Page 1238 - 1253 **DOI:** *https://doij.org/10.10000/IJLMH.111461*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

Comparative Analysis of Key Provisions of Corporate Insolvency Resolution Process and Pre-Packaged Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016

KUSHAGRA GAHOI[1] AND AKASH KRISHNAN[2]

ABSTRACT

COVID-19 pandemic has impacted businesses, financial markets, and economies all over the world, including India, and has affected the business operations of micro, small and medium enterprises and exposed them to financial distress. The Government has taken several measures to mitigate the distress used by the pandemic including increasing the minimum amount of default for initiating insolvency resolution process to Rupees One Crore, and suspending filing of applications for initiation of corporate insolvency resolution process in respect of the defaults arising during the period of one year, beginning from March 25, 2020 which has ended on March 24, 2021.

The Government of India has recently amended the IBC (through ordinance dated April 4, 20213) and has introduced a new mechanism for insolvency resolution specially for entities classified as MSMEs by insertion of new Chapter IA in the IBC which deals with Pre-Packaged Insolvency Process'.

Corporate insolvency resolution process ("CIRP") for insolvency resolution of corporate persons being companies and limited liability partnerships are governed under Chapter II of Part I of the Insolvency and Bankruptcy Code, 2016 ("IBC") and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"). Pre-packaged insolvency resolution process ("PPIRP") for micro, small and medium enterprises ("MSMEs") regulated under the Micro, Small and Medium Enterprises Development Act, 2006, are governed under Chapter IIIA of Part I of the IBC and the Insolvency and Bankruptcy Board of India (Pre – Packaged Insolvency Resolution Process) Regulations, 2021 ("Pre – Pack Regulations"). A brief comparative analysis of key provisions of CIRP and PPIRP as envisaged under the IBC and the relevant regulations introduced by the Insolvency and

[1] Author is a student at ICFAI Law School, Hyderabad, India.
[2] Author is a student at ICFAI Law School, Hyderabad, India.

 [ISSN 2581-5369]

Bankruptcy Board of India ("IBBI").

Keywords: *CIRP, IBBI, IBC, Pre-Packaged Insolvency.*

I. INTRODUCTION

Though PPIP at present is only applicable to MSMEs, it is imperative to understand the significant differences in the CRP and PPIP under IBC and the key differences thereof. In case of PPIP, the resolution plan is discussed and agreed between the parties prior to approaching the competent authority for final approval instead of formal bidding process under CIRP. The corporate debtor has the power to initiate proceedings under PPIP once the debtor and creditors informally agree on a resolution plan, whereas under CIRP the financial creditors, operational creditors have the right to initiate proceedings along with the corporate debtor.[3] Under PPIP the resolution plans provide for a shorter timeline for disposal of proceedings within maximum period of 120 days as opposed to the threshold of 270 days under CIRP which often gets delayed.

Management and affairs of the corporate debtor rests with the existing management in case of PPIP and the insolvency professional takes control of the debtor as a representative of the financial institutions in case of CIRP. (e) Cost effective: PPIP would prove to be cost effective owing to the reduced timelines in the entire process vis-à-vis the CIRP which involves many parties and runs for a longer duration, PPIP provides a hybrid framework which consists of informal agreement on the resolution plan which is later approved by the competent authority thereby providing adequate safeguards to the parties involved. It is imperative to note that the resolution plan is required to be revised and deliberated upon by parties, in the event the competent authority rejects the initial version of the resolution plan submitted by the insolvency resolution professional.[4]

A brief comparative analysis of key provisions of CIRP and PPIRP as envisaged under the IBC and the relevant regulations introduced by the Insolvency and Bankruptcy Board of India ("IBBI") is set out below.

II. WHO CAN INITIATE SUCH INSOLVENCY RESOLUTION PROCESS?

CIRP may be initiated by:

[3] Icsi.edu. 2021. e-focus ICSI-WIRC e-Newsletter April - 2021. [online] Available at: <https://www.icsi.edu/media/filer_public/e_focus_April_2021.pdf> [Accessed 18 July 2021].

[4] Laws, I., 2021. IBBI (Insolvency Resolution Process for Corporate Persons) (CIRP) Regulations, 2016. [online] IBC Laws. Available at: <https://ibclaw.in/ibbi-cirp-regulations/> [Accessed 18 July 2021].

