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CIRP: More of Liquidation and Less of Resolution

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ABSTRACT

The Insolvency and Bankruptcy Code 2016 has been enacted to ensure healthy credit flow and generation of new capital assets and a procedure known as Corporate Insolvency Resolution Process (CIRP) has been introduced to collect the defaulted loans from the corporate debtors. However the main aim of IBC and the whole process of CIRP being resolution, it is ending in liquidation in most of the cases when it comes to reality. So this article explains what is CIRP process and how it works and statistics showing that liquidation is happening in reality in most of the times than resolution which is the key background for enacting IBC and mainly focuses on the reasons behind failure of resolution process and explained key judicial pronouncements, recommendations and suggestions by various experts to overcome this problem of high liquidation – low resolution. So By identifying all the reasons behind failure of resolution process and by considering all the recommendations and suggestions mentioned in this article, adjudicating authorities and insolvency professionals must try to resolve the cases by way of resolution which is the main aim of CIRP procedure in IBC.

Keywords: IBC CODE, CIRP Process, Resolution, Liquidation, Failure of resolution, Reasons, suggestions.

Credit flow and Issuance of new capital are beneficial for developing country like India, as a result, 'IBC' has been enacted. As we know, when company or business turns insolvent it possibly defaults the loans which struck the credit flow; therefore, banks or creditors must try to recover the loans as early as possible from the defaulter. To be precise this process where corporate debtor or a company defaults the loan payment can be termed as insolvency. This process of collecting defaulted loans is prescribed as Corporate Insolvency Resolution Process (CIRP). According to the Insolvency and bankruptcy code, 2016 this Corporate Insolvency Resolution Process has been discussed under section 6 and as per the code Corporate Insolvency Resolution Process can be initiated either by creditor or a corporate debtor himself to recover the defaulted amount. To initiate this process, the defaulted amount must be 1crore or more than that. To embark on, this procedure has multiple steps to follow. Firstly, stipulating adjudicatory

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authority of IBC must be approached for filing an application. The decision either to accept or reject the application should be taken in 14 days by the adjudicating authority and, if rejected, reasons has to be provided for that. The Corporate Insolvency Resolution Process begins once the application has been admitted. The whole process of this Corporate Insolvency Resolution process has to be concluded within 330 days as per the code. In spite of that, the time period can be extended in rare cases. After admission of application, interim resolution professional will be appointed to take control of debtor's assets and also to provide information regarding debtor's assets with the help of Information Utilities and in the end to form the committee of creditors (COC). Since Committee of Creditors consists of all financial creditors, whose interest is at stake, the decision taken by this COC will play a vital role as it is the decision making authority regarding whether a company is viable enough to get a new start or should be gone into liquidation. A Resolution professional(RP) will be appointed to handle the entire corporate resolution process(CIRP).The aftereffect of this whole Corporate Insolvency Resolution Process is either restructuring of company through handing over company to new owners and by mergers and other methods or selling and liquidating assets in a time bound manner, which is nothing but either Resolution or Liquidation. According to the objectives of IBC, which is to maintain proper credit flow, Resolution is the main aim which ensures the on-going concern of the company unlike liquidation which is selling off company's assets to repay creditors and dissolving a company. A Resolution plan will be designed by interim resolution professional which will be submitted to committee of creditors. If COC satisfies with the plan that it ensures smooth running of company, they approve it with 66% of votes. After getting approval from committee of creditors, an application will be filed by resolution professional (RP) before adjudicating authority to accept the plan. If National Company Law Tribunal (NCLT) approves the plan, it becomes legally binding on corporate debtor, Otherwise it will result into liquidation. The liquidation process can be put into effect at prior stage itself that is, when committee of creditors (COC) rejected the resolution plan.

As per the statistical data since the day of IBC implementation total 3,774 cases are filed and 1,604 cases which can come up to 43% are only solved in form of resolution or liquidation, which means the rest 57% are left unsolved and are still continuing after the maximum time limit of 330 days. Besides the result of 1,604 cases only 14% ended in resolution and the remaining 57% solved in way of liquidation. The emphasis of this article is understanding the reasons for less chance of resolution and more of liquidation. .It is evident that liquidation is more than resolution under the Corporate Insolvency Resolution process.

After detailed analysis of this situation exhibits that Haircuts, delay in entire resolution process

