalabh, 2019, Wealth section).

Recently in January 2020, an IRP was arrested by CBI for allegedly receiving a bribe of Rs. 3.5 lakhs when the professional blackmailed to file a criminal case against the contractor's wife who was handling the work outsourced by the CD (Outlook, 2020).

The IRP/RP of Viceroy Hotels Limited, KR Karuchola outsourced his duty to verify the creditors' claims to an IPE in spite of it being the duty of an IRP/RP. He failed to mention the security interest in the list of claims even after being provided with that information. Further failure to file the preferential transactions before the AA just speaks of the complacent attitude, making the imposition of a penalty of one lakh rupees justified (IBBI, 2020, Orders section).

Bhavna Sanjay Ruia, who acted as IRP and later as RP in 15 CIRPs charged five crore rupees per month, plus out of pocket expenses as IRP and three crore rupees per month as RP, where in case of some companies it was more than twice the amount of default (IBBI, 2019, Orders section).

The incidents are a matter of grave concern in the light of the fact that the law has been in effect for just 3 years with provisions for only corporate persons being brought into force as of now and operation of the Code being suspended since the nation-wide lockdown because of COVID-19.

7.2 Orders punishing the Insolvency Professionals

It is disappointing to see that IPs either don't realise or just ignore to realise the sanctity of their profession. The entire economy is relying on their knowledge, skills and experience to salvage the precious but distressed assets and put them to use in productive ventures. Number of stakeholders are dependent upon them to get back their dues. Persons in financial difficulties entrust their everything to these professionals. Yet they indulge in malpractices and professional misconduct.

When these professionals fail to perform their duties with integrity and discipline, the regulatory authorities and the Adjudicating Authorities are left with no option but to jump in to save the day. And thus, from the very beginning, the Board/IPAs/AA have taken a strict view of professional misconduct on part of these professionals and punished them in some way or the other for their failure to perform their duties.

In August, 2018, the Disciplinary Committee of the Board found Mukesh Mohan, IRP/RP of 4 corporate debtors – JEKPL Pvt. Ltd, Carnation Auto India Private Limited, Athena Demwe Power Limited and Tirupati Inks Limited, in contravention of numerous provisions of the Code as well as rules and regulations made thereunder. In case of JEKPL Pvt. Ltd., IRP/RP disregarded an NCLAT order, being privy of his professional misconduct, equivalent of contempt of court. However, the contempt proceedings were dropped. During the CIRP of Carnation

Auto India Private Limited, he outsourced his responsibility of certifying a resolution applicant's eligibility to a Chartered Accountant while the Code does not lay down any such requirement, as well as claims' verification to a related party in contravention of the Code. While undertaking the CIRP of Athena Demwe Power Limited, his failure to include liquidation value in information memorandum and to file a complete information memorandum in time led to several violations. And lastly in case of Tirupati Inks Limited, he handed over the custody of the corporate debtor's assets to its suspended Board of Director thus ignoring his duties blatantly. Besides, one of the valuers appointed in the process by him was consultant to one of the financial creditors, resulting in compromise of the valuer'sprofessional independence (IBBI, 2018, Orders section).

In April, 2019, the Board's Disciplinary Committee suspended the registration of Sanjay Ruia for 2 years, who acted as IRP/RP for 3 corporate debtors- Sanjay Strips Pvt. Ltd., Global Proserv Ltd. and S. N. Plumbing Pvt. Ltd. The IP tried to charge exorbitantly high fees for his services. Besides, the professional reduced his fees to just 8% of the fees to be charged earlier, when the AA ordered to submit the term sheet for approval of his fees. The clarification provided was he charged higher fees because he referred to the older financial information of the corporate debtors, depicting professional incompetence. Also, he tried to increase his fees once it was approved by the AA. The professional got approval of his wife's appointment as the IRP in 15 CIRPs, compromising his integrity, independence and leading to conflict of interest. Moreover, his and his wife's appointment was locked in by approval from the applicant who is not empowered to appoint IRP/RP. Apart from these serious lapses, there were numerous minor lapses as well, resulting from a lack of knowledge. Ultimately, he was debarred from seeking any fresh appointment or assignment till the end of his suspension period along with an order to undergo pre-registration educational course from the concerned IPA and to work for at least 6 months as an intern with a senior insolvency professional (IBBI, 2019, Orders section).

