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Eligibility and qualification of prospective resolution applicant in cirp: a study in light of recent enactments

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Abstract

The Insolvency and Bankruptcy Code, 2016 (IBC2016) provides for a tool for revival and reorganization for distressed entities. It provides that the debtor entity should be recused and revived under the supervision of the creditors and further limits the participation of the current management of debtor. § 29A which spells out the ineligibilities provides that the promoters and management of the debtor with an account marked as NPA are prohibited from submitted a resolution plan. The applicability of the provision is further extended to the provisions of the Companies Act though judicial interpretation followed by the legislative amendments. The paper is aimed at evaluating the extent of the effectiveness of the § 29A and also takes a peek into the growing demand for relaxation of the provisions of § 29A, especially for the persons with an account declared as NPA. It uses the laws prevalent in UK and US to draw references and contrasts to further the arguments.

Keywords: *Insolvency and Bankruptcy Code, § 29A, Current Management, Disqualifications of resolution applicants.*

Introduction

In year 2016, the laws related to bankruptcy and insolvency in India were reworked to completely revamp the entire legal ecosystem in order to promote the maximization of value of assets of debtor (Insolvency and Bankruptcy Board of India, 2020). The law was codified and came to be known as *'Insolvency and Bankruptcy Code, 2016 (IBC2016)'*. The law imports major concepts from laws prevalent in US and UK and is aimed towards streamlining the resolution process in India. Although certain concepts are imported from these two major countries, yet stark differences in their own laws and approach cannot be ignored. While in UK, once the application for insolvency is accepted, the management of the debtor is taken over by an insolvency administrator. The creditors take up the supervisory role and have power to vote on the proposals and agendas to explore the most suitable process for rescue (The Insolvency Act, 1986). US follows an entirely different approach, and allows the existing management to stay in effective control throughout the process. However, the approval of the creditors is still necessary in order for confirmation and approval of resolution plan (Title 11 of United States Code, 1978)

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The UK model follows the approach which has been referred to as *"creditor-in-control"* model, which the US approach is referred to as *"debtor-in-control"* model. While both the approaches can be said to be polar opposites, yet the underlying intention to resolve the debtor instead of liquidation is quite evident.

IBC2016 follows '*creditor-in-control;* model under which the Corporate Insolvency Resolution Process (CIRP) is supervised by a committee of the creditors with aid and assistance of an Insolvency Resolution Professional (IRP). This principle is squarely imported from the process in UK with the insolvency administrator being analogous to IRP. The judiciary is another important aspect in CIRP who is empowered to guide the CIRP and pass the final decision on the resolutions of the creditors to liquidate or resolve the debtor through resolution plan (Insolvency and Bankruptcy Code, 2016). The adjudication of the CIRP is entrusted in the National Company Law Tribunal (NCLT) which can be said to be imported from US (Title 11 USC, 1978).

However, IBC2016 is not a jumbled mixture of US and UK laws and have certain distinct features as well. One of the most prominent distinct feature is the disqualifications associated to the proposed resolutions applicants proposing a resolution plan. It would not be prudent to say that laws in US and UK is devoid of providing safeguards against the possible misuse of the provision of the insolvency law. The UK addresses the situation through limitation of the ability of the management of debtor to run the company. IBC2016 ensures that the current management of the debtor is effectively debarred from being part of the debtor in future (Insolvency and Bankruptcy Code, 2016).

At the time of the inception of IBC2016 (as per the recommendations of BLRC), no disqualifications were prescribed for the prospective resolution applicants (Viswanthan, et al., 2015). § 29A was introduced as an amendment to IBC2016 providing various disqualifications attributable to anyone who wishes to be a prospective resolution applicant. The paper shall focus upon various disqualifications or ineligibilities as provided under the provisions of § 29A especially towards its applicability upon the current management of the debtor.