 [ISSN 2581-5369]

a. For any financial creditor (as defined under Section 5(7) of IBC) upon the occurrence of any default as per Section 7 of IBC;
b. any operational creditor (as defined under Section 5(20) of IBC) upon serving a demand notice to the corporate debtor and if there is no existence of dispute, as per Section 8 and Section 9 of IBC; or
c. the corporate applicant (as defined under Section 5(4) of IBC) upon the occurrence of any default as per Section 10 of IBC.

commencement of CIRP, no approval(s) of any financial creditors are required to be obtained.

An application for initiation of PPIRP may be made in respect of a corporate debtor classified as an MSME (as defined under sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006) subject to the fulfilment of inter-alia the following conditions:

(i) such corporate debtor should not have undergone a PPIRP or CIRP in the 3 years preceding the date of application;
(ii) such corporate debtor should not be undergoing a CIRP;
(iii) no pending liquidation order should have been passed against corporate debtor;
(iv) such corporate debtor is eligible to submit a resolution plan under Section 29A;
(v) financial creditors of the corporate debtor, not being its related parties, representing not less than 66% in value of the financial debt due to such creditors have approved a resolution professional for conducting the PPIRP;
(vi) the majority of directors or partners of the corporate debtor have made a declaration (in Form P6 of the Pre – Pack Regulations) that the application for initiation of the PPIRP shall be filed in 90 days, that the PPIRP is not being initiated to defraud any person and setting out the name of the insolvency professional proposed;
(vii) members of the corporate debtor have passed a special resolution (i.e. by way of 75% majority vote) have approved the filing of application for initiation of PPIRP; and
(viii) the corporate debtor has sought approval of the financial creditors of the corporate debtor, not being its related parties, and have submitted the declaration by majority directors, the special resolution of its members and the base resolution plan prepared by corporate debtor, basis which such financial creditors would be required to approve the commencement of PPIRP by way of 66% majority vote

III. WHEN CAN SUCH INSOLVENCY PROCESS BE INITIATED?

The minimum threshold amount of default for initiating CIRP is INR 1,00,00,000/- as per the Notification No. S.O. 1205(E) dated March 24, 2020 passed by the Government of India.

The minimum threshold amount of default for initiating PPIRP is INR 10,00,000/- as per the Notification No. S.O. 1543(E) dated April 09, 2021 passed by the Government of India.

WHAT IS THE PROCESS OF SUBMISSION, NEGOTIATION AND APPROVAL OF RESOLUTION PLANS FOLLOWED IN SUCH INSOLVENCY RESOLUTION PROCESS?

In terms of section 25(2)(h) of IBC, the resolution professional ("RP") invites prospective resolution applicants who fulfil the criteria laid down with the approval of the committee of creditors ("COC"), to submit a resolution plan. For this purpose, the RP invites expression of interest from prospective resolution applicants who fulfil such criteria as may be laid down by RP with the approval of COC, having regard to the complexity and scale of operations of the business of corporate debtor. Basis the EOI received from the prospective resolution applicants, the RP shortlists the resolution applicants. Further, the RP (with the approval of COC) will issue the request for resolution plans ("RFRP") to such shortlisted resolution applicants basis which the shortlisted resolution applicants will submit resolution plans. It is the duty of the RP to confirm that the resolution plans are compliant with the mandatory requirements of resolution plans as set out under Section 30 of IBC and Regulation 38 of CIRP Regulations. The RP then presents such compliant resolution plans to COC for their consideration. The COC then negotiates with the resolution applicants of such compliant resolution plans and approves a resolution plan which is then submitted by RP for approval of the Hon'ble National Company Law Tribunal ("NCLT").

It is pertinent to note that as per Section 240A of IBC, the provisions of clauses (c) and (h) of Section 29A shall not apply to the resolution applicant in respect of CIRP or PPIRP of any MSME. Therefore, if the promoter of the corporate debtor remains solvent, is not categorized as wilful defaulter, has not been convicted for any offence punishable with imprisonment, is not disqualified to act as a director under Companies Act, 2013, is not prohibited by Securities and Exchange Board of India to access securities market and/or has not engaged in any preferential or undervalued or fraudulent transactions under IBC, such promoter of the corporate debtor (being MSME) can be a resolution applicant in CIRP/PPIRP of the corporate debtor.

