LIQUIDATION UNDER IBC VIS-À-VIS SCHEME OF ARRANGEMENT UNDER COMPANIES ACT

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ABTSTRACT

The Insolvency and Bankruptcy Code, 2016 is a self-contained bankruptcy legislation which was much needed. This comprehensive code is a huge step towards cleaning up the mess that bankruptcy and resolution laws in India are in. The IBC was passed mainly with the view to consolidate and amend the existing legal framework of reorganization and resolution of insolvent and bankrupt persons. It was brought about with the objective to ensure that ease of doing business improves in India. The IBC has always functioned on the principle "Revival, not Liquidation". However, once the company goes into liquidation, is there a hope for revival? Interestingly, recent rulings appellate judicial and quasi-judicial authorities suggest that revival schemes can be filed even after liquidation proceedings have commenced. While such revival schemes have not yet been imbibed in the Code, however, the Companies Act has always enabled schemes of arrangement to be filed during winding up. The Draft Regulations on IBBI (Liquidation Process)(Amendment) Regulations, 2019 have provided the timeline which shall be applicable in cases where a revival scheme is proposed after commencement of liquidation of the corporate debtor. Since section 29A of the Insolvency and Bankruptcy Code, 2016 was enacted, which disqualifies a promoter from submitting resolution plans or acquiring the assets of the entity in liquidation. Hence, in this paper the issue "how does the possibility of a scheme of arrangement co-exist with the principle of promoter disqualification?" will be discussed.

INTRODUCTION

MEANING OF LIQUIDATION

Liquidation is the process of selling off all the assets of an entity, settling its liabilities, distributing any remaining funds to shareholders, and closing it down as a legal entity. The liquidation process is a plausible outcome of bankruptcy, which a company enters when it does not have sufficient funds to pay its creditors. The company liquidation in India refers to the process through which registered companies are shut down due to various reasons. Investors may liquidate a company as a consequence of various economic problems and non-payment of debts. Liquidation in finance and economics is the process of bringing a business to an end and distributing its assets to its claimants. It is an event that usually occurs when a company is insolvent i.e. it cannot pay its obligations when they are due. As company operations end, the remaining assets are used to pay creditors and shareholders, based on the priority of their claims which is also referred as 'waterfall mechanism'.

According to the Cambridge English Dictionary, 'liquidation' means "the process of closing a business, so that its assets can be sold to pay its debts, or an instance of this" or "a situation in which a company stops operating and sells all its assets in order to pay its debts".

As per The Black Dictionary, liquidation is defined as "the act or process of settling or making clear, fixed, and determinate that which before was uncertain or unascertained. As applied to a company, (or sometimes to the affairs of an individual,) liquidation is used in a broad sense as equivalent to "winding up;" that is, the comprehensive process of settling accounts, ascertaining and adjusting debts, collecting assets, and paying off claims".

Liquidation Value and Fair Value

The Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 give an elaborate process of the Insolvency resolution process for the corporate persons. Rule 2(1) (k) of the Regulations defines 'liquidation value' as, "the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date."

After amendment, fair value and liquidation value shall be determined by the two registered valuers appointed under Regulation 27. They shall submit the estimate of both fair and

liquidation values computed in accordance with the internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor to the resolution professional. If the resolution professional is of opinion that the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner. After the submission of reports, the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be

Rule 36 of the Regulations requires the submission in an electronic form to each member of committee within two weeks of appointment but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.

Liquidation value is the amount at which a company could sell its assets and settle liabilities on a rush basis. This concept applies to the valuation of a business that is considering entering bankruptcy protection. Valuation of assets is quintessential part of Corporate Insolvency Resolution Process (CIRP). There are two variations on the concept that can result in different liquidation values:

- Orderly basis. The liquidation event is conducted on an orderly basis, where the seller spends a limited amount of time researching and evaluating possible buyers and their offers.
- Forced basis. If the liquidation event is forced, such as via a one-day auction, the value obtained will be lower than would be the case with an orderly sale.

The liquidation value concept can be extended to be net of liquidation costs, such as the fees charged by any third-party liquidation service hired to handle the sale.[i]

According to Regulation 2(1) (hb), "fair value" means "the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion."

