



## **A tale of financial death & redemption of pandemic affected workmen in light of Indian Insolvency & Bankruptcy Code, 2016**

Parth Singhal

3<sup>rd</sup> year law student at School of Law, UPES Dehradun

### **Introduction**

Insolvency & Bankruptcy Code, 2016 [“**IBC**” or “**code**”] was implemented to provide a time bound process to determine insolvency among companies and individuals. The introduction of IBC has brought more authenticity and confidence amongst all stakeholders in India.<sup>1</sup> Now, just like any other legislation, the code faces test of time in order to prove itself on various facets. The regime of insolvency in India has shown characteristics such as that of a teen, in the sense of its frequent amendments. The birth & ever dynamic evolution of the insolvency regime in India is in accordance with the trial & error procedure w.r.t any economic legislation, as is also followed by legislature and judiciary.<sup>2</sup>

It is a settled proposition that IBC strives to prescribe a certain procedure & requirement for completion of insolvency proceeding in a time bound manner, but does not bind the Committee of Creditors (“**CoC**”) with the resolution plans which may or may not take consideration of any particular specifics of the corporate debtor.<sup>3</sup> The procedure in an ideal sense implies that CIRP will be completed in timely manner<sup>4</sup> and will help in reinstating the Corporate Debtor (“**CD**”)<sup>5</sup>, or else liquidate Corporate Debtor<sup>6</sup> but due to pandemic, these ideal conditions have deviated their path and the procedure stated under the code stands on a loose footing.

Therefore, in pursuit to ease up the pressure on the failing Indian economy & businesses, Finance Minister, Ms. Nirmala Sitaraman announced an ordinance<sup>7</sup> pursuant to which Section 10-A was inserted in the code which stated section 7, 9 & 10 of the IBC stand suspended with respect to defaults that arise after 25<sup>th</sup> March, 2020. This suspension was for a period of 6 months starting from 25<sup>th</sup> March and could also be extended for over a year but not more than that.<sup>8</sup>

This suspension along with retrospectively raising the overall default threshold limit enshrined under

<sup>1</sup>Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478

<sup>2</sup>Swiss Ribbons Private Limited v. Union of India, 2019 4 SCC 17; Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416

<sup>3</sup>*Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, (2005).

<sup>4</sup>*Preamble*, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India).

<sup>5</sup>*Id.*

<sup>6</sup>*Preamble*, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India).

<sup>7</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, No. 9, 2020 (India).

<sup>8</sup> § 10-A, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).



section 4 of the code from Rs. 1 lakh to Rs. 1 crore<sup>9</sup> could perhaps ensure that micro, small & medium enterprises (MSME) would utilize the calm period offered by the suspension to mitigate and reduce the financial damage to their business caused because of coronavirus pandemic. Another area which perhaps require greater attention is the workmen working in the industries who have been vehemently ignored by the Govt. especially considering the fact that a lot of State Govt. imposed suspension of basic labor laws such as minimum wages act, factories act, and Industrial dispute act for a period of 3 years.<sup>10</sup>

Given the fact that labor laws are facing their own battles, an important question which requires consideration is whether IBC could help the organized/unorganized workmen whose rights are easily overlooked? Workmen are also operational creditors since an operational debt is owed by the corporate debtor to them.<sup>11</sup> Now, there are some provisions in the IBC which give importance to interest of workmen as well but considering the fact that the NCLT & NCLAT are not courts of equity,<sup>12</sup> and how they cannot adjudicate upon the validity of the resolution plan which has been duly approved by the committee of creditors,<sup>13</sup> the pertinent point of consideration is whether provision of IBC are enough to save the workmen from exploitive conditions?

In this pretext, the author intends to explore the position of workmen which has been derived upon by the courts and the provisions of IBC to bring CIRP claims by the workmen against the CD in part II of the paper. Further, Part III will focus on how the workmen are a fundamental factor in keeping the CD as an ongoing concern which encompasses them with a leverage against the Committee of Creditors (CoC) especially given the fact that CD & CoC are also facing the situation of pandemic. Part IV of the paper will focus on the provisions enumerated in the IBC towards the benefit of workmen & where these provisions have failed. Part V lays down the importance of needing an efficient appeal mechanism for certain special classes' claimssuch as workmen. Part VI of the paper will focus on benefits of reverse CIRP pertaining to real estate sector in light of workmen. Finally, part VII of the paper encompasses the conclusion.