In PPIRP, the corporate debtor prepares the base resolution plan ("Base Resolution Plan"), which should be prepared in accordance with Section 54K of IBC. The Base Resolution Plan

should be prepared prior to commencement of PPIRP and shall be presented to the financial creditors (who are not related parties) for their approval by way of 66% majority vote prior to commencement of PPIRP. Such resolution plans which are presented to COC should be compliant with the mandatory requirements of resolution plans as set out under Section 30 of IBC and Regulation 45 of Pre-Pack Regulations.

Upon constitution of the COC, the Base Resolution Plan is presented to the COC and the COC may provide an opportunity to corporate debtor to revise upwards the Base Resolution Plan.[5] The COC may approve the Base Resolution Plan for submission to the NCLT if it does not impair any claims owed by the corporate debtor to the operational creditors i.e. it makes payments of all claimed amounts as per the updated list of claims maintained by RP. Where the resolution plan submitted by the corporate debtor provides for impairment of any claims owed by the corporate debtor, the COC may require the promoters of the corporate debtor to dilute their shareholding or voting or control rights in the corporate debtor, prior to approval of such resolution plan and in the event, the COC proceeds with approval of such resolution plan which does not provide for such dilution of shareholding/voting rights in case it provides for impairment of any claims owed by the corporate debtor, the COC shall record reasons for its approval.[6]

If the COC does not approve the Base Resolution Plan or the Base Resolution Plan impairs any claims of operational creditors, the RP will invite resolution plans from prospective resolution applicants who fulfil such criteria as may be laid down by RP with the approval of COC, having regard to the complexity and scale of operations of the business of the corporate debtor.

The RP (with the approval of COC) will issue the RFRP under which the basis of evaluation of resolution plans shall be disclosed along with: (a) the number/percentage basis which a resolution plan shall be determined to be 'significantly better' than another resolution plan; and (b) the 'tick size' of resolution plan i.e. the minimum improvement over another resolution plan in terms of score.

Among the resolution plans received in response to the RFRP, the resolution plan with the highest score ("H1 Resolution Plan") will be selected for competition with the Base Resolution Plan. If the H1 Resolution Plan is 'significantly better' than the Base Resolution Plan, it will

[5] Bavani, A. and Jayakumar, R., 2021. *Overview Of Pre-Packaged Insolvency Resolution Process – Part 2 - Insolvency/Bankruptcy/Re-structuring - India*. [online] Mondaq.com. <https://www.mondaq.com/india/insolvencybankruptcy/1065408/overview-of-pre-packaged-insolvency-resolution-process-part-2> [Accessed 18 July 2021].

[6] Agarwal, R. and Agarwal, P., 2021. *Pre-Packaged Insolvency for Micro, Small and Medium Enterprises*. [online] IBC Laws. Available at: <https://ibclaw.in/pre-packaged-insolvency-for-micro-small-and-medium-enterprises-by-ms-riya-agarwal-ms-priya-agarwal/> [Accessed 18 July 2021].

be considered by COC for approval. If no compliant resolution plans are received in response to RFRP, then Base Resolution Plan will be considered by COC for approval. In any other scenario other than the above, the scores will be notified by RP and during an overall time window of 48 hours, the submitter of the H1 Resolution Plan and the corporate debtor will each be provided with opportunity to improve their resolution plan by at least the 'tick size' and the process will be repeated till such time that either of them fail to improve their resolution plan by at least the 'tick size' and the resolution plan having the highest score on completion of such process will be considered by COC for approval.

It is pertinent to note that as per Section 240A of IBC, the provisions of clauses (c) and (h) of Section 29A shall not apply to the resolution applicant in respect of CIRP or PPIRP of any MSME. Therefore, if the promoter of the corporate debtor remains solvent, is not categorized as wilful defaulter, has not been convicted for any offence punishable with imprisonment, is not disqualified to act as a director under Companies Act, 2013, is not prohibited by Securities and Exchange Board of India to access securities market and/or has not engaged in any preferential or undervalued or fraudulent transactions under IBC, such promoter of the corporate debtor can be a resolution applicant in CIRP/PPIRP of the corporate debtor

IV. WHAT ARE THE TIMELINES FOR COMPLETION OF SUCH INSOLVENCY RESOLUTION PROCESS?

As per Section 12(1) of the IBC, CIRP is required to be completed within a period of 180 days from the date of admission of the application by the NCLT. The NCLT may grant a one-time extension of 90 days (upon such extension being approved by COC). The maximum time within which CIRP has to be mandatorily completed, including any extension or litigation period, is 330 days from the date of admission of the application by the NCLT.