The IRP of Upadan Commodities Private Limited and Maa Tara Industrial Complex Pvt. Ltd., S. K. Kejriwal, who was later appointed as their RP as well, did not comply with the procedures of Section 23 of the Code. Failure to submit progress report and make public announcement in time, appoint registered valuers, prepare information memorandum were the lapses in case of both the corporate debtors. Also, he neither took over the management of the corporate debtors nor sought the AA's directions in case of non-cooperation. Besides, he resigned from his duties without AA's prior permission. The ultimate result was the Board declaring him to pay a penalty of 100% of the professional fees received for his services and to undergo the pre-registration educational course from the concerned IPA to get a better understanding of the Code and the regulations thereunder (IBBI, 2019, Orders section).

Reprimanding and punishing the insolvency professionals for their disreputable conduct, NCLT's Chennai Bench held the IRP of Apna Scientific Supplies Pvt. Ltd., unfit for providing services as an IP under IBC, 2016 on account of his wilful disobedience to honour the numerous orders of the NCLT to appear before it as well as his staunch reply to the Indian Overseas Bank, the applicant to approach the AA for replacing the IRP with another RP. The AA ordered the removal of his name from the list of Insolvency Professionals maintained by and with the IBBI and imposed a penalty of Rs. 20,000*(Indian Overseas Bank v. Gopala Krishna Raju, MA/154/2019 in CP/811/IB/2018)*.

7.3 Measures taken to curb harassment of corporate debtor at the hands of the Insolvency Professionals

As the profession of insolvency professionals grew, the number of applications for insolvency increased along with an increase in the number of IPs. Unfortunately, the incidents of professional misconduct by IPs were also following the increasing trend. The provisions of the Code as well as regulations made thereunder were being blatantly ignored and flouted.

To ensure that the IPs do not indulge in any kind of professional misconduct, the Board has undertaken various measures through Notifications, Circulars and formulating new or amending the old regulations etc.

The Board made the IBBI (IP) Regulations, 2016 providing for the eligibility, qualification, experience of and grant of registration to, IPs and has been amended 5 times till April, 2020. It also laid down a detailed Code of Conduct to be adhered to by these professionals. The Board also made the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 empowering IPAs to make bye-laws and amend the same. The regulations lay down the provisions regarding IPAs' Governing Board. The Model Bye-laws given in the Schedule provide for eligibility and process for enrolment with an IPA, eligibility for an Authorisation for Assignment, duties of the members, and expulsion from professional membership as well as the disciplinary proceedings of the IPA in case a complaint is received. These provisions aim to ensure that only persons who are qualified, skilful, knowledgeable and experienced are enrolled as IP.

Keeping in mind the number, nature and complexities of the roles to be performed by the IPs, it was important to ensure that only the best of the individuals are involved in the profession. Thus, the Board made it mandatory through an April, 2018 circular that all the insolvency professionals must undergo a *pre-registration educational*

course after their enrolment with an IPA, from that agency itself. In the circular, with the consultation of the IPAs, the Board laid down the contents of the course which are to include various Committee reports, drafting and filing of applications, familiarisation with forms and formats, management of the corporate debtor, conducting meetings, appearances before authorities, moratorium, information memorandum, inviting resolution applicants and plans, liquidation process, governance etc. (IBBI, 2018, Legal Framework section).

To ensure integrity, independence and transparency on their part in carrying out the CIRP, the Board issued a circular stating that the IPs have to make certain mandatory disclosures while conducting resolution processes. The disclosures are regarding any relationship subsisting between the IP and corporate debtor/financial creditor(s)/other professional(s) engaged by her/interim finance provider(s)/prospective resolution applicant(s), to be made to the concerned IPA within specified time period. The IP has to make the same disclosure to the IPA within specified time, regarding any relationship of the other professional(s) engaged by her with herself/corporate debtor/financial creditor(s)/ interim finance provider(s)/prospective resolution applicant(s). The Board has explained 4 kinds of relationship in the Circular itself and any one of them should be prevalent to state that a *relationship* exists (IBBI, 2018, Legal Framework section).