### **Workmen as operational creditors**

Section 5(21) of the IBC enumerates the definition of operational debt which covers claims in respect of provision of goods & services including employment or debt. Now, since workmen provide service by discharging their labor in return of a claim, the debt owed to the workmen will be classified as operational

---

<sup>9</sup>Ministry of Corporate Affairs Notification, dated Mar. 24, 2020, <https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>.

<sup>10</sup> UP (Temporary exemption from certain labor laws), ordinance 2020

<sup>11</sup> § 5 (21), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>12</sup> K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257

<sup>13</sup> K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257



debt.<sup>14</sup> Thus, when a corporate debtor defaults on payment of wages of workmen, then those workmen who are the operational creditors can file an application for CIRP against the corporate debtor under section 9 of the code.<sup>15</sup>

Now, although the IBC enables workmen to initiate corporate insolvency resolution process against the corporate debtor, but complying with the procedure envisioned under IBC seems difficult financially for the individual workman who seeks relief under section 9 of the code.<sup>16</sup> This problem becomes more relevant in the pretext of amendment to section 4 of the code which raised the default threshold limit from 1 lakh to 1 crore,<sup>17</sup> which basically disqualifies the individual workman to file claims u/s 9 of IBC since no worker will have a claim to the tune of 1 crore Rs.

### 1) Taking assistance from the Trade Unions

Since, it is very difficult for an individual workmen to file petition for insolvency against the corporate debtor for the reasons enumerated above, one plausible solution can be that a Trade Union which is duly registered under Trade Union Act, 1926<sup>18</sup> could represent the claims of workmen as one, allowing the desired accumulation of default in order to fall within the ambit of section 4 of IBC. This would also help in reducing/eliminating the financial encumbrance faced by an individual worker during the process of CIRP. Moreover, Trade Union Act explicitly states & recognizes that Trade Unions can pursue legal claims to which a member (worker) of Trade Union is a party to and which arises as a resultant because of relationship between the employee & employer.<sup>19</sup>

But, the problem arises in the Insolvency & bankruptcy code which enumerates that only a 'person' can file an application for CIRP against the corporate debtor. Now, Section 3(23) of IBC defines the term person which does not unambiguously cover the term trade union under the ambit of person who could then be further categorized as a type of creditor for purpose of CIRP. However, the definition also encompasses the phrase '*any other entity established under a statute*' which means that a Trade Union can also be covered under the ambit of person for the purpose of filing the CIRP application.<sup>20</sup>

Thus, on construing a purposive interpretation in accordance with the basic tenets of Interpretation of statutes, and on construing section 3(23) of the IBC, governed by the provisions of general statute<sup>21</sup>,

<sup>14</sup> § 5 (21), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>15</sup> *Id*

<sup>16</sup> J.K Jute Mill Mazdoor Morcha v. Juggilal Jute Mills Co. pvt. ltd., 11 SCC 332. (2019)

<sup>17</sup> Ministry of Corporate Affairs Notification, dated Mar. 24, 2020, <https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>.

<sup>18</sup> § 8, The Trade Unions Act, 1926, No. 16, Acts of Parliament, 1926 (India).

<sup>19</sup> § 15(c), The Trade Unions Act, 1926, No. 16, Acts of Parliament, 1926 (India).

