

RECOVERY OF NON-PERFORMING ASSETS IN INDIA- A TOUGH ROW TO HOE

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Abstract

The Indian Banking Sector has been highly infested by Non-Performing Assets in the past few years. There are numerous reasons for an advance turning into Non-Performing Assets (hereinafter referred to as NPA/s) ranging widely from reasons attributable to the Banks & Financial institutions like erroneous credit appraisal, lack of due diligence & monitoring, etc, then reasons attributable to the borrowers like wilful default, fraud, etc. Other than these there are reasons which are beyond the control of both parties like statutory regulations, market conditions, etc. Whatever be the reason the fact remains that the recovery has to be done as the public stake is involved and balance sheets of the Banks and Financial Institutions are severely affected. In the current legal framework, there are various means of recovery like filing of suits, initiating actions under SARFAESI Act, 2002, declaring as wilful defaulter, fugitive economic offender, publishing photographs in the newspaper, etc. The latest measure is provided by Insolvency and Bankruptcy 2016 with the latest amendment in 2019 for recovery by resolution procedure and insolvency procedure. Though the Government is trying to find a solution for this surmounting issue of NPA on a real-time basis, with no recovery forthcoming in big corporate cases like Vijay Mallaya Case, Nirav Modi Case it appears that NPA reduction is a tough row to hoe. The paper analysis the legal means of recovery of NPA in India and their drawbacks..

Keyword: Non- Performing Assets, Wilful, Insolvency, Bankruptcy, Default, RBI

1.INTRODUCTION

Banking system is the backbone of any economy and Non-Performing assets (NPAs) are a major blow to such a backbone because it not only affects the profitability but also affects the overall functioning of any Bank or Financial Institution in an economy. Non-Performing assets or NPAs as it is commonly referred to in the simplest language means those advances of the Banks or Financial Institutions from which repayment has stopped. It has been referred to as Assets instead of accounts or advances because as per principles of Banking an advance is an asset for the Banks or Financial Institutions because it is from these accounts that the Bank earns its profit in form of interests. However, when the repayment stops the interest income of the Bank stops & the asset in form of advances turns into Non-Performing assets or NPA and the provisioning in the Balance sheet as per RBI guidelines has to be done based on the classification as Sub-standard, doubtful and loss as per the Reserve Bank of India Master circular on "Prudential Norms on Income Recognition, Asset Classification and Provisioning - Pertaining to Advances"¹ dated August 30, 2001. This provisioning directly affects the profitability of the Banks or Financial Institutions. As per the data released by Press Information Bureau, Ministry of Finance, Government of India, as a result of transparent recognition of stressed assets as NPAs, gross NPAs of PSBs, as per RBI data on global operations, rose from Rs. 2,79,016 crore as on 31.3.2015, to Rs. 8,95,601 crore as on 31.3.2018, and as a result of Government's 4R's strategy of Recognition, Resolution,

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https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?Id=449&Mode=0 (Sept. 19, 2019, 4.23PM)

Recapitalisation and Reforms, have since declined by Rs. 89,189 crore to Rs. 8,06,412 crore as on 31.3.2019.²

2. CAUSES FOR NPA

If rising NPA has to be controlled then it is necessary to assess the causes behind the performing assets turning into Non-Performing Assets. There may be causes which can vary from case to case but generally the causes may be attributed to either the borrower or the bank itself or may be due to factors beyond the control of both. Further, these causes may be internal or external for either the borrower or the bank. Some of the causes attributable to borrowers or bank or both as identified by A.T. Pannirselvam Committee are listed as under:-

2.1. Causes attributable to borrowers

Some of internal causes attributable to borrower are improper borrower identification, Wilful defaults, Financial indiscipline / diversion of funds, Wrong/ Misleading KYC, Delayed project implementation leading to excessive costing etc. Further, Poor Inventory / Receivable management, Delayed settlement of receivables of borrower by large Industrial houses, Govt. Depts., PSUs, etc., Inability to compete in the market because of smaller size and new brand name, Infrastructural bottlenecks etc are some of the external causes attributable to the borrowers.

2.2. Causes attributable to Banks:-

Poor/erroneous pre-sanction appraisal / unrealistic projections, Poor assessment of commercial viability (due to lack of inadequate data / knowledge on market industry), Delayed disbursements, Lack of Networking / Information Systems amongst branches / Banks enabling borrowers to misuse Bank funds, Non-compliance of terms of sanction, Incomplete / Defective documentation etc are some of the internal causes attributable to the Bank.