As per Section 54D of IBC, the PPIRP shall be completed within a period of 120 days from the date of admission of the application by the NCLT. The RP shall submit a resolution plan approved by the COC to the NCLT within 90 days from the date of admission of the application. In an event where no resolution plan is approved by the COC within the above-mentioned time period, then the RP shall, on the day after the expiry of such time period, file an application with the NCLT for termination of the process.

V. MANAGEMENT OF AFFAIRS OF THE CORPORATE DEBTOR DURING SUCH INSOLVENCY RESOLUTION PROCESS

The RP shall be responsible for the management of affairs of the corporate debtor. All the

powers of the board of directors of the corporate debtor vests with the RP and as per Section 17(1)(c) of IBC, the officers and managers of the corporate debtor shall report to the RP. During this period, the RP acts on the instructions of the COC. Hence, the COC and the RP are in management of the corporate debtor.

During the pendency of the PPIRP, unlike in the CIRP, the board of directors of the corporate debtor continue to be responsible for the management of affairs of the corporate debtor, and they have a responsibility to protect and preserve the value of the property of the corporate debtor and to maintain its status as a going concern. During this period, they shall be responsible for fulfilling all their roles and responsibilities (statutory or otherwise) in relation to the corporate debtor. The COC may pass directions/guidelines basis which the management of the corporate debtor may be continued by the corporate debtor and the COC may request for all information as may be required for the same from the corporate debtor. However, in case the affairs of the corporate debtor have been grossly mismanaged or conducted in a fraudulent manner, then as per Section 54J of IBC, pursuant to necessary orders of the NCLT, such management of the affairs of the corporate debtor may be vested with the RP.

VI. Requirement of preparation of list of claims and preliminary information memorandum

In CIRP, the RP shall collate and verify the claims received from various creditors and such updated list of claims is to be maintained by RP basis verification of claims received. Also, the information memorandum containing all information which is relevant for formulating a resolution plan is prepared by the RP.[7]

In PPIRP, the corporate debtor prepares the list of claims, along with details of the respective creditors, their security interests and guarantees, and submits the same to the RP. In PPIRP, the RP only confirms the list of claims and prepares the information memorandum based on the preliminary information memorandum received from the corporate debtor. As per Section 54G of IBC, if any person sustains any loss or damage as a consequence of omission of material information or inclusion of misleading information, then the promoter and the management of corporate debtor would be liable to pay compensation to such persons who have sustained any loss or damage which would not be applicable for CIRP. Further, such person may be liable for fine and imprisonment as per Section 77A of IBC, which would not be applicable for CIRP.

[7] 2021. *Understanding the IBC KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS*. [online] Available at: <https://www.ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> [Accessed 18 July 2021].

 [ISSN 2581-5369]

Thus, it becomes the responsibility and duty of the corporate debtor to submit correct details to the RP during PPIRP.

VII. PRIORITY/PREFERENCE IN CASE OF INITIATION OF CIRP AS WELL AS PPIRP

As per Section 11A of IBC, if any application for initiation of PPIRP is filed after 14 days from the date of filing the application for initiation of the CIRP, then the NCLT shall first dispose of the application for CIRP.

As Section 11A of IBC, if the application for PPIRP is filed within 14 days from the date of filing the application for initiation of CIRP or prior to the filing of the application for initiation of CIRP, then the NCLT shall first admit or reject the application for PPIRP filed under Section 54C of IBC before considering the application for commencement of CIRP. Therefore, in case where application for both PPIRP and CIRP is filed then preference is given to PPIRP. This is important considering that any financial creditor or operational creditor may file for commencement of CIRP immediately upon occurrence of any default. This provides an opportunity to the corporate debtor to resolve such insolvency through a PPIRP if the same is already being considered by the corporate debtor.

VIII. CONVERSION OF INSOLVENCY RESOLUTION PROCESS

Once the CIRP is initiated, then the same cannot be converted into PPIRP. As per Section 54A of IBC, for commencement of PPIRP, the corporate debtor must not be undergoing CIRP.