The provision was challenged before the Supreme Court for its validity who undertook the principles of purposive interpretation by using the excerpts of debates in parliament to understand the rationale behind the provision. Although, the topic is discussed later in detail, the judgement was not based upon the history related to provision of § 29A, but upon the precedents set in explaining similar terms. This paper shall scrutinize the incentive behind § 29A and its impact upon the restructuring the corporates in India.

§ 29A: An overview

IBC2016 is aimed towards facilitation of revival and rehabilitation of distressed entities (Insolvency and Bankruptcy Board of India, 2020). Liquidation and dissolution is the last resort measure in CIRP. This is evident from various orders which acknowledges and endorses the core intent of

revival of IBC2016 (Swiss Ribbons Pvt Ltd. v Union of India, 2019) (Arun Kumar Jagatramka v Jinal Steels and Power, 2021). It has been understood that the value of the debtor is preserved upon the keeping the assets together and maintain business of the debtor as going concern. Surplus value is derived the debtor fetches more value than value derived via fragmentary sale of assets (Datta, 2018). The disposal of assets may be through transfer of management, sales of undertakings or scheme or arrangements as under Companies Act, 2013.

IBC2016 provides that the CIRP can be initiated via three modes, namely:

(a) Through Financial Creditor (§ 7); or

(b) Through Operational Creditor (§ 9); or

(c) Through Corporate Debtor itself (§ 10);

The difference in the operational and financial creditor lies in the nature of the relationship with the debtor. In case the creditor has become the creditor of the debtor due to its operations, then the creditor shall be operational creditor. Hence, suppliers, employees, and government agencies shall be categorized as operational creditors (§ 5(20)). In case relation of the creditor with the debtor is financial in nature, such provision of loan, or advance with intention to earn interest, shall be categorized as Financial Creditors (§ 5(7)).

Another point of difference between Operational and Financial Creditors is that the Financial Creditors supervise the resolution of the debtor through Committee of Creditors (CoC). All the unrelated financial creditors form CoC who undertake the supervision of the resolution process and casts vote upon the resolution plan or dissolution as the case may be. CoC functions through the rule of majority wherein all the decisions are taken with a minimum majority of 66% of the voting share. If the CoC is unable to approve a resolution plan within the prescribed time limit, then the debtor is liable to be dissolved (§ 33).

Operational creditors are not part of CoC unless, there are no financial creditors of the debtor. They, however, have the power to appoint an authorized representative to put forth their point of view in the CoC. However, they do not have the power to vote on the resolutions of the CoC. However, the operational creditors have been guaranteed payment in resolution plan which shall not be less than the amount payable to them in case of liquidation of the debtor (§ 21).

In the third mode, the debtor itself applies for the initiation of the CIRP. The only difference in this mode from the previous two modes is the applicant and the rest of the process shall remain the same. It is pertinent to note that an applicant can only initiate the proceedings, if the debt due and defaulted is in excess of ₹ 1,00,00,000.00 (Rupees One Crore Only) (Notification No. SO 1205(E), 2020). The entire process can be summarized as:

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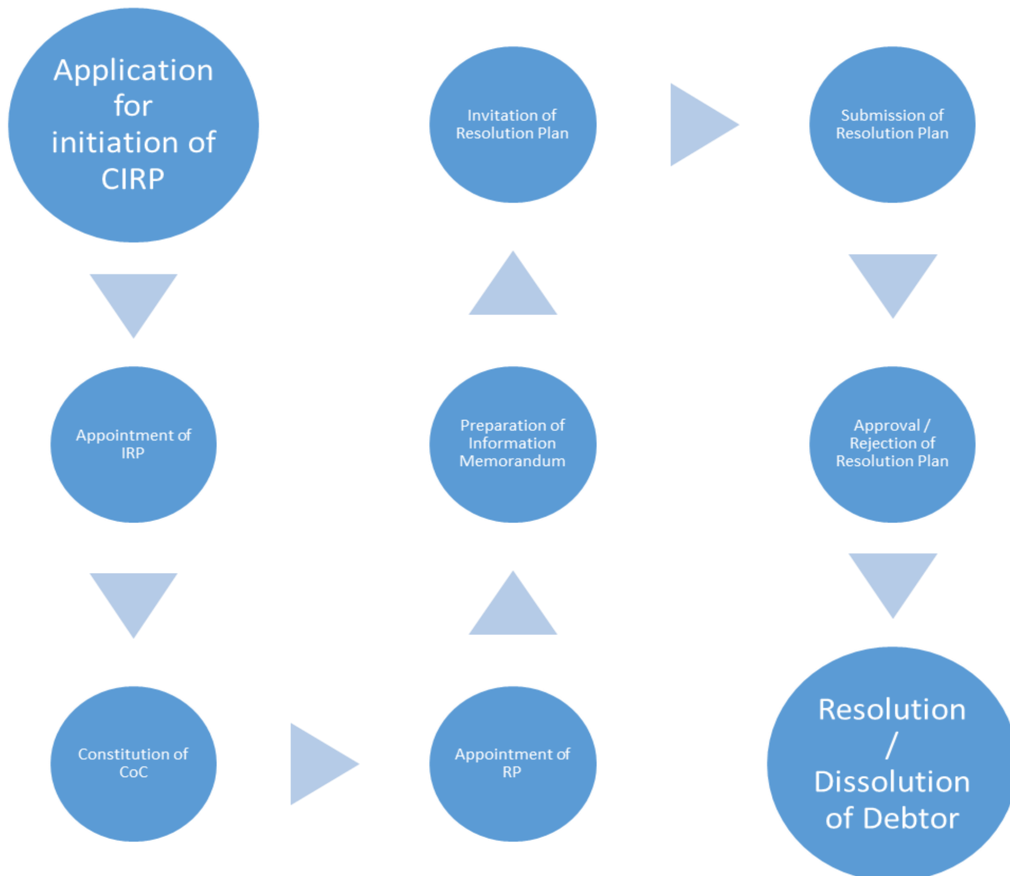

It is at the stage of invitation and submission of resolution plan, the importance and relevance of § 29A can be found.

§ 29A and position of promoters of debtor

§ 29A primarily provides for the ineligibilities for the persons who are wishing to file for a resolution plan. While § 29A provides distinct disqualifications certain are linked to one basis, which is non-payment of dues. Thus if a person is a wilful defaulter (§ 29A(a)) or is an undischarged insolvent (§ 29A(b)) or is the owner of an account which has been declared NPA for over a year (§ 29A(c) or is a guarantor to a debtor in CIRP (§ 29A(h)), shall be considered to be ineligible to be a resolution applicant.

Other significant basis the legal disabilities under different commercial laws, such as: disbarment from accessing the securities market by SEBI (§ 29A(e)), disqualification from being a director (§ 29A(f)) or is a convicted felon punished with the imprisonment of more than 2 years or 7 years as the case may be (§ 29A(g)).

The disqualification shall extend to the connected persons of the persons mentioned above. Hence, current and previous management, promoters or management of applicant or its holding or subsidiary shall be looked into to ascertain the disqualification.

§ 29A is not only limited to resolution but also has an impact upon the liquidation proceedings as well. The liquidator of liquidated company cannot dispose off assets of the debtor in favour of the persons disqualified (§ 35). Even the creditors who are looking to realize their sums wishes to dispose off its security interest in the liquidated company, cannot dispose off the interest to an ineligible person (Regulation 27(8) of Liquidation Regulations).

Although § 29A does not explicitly debar the promoters of the debtor from being a resolution applicant, yet it lays down the genera conditions for disqualifications of resolution applicants. However, the promoters of the debtor are usually member or one or more classes of disqualified persons.