No matter which of the preceding liquidation valuation methods is used, the calculated amount will be less than fair market value, because the sale transaction does not encompass a sufficient amount of time to make the sale visible to all possible buyers. If more buyers had been made aware of the sale, they might bid asset purchase prices up to higher levels.

HOW LIQUIDATION PROCESS WORK?

The first and foremost step in a corporate insolvency resolution process is to make all possible efforts to revive and restart the corporate debtor[ii]. This is usually done by preparing and enforcing a 'resolution plan'. However, if that does not work out then liquidation process follows. Section 33 to 54 of IBC provides for the law related to the liquidation process.

Section 33 of IBC provides for the initiation of liquidation. Following are the circumstances where an order for liquidation is passed by the Adjudicating Authority-

(a) Non- receipt of resolution plan

When a Resolution plan which is required under Section 30(6) of IBC is not received before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 of IBC or the fast track corporate insolvency resolution process under Section 56 of IBC as the case may be.

(b) Rejection of resolution plan

When the Adjudicating Authority (NCLT) rejects the resolution, plan submitted to it under section 31 for the non-compliance of the requirements specified therein.

(c) Intimation of decision of the COC to liquidate to Adjudicating Authority

Where before the approval of a resolution plan, the resolution professional intimates to the NCLT the decision of Committee of Creditors (hereinafter referred as 'CoC') approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor.

The IBC amendment[iii] lowers the minimum vote requirement to 66 percent from earlier level of 75 percent.

(d) Contravention of resolution plan approved by the Adjudicating Authority

Where a resolution plan approved by the Adjudicating Authority is contravened by the corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a

liquidation order. If the adjudicating authority determines that the corporate debtor has indeed contravened the resolution plan, it shall pass a liquidation order.

APPOINTMENT OF LIQUIDATOR

A liquidator is an insolvency professional on whom all the powers of the Board of Directors, key managerial personnel and the partners, as applicable, of the Corporate Debtor are vested by the Adjudicating Authority upon liquidation order being passed under Section 33 of the IBC. Section 34 of IBC provides for the appointment of liquidator. After the Adjudicating Authority passes an order for liquidation under Section 33 of IBC, the resolution professional who was appointed for the corporate insolvency resolution process shall act as the liquidator for the purposes of liquidation, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in a specified form. He shall act as the liquidator unless replaced by the Adjudicating Authority under section 34(4) of the IBC. As per Section 34(4) of the IBC, the Adjudicating Authority may order to replace the Liquidator if: –

- The resolution plan submitted by the Resolution Professional under section 30 of the Code, was rejected for failure to meet the requirements as per Section 30(2)
- The Insolvency and Bankruptcy Board of India (hereinafter referred as 'IBBI') recommends the replacement of the Resolution Professional for recorded reasons
- The Resolution professional fails to submit written consent for appointment as Liquidator.

ELIGIBILITY OF LIQUIDATOR

- An Insolvency Professional shall be eligible to be appointed as a liquidator only if he/she and every partner or director of the insolvency professional entity of which he/she is a part of, is independent of the corporate debtor.
- In addition to this, he/she should be eligible to be appointed as independent director of corporate debtor under section 149 of Companies Act, 2013.
- He/She should not have been an employee or proprietor or partner of auditors, secretarial auditors or cost auditors of corporate debtor in last three financial years or legal or consulting firm of corporate debtor contributing to more than 10% of gross

turnover of such firm in last three financial years.[Regulation 3(1) of IBBI (Liquidation Process) Regulations, 2016]

- It is important for the person who is supposed to be appointed as a liquidator to disclose any pecuniary or personal relationship with the corporate debtor. It is also pertinent to note that he/she should not represent any other stakeholder in the same liquidation process.
- There might be instances where the person acting as the Resolution Professional is not appointed as the liquidator. This is usually done where:
    i. the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in section 30(2) of section 30; or
    ii. the IBBI recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or
    iii. the resolution professional fails to submit written consent under Section 34(1) to Section 34(4) of IBC

POWERS AND DUTIES OF LIQUIDATORS

Section 35 of the IBC enumerates the Powers and Duties of the Liquidator which includes the following:

- to verify claims of all the creditors and consolidate them;
- to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- to evaluate the assets and property of the corporate debtor in the manner and prepare a report;
- to take such measures to protect and preserve the assets and properties of the corporate debtor;
- to carry on the business of the corporate debtor for its beneficial liquidation;
- to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such

property to any person or body corporate, or to sell the same in parcels, though transfer are subjected to section 52 and further the liquidator shall not sell the immovable and movable property or actionable claims to any person who is not eligible to be a resolution applicant.