<sup>20</sup> § 3 (23) (b-f), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>21</sup> *In general*, The Indian Trusts Act, 1882, No. 2, Acts of Parliament, 1882 (India); The Companies Act, 2013, No. 1,



which allows them to be recognized as those entities for purpose of regulation & as ‘person’ under IBC. Thus, on applying the rule of statutory interpretation, or *noscitur a sociis* a trade union which is registered under Trade union act should be classified as “any other entity established under a statute” and therefore, trade union falls under the ambit of person. Moreover, it is also clear that claims can be made jointly by the operational creditor while filing insolvency application against the CD.<sup>22</sup>

However, the problem that still remains is that unorganized labor would not be able to get help of IBC for repayment for their services considering the new amendments enacted under IBC due to pandemic. Even in pre-Covid era, the amendments would financially burden & in a way disqualify them indirectly in pursuing insolvency. Furthermore, given the fact that many states have removed the labor protection laws in order to attract foreign investments, even Trade Unions would find a hard time to protect the rights of labor.<sup>23</sup>

### **Workmen leverage over CoC**

One of the fundamental & paramount object of the IBC is to protect the CD’s company as an ongoing concern.<sup>24</sup> This is also evident from the fact that the Chapter II<sup>25</sup> of IBC which covers the aspect of CIRP did not even mention about the liquidation process which is consequently governed under chapter III of the IBC,<sup>26</sup> until amendment increased the min. level of monetary benefit that would be ensured by the Committee of Creditors to operational creditors in the resolution plan.<sup>27</sup>

Although, now since it is explicitly mentioned as Resolution professional’s duty that he has to ensure the feasibility of resolution plan in as much that when resolution applicant submits his plan to the CoC, then CoC has to assess the feasibility of the plan while keeping in consideration the operational debts like electricity bills,<sup>28</sup> as in the absence of these operational bills, CD cannot remain as a going concern.

But, the leverage that these workmen have over the committee of creditors is very tangible in nature in the way that if operations are suspended due to pandemic, & workmen went to their villages, then this leverage also disappears. Now, electricity/water bills can be forced out by the govt. but workmen do not have such kind of similar powers in this condition and are ultimately left at the mercy of employer.

---

Acts of Parliament, 2013 (India); The Partnership Act, 1932, No. 9, Acts of Parliament, 1932 (India).

<sup>22</sup> Form 5, read with Rule 6(1) The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016,

<sup>23</sup> Kamala Sankaran, Emerging Perspectives in Labour Regulation in the Wake of COVID-19; Ghosh, A critique of the Indian govt. response to pandemic, Journal of Industrial and Business Economics, July, 2020

<sup>24</sup> Office Of The Asst State Tax vs Parthiv Parikh Resolution, 2021 (C.A583/2020)

<sup>25</sup> Chapter II, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>26</sup> Chapter III, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>27</sup> § 30 (2) (b), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India). Subs. by Act No. 26 of 2019, § 6.

<sup>28</sup> Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478



## **Protection offered to workmen during CIRP**

Considering a hypothetical situation that a claim by workman/Trade Union still somehow qualifies within the limit of amended section 4 w.r.t default occurred after 25<sup>th</sup> March, 2020, can IBC in its provisions which are subject to interpretation of the committee of creditors (CoC) protect the right of workman?

### 2) Provisions under the code

Primarily, IBC is an economic legislation and accordingly it must be construed that private entity interest would supersede the interest of public during insolvency proceedings, while keeping priority classes to a minimum. But, interest of workmen must be maintained as they are quintessential to the daily operations of corporate debtor and therefore their interest must be balanced carefully against the interest of other creditors.<sup>29</sup> Moreover, in countries like India, the fundamental rights of laborers depend upon the daily wages that they earn.<sup>30</sup> Thus, a policy focused approach in the IBC would be in accordance with the constitutional mandate of ensuring fundamental rights of workers *vis-a-vis* living wages, working conditions and ensuring decent standard of life and livelihood.<sup>31</sup>

Accordingly, the code u/s 36(4)(a)(iii) provides for exclusion of wages owed by the CD/employer to the workmen from the ambit of welfare funds or liquidation estate and further explicitly reserves it for treating funds as property which belong to workmen.<sup>32</sup> Section 53 (1) of the code which enumerates waterfall mechanism in liquidation also prioritizes workmen dues owed by the CD over any other dues.