Circumstances leading to § 29A

§ 29A was introduced in response to certain results which were negating the very aim of IBC2016. Initially the promoters were able to regain the control of the debtor company through back door and making the creditors provide huge concessions (Mani & Bakshi, 2017). The tendency was vehemently discussed in Synergy Dooray case. In the instance case resolution plan was submitted by Synergy Castings Ltd. which was the associate company to the debtor. The plan was highly prejudicial to the interest of the creditors by seeking a haircut of 95% of the debts due to them. The plan was approved by the CoC. The plan subsequently was affirmed by the Adjudicating Authority. The order of the Adjudicating Authority was challenged on the ground that the resolution applicant was the related party and was also a member of CoC. It was submitted that IBC prohibited related parties from being member of CoC and thus was not eligible to participate in CoC. It is pertinent to point out that prior to initiation of CIRP, the resolution applicant have transferred its claim to another Financial Creditor. This transfer gave the said financial creditor, Millennium Finance Limited, voting share of 76% in the CoC. It was contended that this transaction was mainly a channel for back door entry of the related party to negate the safeguard put in place by the IBC in relation to participation of related parties. The Appellate Tribunal, however, opined that the assignment of the claim was legally transferred and IBC2016 contains no provisions for prohibition of such transferee creditor from participating in the CoC (Edelweiss Asset Reconstruction Company Ltd v. Synergies Dooray Automotive Ltd. & Ors., 2018).

The order of the Appellate Tribunal created ripples in the insolvency regime and was viewed as the perfect validation towards the claw back of related parties in the debtor through assignment of debts and thereafter regaining the control of the debtor through back door channels (Mani & Bakshi, 2017). This led to the amendment in the IBC2016 which was aimed at plugging this legal loophole. The amendment was brought in two steps:

(a) Ordinance introducing the provision in the IBC2016 (Insolvency and Bankruptcy Code

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(Amendment) Ordinance, 2017 (Ord. 7 of 2017));

(b) Amendment giving solid foundation to provision (Insolvency and Bankruptcy Code (Amendment) Act, 2018 (Act No. 8 of 2018));

The most distinct feature of § 29A introduction, is the time taken the government to come up with the amendment. Synergy Dooray case was decided in August 2017 and the provision was added in November 2017 through ordinance. Even the amendment was brought with retrospective effect from 23rd November 2017.

IBC2016 further acknowledges the scope of the disposal of assets of the debtor in prejudice to the collective interest of all the stakeholders. It provides that the NCLT has the power to void the undervalued and preferential transactions. The avoidance provisions however, are applicable only upon the assets of the debtors. Hence, although § 29A tried to resolve the problem and plug the legal void, yet the matter of the former related parties being part of the CoC still persists. The issue has however, been addressed by the Supreme Court through purposive interpretation of the provisions of the IBC2016.

Supreme Court opined that the creditors may not be related parties at the time of the initiation of CIRP, however, if they were former related parties, then such creditors should be excluded from CoC. It was further understood that the plain reading of the provisions of the CoC, would not exclude creditors who would divest their interest prior to filing for initiation of CIRP. However, the aim of the IBC2016 would stand defeated unless such creditors are excluded from CoC (Phoenix Arc Private Ltd. v. Spade Financial Services Ltd., 2020).

It is to be understood that case of Phoenix Arc is not completely analogous to Synergies Dooray case. Both the cases, the actions of the related parties have contributed towards the negation of the aims and objectives of IBC2016. While the procedure laid down under the code was followed to the letter, yet the related parties were able to find out a loophole to exploit. The resolution plan in Synergy Dooray case was approved by the CoC, which can be said to be tainted with claims of the related parties.

Amendment of insertion of § 29A did not address the basic problem of related party in the CoC, but was focussed upon laying down the eligibilities for the resolution applicants. This has still left open the back door for the related parties to be part of CoC by ensure divestment prior to the initiation of the CIRP.