- to draw, accept, make and endorse any negotiable instruments on behalf of the corporate debtor, with the same effect as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
- to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;
- to obtain any professional assistance, in the discharge of his duties, obligations and responsibilities;
- to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of IBC;
- to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;
- to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;
- to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- to apply to the Adjudicating Authority for such orders or directions as may be necessary and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- to perform such other functions as may be specified by the Board.

REALISATION OF ASSETS

Under the Regulation 32 of IBBI (Liquidation Process) Regulations, the liquidator may sell-

(a) An asset on a standalone basis;

(b) The assets in a slump sale;

(c) A set of assets collectively;

(d) The assets in parcels

(e) The corporate debtor as a going concern (This clause has been inserted through amendment vide 28 March 2018. This amendment has been welcomed.)

(f) The business(s) of the corporate debtor as a going concern

Earlier there were four modes for liquidation of a corporate debtor i.e. disposal of its assets, namely, sale on a stand-alone basis; slump sale; sell the assets in parcels; and sell the assets collectively. Now liquidators have an option to sell them as a going concern, rather than disposing assets in parcels especially where an insolvency resolution process has been unsuccessful.

Benefits of inclusion of going concern:

- If these assets were to be sold as part of a going concern, it would most definitely fetch more than their scrap value. This, in turn, ensures better returns from the liquidation process, which is in the interest of all the stakeholders in this process.
- It will help to protect the interests of employees in viable units and help reduce the time period for liquidation. It will also help in takeover of viable units to protect the interests of employees and other stakeholders.

In any insolvency process, the liquidator strives to obtain the best price for the assets at his disposal. This inclusion of new method of sale as a going concern is in line with the spirit of the IBC as one of the main objectives of IBC is to ensure continuity of the corporate debtor. Sale of corporate debtor as a going concern helps to realise maximum value for the creditors and to ensure the welfare of the employees.[iv]

In the matter of **Gujarat NRE Coke Ltd. In re**[v], the bankruptcy court has mandated to liquidate the company as an ongoing concern, which aimed at protecting about 10,000 people from unemployment or joblessness. Under normal liquidation process, the company operation is shut first and then assets are sold to realise value. Slum sale of assets is expected fetch higher

value realisation. A going concern" or "a slump sale of the assets" enables the sale of business of the company including all its assets and properties. The business of the company is continued during the liquidation process by the liquidator.[vi]

It was observed:

"*The Liquidator shall try to dispose off the Corporate Debtor company as a going concern after publication of notice in newspaper with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three month from the date of the order if the process of sale as a going concern is failed during this period, then process of the sale of the assets of the company will be according to the provisions of sale of asset of the Corporate Debtor prescribed under section 33, Chapter VI of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016. In case it is not concluded within this period, the order of this Court directing the sale of the company as a going concern shall stand set aside and corporate debtor to be liquidated in the manner as laid down in Chapter III of the Liquidation process provided in Insolvency & Bankruptcy Code*."

In the matter of **Edelweiss Asset Reconstruction Company Ltd. vs. Bharati Defence and Infrastructure Ltd**[vii], the NCLT has ordered the liquidation of the company, Bharati Defence and Infrastructure Ltd after rejecting resolution plan submitted by Edelweiss Asset Reconstruction Co Ltd as the proposed plan was not practical and viable to manage affairs of the Corporate Debtor (hereinafter referred as 'CD'). Even though the resolution plan was backed by Committee of Creditors (CoC) in which Edelweiss Company had an 82.7 percent voting share as a financial creditor. It was directed that CD should be classified as a 'going concern' and the Liquidator shall endeavour to sell the CD as a going concern. The maximum period applicable for trying the sale on a going concern basis of the Corporate Debtor will be only six months from the date of the order. In case the efforts to sell the company as a going concern fails during the stipulated period of six months, then the process of the sale of the assets of the company will be undertaken by the liquidator as prescribed under Chapter- III of IBC, 2016 and the relevant regulations of IBBI.

It was advised that liquidator should try to liquidate CD as going concern in order to fetch maximum liquidation price.