Moreover, meaning of workmen dues in code is interpreted in accordance with section 326 of companies act, 2013<sup>33</sup> which has the heading 'overriding preferential payment', & defines what comprises of workman dues,<sup>34</sup> and the section also again is in consonance with waterfall mechanism and provides that workmen dues will be paid in priority however these two sections differ in the aspect that non obstante clause incorporated u/s 53 of IBC envisages that workmen dues will be paid after paying up for the insolvency resolution process cost & liquidation cost.<sup>35</sup>

<sup>29</sup>Leroy, Anne-Marie, and Gloria M. Grandolini, *Principles for effective insolvency and creditor and debtor regimes*, No. 106399, THE WORLD BANK, C 12.3 (2016).

<sup>30</sup>*Bandhua Mukti Morcha v. Union of India*, (1984 AIR 802); <sup>30</sup>  
<https://www.thehindubusinessline.com/opinion/labour-laws-to-be-key-to-compliances-in-the-post-covid-era/article33812096.ece>

<sup>31</sup> INDIA CONST. art. 21.

<sup>32</sup> The Insolvency and Bankruptcy Code, 2016, Section 36(4)(a)(iii), Acts of Parliament, 2016 (India).

<sup>33</sup> § 326, The Companies Act, 1956, No. 1, Acts of Parliament, 2013 (India).

<sup>34</sup>*Id*

<sup>35</sup>Section 53 (1) (a), The Insolvency and Bankruptcy Code, 2016 No. 31, Acts of Parliament, 2016 (India).



### 3) Actual application of statutory safeguards

It is pertinent to note herein that the application of these safeguards are in the circumstantial event when liquidation happens which is the last resort. Till then, section 20(2)(b) of IBC aids the operational creditors in as much as it provides min. amount which is to be paid to the operational creditors during the process of insolvency resolution in order to better aid the CoC. Moreover, it also reduces the ambit of review by NCLT/NCLAT in case the debt owed by the corporate debtor to operational creditor has not been dealt properly as it will oust the courts to adjudicate upon the treatment meted out to the OC as long as ascertain minimum standards have been set under the IBC.<sup>36</sup>

Furthermore, Section 30(2) (b) does not talk specifically about workman rather uses the term operational creditor. Whenever the intention of legislature was to use the word workmen, it has explicitly used that word “workmen”.<sup>37</sup> Also, form C of IBBI (liquidation regulations) 2016 excludes the possibility of any familiarity between the claims of operational creditors, & workmen/ Moreover, form F provides for filing of claims by the workmen & employees with the RP in order to avail the fruits of liquidation; as section 30(2) only conveys minimum benefit guaranteed under the section to applicability of Section 53(1) as a result of liquidation and there would not be any major benefit availed to it by the workmen.

Therefore, one can say that although there are safeguards present to protect the interest of workmen, but they are restricted in scope towards the advanced stage of liquidation & while the corporate debtor is under resolution, the code majorly depends upon the operational leverage that workman has on the corporate debtor since they are quintessential in keeping the corporate debtor as going concern. However, during pandemic, and because of total lockdown, workers will not be needed to maintain the CD's company as a going concern, therefore the CoC can at its behest vehemently ignore the dues owed to the workmen.

Moreover, it has been decided by courts in various judgments that NCLT/NCLAT do not have financial knowledge of the upkeep of business and unless there is a blatant injustice apparent on the face of it,<sup>38</sup> they are not supposed to act as court of equity.<sup>39</sup> Hence, this means that courts cannot question the financial wisdom of the committee of creditors & since the committee already will have complied with all the due procedures and minimum standards set by the code to keep CD as a going concern.

<sup>36</sup> K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257

<sup>37</sup> The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>38</sup> K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257

<sup>39</sup> K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257





## **On approval of resolution plan, claims get extinguished**

### *4) Need for appeal mechanism*

The sub division of creditors as operational & financial creditors, subject to the no. of class involved either individual or jointly, results into making insolvency resolution process to be more costly & complex.<sup>40</sup> However, special treatment is recognized as need for certain classes whose daily live is heavily dependent on outcome of the CIRP, or in pursuit of social, or moral objective.<sup>41</sup> In a labor intensive country like India, insolvency process should and must not be very expensive & should consider fairness towards special classes such as workmen, over timely resolution of the CD, with focus towards timely reinstatement if we focus on the objectives of IBC.<sup>42</sup>

Thus, invoking the moratorium enshrined u/s 14 provides a relaxation period to the CD, RP & CoC to reach out a resolution plan which takes into consideration the interest of all creditors along with passing an efficient scheme<sup>43</sup> which also bounds the dissenting creditors.<sup>44</sup> Now, as also mentioned above, the code is an economic legislation and therefore even though the code recognizes certain social objectives, but still private interest is always prioritized over public interest and the RP while adhering to the requirements of IBC has to reinstate the corporate debtor.

