

**36<sup>th</sup> Sir Purshotamdas Thakurdas Memorial Lecture delivered by Hon'ble Justice Shri S J Mukhopadhyaya, Chairperson, National Company Law Appellate Tribunal on the topic "Insolvency and Bankruptcy Code, 2016 and its impact on the Economy" on Saturday, 1<sup>st</sup> February, 2020 at Hotel Hindustan International, Kolkata.**

*Dignitaries, Ladies and Gentlemen,*

I feel honoured to deliver the Lecture on 'Sir Purshotamda's Thakurdas', a distinguished and eminent businessman of India and took a keen interest in the economic life of the country before and after independence.

I am not an economist and economy was never my subject. As a Judge, deliberated on Social Justice including Civil and Criminal justice.

2. Since my appointment as first Chairperson of the National Company Law Appellate Tribunal on 1<sup>st</sup> June, 2016, and subsequent introduction of the Insolvency and Bankruptcy Code, 2016 w.e.f. 1<sup>st</sup> December, 2016, I had to change my perception of justice delivery system from 'social justice' to 'economic justice' for the purpose of social justice, which are the two goals of justice delivery system, as per preamble of Constitution of India.

3. The objective of the Insolvency and Bankruptcy Code, 2016 is for re-organisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons and to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders. The Code explicitly aims to promote 'resolution' over 'liquidation'.

4. The first order objective is "resolution". The second order objective is "maximisation of value of assets of the "Corporate Debtor" and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests" of Creditors. This order of objective is sacrosanct. (*"Binani Industries Limited v. Bank of Baroda & Anr."*<sup>1</sup>)

5. In *"Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors."*<sup>2</sup>, the Hon'ble Supreme Court observed that "the (Corporate Debtor' consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the

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<sup>1</sup> Company Appeal (AT)(Ins) No.82 of 2018

<sup>2</sup> (2018) SCC Online SC 1733

corporate debtor as a going concern, every effort must be made to try and see that this is made possible".

6. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the 'I&B Code', reasoned as to why the 'Financial Creditors' be members of the 'Committee of Creditors': -

i. Under Para 5.3.1, sub-para 4, the BLRC provided rationale for 'Financial Creditors' as under:

"4. Creation of the creditors committee "

The Committee deliberated on who should be on the creditors committee, *given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations.* Typically, 'Operational Creditors' are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the 'I&B Code' will provide that the creditors committee should be restricted to only the 'Financial Creditors'.

ii. In Para 3.4.2 dealing with 'Principles driving design', the principle IV reads as under:

"IV. The (I&B Code' will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. **The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution. "**

7. The important paragraphs contained in the Report of the Bankruptcy Law Reforms Committee of November 2015 were noticed by the Hon'ble Supreme Court in "**Innoventive Industries Limited v. ICICI Bank and Anr.**"<sup>3</sup>, as under:

"India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet, these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while

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<sup>3</sup> (2018) 1 SCC 407

repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently.

“The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors, equity owners have no say.

This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place to a limited extent, banks are able to repossess fixed assets which were pledged with them.

While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.

***When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure.*** In many settings, debt is an efficient tool for corporate finance, there needs to be much more debt in the financing of Indian firms. E.g. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India's rapid growth are "those which are more labour intensive. These industries have been starved of credit."

"The key economic question in the bankruptcy process.

When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm, as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision, a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

#### **“Speed is of essence**

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

#### **“Objectives**

The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

- (1) Low time to resolution.
- (2) Low loss in recovery.
- (3) Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code In implementation will be based on measures of the above outcomes.

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8. As the speed is the essence and resolution of Corporate Insolvency Resolution Process is the object and not the liquidation or death, in *"Innoventive Industries Limited v. ICICI Bank and Anr."*<sup>4</sup>, the Hon'ble Supreme Court explained the facts which are to be noticed in triggering application under Sections 7 or 9:-

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the Corporate debtor itself or a financial creditor or operational creditor".

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor, it need not be a debt owed to the applicant financial creditor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete."