§ 29A and Judicial Interpretation

Judicial interpretation and its application is one of the major aspects of the provision. This provision is to be often implemented by the Adjudicating or Appellate Authority whose viewpoint and precedents play a vital role in interpretation of provision. Furthermore, the Supreme Court has also ensured that it keeps up the sanctity of the provisions of § 29A in its judgements.

A resolution plan is liable to be rejected if it is hit by the ineligibility of the resolution applicant. It was further held that promoters cannot be allowed to gain at the expense of the creditors (Chitra Sharma v Union of India, 2018).

The judicial test of the provisions of § 29A can be said to have come up before the Supreme Court in Arcellor Mittal Case. In the instance case, the Essar Steel Ltd was getting resolved and two resolution plans were rejected by the Adjudicating and Appellate Authorities on the ground that they were ineligible. First resolution applicant, ArcellorMittal India was ineligible on the ground that its holding company has another subsidiary which is has and NPA Account; while the second applicant was held ineligible on the ground that its shareholders were promoters were promoters of entity with an NPA Account. It was held that while the plain reading of the provision would not have made the applicants ineligible applicants, yet a purposive interpretation of the provision is required to uphold the provision in spirit (Arcellormittal (India) Ltd. v. Satish Kumar Gupta, 2019).

Furthermore, in case a person is ineligible to submit a resolution plan on account of being the promoter of an entity with a NPA Account, it has been opined that the person has adequate time to pay off the debt prior to submission of resolution plan. It was held that 90 days for declaration of the account as NPA along with prescribed period of one year is more than enough time to put the house back in order (Swiss Ribbons Pvt Ltd. v Union of India, 2019).

It has also been held that the promoters does not have an inherent right to submit a resolution plan. It was further opined that the provisions of § 29A acts as an exception to the principle of corporate veil and thus are extensive and constitutionally valid. While incorporating purposive rule of interpretation, it was further opined that promoters under § 29A shall include all the persons related to such ineligible entity and such other persons who are acting in concert with such person (Swiss Ribbons Pvt Ltd. v Union of India, 2019).

Such purposive interpretation of the provisions of § 29A has provided the opportunity to the courts to expand the application of the provision in order to uphold the spirit of the provision at highest standard.

Corporate Actions and § 29A

Companies Act, 2013 provides that the company and its members and creditors can enter into an arrangement of compromise (in of creditors) or arrangement (in case of members) (§ 230 - § 240 of the Companies Act, 2013). Until 2020, there was no provision in the IBC2016 governing such actions. It can be understood that one of the ways to revive a debtor is to enter it into a scheme or compromise or arrangement. However, in event of lack of provisions in IBC2016, the same were being governed under the provisions of Companies Act, 2013. This implied that any corporate action needs to be approved by a members and creditors, as the case may be, with a 3/4th majority and needs approval from the NCLT (§ 230 - § 231 Companies Act, 2013). It is to be noted that there are no equivalent disqualification under the provisions of the Companies Act, 2013 to § 29A of IBC2016. Therefore, the persons disqualified under the provisions of § 29A were eligible to

propose corporate action under provisions of Companies Act.

It was noted by the IBBI which was of the opinion that provisions of Companies Act provide a backdoor access to the promoters of the debtors who are ineligible under § 29A of iBC2016 (Insolvency and Bankruptcy Board of India, 2019). When public comments were sought by the IBBI upon the issue, it was vehemently commented that provisions of § 29A shall not be made applicable upon the provisions of § 230 - § 231. The rationale quoted was that the corporate action during liquidation is the last ditch effort to preserve the surplus value of the debtor. Extension of the ineligibilities shall frustrate the purpose of the corporate action at the time of liquidation (Insolvency and Bankruptcy Board of India, 2019). IBBI siding with the unpopular opinion and reiterated its stand that the unfettered eligibility to propose the corporate actions under provisions for corporate actions under Companies Act, 2013 at the time of liquidation is prejudicial to the aims and objectives of the IBC2016.