and reduction in buying capacity of companies were the main reasons for the companies which are going into liquidation. Time period is the key feature in Insolvency proceedings which should ensure that viability of the business or the value of the assets does not deteriorate further when it comes to the end of insolvency proceedings. At first, there was a 180- day time limit for the whole resolution process to get completed with an extension of 90- day period in rare cases. IBC code was further amended to prescribe a deadline of 330 days for completion of resolution process and even more than that in exceptional cases which is almost a year due to which the average number of days which will be taken to resolve the case has been increased expeditiously over the last five years according to experts report. But on the other hand, according to some other group of experts, the maximum period of 330 days deadline is also raising pressure on adjudicating authorities to end the case by simply preferring liquidation than opting for a resolution plan to regain the company into normal position which is time consuming procedure. Delay in the entire resolution process can also be a reason for not choosing resolution when compared with liquidation. So the time period prescribed in the code has been a problematic issue since the enactment of code. The next considerable drawback of resolution process is 'HAIRCUTS' that is, losses occurred to creditors on resolving bad debts or stressed assets in resolution process which precisely means the amount which has to be sacrificed by the creditors to get the whole defaulted amount in resolution process. When a resolution plan is drafted to get back the company into normal position, some portion of defaulted amount may not be considered normally to settle the company issues between defaulters and creditors by forming an amicable plan as a result of which creditors will be ready to sacrifice a portion of amount on lieu of getting solved of whole dispute rather than cancelling the whole plan which doesn't bring anything to them which generally referred as haircuts. .But according to survey reports, creditors has to bear an nearly 80% of haircut in more than 70% of cases over the past five years of IBC which is acting as yardstick for the creditors to come forward for solving the cases by way of resolution. In conclusion, Haircut has been a pitfall for resolution process. Subsequent to this, pandemic affected buying capacity of companies drastically that are participating in the resolution process which decreased the bid amount of companies during resolution much lesser than liquidation value so creditors choose latter one. In addition, the lack of inherent value of stressed assets, that is, when assets are not performing, they will become non-performing assets and if those assets are not recoverable, they become bad loans and before this period of 90 days, they can be called as stressed assets which can be one of the reasons behind opting for liquidation. These were the main reasons for the defaulting companies resulting into liquidation than resolution.

On considering all these, courts through various judicial pronouncements and through proposed amendments to IBC, laid emphasis to resolution and it made clear that wherever there is a chance to resolution, it should be opted and only when there is no possibility for resolution, liquidation should be chose and it also mentioned suggestions regarding how lacunas can be filled while opting for resolution. In the case of Bank of Baroda and Anr. Vs Mbl Infrastructures Limited, Supreme court observed that one must always remember the ultimate object of the code, which is to put the corporate debtor back on the rails while dealing with corporate insolvency resolution process(CIRP), which stressed on one should always try for resolution in case of insolvency proceedings which is main aim of code and in another remarkable case of CFM Asset Reconstruction Private Limited v .S.S. Natural Resources Private Limited and Another, NCLT held that a corporate debtor cannot be sent into liquidation just because liquidation value is more than the resolution plan. Further it expanded that “liquidation value being more than the enterprise value cannot be a ground for sustaining the application, nor is it in line with the objects of the IBC. The IBC is not about maximising value at all costs if it means death of corporate debtor”. And it made clear that “Liquidation should be the last resort, when everything else has been attempted and failed and the whole idea of the IBC is to put the corporate debtor back on its feet for the larger benefit of all the stakeholders and not just the creditors. And again with the noteworthy observations in the case of Maharashtra seamless steel Ltd. V. Padmanabhan Venkatesh &Ors., Supreme court upheld the primacy of ‘Commercial Wisdom’ of the committee of creditors and held that the approved resolution plan can provide for payment of amounts lower than the liquidation value of the corporate debtor and the same can be accepted by the creditors based on their commercial wisdom if it complies with the provisions of the code and it make explicit that maximisation of value of assets of the corporate debtors so as to run them efficiently as going concerns is an important objective of IBC and when committee of creditors exercised their commercial wisdom to arrive at business decisions, they must take into account the key feature of IBC. So all these landmark judgements by NCLT and Supreme court gave importance to resolution and made clear that if all the possible means of resolution has been closed, liquidation should be opted. The experts are also made some recommendations, suggestions and some amendments has also been made to IBC code to tackle this issue of why liquidation is happening most of the times in reality than of resolution. Before Amendment, Regulation 36-Aof CIRP explains about Invitation for Expression of Interest (EOI) which contains basic information about corporate debtor and criteria for prospective resolution which may be required for prospective resolution applicant. But there is no stipulation regarding how many times this can be amended which causes delay in resolution

process and 36-B contains section regarding request for resolution plans and revision or modification of such request. But it also doesn't mention the cap on how many times such modifications or revision can be made which again resulting into delay. As a result, clause (4-A) to Regulation 36-A and a proviso to Regulation 36- B (5) were inserted which mandates that such modifications or revision should not be made more than once.

Experts also made some recommendations such as to address the issue of delay, NCLT should not take more than 30 days to admit or to transfer control of the company to resolution process when an insolvency application has been filed and considering more than 50% vacancy in tribunal, experts opined that Recruitment will help in tackling the delays. They also suggested Pre-package insolvency will also help to reduce caseloads because Debtor continues to be in managing the company operations in pre -packaged insolvency unlike CIRP. Then coming to issue of haircuts, Insolvency and Bankruptcy Board of India (IBBI) suggested that "Haircuts should not be viewed as difference between creditor's claims and actual amount realised but rather it should be seen as the difference between what the company brings along when it enters procedure of IBC and the actual value realised".

In conclusion, based on the above statistics it is proved that liquidation is more evident in most of the cases than resolution which is the main objective of IBC. By considering above recommendations and suggestions given by judicial authorities and various experts, Adjudicating authorities and insolvency professionals should try to solve the cases based on resolution wherever possible which is the main and key objective of IBC.

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