So, in light of the said observations, the NCLT/NCLAT has to give in to the financial wisdom of CoC and can only reject the plan/suggest some modifications in the case the plan has some blatant irregularities which directly harms the objective of code. Further, the RP is merely an adjudicatory body whose task involve providing opinions which only streamlines the whole process of CIRP.<sup>45</sup>

Thus, considering the limited jurisdiction of NCLT/NCLAT as well as the RP, who are without a doubt the only non-biased entity in the entire process of CIRP, the need for providing a mechanism of appeal is quintessential to this whole process and for striking a balance between taking care of special classes such as workmen as well as timely resolution of the CD.

---

<sup>40</sup> *Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, ,218 ¶ 20.

<sup>41</sup> *Id.*

<sup>42</sup> *Preamble*, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>43</sup> Regulation 38(2), The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,.

<sup>44</sup> § 31 (1), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>45</sup> *Arcelor Mittal India Private Limited v. Satish Kumar Gupta*, (2019) 2 SCC 1 ¶ 80



### 5) Extinguishment of claims

However, the Apex court has held that the resolution applicant who raises sufficiently to the occasion, as is also evident by his response to request for proposal, & consequently its approval by CoC as well as the adjudicating authority (AA) should be welcomed with fresh slate, in as much as that any claim received before commencement of CIRP that were submitted through RP during CIRP would stand extinguished on CoC approving the resolution plan.<sup>46</sup>

Based on this, the SC strike out the word “mandatorily” from Section 12<sup>47</sup> & in light of judicial history wherein procedural timelines<sup>48</sup> may or may not be followed properly was considered to be against the constitution specifically, the mandatory completion of CIRP within 330 days restricts the CD’s right to business.<sup>49</sup> Hence, providing the RP with more time than that enumerated u/s 12 of the IBC to settle all claims before passing a resolution plan by AA to effectively bind all creditors of the CD.<sup>50</sup> Thus, claims arising out of default which were prior to commencement of CIRP will be required to settle before approval of resolution plan, as after its approval, the claims stand extinguished.

The aforementioned problems were further enumerated by the disturbed judicial legislations & its errors which lead to extension of resolution process through litigation which was initiated by the dissentient creditors. Moreover, a robust compliance mechanism would bind the dissenting creditors as well as OC in accordance with the spirit of IBC.

These consideration however should always be subject to need for appeal mechanism especially in the backdrop of Covid 19 pandemic wherein dealing with each and every class is equally important. Thus, Section 31(1) which enumerates the approval of a resolution plan which is approved by the CoC<sup>51</sup> & the AA<sup>52</sup> and binds all classes of creditor should in as far be harmoniously construed with the requirements of a well settled appeal mechanism.

#### *Extinguishment w.r.t workmen claims*

A direct reading of Section 31(1) of IBC brings to notice that each every specific creditor has been paid due attention and would be bound by the approved resolution plan, as well as all the stakeholders.

Now, although the workmen come under the ambit of operational creditors<sup>53</sup> to invoke CIRP against the corporate debtor, the code has gone to full length to specify workmen entity whenever a reference has been directed towards them in IBC. Furthermore, whenever a direct mention has been made to the

<sup>46</sup> The Insolvency and Bankruptcy Code, 2016, § 32-A (1), No. 31, Acts of Parliament, 2016 (India).