However, even after several initiatives on the part of the Board to curb incidents of professional misconduct, there is no full stop to such a behaviour and attitude.

8. Victimisation of Insolvency Professionals

The fact that the insolvency professionals have been showcasing professional misconduct is highly disappointing. In spite of being considered the nervous system of the framework and being entrusted with numerous responsibilities, they indulge in malpractices for their personal gains.

However, every coin has two sides. If something has a good side to it, it also has a bad one. Same is the case with these professionals. That is, if IPs, by indulging in malpractices and showcasing professional misconduct are harassing the corporate debtors, these professionals as well are being subjected to harassment.

The insolvency resolution process aims to either salvage the debtor from the financial distress through an insolvency resolution plan or to liquidate it by selling off the assets. In the process, the assets' control and custody as well as the management of the corporate debtor's operations are vested in an IP. The Board of Directors are suspended and have to extend all the necessary support to these professionals. They, along with the employees of the corporate debtor have to provide all records, documents, information etc. to the IP in the insolvency resolution processas well as liquidation process.

However, many a times, the IPs are unable to securenecessary cooperation. The corporate debtor's personnel consider the professional their enemy as suddenly a person with no interest in or association with, the company is put in-charge of it. They often consider him/her as the alter ego of the CD. They are often questioned by various creditors as to when CD will pay their dues. Thus, IPs, on several occasions, are *welcomed* with agitated and uncooperative personnel. Sometimes, the IPs are targeted for their actions performed for the betterment of the CD, but considered not so by the stakeholders. However, Section 233 of the Code protects the insolvency professionals for the actions taken or intended to be taken in good faith. In rare circumstances, the situation worsens and IPs face threats of violence, threats to their life, family or property. Some stakeholders go to the extent of blackmail or even torture to convince them to drop the assignment. It is a shame that people who put their sweat in saving a company and thousands and lakhs of people associated with it are meted out such a treatment.

8.1 Instances of victimisation of Insolvency Professionals

As early as in 9th month of Code's implementation, an NCLT-appointed IRP was surrounded by around 200 angry workers of the CD who were not paid wages for the last 18 months. He himself stated that the workers considered him the new owner of the company and thought that he will have the solution to all of their problems. The IRP tried to calm the workers down and clarify that he has been appointed by the Court (Dave &Mahanta, 2017, News section) .

Insolvency professionals are that part of insolvency machinery on which it actually runs. But if these professionals will be intimidated, threatened, abused and even abducted to ensure recovery of the dues when this itself is professional's top priority, how can they perform their jobs peacefully. Facing angry staff members and answering never-ending questions and doubts, though have become their daily routine, yet is just the tip of the iceberg.

In March, 2018, the resolution professional of Bhushan Steel approached NCLT with a complaint that the CD's staff members are not cooperating and giving access to necessary documents and records (Financial Express, 2018).

Matters took a dangerous and scary turn when RP in a CIRP was abducted by a group of investors, dying to know when the corporate debtor will pay their money back. The RP was kept in a bungalow for 24 hours but was not harmed. The abduction, obviously made his family anxious who keep pestering him to leave the assignment. However, it only made him more determined and dedicated and now he is always accompanied by an armed bodyguard(Shrivastava, 2018).

The abduction shocked the entire nation as hardly anyone could have expected things to take such an ugly turn. Since the incident, the IPs have been having second thoughts about their career choices. The near and dear ones keep on convincing them to change professions. After all, who wants a constant threat over one's life and family.

Even though the abduction incident has been a one-time incident till date, still it alerted the authorities of the dangers attached to the professions. Reacting actively on the incident, the concerned authorities undertook measures on their part to protect the precious insolvency professionals.

8.2 Measures Taken to Prevent the Victimisation of Insolvency Professionals

Victimisation of IPs is a grave problem for the economy. Insolvency and Bankruptcy Code cannot be implemented without these professionals. The expectations of the Government from the Code would remain a dream if these professionals are treated in a disrespectful, degrading, threatening and dangerous manner.