As per Section 54O of IBC, the COC may, at any time after the commencement of the PPIRP but before the approval of resolution plan, decide to initiate CIRP against the corporate debtor by a vote of 66% of its voting share. In case of such a decision by the COC, the RP may file an application for the same and pursuant to such an application, the NCLT may pass an order, terminating the PPIRP and commencing CIRP of the corporate debtor.

IX. KEY JUDICIAL PRONOUNCEMENTS

(A) Lalit Kumar Jain vs. Union of India & Ors.[8]

1. Legal Issue Involved

Challenge to constitutional vires of notification issued by Government of India bringing into force provisions of Part III of the IBC (i.e., insolvency resolution and bankruptcy process of personal guarantors) with respect to individuals who provided personal guarantees for the

[8] Insolvency & Bankruptcy Board of India v. Lalit Kumar Jain, (2020) 10 SCC 703 [Transfer Petition (c) No. 1034 of 2020 with Nos. 1027, 1029-30, 1035-36, 1142-44 and 1146-48 of 2020]

 [ISSN 2581-5369]

benefit of corporate debtors.

2. Supreme Court Judgement

The Supreme Court of India has put to rest a major controversy that had erupted last year with certain high-profile industrialists (who were also personal guarantors to various corporate debtors under personal guarantees) ("Petitioners") challenging that part of the Insolvency and Bankruptcy Code, 2016 ("IBC") which pertained to initiation of personal insolvency against personal guarantors when the corporate debtor for whose benefit such personal guarantee was given was under corporate insolvency resolution process. The brief facts are that certain industrialists, who had issued personal guarantees as security for the facilities granted to corporate entities in which they were interested as directors / promoters etc. challenged the constitutional vires of the notification and rules issued by the Ministry of Corporate Affairs ("MCA") and the regulations issued by Insolvency and Bankruptcy Board of India ("IBBI") which notified those provisions under the IBC which granted the lenders the option of initiating personal insolvency against the personal guarantors in cases where the company was already under corporate insolvency resolution process or liquidation process under the IBC. While these petitions were pending before the Delhi High Court and bunch of other petitions were filed in other High Courts on the same issue, IBBI moved an application before the Supreme Court of India ("SC") to transfer all these matters to SC, which application was allowed. Thus, all matters in this regard were folded up under a common petition before the SC.

During the course of arguments before the SC, the Petitioners restricted the challenge to the Notification, primarily on the following grounds:

1. The notification issued by MCA[9] suffered from excessive delegation insofar as it enforced Part III of the IBC only in relation to individuals who provided personal guarantees for the benefit of corporate debtors. They argued that such actions are arbitrary as there is no intelligible differentia / reasonable classification on the basis of which the individuals who provided personal guarantees for the benefit of corporate debtors have been singled out.
2. The notification issued by MCA did not bring into force section 243 of the IBC, which repeals the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. Therefore, it created 2 self-contradictory legal regimes viz. the 1909 and 1920 Act along with the regime under the IBC.

[9] Notification Dated 18th December 2018 - S.O. 6225 (E)

 [ISSN 2581-5369]

3. Sections 96 and 101 of the IBC (moratorium provisions) have the illogical consequence of staying insolvency proceedings against the Corporate Debtor when insolvency proceedings have been initiated against the personal guarantor.
4. Under Section 128 of the Indian Contract Act, 1872, liability of a guarantor is co-extensive that of the principal borrower. Conclusion of insolvency proceedings against a principal debtor amounts to extinction of all claims against the principal debtor. Therefore, no claim can be made on the guarantor after extinguishment of claim against the principal debtor.

While dismissing the entire batch of petitions, the Supreme Court has held as follows:

1. Section 2 (e) of the IBC was amended to split individuals into 3 categories and individuals providing personal guarantees for the benefit of corporate debtors were a distinct category. This was done with the idea of strengthening the corporate insolvency resolution process as it is only apt that the corporate insolvency resolution process or liquidation process of a corporate debtor and the insolvency proceedings against such personal guarantor(s) of the said corporate debtor be adjudicated by a single forum.
2. In view of the amendment to section 2 of the IBC, the MCA was within its power to notify part III of the IBC only with respect to individuals providing personal guarantees for the benefit of corporate debtors. Parliamentary intent was to treat personal guarantors differently from other categories of individuals.
3. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different fora, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee.
4. The non-obstante provision under Section 238 of the IBC gives it an overriding effect over other prevailing enactments. Section 243(2) saves pending proceedings under the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 to be undertaken in accordance with those enactments.
5. Section 243 has not been notified as of now but in the event Section 243 of IBC is notified and the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 would be repealed, then, the Notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other fora, and would bring them under the provisions of the IBC pertaining to insolvency and bankruptcy of personal guarantors.