SCHEME OF ARRANGEMENTS IN LIQUIDATION

Whether Section 230 of Companies Act and provisions of Insolvency and Bankruptcy Code are conflicting in spirit?

Section 230 of Companies Act, 2013 deals with the 'Power to compromise or make arrangements with creditors and members'. This section empowers NCLT to make an order on the application of the company or creditor or member or in the case of company being wound up of the liquidator for the proposed compromise or arrangements including Corporate Debt Restructuring (CDR). This section is a mechanism to ensure institutional settlement of disputes between creditors and the company. It ensures that the company has a chance to save itself from insolvency or liquidation by doing a deal with at least majority of creditors. Both the creditor and the company can approach the NCLT i.e. creditors can take a defaulting company to NCLT under IBC and companies can approach the NCLT through Section 230 of the Companies Act for proposing a plan in settling dues with creditors. Therefore, it is a wise decision to approach NCLT under Section 230 of the Companies Act as it can help the management in retaining control over the company. The 2005 Report of the Expert Committee on Company Law (JJ Irani Committee Report) had noted that an effective insolvency law:

".. should strike a balance between rehabilitation and liquidation. It should provide an opportunity for genuine effort to explore restructuring/ rehabilitation of potentially viable businesses with consensus of stakeholders reasonably arrived at. Where revival / rehabilitation is demonstrated as not being feasible, winding up should be resorted to.

*Where circumstances justify, the process should allow for easy conversion of proceedings from one procedure to another. This will provide opportunity to businesses in liquidation to turnaround wherever possible. Similarly, conversion to liquidation might be appropriate even after a rehabilitation plan has been approved if such a plan was procured by fraud or the plan can no longer be implemen*ted".

As liquidation is the last resort, the IBC does not make any provision for the conversion of liquidation proceedings into restructuring/rehabilitation proceedings. Irreversibility of the liquidation process was a feature recommended in the Report of the Bankruptcy Laws Reform Committee.[viii]

Nowadays, liquidation proceedings are evolving into restructuring or rehabilitation proceedings by taking recourse to Section 230 of the Companies Act, 2013. Section 230 allows the liquidator of a company undergoing liquidation to file an application before the NCLT to seek sanction for a scheme of arrangement between the company and its creditors and, where applicable, its members.

The National Company Law Appellate Tribunal has brought the section into limelight in series of orders starting with **S.C. Sekaran vs. Amit Gupta**[ix]. Here, the NCLAT directed the liquidator, appointed under the IBC, to "*take steps in terms of Section 230*" for the revival of the corporate debtor before undertaking the sale of its assets.

Section 391 of the Companies Act, 1956 has since been replaced by Section 230 of the Companies Act, 2013. In the case of **Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors**[x]., the Hon'ble Supreme Court observed and held as follows:

"*The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application*."

In view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' and 'Swiss Ribbons Pvt. Ltd.', it was directed that the 'Liquidator' should proceed in accordance with law. He will verify claims of all the creditors; take into

custody and control all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the IBC. The Liquidator will access information under Section 33 and will consolidate the claim under Section 38 and after verification of claim in terms of Section 39 will either admit or reject the claim, as required under Section 40. Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.

Therefore, it is clear that during the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows:

i. By compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of Section 230 of the Companies. Act, 2013.
ii. On failure, the liquidator is required to take step to sell the business of the 'Corporate Debtor' as going concern in its totality along with the employees.

The last stage will be death of the 'Corporate Debtor' by liquidation, which should be avoided.

Normally, the total period for liquidation is to be completed preferably within two years. Therefore, in the matter of S.C. Sekaran v. Amit Gupta & Ors, this Appellate Tribunal allowed 90 days' time to take steps under Section 230 of the Companies Act, 2013. In case, for any reason the liquidation process under Section 230 takes more time, it is open to the Adjudicating Authority (Tribunal) to extend the period if there is a chance of approval of arrangement of the scheme.