After the abduction incident, NCLT have directed Police authorities to provide protection to IPs in 20 different cases. In fact, on various occasions when the corporate debtor's personnel refused to provide the necessary cooperation,IP approaches the AA for police protection which is provided by it along with an order for required cooperation**.**

In *The Central Bank of India and the State Bank of India v. M/s Ashok Magnetics Ltd., 2017 SCC OnLine NCLT 15256*,the AA ordered the relevant police authorities to provide the required assistance to the IRP to take the charge of the assets as the professional received stout resistance from the corporate debtor.

In case of *Sunrise 14 A/S, Denmark v. Muskaan Power Infrastructure Ltd., 2017 (10) TMI 1406*,the AA issued bailable warrants against two of the respondents who were not cooperating with the RP and not handing over the original records of the company.

Likewise, in case of *Punjab National Bank v. Divyajyoti Sponge Iron Pvt. Ltd., 2017 (12) TMI 1651*, the AA ordered the appropriate police authorities to provide the necessary assistance to the RP to visit the corporate debtor's premises so that he can carry out his statutory duties.

In *Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan (P) Ltd., 2017 SCC OnLine NCLT 13223*, the IRP of the respondent CD sought protection for all the acts done by him in good faith and from frivolous allegations and FIRs. The AA stated that if there is a complaint against the IP, it should be filed with the Board which shall constitute a Disciplinary Committee and have it investigated by an Investigating Authority. If the allegations are found to be true, the Board shall file a complaint against the professional.

In January, 2019, the NCLT held that creating hindrances in an IP's work will amount to contempt of court as the professional acts as a Court officer. The order was passed in case of CIRP of Shivam Water Treaters. The complaint was filed by the RP Hema Shah when the actions of company's former director prevented her from performing her duties (Das, 2019, News section).

In a nutshell, the AA have been proactive in providing the necessary assistance to the IPs through police protection. But, is it enough to carry out the statutory duties under the Code? Is it enough to just provide the police protection and take no action against people who refuse to cooperate with the professionals or go on to intimidate and threaten them?

9. Recommendations

Insolvency professionalfor the insolvency and bankruptcy regime is what oxygen is to human body. Even though they are often termed as the nervous system, but until and unless an insolvency professional is appointed to carry out the insolvency and bankruptcy processes, the provisions under the Code are mere words. Not even a single function can be performed without insolvency professional's help.

But, the incidents of harassment by and victimisation of, insolvency professionals, since the enforcement of the Code is a ticking-clock.

Therefore, the institution of insolvency professional requires utmost support and initiative from all the corners for its promotion and development.

Following are some of the recommendations which could help in improving the condition of the profession in the country.

Insolvency and Bankruptcy Board of India

IBBI being the nodal agency under the new insolvency regime needs to be the most proactive body when it comes to encouraging and developing the profession. No doubt since the beginning, the Board has played its part by formulating numerous rules and regulations, issuing circulars and notifications, punishing IPs for their misconduct. But being the regulator and supervisor of the institution of insolvency professionals, it needs to be vigilant with regard to the assignments being carried out by insolvency professionals. IPs should be directed to submit periodic reports of their assignments. The stakeholders of a CIRP should be approached to seek opinions on the working of IP. Even though there is a higher possibility of false information being furnished, the Board will be better equipped with both sides of the story. And ultimately, the act of furnishing false information can always be penalised. Any lapse on the part of IPs should be reprimanded and penalised by suspending or cancelling registration. It will be safe to say that assurance of a high standard of performance from insolvency professionals requires following the deterrence theory when it comes to penalising them.

At the same time, any act from stakeholders' side which interferes with the working of the IP should be highly reprimanded. Corporate debtors indulging in wrongful practices leading to harassment of IPs should be subjected to compulsory liquidation. Creditors intimidating and abusing the IPs should be brought down in the waterfall mechanism.In a nutshell, the Board should come down heavily upon the stakeholders obstructing the work of IPs as the rationale of their profession is to help out the persons in distress.