Evaluation of § 29A

One of the most appealing features of a corporate is the separate legal entity coupled with limited liability. This provides for the separation of ownership and management of the entity. It also helps to manage and contain the risk associated with the business (Bankruptcy Law Committee Report, 2015). One of the major aspect of the insolvency law is to mitigate and limit the entity's liability in case of failure (Finch, 2009). .

India primarily follows the creditor-in-possession regime which has been imported from the UK. The regime in itself imply the enhanced scepticism towards the current management of the debtor. However, under the UK Act, the scepticism has not translated into the strict form of ineligibilities as prescribed under § 29A.

Global Perspective

Under the UK regime, during administration process (analogous to CIRP) the management of the debtor is transferred into the hands of the insolvency administrator who in terms of powers and duties be equated to Resolution Professional under IBC2016. This is quite different under the US regime, wherein the management of the debtor stays and is also provided with a right to submit a resolution plan within 120 days.

Although both UK and US follow separate approach, yet none of them debar the management or promoters of the debtor to participate in the resolution of the debtor and ultimately regain control of the same. The scope for participation by the management and promoters of the debtor also gains limelight in the era of pre-packs. Both US and UK acknowledges the concept of pre-packs and consider them an effective tool to revive and rehabilitate the MSMEs. While the evaluation reports have frowned upon the sales of the assets of the debtor to related parties, yet were not convinced about banning them. Instead the report recommended that transparency should be promoted in such transactions. It has led to laying down of regulations which regulate such

transactions, thereby ensuring that fairness and transparency is maintained (Government of UK, 2020).

Development of § 29A

The Bankruptcy Law Review Committee Report can be considered to be a vital source of information to understand the history, purpose and intent of IBC2016. The report of this committee can be considered to be the ultimate basis for enactment of IBC2016 (Bankruptcy Law Committee Report, 2015). The report was aimed at understanding the bankruptcy law and providing with a way out for the promoters. It also advocated that the promoters should be provided an attempt at the second chance to turn around the debtor.

After the amendment to introduce § 29A, the room available for the promoters to provide a resolution plan for their entities. There has been various recommendations to relook into the provisions of § 29A to relax the same for the promoters. One of the recommendations provided with the powers to the CoC to reject a resolution plan by the promoter, in case the same is perceived to be of value lower than the market value. It was recommended that this would enable to limit the possibility of misuse the CIRP by the promoters. However, it was cautioned that not all promoters will be covered under this setup and there shall always be certain unscrupulous promoters against whom safeguards need to be put up (Srinivas, 2020).

A viewpoint states that the provisions of § 29A(c) is excessive and seeks to do a lot more than the problem it was meant to solve. The scope of the section needs to be trimmed while ensuring that the aim of the provision is preserved. One such step could include the extension of the time limit of invoking ineligibility in case of promoter of an NPA account. The same was reiterated by the Insolvency Law Committee Report who advocated the extension of time to three years from current one year. The basis for the term of three years is that a troughs of a typical business cycle extends beyond one year (Insolvency Law Committee Report, 2018). It was however recognized that no calculation model can determine whether the account was rendered NPA due to business cycle movements, yet a broad guideline could be drawn up in order to provide a safeguard against the misuse of time period.

Legislative changes

While the provisions of § 29A was limited to IBC2016, yet principles of purposive interpretation were imported by the NCLAT to provide an extended application of the provision to the corporate actions under Companies Act. It was first laid down in matter of Jindal Steel Case. (Jinal Steel & Power Ltd. v Arun Kumar Jagatramka, 2019). The case of an appeal against the order of the NCLT which allowed the promoters of the debtor to provide a scheme of compromise and arrangement under the Companies Act. The appeal was filed on two grounds, namely:

(a) Whether the scheme of arrangement could be entered during the liquidation proceedings under IBC? And

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(b) Whether § 29A is applicable upon such scheme?

In order to answer the first issue, reliance was put on the precedent, which provided that nothing in the current legislative set up under IBC prevents such a scheme at the time of liquidation. It was further understood that such a scheme would be in line with the core objective of the IBC2016 to revive the debtor and realize its surplus value.