*"29. The scheme of Section 7 stands in contrast with the scheme under Section B where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing i.e. before such notice or invoice was received by the corporate debtor. The*

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<sup>4</sup> (2018) 1 SCC 407

*moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

9. The 'I&B Code' aims at promoting availability of credit and maximisation of the assets and the final findings of the Appellate Tribunal is the aim as has been held in "*Binani Industries Limited v. Bank of Baroda & Anr.*<sup>5</sup>":-

"(b) The 'I&B Code' aims at promoting availability of credit. Credit comes from the 'Financial Creditors' and the 'Operational Creditors'. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. 'Operational Creditors' need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.

c. The 'I&B Code' is for reorganisation and insolvency resolution of corporate persons, for **maximisation of value of assets of such persons, to balance interests of all stakeholders**. It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the 'Corporate Debtor'. One cannot balance interest of all stakeholders, if resolution maximises the value for a or a set of stakeholders such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.

10. In "*Binani Industries Limited v. Bank of Baroda & Anr.* <sup>6</sup>", the Appellate Tribunal further observed: -

"The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders. "

The Appellate Tribunal further held: -

**"It is not an auction.** Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management,

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<sup>5</sup> Company Appeal (AT)(Ins) No.82 of 2018

<sup>6</sup> Company Appeal (AT)(Ins) No.82 of 2018

technology, product portfolio or marketing strategy, acquisition or disposal of assets, undertaking or business, modification of capital structure or leverage, infusion of additional resources in cash or kind over time etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

**It is not recovery:** Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues one after another or simultaneously from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the 'Corporate Debtor' to death, resolution endeavours to keep the 'Corporate Debtor' alive. In fact, the 'I&B Code' prohibits and discourages recovery in several ways.

**It is not liquidation:** Liquidation brings the life of a corporate to an end. It destroys organisational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The 'I&B Code', therefore, does not allow liquidation of a 'Corporate Debtor' directly. It allows liquidation only on failure of 'Corporate Insolvency Resolution Process'. It rather facilitates and encourages resolution in several ways.

11. The Insolvency and Bankruptcy Code, 2016 was challenged and upheld by the Hon'ble Supreme Court. The Hon'ble Supreme Court explained the relevant provisions of Sections 7, 9 & 10 for triggering the 'Corporate Insolvency Resolution Process'. 'Viability and feasibility of a plan is the essence of a 'Resolution Plan', coupled with commercial aspect of maximisation of assets of the 'Corporate Debtor' as also maximisation of assets of 'Financial Creditors', 'Operational Creditors' and other stakeholders. The Hon'ble Supreme Court observed that the most 'Financial Creditors', particularly Banks and Financial Institutions are 'secured creditors' whereas most 'Operational Creditors' are 'unsecured creditors', payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between the 'secured and unsecured creditors' was noticed which has obtained since the earliest of the Companies Act both in United Kingdom and in India.

12. The 'Committee of Creditors' is entrusted with the primary responsibility of financial restructuring. They are required to assess the 'viability of the Corporate Debtor' by taking into account all available

information as well as to evaluate all alternative investment opportunities that are available. The 'Committee of Creditors' is required to evaluate the 'Resolution Plan' on the basis of feasibility and viability.

13. Since the 'Financial Creditors' are in the business of money lending, Banks and Financial Institutions are well equipped to assess viability and feasibility of the business of the 'Corporate Debtor' (*"Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors."*<sup>7</sup>).

14. As per the Hon'ble Supreme Court, NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It must be seen that a resolution plan cannot pass muster under Section 30(2) (b) read with Section 31 unless a minimum payment is made to operational creditors (*"Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors."*<sup>8</sup>).

15. The Insolvency and Bankruptcy Code, 2016 envisages that Applicant to submit records of the default while initiating Corporate Insolvency Resolution Process. The Creditor(s) to submit claim along with proof of existence of debt. The information utility is required to make authentic record of debt and default available to the Adjudicating Authority (National Company Law Tribunal) and the Resolution Professional to facilitate time bound completion of the processes.

16. The Scheme of the Code is implemented by the National Company Law Tribunal. The Code and its Scheme is explained by the National Company Law Appellate Tribunal and finally law is laid down by the Hon'ble Supreme Court under Article 141.

### **Benefit of Code**

17. After introduction of Section 29A of the 'I&B Code', many Promoters became ineligible. However, during the last three years, the law has been explained in a manner that before liquidation (sale of assets), the Promoters get three chances to exit and to take control of the 'Corporate Debtor' (Company) or otherwise outsiders get three opportunities.