It was observed in **Y. Shivram Prasad v. S. Dhanapal & Ors**[xi] that

"During proceeding under Section 230, if any, objection is raised, it is open to the Adjudicating Authority (National Company Law Tribunal) which has power to pass order under Section 230 to overrule the objections, if the arrangement and scheme is beneficial for revival of the 'Corporate Debtor' (Company). While passing such order, the Adjudicating Authority is to

play dual role, one as the Adjudicating Authority in the matter of liquidation and other as a Tribunal for passing order under Section 230 of the Companies Act, 2013. As the liquidation so taken up under the 'I&B Code', the arrangement of scheme should be in consonance with the statement and object of the 'I&B Code'. Meaning thereby, the scheme must ensure maximisation of the assets of the 'Corporate Debtor' and balance the stakeholders such as, the 'Financial Creditors', 'Operational Creditors', 'Secured Creditors' and 'Unsecured Creditors' without any discrimination. Before approval of an arrangement or Scheme, the Adjudicating Authority (National Company Law Tribunal) should follow the same principle and should allow the 'Liquidator' to constitute a 'Committee of Creditors' for its opinion to find out whether the arrangement of Scheme is viable, feasible and having appropriate financial matrix. It will be open for the Adjudicating Authority as a Tribunal to approve the arrangement or Scheme in spite of some irrelevant objections as may be raised by one or other creditor or member keeping in mind the object of the Insolvency and Bankruptcy Code, 2016."

Therefore, it was held in this case that the liquidator is required to act in terms of the aforesaid directions of NCLAT and take steps under Section 230 of the Companies Act.

Section 29A of the IBC lays down the ineligibility criteria applicable to resolution applicants during the insolvency process. It does not allow non-performing asset (NPA) holders, including promoters, to take part in the resolution process. This section aims to prevent promoters from taking back companies against whom IBC proceedings have started. The IBC further bars the liquidator from selling any movable or immovable assets of the corporate debtor to any entity who is ineligible under Section 29A to propose a resolution plan. However, the defaulting promoters can enter into settlement of dues by taking creditors on board under Section 230 of Companies Act. This section also gives promoters' power to make arrangements with creditors and other members. This provision would apply only after the company's insolvency resolution application has been withdrawn by the support of 90 per cent of the lenders under Section 12A of IBC, which allows debtors another chance to retain control over a firm even after a case is admitted to the National Company Law Tribunal.

It has been argued that the defaulting promoters might misuse the Companies Act provision to get a backdoor entry into their firms. Section 29A of IBC and Section 230 of Companies Act are conflicting in spirit although not in the letters of law as both the laws are working at cross

purpose. About 99 stressed firms have opted for withdrawal of resolution applications under Section 12A and over 400 have gone for liquidation.[xii]

But the counter argument has been made that there cannot be a situation where the promoters of company can abuse the process and get a wrongful gain. But there can be a situation where nothing is left then 90 percent creditors will make a conscious decision to come out of the system. The underlying objective in the entire process is value maximisation. If the process under Section 230 helps achieve a higher value for the asset, therefore, the regulatory framework should enable it.

In the case of **R. Vijay Kumar v. Kasi Viswanathan**[xiii], the 'Resolution Professional' has filed an application under Section 33 of the IBC before the Adjudicating Authority (National Company Law Tribunal) due to failure of the resolution process. The NCLT has passed the order of liquidation dated 26th February, 2019. The appellants who are the Directors of M/s. Gemini Communication Limited (Corporate Debtor) submitted that the liquidation value of the property of the 'corporate debtor' is Rs.3 Crores whereas the 'Promoters' are willing to pay a sum of Rs.30 Crores. However, such submission was not accepted in view of their non-entitlement under Section 29A of the IBC.

The National Company Law Appellate Tribunal held that a scheme of compromise must be considered first at the liquidation stage before the assets of the company can be liquidated. But the NCLAT didn't go into the question of whether such schemes can be proposed by the existing promoters who are ineligible under Section 29A of the Insolvency and Bankruptcy Code.

The Insolvency and Bankruptcy Board of India has notified amendments to its liquidation regulations i.e. Regulation 2B allows for a compromise or arrangement under Section 230 of the Companies Act, 2013. The process for such a compromise needs to be completed within 90 days from the liquidation commencement date. The amended provision doesn't specify who can or cannot propose a scheme.

Recently, in the case of **Jindal Steel & Power Ltd. V. Arjun Kumar Jagatramka**[xiv], the issues were-

1. Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC') the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act?