<sup>47</sup> Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478

<sup>48</sup> Neeraj Kumar Sainy v. State of Uttar Pradesh (2017) 14 SCC 136

<sup>49</sup> Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478

<sup>50</sup> § 31 (1), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>51</sup> § 30 (4), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>52</sup> *Id.*

<sup>53</sup> Section 53 (1), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).





workmen in IBC, the code has ensured them more security against operational creditors in as much as they have been given priority in waterfall mechanism. Moreover, the welfare funds owed by the CD to the workmen have been excluded from the liquidated estate of CD.<sup>54</sup>

Thus, absence of workmen from section 31(1) should also be given a purposive interpretation so as to negate them from the purview of other creditors who are bound by the approved resolution plan and henceforth the reasoning deployed by the Supreme Court, which encompasses that their shall lie no appeal w.r.t claims against the CD after resolution plan has been approved<sup>55</sup> should not apply to workmen, who owing to their socio economic standing must be considered as a special class.

So, it can be said that workman should have a right to appeal with regard to their prior claims even in such cases wherein resolution plan has been approved by the Committee of Creditors<sup>56</sup> and is also passed by NCLT/NCLAT.<sup>57</sup> The reasoning is further strengthened by the fact that objectives of IBC is speedy resolution of insolvency of corporate debtor for which reliance is placed on the financial wisdom of committee of creditors which in pursuit of their own self-interest may leave out the interest of workmen.

However, to workers dismay, due to pandemic, Section 32-A was inserted in IBC which defies the above mentioned construction as it directly bars claims w.r.t offences committed by the corporate debtor before commencement of corporate insolvency resolution process, on acceptance of resolution plan and negates the claims of special classes as well such as the workmen. Although, the consideration given into this section by the legislature to mitigate the damages does provide space for some judicial innovation in favor of pandemic affected workmen.

### **Reverse CIRP**

#### *6) Need for a specific process?*

Some industries which are labor centric depend heavily on its workforce or in other words its workmen to keep their operations running. This is also evident by office memo which was circulated by Ministry of housing & urban affairs<sup>58</sup> which places emphasis on reverse migration of labor to their villages as one of the vital factors which caused mayhem is the real estate sector. In fact, this has resulted into a lot of *force majeure* events under the RERA Act, 2016<sup>59</sup> granting relaxation to the developer/builder w.r.t projects

<sup>54</sup> § 36 (4) (a) (iii), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).,

<sup>55</sup> Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478

<sup>56</sup> § 30 (4), The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>57</sup> *Id.*

<sup>58</sup> *Office Memorandum*, GOVERNMENT OF INDIA MINISTRY OF HOUSING & URBAN AFFAIRS, No. O-17024/230/2018-Housing-UD/EFS-9056405, (May 13, 2020).

<sup>59</sup> § 6, The Real Estate (Regulation, and Development) Act, 2016, No. 16, Acts of Parliament, 2016 (India).



due on or after 25<sup>th</sup> March, 2020.

Now, although the duty of deciding the fate of corporate debtor is essentially vested with the financial creditor because of their vested interest, creditors who would be incentivized to vote for liquidation & the ones who can't assess the feasibility of particular resolution plan<sup>60</sup> will hurt the whole objective of the process. Therefore, labor centric industries require a more tailor fit approach<sup>61</sup> in order to protect the interest of operational creditors (such as homebuyers), labor and corporate debtor.

Thus, taking into cognizance the fact the NCLT/NCLAT do possess certain supervisory jurisdiction<sup>62</sup> which under its umbrella cover the power to give directions/modifications in schemes which are against the mandate of code, can also be used to benefit the CD & all other creditors in cases wherein financial creditors cannot be relied upon to deal fairly with regard to all the creditors or in cases where due to events such as pandemic, the financial creditor would be more inclined to overlook the interest of certain class of creditors. Specially, when offences of CD stands terminated when one resolution plan is approved.<sup>63</sup>

#### 7) Reverse Corporate Insolvency Resolution Procedure

Reverse CIRP or Reverse Corporate Insolvency Resolution Procedure is a legal experiment by the National Company Law Appellate Tribunal<sup>64</sup> which eases up the burden of following the complex procedure of insolvency resolution when the corporate debtor at hand is a real estate company. The whole objective of following the reverse CIRP as stated by NCLAT was that

*“Reverse CIRP” can be followed in cases where real estate companies are in insolvency proceedings & the interest of several allottees has to be protected by ensuring timely completion of project which also provides employment to large no. of unorganized workmen”*<sup>65</sup>

A real estate business/project gets its funding through 2 sources 1) the homebuyers who invest in purchasing a flat & 2) Financial creditors such as bank, Financial Institution, NBFC etc. But, while propounding the equality of all creditors' principle in *Umang Realtech*<sup>66</sup> judgment, the court realized that there is an inherent conflict of interest.