 [ISSN 2581-5369]

6. As a consequence of the non obstante clause in Section 238 of IBC, if any proceeding were to be initiated against personal guarantors of corporate debtors who are under corporate insolvency resolution process, it would be under the IBC. Insofar as other individuals are concerned (who are not personal guarantors to corporate debtors) the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 continue to remain in force.
7. Approval of a resolution plan does not by itself discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. The release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety / guarantor of his or her liability, which arises out of an independent contract.

3. Analysis of Lalit Kumar Jain vs. Union of India & Ors.

This is a significant development as it gives the lenders the relief and freedom to proceed simultaneously against the personal guarantors as well as companies for recovery of their dues, thereby ensuring that the promoters being the personal guarantors have to deal with their own insolvency and not become an impediment / roadblock in the insolvency proceeding of the corporate debtor. The simultaneous proceeding will be useful to find a holistic and composite recovery for the lenders and resolution of the corporate debtor as the assets of the promoters would also be brought to the fold for the purposes of recovery of dues to the creditors and resolution for the corporate debtor. Hopefully, this will now force promoters in their capacity as personal guarantors to try and agree on a settlement with the lenders whether under the repayment plan or by way of a one-time settlement.

(B) Sirpur Paper Mills Limited Vs. I.K. Merchants Pvt. Ltd[10]

An application was filed in the High Court of Calcutta by Sirpur Paper Mills Limited ("Corporate Debtor or Award Debtor") for setting aside an arbitral award stating that the proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 ("A&C Act") has become infructuous by reason of the management of the Corporate Debtor being taken over by a new entity following the approval of a Resolution Plan by the National Company Law Tribunal ("NCLT") under the Insolvency and Bankruptcy Code, 2016 ("IBC").

1. Legal Issue

[10] Sirpur Paper Mills Limited Vs. I.K. Merchants Pvt. Ltd - A.P. 550 of 2008

 [ISSN 2581-5369]

Whether the claims of an arbitral award holder would be extinguished upon approval of a resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016 ("IBC") if such claims are not pressed during the Corporate Insolvency Resolution Process ("CIRP").

2. Judgement

The Hon'ble High Court of Calcutta, relying on the Supreme Court judgement of Board of *Control for Cricket in India vs. Kochi Cricket Private Limited & Ors*[11]. stated that there being no automatic stay, the arbitral award holder has a debt which is due and can file a claim under IBC. The Hon'ble Court further stated that as per Regulation 7 and Regulation 12 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") read with Form B of the schedule to the CIRP Regulations, provides specific procedural provisions for submission of claims. Thus, the arbitral award holder should have taken active steps under IBC instead of waiting for adjudication of application filed under Section 34 of the A&C Act.

The Hon'ble High Court of Calcutta clarified that an arbitral award-holder's claim would get extinguished and frustrated upon the approval of the resolution plan by the NCLT when such claim was not pressed during the CIRP and further held that a petition to set aside such an arbitral award under Section 34 of the A&C Act would be a complete waste of judicial time. While coming to this decision, the Hon'ble Court observed the 12 view of the Supreme Court as crystallized in Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta and Ghanshyam Mishra v Edelweiss Asset Reconstruction Company Limited is that pre-existing and undecided claims which have not featured in the collation of claims and consequent consideration by the resolution professional shall be treated as extinguished upon approval of the resolution plan under Section 31 of the IBC. This can be seen as a necessary and an inevitable fallout of the IBC to prevent a "hydra head popping up" and rendering uncertain the running of the business of a corporate debtor by a successful resolution applicant.

The Hon'ble Court further observed that in essence, an operational creditor, including an award holder, who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an award even where a challenge to the award is pending in a Civil Court. A challenge to maintainability of an action must be considered by the court before the substance of the dispute is adjudicated on merits.