2. If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the IBC to submit a 'Resolution Plan'?

In view of the decisions of Y. Shivram Prasad and S.C. Sekaran, the first question was answered in affirmative, i.e., a petition under Section 230 to 232 of the Companies Act is maintainable in a Liquidation proceeding under IBC

The next question was answered in negative. The NCLAT held that an application under Section 230 to 232 of the Companies Act, 2013 for Compromise and Arrangement with creditors is maintainable during the pendency of the liquidation proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC). However, it has been clarified that the promoters who are ineligible under Section 29A IBC are not entitled to file an application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Also, Proviso to Section 35(f) of IBC prohibits the liquidator to sell immovable and movable property or actionable claims of the 'Corporate Debtor' in liquidation to any person who is not eligible to be a resolution applicant.

EFFECTIVENESS OF IBC W.R.T LIQUIDATION

Whether the new insolvency law, i.e., IBC is effective or not in the light of increasing the no. of liquidation cases.

The Preamble of IBC states that it has been enacted to consolidate and amend the laws on reorganisation and insolvency resolution of corporates, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance interests of all stakeholders and to establish an Insolvency and Bankruptcy Board of India.

The purpose of IBC is to find appropriate solution for stress assets and liquidation would be the last resort. The Hon'ble Supreme Court in the matter of Swiss Ribbons Pvt. Ltd. & Anr.

v. Union of India & Ors.[xv], observed: *"What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark".*

But in reality, the purpose of IBC is not fulfilled instead it is used as substitute of recovery forum legislation. Latest data from IBBI revealed that out of the 2,542 cases admitted under IBC till date, 1,497 CIRPs or 59% of cases are still in court.[xvi] A comparative analysis of data of two years is done below:

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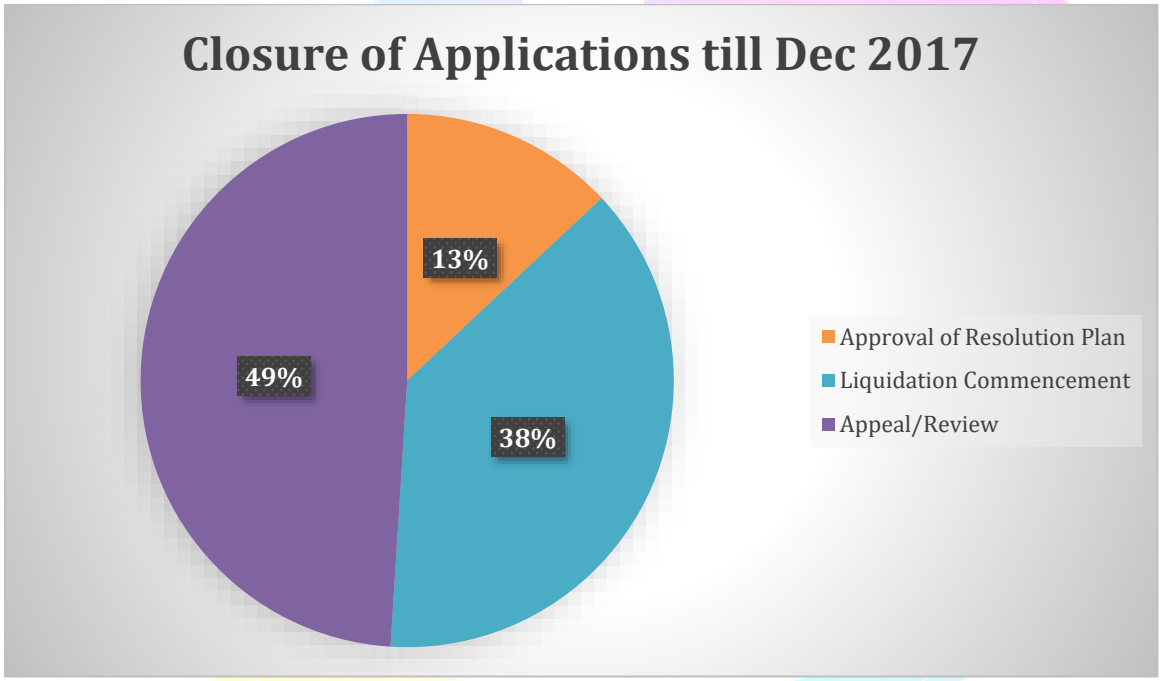