For the answer to the second issue, the matter was swinging upon the provisions of § 29A which provided that the liquidator is debarred from selling the assets of the debtor to those person who are ineligible to be resolution applicants. Furthermore, there is no such bar upon the compromise and arrangements. The view was further promoted by the IBBI in its discussion paper, which stated that the intention of § 29A was never to be cover the compromise and arrangements (Insolvency and Bankruptcy Board of India, 2019). Discussion papers are considered to be guidelines and are not binding upon the courts and tribunals. However, NCLAT took a divergent view and relied upon the provisions of § 35 stating that the debtor should still be protected from its erring management. Thus, the NCLAT while importing the principles of purposive interpretation held that the provisions of § 29A shall be applicable upon the compromise and arrangements under companies act.

The principle of purposive interpretation and the intention to save the debtor from its management was influenced from Supreme Court judgement in matter of Swiss Ribbons (Swiss Ribbons Pvt Ltd. v Union of India, 2019). The Supreme Court was of the view that – 'primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation'.

After the order of the Jindal Steels, IBBI took the order in good light and proposed extension of application of provisions of § 29A to reorganization under Companies Act. IBC2016 was thus amended to disqualify the ineligible persons under § 29A from participation in reorganization schemes of debtors under liquidation.

The said amendment was challenged before the Supreme Court which further affirmed the stance of the NCLAT. The Court held that the situation warranted the purposive interpretation of the provisions of § 29A (Arun Kumar Jagatramka v Jindal Power & Steels Ltd., 2020). It was further stated that the amendment of 2020 was merely of a clarification of the applicable law and thus granting a clearer picture to the said stance. The order of the Supreme Court led to the discussion paper becoming useless as the impression of law was countered by settled principle of law.

A common basis for the stance of the NCLAT and Supreme Court is a principle that the current management of the debtor shall not be authorized to retake control of the debtor company. The underlying thought is that the persons who have contributed to the downfall of the debtor shall not be in allowed to further take part in its management, thus possibly exacerbating the situation. The though can be considered to be omnipresent in the minds of the NCLAT, Supreme Court and the legislature. This is further evident from the statement of objects and reasons of amendment

bill bringing out § 29A which stated as – "Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process".

One view is that additional time be granted to the resolution applicant to pay off the dues, especially in case where the applicant is holder of an account which has been declared NPA. However, it is countered with the thought that providing of additional time may not do all good and keeping the applicant within the loop would not guarantee the successful revival of the debtor. Furthermore, if the resolution applicant was already competent to repay its debts, then perhaps the situation would not have cropped up where the creditor has approached the Adjudicating Authority for initiation of CIRP.

§ 29A and Pre-Pack Insolvency Setup

Pre-pack insolvency setup in India provides that MSMEs can provide for a pre-packaged insolvency resolution. This would further reduce the turn-around time for the debtors. The setup has been brought about based upon IBBIs Report on Pre-Packaged Insolvency in 2020. It provided that the provision of § 29A shall be relaxed for pre-pack report.

In order to initiate a Pre-Pack CIRP, the debtor needs to apply after obtaining approval from the members and creditors. This pre-pack setup provides for retention of management of debtor during the CIRP, since RP is appointed only after discussions and negotiations with the creditors conclude with reaching of a mutual understanding. The setup basis itself upon debtor-in-possession model. Although the classical CIRP regime also provides for application by the debtor, yet a reluctance to utilize the provision can be seen. As per the Pre-Pack report, till 2020 only 6.6 % of the total CIRP initiated is initiated by the debtors. The report cites following reasons for the same:

(a) Ineligibility of the management of the debtor to submit a resolution plan in most cases, leading to the loss of control of the debtor entity;

(b) Apprehension that the resolution plan so submitted by the management of the debtor may be inferior to the plans so received from the other resolution applicants;

(c) Apprehension that the debtor may eventually be wound up in the event of non-approval of the resolution plan by the CoC.