The Hon'ble Court concluded that the pre-existing and undecided claims which have not featured in the collation of claims and consequent consideration by the Resolution Professional

[11] CIVIL APPEAL Nos.2879-2880 OF 2018 (Arising out of SLP (C) Nos.19545-19546 of 2016)

 [ISSN 2581-5369]

shall be treated as extinguished upon approval of the Resolution Plan under Section 31 of the IBC.

(C) Basavaraj Koujalagi & 82 others Vs Sumit Binani, liquidator of Gujarat NRE Coke Limited[12]

An application was filed by the workers/applicants of Dharwad unit of Gujarat NRE Coke Limited ("Company") primarily for recovery of their wages. The applicants stated that there was a viable agreement between Jeju Metals Private Limited ("JMPL") and the Company according to which JMPL processed its coal at the Coke plant of the Gujarat NRE at Dharwad ("Dharwad Plant") and that this agreement was self-sufficient to pay off their wages. It is the contention of the applicants that payments from JMPL were received on time and that the liquidator, for no good reason, gave notice of suspension of work.

The liquidator stated that JMPL itself was in financial distress and payment from them were not coming regularly. Accordingly, the liquidator terminated the agreement with JMPL and the Company. Further, even after issuing the notice of suspension of work, it was categorically informed to JMPL that if they intend to carry their production at Dharwad Plant, the terms of the processing agreement should be honored. JMPL on the other hand did not commence any production work nor paid any money in terms of the agreed contract.

1. Legal Issue/ Relief Sought

The workers prayed for the following reliefs:

a. To direct the liquidator to pay the dues of the workers and employees in a regular and timely manner;
b. To restrain the liquidator from taking any coercive action for closing down the operations of the Corporate Debtor's plant at Dharwad, Karnataka;
c. To restrain the liquidator by an order of injunction from terminating the agreement between the Corporate Debtor and JMPL; and
d. To appoint an independent agency to investigate the manner in which the respondent/Liquidator has been conducting his affairs as such Liquidator.

2. Judgement

The National Company Law Tribunal, Kolkata ("NCLT") firstly rejected the payer (c) and stated that the adjudicating authority cannot step into the shoes of the liquidator and examine the commercial viability of terminating a contract. The liquidator is responsible for the affairs

[12] IA No.865/KB/2020 in CP (IB) No.182/KB/2017

 [ISSN 2581-5369]

of the company in liquidation and if the decision is taken by him is in the best interests of the company, then the matter should be left at that. Further JMPL had all the resources and legal framework to challenge the termination of contract the fact that they can infer that JMPL was not aggrieved by such termination of contract.

With regards to prayer (a) the NCLT found that the wages of the workers were paid by the liquidator based on the wage sheet which was satisfactory owning to the fact that there was limited cash flow available with the Company.

While considering prayer (b) the NCLT found that the liquidator has taken every possible step to keep the Dharwad plant operational. Keeping in mind the objective of the IBC, one of which is to free up resources of unviable companies by permitting an easy exit, the NCLT held that unviable units such as the Company have to close down.

The NCLT also rejected prayer (d) stating that in the absence of any allegation of fraud or bias in the decisions of the liquidator, an order for inquiry cannot be made on the basis of perceived loss of employment of the workers on account of a business decision taken by the liquidator to terminate the arrangement with JMPL.

(D) Mr. Kapil Wadhwan, Promoter, DHFL vs The Administrator, Dhfl & Ors[13]

On November 20, 2019, Reserve Bank of India ("RBI"), in exercise of its powers under Section 45-IE of the RBI Act, 1934, superseded the Board of Directors of Diwan Housing Finance Limited ("DHFL") and appointed R Subramaniakumar as the Administrator of the DHFL. Thereafter, RBI filed an application for initiation of insolvency resolution process of DHFL under the UBC read with the IBBI (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 and the same was subsequently admitted by the Adjudicating Authority. Thereafter, the promoters of DHFL proposed a settlement proposal, ensuring the entire repayment of the principal amount due to all creditors of DHFL. However, the same was rejected by the Committee of Creditors ("COC") without considering the proposal on merits. Since the COC rejected the settlement proposal of the promoters twice, without considering the same, the promoters moved to Hon'ble National Company Law Tribunal, Mumbai bench ("NCLT") seeking consideration of their settlement proposal.