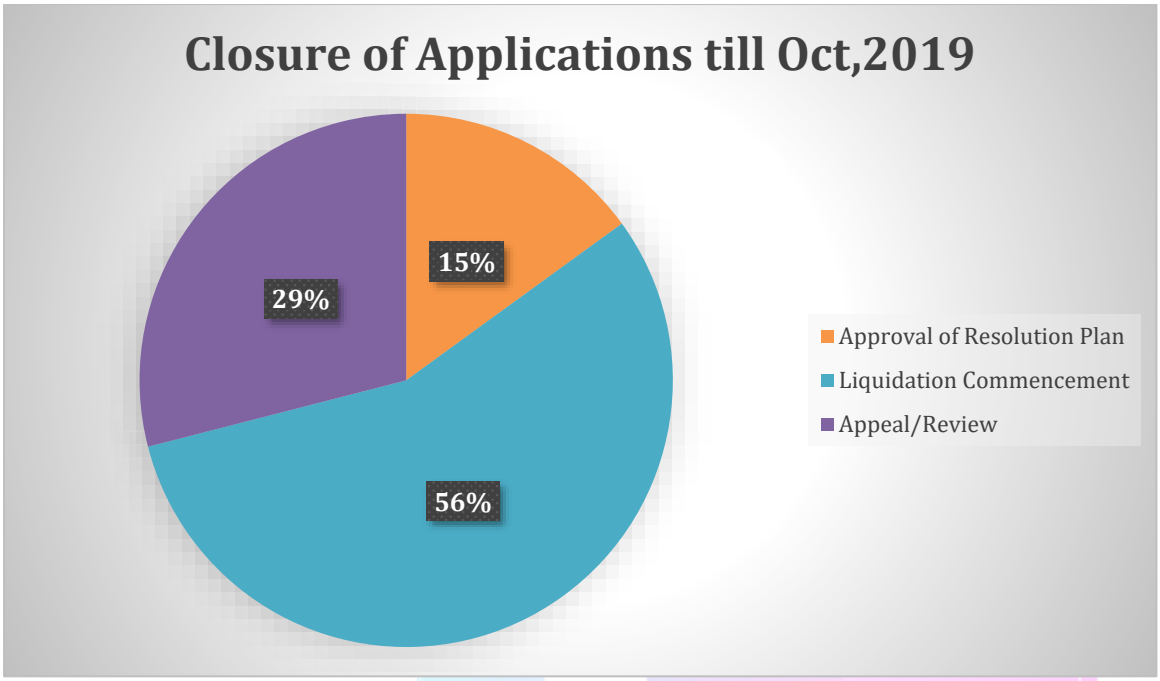

There is slight increase in the number of resolution plans that have been approved. But, simultaneously there is an increase in the number of liquidation cases which is higher than the former. This implies the purpose for which IBC was enacted has been defeated.

CONCLUSION

As per the ruling of NCLAT in the SC Sekaran v. Amit Gupta and recent amendments made by IBBI in Regulations, the errant promoters can make a sly backdoor entry to reclaim control of their company at a throwaway price. IBC is premised on the basis of shareholders' disenfranchisement after a default and promoters of a company in default should not be handed back management with the creditors taking a write-off. After the perusal of the NCLAT's recent judgement, it can be said that promoters' powers to make compromise or arrangement with creditors etc. under Section 230 of Companies Act is in conflict with the spirit of IBC as the promoters have been clearly debarred from participating in making compromise. The NCLAT has clarified that the persons who are ineligible under Section 29A are not qualified to propose scheme during the liquidation. However, it can be suggested that there should be qualifications for promoters applying under Section 230. For instance, if there has been a serious criminal infraction on account of promoters or if the promoters are guilty of fraud or

are ineligible to be directors then they should be barred from proposing scheme of compromise under Section 230. Though it appears that the issue of applicability of Section 29A of IBC on the schemes of Section 230 has finally resolved by the NCLAT but there are further critical issues such as participation, voting thresholds during the liquidation process which need clarification.

Also, IBC records more liquidations than resolutions over past two years. A cursory look at the latest data from the Insolvency and Bankruptcy Board of India (IBBI) shows that while delays in the resolution process persist, liquidation remains dominant, which could be an unhealthy benchmark. However, it can be said that the purpose of the new insolvency has somehow been defeated.

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