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<sup>7</sup> 2019 SCC Online SC 73

<sup>8</sup> 2019 SCC Online SC 73



## **Opportunity to the Promoters to keep control/take back control of the company**

- (i) After filing application under Sections 7 or 9, but before admission, by satisfying the debt or by settlement with 'Financial Creditors' / 'Operational Creditors';
- (ii) After admission, but before constitution of the 'Committee of Creditors', by settlement with 'Financial Creditors' / 'Operational Creditors' and then to move application under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 for exercising its inherent powers;
- (iii) After constitution of the 'Committee of Creditors', but before the approval of the Resolution Plan, under Section 12A, satisfying 'Financial Creditors' / 'Operational Creditors' and if the Committee of Creditors approve it with 90% voting shares.

If the 'Promoters' do not settle, the outsiders get the best of the opportunity to acquire the Company without much difficulty. They get the land, Infrastructure, and in many cases a running company and expert employees. It is one of the best mode of investment and attracts Foreign Investors. Three opportunities are:

- (i) By filing best of the Resolution Plan in accordance with Section 30(2) and getting it approved by the Committee of Creditors and the Adjudicating Authority.
- (ii) Even after order of liquidation, the Company can be taken over by 'Arrangement and Scheme' with the Liquidator in terms of Sections 230-232 of the Companies Act, 2013 (***“Y. Shivram Prasad Vs. S. Dhanapal & Ors.”***<sup>9</sup>).
- (iii) On failure, the Company can be purchased by outsiders by way of outright sale as is wherein basis along with employees by paying maximum amount, i.e. much more than the liquidation value.

18. The 'I&B Code' has changed the habits of the Corporate Debtors. Previously, the Financial Institutions/ Banks/ NBFCs used to request the defaulter Company to pay back the debt. The defaulter Companies waited for action(s) under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or Section 13(4) of the SARFAESI Act, 2002 and if action taken then to move before the Debt Recovery Tribunal to delay recovery. Now, the habit of defaulter Companies has changed. The genuine Corporate Debtors are ensuring not to commit default and make payment. In cases where Corporate Insolvency Resolution Process triggered (admitted), the genuine Corporate Debtors are paying the default amount or reaching 'Terms of Settlement' with the Financial Institutions/

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<sup>9</sup> Company Appeal (AT) (Insolvency) No.224 of 2018

Banks/ Operational Creditors. A good habit has been developed amongst the borrower Companies, who are now approaching the Financial Institutions/ Banks/ Operational Creditors with request to settle their debt.

19. The Insolvency and Bankruptcy Board of India (IBBI) maintains records relating to Corporate Insolvency Resolution Process out of information received from Insolvency Professionals or other sources. As on 30th September, 2019, the details published in the '**Insolvency and Bankruptcy News**' of IBBI reflects the details:

**“Table 1: Corporate Insolvency Resolution Process**

Quarter	CIRPs at the beginning of the quarter	Admitted	Closure by				CIRPs at the end of the quarter
			Appeal/Review Settled	Withdrawal under Section 12A	Approval of Resolution plan	Commencement of liquidation	
Jan-Mar, 2017	0	37	1	0	0	0	36
Apr-Jun, 2017	36	129	8	0	0	0	157
July-Sept, 2017	157	233	18	0	2	8	362
Oct-Dec, 2017	362	147	38	0	7	24	440
Jan-Mar, 2018	440	195	20	0	11	59	545
Apr-Jun, 2018	545	246	20	1	14	52	704
Jul-Sept, 2018	704	243	30	27	29	87	774
Oct-Dec, 2018	774	275	8	36	17	82	906
Jan-Mar, 2019	906	374	20	19	22	86	1133
Apr-Jun, 2019	1133	294	14	19	27	93	1274
July-Sept, 2019	1274	369	9	14	27	96	1497
<b>Total</b>	<b>NA</b>	<b>2542*</b>	<b>186</b>	<b>116</b>	<b>156**</b>	<b>587</b>	<b>1497</b>

\*These CIRPS are in respect of 2538 CDs.

\*\*This excludes 5 resolutions which have since yielded liquidation.

Source: Compilation from website of the NCLT.