Adjudicating Authorities

National Company Law Tribunal and National Company Law Appellate Tribunal, being the Adjudicating Authorities in the insolvency resolution process of corporate debtors have an important responsibility on their shoulders to ensure that all the parties are treated with dignity and fairness. Neither the IPs are subjected to harassment at the hands of the stakeholders, nor the stakeholders at the hands of IPs. Any complaint regarding harassment from either side should be heard and decided on an urgent basis. While hearing a matter of corporate insolvency, the Tribunals should call for a report regarding any incident of negligence, misconduct, wrongful act or harassment from all the parties, with adequate evidence, as a matter of procedure. Since complaints regarding harassment can be filed before the Tribunals, they can play a major role in promoting and developing the profession.

Insolvency Professional Agencies

Insolvency Professional Agencies, acting as an intermediary between the Board and IPs, has to be proactive with regard to the performance of its insolvency professionals. A close eye should be kept on the working of all the IPs. Filing of necessary information should be considered a priority. Strict action should be taken against any negligence, wrongful act or professional misconduct. The agencies should suspend or cancel the registration of repeat offenders. They should be ordered to undergo proper training for the failure to perform their duties. Simultaneously, they should be educated about the dangers associated with the profession in the light of incidents of intimidation, threats and abduction. They should be given adequate training regarding how to handle agitated and demanding stakeholders and their questions.

Insolvency Professionals

Insolvency Professionals themselves need to take their role and responsibilities seriously. Until and unless they are dedicated and devoted to their profession, any other effort would go in vain. They should perform all of the tasks with utmost degree of professionalism to leave no chance for any disappointment or complaints. Highest levels of performance should be showcased at all times. Professionals should be skills and experienced enough to tackle with difficult situations like agitated staff, never-ending doubts and queries etc. But at the same time, they need to be vigilant enough to report any and every kind of harassment. They should not allow any party to interfere with their work. Otherwise, adequate actions should be taken.

Other recommendations

After the abduction incident, insurance companies have started preparing insurance policies for insolvency professionals, providing for kidnap, ransom, personal accident and psychiatric help, apart from professional indemnity. The IP, Devendra Jain himself said that he would like to buy an insurance cover for his life, health and litigation expenses. JLT Independent Insurance Brokers, which has now been acquired by Marsh India started providing such cover, ranging from $2mn to $30mn. It is great welcome step in the light of the fact that the Code is still in its early stages (Sinha, 2018, Wealth section).

10. Judicial Approach towards Insolvency and Bankruptcy Code, 2016

Since the implementation of the Code, the Supreme Court has been highly proactive in interpreting and clarifying various provisions of the Code.

The constitutional validity of the Code was upheld in *Swiss Ribbons Private Limited &Anr. v. Union of India &Ors., (2019) 4 SCC 17*.The constitutional validity was challenged on several grounds, most important being the differential treatment offinancial and operation creditors, violating Article 14 of the Indian Constitution. The Supreme Court Bench held that there exists an intelligible differentia between financial and operational creditors. Financial creditors generally provide financial help in the form of term loan or working capital finance. They are the ones who from the very beginning assess the viability as well as the profitability of the business. In case of financial debts, repayment schedule, security requirement, contractual terms, remedy in case of defaults are quite different. These debts are documented properly and default of the same is easily verifiable. Operational debts are related to the supply of goods and services which do not involve a detailed study of business' viability and profitability. Also, operational debts as well as operational debtors are small in number. Thus, differential treatment of the creditors is justified and does not violate Article 14. Also, not giving the voting power to operational creditors in CoCis not discriminatory on the grounds that the Code's objective is not just to protect a specific class of creditors, but all kinds of creditors. They do not help in infusing capital in the economy as compared to the financial debts owed to the banks and FIs. Further, resolution applicants, the Court held, have no vested right to be considered in the resolution process. Also, a company's erstwhile promoter has no vested right to claim its immovable and movable properties. With regard to resolution applicants, the Court held that the ineligibility of the person who was unable to service his/her debts beyond the grace period is a policy matter decided by RBI. For the ground of Code's inapplicability to MSMEs, the Court held that the resolution applicants may not be forthcoming to revive an MSME, ultimately leading to its liquidation.