<sup>60</sup> Flat Buyers Assoc. Winter Hills, Gurgaon v. Umang Realtech Pvt. Ltd, through IRP and Others, 2020 Indlaw NCLAT 42

<sup>61</sup> *Id.*

<sup>62</sup> Flat Buyers Assoc. Winter Hills, Gurgaon v. Umang Realtech Pvt. Ltd, through IRP and Others, 2020 Indlaw NCLAT 42

<sup>63</sup> § 32A, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>64</sup> Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT

<sup>65</sup> *Id.*

<sup>66</sup> Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT



In case the real estate company makes a default, the secured financial creditor who comprises the Committee of Creditors would always prefer to enforce the security that they have (in this case, the prospective flats) for which they provided the funding however, the homebuyers i.e. unsecured financial creditors would always want the earliest possession of the flat that they have booked. So, in such case, it is pertinent to mention that Secured financial creditor will wish to liquidate the company by passing a plan or scheme so as to get priority under waterfall mechanism implicit under section 53 of the code.<sup>67</sup> Therefore, a feasible solution in such cases like this would not be possible to keep the CD as a going concern since there is a fundamental conflict of interest. Furthermore, it would be against the very objectives of IBC i.e. falling back to liquidation only as a last resort.<sup>68</sup>

Therefore, process of reverse CIRP can be useful to solve this abovementioned conflict of interest since it balances out the interest of both the classes of creditors by allowing the corporate debtors to continue with the project in question and also ensures that homebuyers get the benefit of their investment while the Resolution Professional manages the day to day functioning of company allowing the project to get completed in specified deadlines. This continuation of work also fundamentally helps the laborers or workmen who earn very meager wages in India.

This judgment<sup>69</sup> also enlightens the problem that usually Resolution applicants are not interested in an abandoned project because of various complex issues due to which they prefer not to present any resolution plan and very few resolution plan will get accepted.<sup>70</sup> Further, the *Umang Realtech judgment* recognized the fact that unlike other FC's, homebuyers do not have the commercial wisdom to evaluate which resolution plan is most advantageous to them. So, CIRP in these cases becomes a very hectic task. But reverse CIRP gives a lifeline to promoters of Real estate business to still continue with the project without ousting them from the working of the company. Moreover, it helps to maintain the *status quo* in the management of real estate business and at the same time Resolution professional ensures that the promoter pumps sufficient funds to complete the project at hand.

However, to follow the process of Reverse CIRP, the parties in CIRP process which includes financial creditors will have to waive their right to adjudicate the fate of corporate debtor & his company wherein all faith from Corporate Debtor has been lost. Moreover, another major hurdle in this process is that this

<sup>67</sup>Section 53, The Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament (India)

<sup>68</sup>Swiss Ribbons v. Union of India, W.P (C) 99 of 2018, (Supreme Court, 25.1.19) <https://taxguru.in/corporate-law/ibc-2016-section-12a-opportunities-obstacles-resolution.html>; Pioneer Urban Land and Infrastructure v Union of India [2019 SCC OnLine SC 1005]

<sup>69</sup> Flat Buyers Assoc. Winter Hills Gurgaon v. Umang Realtech Pvt. Ltd. through IRP & Ors, Company Appeal (AT) Indlaw NCLAT 42

<sup>70</sup> Dipak Mondal, 'IBC Code: Are Speculative Homebuyers Misusing the Insolvency Law?' (Business Today, 2 October 2019) <<https://www.businesstoday.in/current/corporate/ibccode-are-speculative-homebuyers-misusing-insolvency-law/story/382538.html>> accessed 14 April 2020.



process if tailor made process of pursuing insolvency proceedings against a real estate developer however, it is restricted to only a single project of the corporate debtor. Still, it is pertinent to mention that by adopting this innovation, financial health labor in real estate project can be saved.