**Table 2: Sectoral Distribution of CDs under CIRP as on 30<sup>th</sup> September 2019**

Sector	No. of CIRPs		
	Closed	Ongoing	Total
<b>Manufacturing</b>	450	593	1043
Food, Beverages & Tobacco Products	41	87	128

Chemicals and Chemical Products	48	50	98
Electrical Machinery and apparatus	41	46	87
Fabricated Metal Products	31	33	64
Machinery & Equipment	48	70	118
Textiles, Leather & Apparel Products	79	92	171
Wood, Rubber, Plastic & Paper Products	48	71	119
Basic Metals	82	101	183
Others	32	43	75
<b>Real Estate, Renting &amp; Business Activities</b>	<b>201</b>	<b>299</b>	<b>500</b>
Real Estate Activities	28	87	115
Computer and Related Activities	28	37	65
Research and Development	2	1	3
Other business activities	143	174	317
<b>Construction</b>	<b>88</b>	<b>186</b>	<b>274</b>
<b>Wholesale &amp; Retail Trade</b>	<b>117</b>	<b>133</b>	<b>250</b>
<b>Electricity &amp; Others</b>	<b>22</b>	<b>47</b>	<b>69</b>
<b>Transport, Storage &amp; Communications</b>	<b>30</b>	<b>42</b>	<b>72</b>
<b>Others</b>	<b>110</b>	<b>158</b>	<b>268</b>
<b>Total</b>	<b>1045</b>	<b>1497</b>	<b>2542</b>

Note: The distributions is based on the CIN of CDs and as per the National Industrial Classification (NIC 2004)

The distribution of stakeholders, who triggered resolution process, is presented in Table 3. OCs triggered 48.5% of the CIRPs, followed by about 43% by FCs and remaining by the CDs.

**Table 3: Initiation of Corporate Insolvency Resolution Process**

Quarter	No. of CIRPs Initiated by			
	Operational Creditor	Financial Creditor	Corporate Debtor	Total
Jan-Mar, 2017	7	8	22	37
Apr-Jun, 2017	58	37	34	129
Jul-Sept, 2017	100	94	39	233
Oct-Dec,2017	67	66	14	147
Jan-Mar, 2018	89	84	22	195
Apr-Jun, 2018	129	99	18	246
Jul-Sept,2018	132	95	16	243
Oct-Dec,2018	153	106	16	275
Jan-Mar,2019	166	187	21	374
Apr-Jun,2019	154	127	13	294
Jul-Sept, 2019	177	183	9	369
<b>Total</b>	<b>1232</b>	<b>1086</b>	<b>224</b>	<b>2542</b>

The Status of CIRP as on 30th September, 2019 is presented in Table 4.

**Table 4: Status of CIRPs as on 30<sup>th</sup> September, 2019**

<b>Status of CIRPs</b>	<b>No. of CIRPs</b>
Admitted	2542
Closed on Appeal/Review/Settled	186
Closed by Withdrawal under section 12A	116
Closed by Resolution	156
Closed by Liquidation	587
Ongoing CRP	1497
>270 days	535
>180 days <270 days	324
>90 days<180 days	276
<90 days	362

Note: 1. The number of days is from the date of admission  
2. The number of days includes time, if any, excluded by the tribunal

#### **Withdrawal under Section 12A**

Till September 2019, a total of 116 CIRPs have been withdrawn under Section 12A of the Code. The distribution of claims and reasons for withdrawal in these CIRPs are presented in Table 5.

**Table 5 : Claim Distribution and Reasons for Withdrawal**

<b>Amount of Claims Admitted* (Amount in Rs. Crore)</b>	<b>No. of CIRPs</b>
< or = 01	43
> 01<10	32
>10<50	15
>50<100	6
>100<1000	5
>1000	2
<b>Reason for Withdrawal**</b>	
Full settlement with the applicant	34
Full settlement with other creditors	7
Agreement to settle in future	8
Other settlements with Creditors	35
Corporate debtors not traceable	2

Corporate debtor stuck off the Register	1
Application not pursuing CIRP due to high cost	2
Others	16

\* Data awaited in 13 CIRPs

\*\* Data awaited in 11 CIRPs

### Resolution Plans

It is seen that about 56.17% of the CIRPs, which were closed, ended in liquidation, as compared to 14.93% ending with a resolution plan. However, it is important to note that 72.86% of the CIRPs ending in liquidation (427 out of 586) were earlier with BIFR and or defunct (Table 6). The economic value in most of these CDs had already eroded before they were admitted into CIRP.