The deterrents effect mentioned above also applies to the imitation of the Pre-Pack CIRP when current management is not allowed to present a resolution plan. The pre-packaged framework, which depends on the initiative of the corporate debtor, may therefore remain underutilized unless section 29(c) is relaxed. The first reason identified in the Pre-Pack Report for the current reluctance to use Section 10 is important to understanding the power dynamics between the CoC and current management in a typical insolvency proceeding. If the incumbent does not want to start insolvency

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proceedings for fear of being left out of the plans of third party providers, this suggests that, despite section 29A, the Concerned Committee is considering a better resolution scheme.

§ 29A and its applicability in case of MSMEs

Although the IBC2016 does not differentiate in the size of debtor in normal CIRP, yet in order to cope with the special situation that has cropped up due to Covid-19 pandemic, an amendment was brought about creating a classification for MSMEs and prescribing an alternate method of CIRP for them (Insolvency and Bankruptcy Code (Amendment) Act, 2021). One of the core elements of the Pre-Pack setup is that the promoter of the debtor provides a resolution plan in consultation with the creditors. In order to make it make harmony in the conflicting provisions as a result of bringing in Pre-Pack, § 240A of IBC2016 was amended in order to exempt the promoters of the debtor from being ineligible to submit a resolution plan. Despite such an amendment, it is still mandatory that such promoter shall not be ineligible under any other provision of § 29A. This would imply, that only those MSMEs which have not been declared NPA for over a year would be eligible under Pre-Pack setup, otherwise the promoters shall be hit by the ineligibility of § 29A(c).

It is to be understood that the exemption is provided to the resolution applicant, yet the provision is silent about extending the exemption to the debtor. Hence, technically, a paradox has emerged in which the applicant has been exempted from application of § 29A while the debtor itself is not. Many theorists have opined that this is merely a drafting mistake while others opine that harmonious reading of the provisions also extend the extension to the debtors (Kumar, 2021).

It has been established that promoters of debtors can submit the resolution plans in case where the debtor is MSME. The Adjudicating Authority has held that since, the disqualification of § 29A(c) are not applicable in case of MSMEs, the promoter is a fit person to provide a resolution (Shakambari Overseas Trades v. Darjeeling Rolling Mills, 2019). Hence, a promoter, or director of debtor, either singly or in concert with any person can file for resolution plans in case the debtor is an MSME.

It is to be understood that in the case of Pre-Pack CIRP, the debtor has to initiate the CIRP. However, there is no bar on the other stakeholders to file for the same. The matter shall gain more clarity once, cases upon the matter are adjudicated upon in the courts.

Pre-pack setup has reheated the debate regarding the treatment of existing management and promoters of the debtor. The primarily aim of the IBC2016 is to promote revival of ailing entities. Yet, its comprehensive approach to exclude the promoters of the debtors creates a perception that promoters were the wrongdoers. The promoters of the debtor deserves a benefit of doubt, especially in cases where the default was unintentional and due to market fluctuations.

Conclusion

It was attempted that a complete overview, development and legal interpretation of § 29A be provided. Starting from an ordinance in the IBC2016 and being limited to the insolvency regime,

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the rapid development and judicial interpretations has greatly expanded its scope and applicability into other aspects of corporate law. The notion of the promoters of companies with NPA Accounts (§ 29A(c)) has faced the toughest competition. The IBC2016 was intended to provide the companies and its promoters a chance to accept failure and start afresh. IBC2016 is still a new act which has put in a new regime, however, has gained quite experience during its short journey of 5 years. With the IBC2016 itself has provided for a limited 'debtor-in-possession' regime, especially in case of Pre-Packaged Insolvency Process, it can be said that an updation of the principles laid down in § 29A, especially related to ineligibility of promoters of the debtor, need to be relooked.

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