8) *Saving the interest of all the creditors*

Reverse corporate insolvency resolution process involves 3 parties i.e. the Resolution Professional, Adjudicating Authority, & the promoter of Corporate Debtor for benefit of CD.<sup>71</sup> The adjudicating authority focuses on keeping the real estate CD as a going concern & at the same time maintaining the interest of all creditors of the CD.

The process of reverse CIRP does not involve the presence of resolution applicant<sup>72</sup> as plan which is essential to make the CD running is substituted by the AA which is an unbiased body & would be able to harmonize the interest of every class of creditor including the workmen as well.

The promoter is required to ensure necessary funds for smooth functioning of the whole insolvency resolution process<sup>73</sup> which encapsulates the promoter's financial burden of pursuing insolvency resolution for special class of creditors such as workmen. Moreover, financial knowledge of CoC can also help the AA by pointing them in correct direction as & whenever the need arises.

Thus, on adopting the process of reverse CIRP for real estate companies, there will be no need to pass a resolution plan as its function is substituted by the NCLT/NCLAT. Thus, appeal mechanism also remains in place for creditors which include workmen as pre insolvency claims will not be extinguished if a promoter like entity resumes the operation of CD on successful resolution of insolvency.<sup>74</sup>

This judgment<sup>75</sup> also enlightens the problem that usually Resolution applicants are not interested in an abandoned project because of various complex issues due to which they prefer not to present any resolution plan and very few resolution plans will get accepted.<sup>76</sup> Further, the *Umang Realtech judgment* recognized the fact that unlike other FC's, homebuyers do not have the commercial wisdom to evaluate which resolution plan is most advantageous to them. So, CIRP in these cases becomes a very hectic task. But reverse CIRP gives a lifeline to promoters of Real estate business to still continue with the project

<sup>71</sup> Flat Buyers Association (Winter Hills), Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT 42

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> The Insolvency and Bankruptcy Code, 2016, § 32A (2), No. 31, Acts of Parliament, 2016 (India).

<sup>75</sup> Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Pvt. Ltd. through IRP & Ors, Company Appeal (AT) (Insolvency) No. 926 of 2019. [National Company Law Appellate Tribunal]

<sup>76</sup> Dipak Mondal, 'IBCCode: Are Speculative Homebuyers Misusing the Insolvency Law' (Business Today, 2 October 2019) <<https://www.businesstoday.in/current/corporate/ibccode-are-speculative-homebuyers-misusing-insolvency-law/story/382538.html>> accessed 14 April 2020.



without ousting them from the working of the company. Moreover, it helps to maintain the *status quo* in the management of real estate business and at the same time Resolution professional ensures that the promoter pump sufficient funds to complete the project at hand.

Thus, on adopting the process of reverse CIRP for real estate companies, there will be no need to pass a resolution plan as its function is substituted by the NCLT/NCLAT. Thus, appeal mechanism also remains in place for creditors which include workmen as pre insolvency claims will not be extinguished if a promoter like entity resumes the operation of CD on successful resolution of insolvency.<sup>77</sup>

### **Conclusion**

The various measures taken by the govt. point out their desperation to save the economy due to pandemic; & the amendments made ensure that Micro, small & medium enterprises do not fall under the ambit of the code. The connection between these amendments & IBC lies in the reverberation of economy but the present situation requires a more balanced approach. Day to day work of any company for that matter does not only rely on financial creditor but also other operational creditors such as labor who are a key component in ensuring the operations of company go smoothly.

Therefore, restoration of current state of economy should not be harming the interest of special classes such as workmen who already have suffered a lot at the hands of pandemic, & the state govt. who turned a deaf ear towards their deterioration of fundamental rights. Thus, in the event that direct provisions cannot be imbibed for the benefit of labor, special instruments such as reverse CIRP needs to be adopted which will take into account the interest of workmen while at the same time also taking account the objectives of the code.

---

<sup>77</sup>, § 32A (2), The Insolvency and Bankruptcy Code, 2016 No. 31, Acts of Parliament, 2016 (India).