**Table 6: CIRPs ending with orders for Liquidation**

State of Corporate Debtor at the Commencement of CIRP	No. of CIRPs initiated by			
	FC	UC	CD	Total
Either in BIFR or Non-functional or both	153	190	84	427
Resolution Value < Liquidation Value	188	221	85	494
Resolution Value > Liquidation Value	43	26	23	92

Note:

1. There were 45 CIRPs, where CDs were in BIFR or non-functional but had resolution value higher than liquidation value.
2. Where liquidation value was not calculated, it has been take as '0'
3. Data of 1 CIRP awaited

Till June 2019, 120 CIRPs had yielded resolution plans as presented in the last newsletter. 11 CIRPs were later reported as yielding resolution plans during that period, as presented in Part A of Table 7. During July-September, 2019, 27 CIRPs yielded resolution plans with different degrees of realisation in comparison to the liquidation value as presented in Part B of Table 7. During the Quarter, realisation by FCs under resolution plans in comparison to liquidation value is 183%, while the realisation by them in comparison to their claims is 34%. Till September 2019, realisation by FCs under resolution plans in comparison to liquidation value is 184%, while the realisation by them in comparison to their claims is 42%.

**Table 7: CIRPs Yielding Resolution**

Sr.No	Name of CD	Defunct (Yes/No)	Date of Commencement of CIRP	Date of Approval of Resolution plan	CIRP Initiated by	Total Admitted claims of FCs	Liquidation Value	Realisable by FCs	Realisable by FCs as % of their claims admitted	Realisable by FCs as % of Liquidation Value
<b>PART A : PRIOR PERIOD (TILL 30<sup>TH</sup> JUNE 2019)</b>										
1	Garg Inox Limited	Yes	25-07-2017	04-12-2018	FC	214.13	69.39	72.00	33.62	103.76
2	United Seamless Tubular Private Limited	No	12-06-2017	21-01-2019	FC	2032.78	597.55	472.25	23.23	79.03
3	Say India Jewellers Private Limited	Yes	01-08-2017	29-01-2019	OC	137.92	16.70	27.75	20.12	166.17
4	Paramshakti Steels Limited	Yes	03-07-2017	21-02-2019	FC	174.94	34.11	47.95	27.41	140.57
5	Rainbow papers Ltd.	Yes	12-09-2017	27-02-2019	OC	1468.25	424.01	564.31	38.43	133.09
6	Star Agro Marine Exports Private Limited	No	08-01-2018	11-03-2019	FC	287.23	22.65	48.09	16.74	212.32
7	Inclbs Fila Limited		20-02-2018	10-05-2019	OC					
8	Maiyas Beverages and foods Private Limited	No	24-07-2018	10-05-2019	OC	109.09	58.39	109.09	100.014	186.83
9	NSP Hospitech India Private Limited	Yes	04-12-2018	06-06-2019	OC	1.15	1.09	1.01	88.60	92.66
10	Uttam Strips Limited	No	09-04-2018	06-06-2019	OC	558.83	107.00	109.00	19.51	101.87
11	Korba West Power Company Ltd	No	26-07-2018	24-06-2019	CD	5032.16	1454.93	1166.61	23.18	80.18

**PART B : JULY -SEPTEMBER 2019**

1	Asis plywood Limited	No	21-11-2017	01-07-2019	CD	8935.56	689.91	1114.09	12.47	161.48
2	Network Industries Limited	Yes	26-09-2018	04-07-2019	FC	196.22	31.65	35.80	18.24	113.11
3	Olive Lifesciences Private Limited	No	22-09-2017	09-07-2019	CD	47.51	15.20	40.23	84.68	264.67
4	Dinesh Polytubes private Limited	Yes	11-12-2017	12-07-2019	FC	5.78	1.84	2.53	43.77	137.50
5	BCIL Zed Ria Properties Private Limited	No	09-08-2018	16-07-2019	FC	91.02	21.44	35.90	39.44	167.44
6	Miditech private Limited	Yes	16-02-2018	18-07-2019	CD	11.62	0.16	1.87	16.09	1168.75
7	Sri Srivathsa Paper Mills Private Limited	No	13-11-2018	19-07-2019	FC	153.44	12.00	20.50	13.36	170.83
8	Beans & More Hospitality Private Limited	No	13-03-2018	19-07-2019	FC	87.36	42.01	87.36	100.00	207.95
9	Solidaire India Limited	Yes	26-10-2018	19-07-2019	FC	133.87	6.11	1.20	0.90	19.64
10	Ruchi Soya Industries Limited	No	15-12-2017	24-07-2019	FC	9384.75	2391.16	4093.19	43.62	171.18
11	Murli Industries Limited	No	05-04-2017	25-07-2019	FC	2783.10	231.10	347.74	12.49	150.47
12	Seven Hills Health care private Limited	No	13-03-2018	26-07-2019	FC	1273.30	622.10	1002.54	78.74	161.15
13	Lanco Teesta Hydro Power Limited	No	16-03-2018	26-07-2019	FC	31.72	132.08	11.12	35.06	8.42