In the highly publicised insolvency resolution of Essar Steel India Ltd., Arcelormittal India Pvt. Ltd. as well as Numetal Ltd. submitted their Expression of Interest (EOI) to submit Resolution Plans. However, both the applicants were found ineligible under Section 29-A by the Resolution Professional. The Supreme Court, in the appeal filed by Arcelormittal interpreted and clarified Section 29-A. The Court held that ineligibility under the provision is to be checked on the date of submission of Resolution Plan and not its acceptance. The Court, providing for a purposive interpretation stated that the corporate veil needs to be lifted especially in the circumstances where a corporate vehicle is set up just for the purpose of submission of a resolution plan, which was the case with Numetal Ltd.*(Arcelormittal India Private Limited v. Satish Kumar Gupta &Ors., (2019) 2 SCC 1).*

In *K. Sashidhar v. Indian Overseas Bank &Ors., (2019) 12 SCC 150*, the Supreme Court clarified the powers of the Committee of Creditors with regard to acceptance or rejection of a resolution plan. The Court stated that the amendment in the required voting percentage for the approval or rejection of a resolution plan from 75% to 66% is mandatory and prospective which will not affect the decision already taken by the CoC. The commercial wisdom of the CoCapplied in the approval or rejection of a resolution plan was discussed at length and was held to be outside the purview of judicial review by NCLT. Also, NCLT's powers with regard to the approval of a resolution plan are limited to its satisfaction that the requirements of Section 30(2) have been met.

Through the IBC (Second Amendment) Act, 2016, Section 238A was added which states that the provisions of the Limitation Act, 1963, as far as may be, shall apply to the proceedings or appeals before AA under the Code. After this, several appeals were filed before the Supreme Court as to whether the provisions of the Limitation Act, 1963 would apply to application under Section 7 and 9, for the time period since the beginning of the Code till the Second Amendment. The Court held that the Limitation Act is applicable to both Section 7 and 9 application since the inception of the Code and thus Article 137 of the Act gets attracted. The right to sue, thus, accrues on the occurrence of a default. If the default has occurred 3 years prior to the date of application, it is time-barred except in cases where the facts allow the application of Section 5 of Limitation Act, 1963 for condonation of delay*(B. K. Educational Services Private Limited v. Parag Gupta& Associates, (2019) 11 SCC 633).*

The Supreme Court has endeavoured to do its best alongside NCLT and NCLAT to interpretthe provisions of the Code.

11. Conclusion

The fact that IPs are the indispensableintermediary in the insolvency and bankruptcy framework of any country cannot be stressed enough. A detailed study of the IBC, 2016 makes it crystal clear that not even a single task under it can be performed without the help of these professionals. Whatever be the objective of enacting an insolvency and bankruptcy law, whether for corporates or individuals or limited liability partnerships or any other form of organisation, it cannot be realised except with the help from insolvency professionals.

Thus, the profession of IPs requiresutmost amount of attention, care and initiatives for its growth and development. More and more people should be made aware and rather educated about the profession. The IBBI as well as IPAs should publicise the profession as much as possible.

Moreover, the pace at which geographical boundaries are turning into imaginary lines, competition is increasing every day, ideas are turning obsolete, business environment is changing at an unprecedented rate, the need for these professionals is only bound to grow at an exponential rate.

But with an incident of abduction of an IP, the profession is facing some serious threats and dangers from angry and ever-demanding stakeholders. In today's time of rising prices and earning money not being a cake walk, the creditors are worried all the time that whether they will be able to recover their dues or not. But, in no way, does it give them a right to threaten IPs who act as Court officers in the processes undertaken for the betterment of the stakeholders.

In the coming years, one will have to look out for the direction this profession will take in the wake of the global pandemic of COVID-19 when countries have been in shut down for months and creditors are more than anxious for the recovery of their dues. And to top it off, the suspension of the Code's application through a President promulgated Ordinance for a period up to one year will make matters worse.

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