1. Legal Issues

The promoters of DHFL sought a direction from the NCLT for submitting the 2nd settlement

[13] IA 2431 of 2020 in CP (IB) 4258/MB/C-II/2019

proposal before the COC for its consideration.

2. Judgment

The NCLT in accordance with the provisions of Section 60 (5)(c) of the IBC and also by exercising the inherent powers under Rule 11 of NCLT Rules 2016 directed the promoters of DHFL to place the 2nd Settlement Proposal of Mr. Kapil Wadhawan before the COC for its consideration, decision and voting. While issuing this order, the NCLT relied upon decision in Swiss Ribbon V/s Union of India and held that if the Corporate Debtor proposes for settlement in the post admission stage before the constitution of COC the Adjudicating Authority may exercise its power conferred to the NCLT under rule 11 of the NCLT Rules. After constitution of the COC, an application can be entertained under the procedure of Section 12A of the IBC, wherein approval of 90% of the members of the COC is required to withdraw the application filed by the original applicant for initiation of insolvency proceedings.

Further, the NCLT held that if the 2nd settlement proposal of the promoters of DHFL is viable, feasible and acceptable after exercising commercial wisdom of the COC it would immensely benefit the members of COC and in turn would benefit the public depositors, fixed deposit holders, small investors etc. of DHFL. The NCLT further observed that the amount proposed by the promoters is higher than the amount proposed by the highest bidder and thus urged the COC to exercise its commercial wisdom and decide suitably in the interest at large.

With respect to contentions that the promoter is not eligible to submit a resolution plan because he is disqualified under Section 29A of IBC read with Regulation 30A of CIRP Regulations, the NCLT held that the promoter had submitted an offer/proposal for settlement akin to one time settlement and there is no express legal bar under the provision of IBC for a promoter for making a proposal for settlement.

The NCLT while being mindful of the fact that it cannot substitute its view of over the commercial wisdom that may be exercised by the COC, observed that the COC ought to have considered such settlement proposal of the applicant as per norms and its commercial wisdom and should not treat the settlement plan of the promoter of DHFL as a resolution plan.

X. POSITION OUTSIDE INDIA

While the concept of pre-packaged insolvency resolution has been recently introduced in India with a limited applicability to MSMEs, pre-packaged insolvency resolution process is immensely popular in other jurisdictions around the world.

Businesses in European countries such as UK and France have a larger inclination towards

informal resolution through mechanisms such as pre-packaged insolvency resolution. The laws in these jurisdictions also provide for a robust mechanism which ensures transparency and adequate disclosures in the entire process of pre-packaged sale, The Bankruptcy Code in the US provides for 3 types of pre packs consisting of pre-plan sales, pre-packaged bankruptcy proceedings and pre-arranged bankruptcy proceedings.[14] Singapore has recently proposed to introduce pre-packaged scheme for micro and small companies in view of the Covid-19 related challenges and disruptions.[15]

XI. CONCLUSION

India currently has approximately 6.3 Crore MSMEs and the number of registered MSMEs is constantly growing on a regular basis.[16] The introduction of PPSP would benefit many stakeholders as PPIP would require minimal disruption in business affairs, retention of management and control of affairs with the corporate debtor. Cost effectiveness and quicker resolution make PPIP a lucrative option as compared to other existing mechanisms available for insolvency resolution. It remains to be seen whether PPIP as an insolvency resolution mechanism gains popularity in India like in other jurisdictions and soon PPIP is also introduced to all corporate persons (other than MSMEs) or whether PPIP will get entangled in the challenges that India faces in terms of lack of adequate infrastructure and awareness amongst stakeholders

*****

[14] Report of the Sub-Committee of the Insolvency Law Committee on Pre-Packaged insolvency Resolution Process dated October 31, 2020

[15] Sso.agc.gov.sg. 2021. *Insolvency, Restructuring and Dissolution (Amendment) Bill - Singapore Statutes Online*. [online] Available at: <https://sso.agc.gov.sg/Bills-Supp/36-2020/Publsihed/20201005?DocDate=20201005> [Accessed 18 July 2021].

[16] India and India, M., 2021. *MSME Industry in India – Market Share, Reports, Growth & Scope | IBEF*. [online] Ibef.org. Available at: <https://www.ibef.org/industry/msme.aspx> [Accessed 18 July 2021].

 [ISSN 2581-5369]