14	Shrid Metal Technologies Private Limited	No	16-04-2018	26-07-2019	OC	16.97	4.32	13.34	78.61	308.80
15	MIC Electronics Limited	No	13-03-2018	31-07-2019	FC	263.53	53.00	49.72	18.87	93.81
16	Khandoba Prasanna Sakhar Karkhana Limited	Yes	01-01-2018	01-08-2019	FC	30.89	13.53	18.53	59.99	136.95
17	Rustagi Impex Private Limited	No	10-05-2018	06-08-2019	FC	126.71	8.57	7.15	5.64	83.43
18	Feedatives Pharma Pvt. Ltd	No	18-09-2018	06-08-2019		56.42	5.90	8.00	14.18	135.59
19	BCIL Red Earth Developers India Private Limited	No	09-08-2018	09-08-2019	FC	199.74	21.05	79.56	39.83	377.96
20	Sheon Skincare Private Limited	No	08-12-2017	09-08-2019	OC	0.00	0.23	0.00	0.00	0.00
21	Aristo Texcon Pvt. Ltd	No	31-08-2018	20-08-2019	CD	36.32	8.43	8.51	23.43	100.95
22	PRC International Hotels Private Limited	Yes	24-07-2018	27-08-2019	FC	53.43	28.38	25.40	47.54	89.50
23	Ramsarup Industries Limited	No	08-01-2018	04-09-2019	FC	5851.96	614.41	351.00	6.00	57.13
24	Bhushan Power & Steel Limited	No	26-07-2017	05-09-2019	FC	47157.99	9513.63	19350.00	41.03	203.39
25	Sunstar Overseas Limited	No	20-07-2018	12-09-2019	FC	161.96	157.95	195.00	17.86	123.46
26	Scott Garments Limited	Yes	13-08-2018	16-09-2019	OC	564.04	160.00	160.00	28.37	100.00
27	Jasper Engineers Pvt. Ltd	Yes	05-09-2018	17-09-2019	OC	7.21	3.47	4.67	64.77	134.58
	<b>Total (July –</b>					<b>78592.42</b>	<b>14789.63</b>	<b>27064.95</b>	<b>34.44</b>	<b>183.00</b>



	September, 2019)									
	Total (Till September, 2019)					332087.26	74996.82	137919.28	41.53	183.90

\*Data awaited

Defunct: Not Going Concern/Erstwhile BIFR

Note : Two CIRPs of prior period (in respect of Zion Steel Ltd. and Adhunik Metaliks Ltd.) which had yielded resolution plans earlier, have moved into liquidation in this quarter.

## Liquidation

Till 30th June, 2019, a total of 475 CIRPs had yielded orders for liquidation, as presented in the previous Newsletter. The liquidation order passed with respect to one CD was set aside by the Appellate Tribunal during the prior period. 20 CIRPs were later reported as yielding orders for liquidation during that period. During the quarter July-September, 93 CIRPs ended in liquidation, taking the total CIRPs yielding liquidation to 587.

**Table 8: Status of Liquidation Process as on 30<sup>th</sup> September, 2019**

Status of Liquidation	Number
Initiated	587
Final Report submitted	37
<b>Closed by Dissolution</b>	24
<b>Ongoing</b>	<b>550</b>
>Two years	<b>8</b>
>360 days	193
>270 days<_360 days	82
>180 days<_270 days	86
>90 days <_ 180 days	92
<_ 90 days	89

20. The 'Financial Creditors' and the 'Operational Creditors' while dealing with the 'Corporate Insolvency Resolution Process' must apply positive approach to find out what is the benefit for the present and in future. The past dues can be compromised if by present resolution, it is seen that future is bright and there will be 100% return of the amount, if the Company remains a going concern through the genuine Promoter. This should be the approach of the members of the 'Committee of Creditors', Financial Institutions/ Banks/ NBFCs (Financial Creditors).

### **The Recent Problems:**

21. The Parliament made amendment of Section 30(2) & (4) of the 'I&B Code' to give weightage to the 'Secured Creditors' which came into force on 16th August, 2019.

22. In "*Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*<sup>10</sup>", the Hon'ble Supreme Court made a distinction between the 'Secured' and 'Unsecured Creditors' and observed that protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important. If an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the Corporate Debtor is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow. The amended Regulation 38 does not lead to the conclusion that 'Financial Creditors' and 'Operational Creditors', or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of Operational Creditors rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of Operational Creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

23. In "*Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.*<sup>11</sup>", the Hon'ble Supreme Court upheld the Explanation below Section 5(8) (f) to hold that allottees (Homebuyers) of Infrastructure Company are 'Financial Creditors'. It further observed that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Therefore, provisions of the Code would apply in addition to RERA.

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<sup>10</sup> 2019 SCC Online SC 1478

<sup>11</sup> (2019) SCC Online SC 1005

24. The following are the problems which have now cropped up.

There is a difference in Form B and Form C for submission of proof claims by the Operational Creditors and the Financial Creditors. Prior to the Notification dated 27th November, 2019, Form B which is for 11 (2019) see Online SC 1005 submission of proof of claims by Operational Creditors before the Interim Resolution Professional, did not have any column for details of any security held by them, unlike Form C which had such a separate column. The inclusion of this column vide the aforesaid notification acknowledges the fact that Operational Creditors can also be secured and that earlier, due to absence of any such specific column, the Operational Creditors were deprived from submitting their claims and to 'state whether any security is held by them either by annexing it by way of supplementary documents. Hence, there was a need for this inclusion.

25. On the other hand, since inception of the Insolvency and Bankruptcy Code, 2016, at the time of liquidation, Forms B & C provided column for details of any security held by 'Operational Creditors' and the 'Financial Creditors'.

26. The 'allottees' (Homebuyers) come within the meaning of 'Financial Creditors'. They do not have any expertise to assess 'viability' or 'feasibility' of a 'Corporate Debtor'. They don't have commercial wisdom like Financial Institutions/ Banks/ NBFCs. However, these allottees have been provided with voting rights for approval of the plan. Many of such cases came to my notice where the allottees were the sole Financial Creditors. However, it is not made clear as to how they can assess the viability and feasibility of the 'Resolution Plan' or commercial aspect/ functioning of the 'Corporate Debtor' in terms of the decision of the Hon'ble Supreme Court in "*Innoventive Industries Limited v. ICICI Bank and Anr.*"<sup>12</sup> " followed by "*Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors.*"<sup>13</sup> " and "*Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*"<sup>14</sup> ".

27. In terms of the 'I&B Code' and the decisions of the Hon'ble Supreme Court, the 'Resolution Plan' must maximise the assets of the Corporate Debtor and balance the stakeholders (secured and unsecured creditors Financial Creditors/ Operational Creditors).

28. The Infrastructure which is constructed for the allottees by Corporate Debtor (Infrastructure Company) is an asset of the Corporate Debtor. The assets of the Corporate Debtor as per the Code

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<sup>12</sup> (2018) 1 SCC 407

<sup>13</sup> 2019 SCC Online SC 73

<sup>14</sup> 2019 SCC Online SC 1478

cannot be distributed, which is meant for 'Secured Creditors' . On the contrary, allottees (Homebuyers) who are 'Unsecured Creditors', the assets of the Corporate Debtor which is the Infrastructure, is to be transferred in favour of 'Unsecured Creditors' and not to the 'Secured Creditors' such as Financial Institutions/ Banks/ NBFCs.

Normally, the Banks/ Financial Institutions/ NBFCs also would not like to take the flats/ apartments in lieu of the money lent by them. On the other hand, the 'unsecured creditors' have a right over the assets of the Corporate Debtor i.e. flats/ apartment, assets of the Company.

29. In most cases, the Committee of Creditors take 'haircut'. The Resolution Applicants satisfy them most of the time with lesser amount than the total amount. In the case of allottees (Financial Creditors), can there be a haircut of assets/ flats/ apartment? No, there can't be.

The law is to be explained now again in a reverse way.

30. Recently, in "*B.K. Educational Services Private Limited Vs. Parag Gupta and Associates*<sup>15</sup>"; *II Jignesh Shah & Anr. Vs. Union of India & Anr.*<sup>16</sup> " and "*Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd & Anr.*<sup>17</sup>", the Hon'ble Supreme Court held that an application under Section 7 is barred by limitation if it is more than three years from the date of default (NPA).

31. The Hon'ble Supreme Court held that Article 137 of the Limitation Act, 1963 which relates to application for which no period of limitation has been prescribed to be applicable in the case of application filed under Sections 7 and 9.

32. Section 238A of the 'I&B Code' was inserted by the Parliament, as follows:

**“238A. Limitation**

The provisions of the Limitation Act, 1963 shall, as far *as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.*"

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<sup>15</sup> (2019) 11 Supreme Court Cases 633

<sup>16</sup> (2019) 10 Supreme Court Cases 750

<sup>17</sup> (2019) 10 Supreme Court Cases 572

33. On plain reading of Section 238A, it will be clear that the Limitation Act is applicable only with regard to the 'proceedings' or 'appeals' before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal. The word 'applications' have not been brought within the ambit of Section 238A by the Parliament.

34. There is a provision of filing an 'appeal' under Section 42 of the 'I&B Code' before the National Company Law Tribunal. There is a provision of filing 'liquidation proceeding' under Section 59 of the 'I&B Code'. Section 60(5) of the 'I&B Code' empowers a person to file 'application' or 'proceeding' by or against the Corporate Debtor before the National Company Law Tribunal.

'Applications' under Sections 7 & 9 relate to Corporate Insolvency Resolution Process as distinct from a 'proceeding', as applicable in the case of liquidation proceeding. The Corporate Insolvency Resolution Process is also different from the appeal. Now it is to be explained as to how Section 238A is to be read and made applicable to 'an application' under Sections 7 or 9 of the 'I&B Code'. The word 'application' being absent in Section 238A, how Article 137 of the Limitation Act will be applicable.

35. The decisions of the Hon'ble Supreme Court in "***B.K. Educational Services Private Limited Vs. Parag Gupta and Associates***"; "***Jignesh Shah & Anr. Vs. Union of India & Anr.***" and "***Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd & Anr.***" etc. are law of land under Article 141 of the Constitution of India and binding on all Courts and Tribunals. Section 238A is a law enacted by Parliament and is also binding on all the Courts/ Tribunals. Hence, the matter requires reconsideration.

36. What was the reason for the Parliament in not using the word 'application' in Section 238A, when the word 'application', 'proceeding' and 'appeal' all were existing as on 6th June, 2018 when it was introduced. Even if the claim is not barred by limitation, but now in view of the aforesaid decisions of the Hon'ble Supreme Court, many of the applications under Section 7 filed by the Banks / Financial Institutions/ NBFCs are now being dismissed being barred by limitation, by counting three years' period from the date of default/ NPA which has badly affected the Financial Creditors.

37. The bright side of 'I&B Code', which is yielding result at national level has been constantly highlighted. However, a stagnation point has come with regard to Operational Creditors, after the recent decisions. They are not being paid any amount, as they are neither secured nor financial

creditors and their liquidation value in most cases is also 'zero'. Prior to the amendment, they were not given opportunity to mention that they were 'secured creditors' in absence of column pertaining to details of security in Form-B. This is the position which needs to be resolved mainly by the Banks/ Financial Institutions/ NBFCs, who are the members of the Committee of Creditors.

### **Collation of claims by the Resolution Professional**

38. A claim which is barred by limitation is not payable in law. In "Innoventive Industries Limited v. ICICI Bank and Anr.<sup>18</sup> ", the Hon'ble Supreme Court also observed that the Committee of Creditors can take plea that the claim is not payable in law or in fact. If a claim is barred by limitation, can such claim be filed before the Resolution Professional? Has the Resolution Professional any right to reject the claim on the ground that the claim is barred by limitation? The IBBI Regulations do not mandate to enclose a document in terms of Sections 18 & 19 that the claim is not barred by limitation. This is another issue which requires deliberation.

As the aforesaid issues have not been deliberated by any of the Resolution Professionals while collating the claim, they may not have knowledge.

39. The benefits of the I&B Code are huge, but many matters are required to be explained or to be re-looked in to by the appropriate forum such as National Company Law Tribunal, National Company Law Appellate Tribunal and the Hon'ble Supreme Court.

40. The problems given are illustrative, there are other problems too.

(S.J. Mukhopadhaya)

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<sup>18</sup> (2018) 1 SCC 407