Some of the External causes which can be attributed to the Bank can be listed as changes in regulatory

prescriptions causing change in norms for classification, Long drawn legal processes for recovery of loan, Delay in action for rehabilitation of accounts and finalisation of rehabilitation package either at the Bank level or at the Board for Industrial and Financial Reconstruction (BIFR) level etc.

2.3. Causes beyond control of both the Borrower and the Bank

There are certain causes which are beyond the control of both the borrower as well as the Bank like General slow-down in the Economy / Recessionary trends and adverse market conditions, Depressed capital markets and consequent delay in arrangement of funds for the project, Frequent adverse changes in the govt. policies, excise and customs duties, de-categorization of items reserved for Supplemental Security Income (SSI), price preferences, cash incentives, product reservation quota system, etc

Whatever be the reason for the surmounting NPAs, be it attributable to the borrower or bank or both or any other factor beyond the control of both, the fact remains that NPAs directly hamper the economy of any country. The NPAs have such a deep impact on the profitability of the Bank that at times it also leads to the merger of the Bank. The best example of merger of Banks due to rising NPAs is merger of five associate banks and Bharatiya Mahila Bank with SBI on April 1, 2017.

3. RECOVERY OF NPAs

The solution to the problems like NPAs lies in the problem itself. The famous mantra of medical science "*Prevention is better than cure*" works well in case of NPAs also. For effective NPA Management policy it is very essential to identify and work upon the early warning signals like change in behaviour of the borrower/s, slippages, change in market policies, Govt. Regulations etc. Based on early warning signals recovery measures can be identified on a case to case basis and recovery strategy can be worked out. Some of the remedies for NPAs are as under:-

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<https://pib.gov.in/newsite/PrintRelease.aspx?relid=190704> (Sept. 19, 2019, 3.30PM)

3.1. Recovery

The best solution for NPAs is the recovery of the bad loans. Once the recovery is done the amount is credited in the Balance sheet and provisioning is reversed thereby reducing the loss. There are several ways in which bad loans or NPAs can be recovered. Some of the recovery measures are as listed below:

3.1.1. Legal Notice

The Legal Notice calling for the outstanding dues or recalling the complete advance can be issued from the Branch level itself depending upon the discretion of the Branch head. However, this measure is effective only for borrowers with eggshell skull and at times is not even taken cognizance of by big corporate borrowers.

3.1.2. Action under The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (also known as the SARFAESI Act)

The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act is one of the magnificent effort of Indian Legislation to curb down the menace of rising NPAs of Banks and Financial Institutions. The act empowers the Authorized Officer to auction and sell the secured interest other than properties like agricultural property, aircrafts etc as excluded under Section 31 of the said act, without intervention of the courts. The brief procedure which is followed under SARFAESI Act, 2002 is as under:

- i. On stamping of Advances as NPA as per RBI guidelines, the notice u/s 13(2) of the captioned Act is issued to all the borrowers which includes the guarantors and mortgagors.³

³ Section 2(f) SARFAESI Act, 2002- "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a asset reconstruction company]consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities;

⁴ Section 13 (3A) SARFAESI Act, 2002 - If, on receipt of the notice under sub-section (2), the borrower makes any

It is noteworthy here that the NPA classification is borrower wise and not facility wise i.e. once a facility granted to a borrower is classified as NPA, the other facilities of the same borrower under same CIF shall automatically be classified as NPA even if the repayment is regular in other facilities.

- ii. In the said notice clear 60 days notice is to be given to the recipient of the notice and for reckoning of 60 days the date of receipt of notice is considered. In case the notice is not delivered to the borrower due to wrong address or any such reason, the said notice is published in two newspapers (One essentially vernacular). From the date of publication of notice 60 days is reckoned. As per the act if any objection to the notice under Section 13(2) is raised by the borrower in writing then the same is to be replied with 15 days of the receipt of the objection⁴.
- iii. After completion of 60 days the Authorized Officer alongwith the Recovery team is free to proceed for taking possession of the secured interest. However, as a way of extra caution notice u/s 13(4) of the Act is given indicating date, time and place of the possession.
- iv. On the date and time mentioned in the notice under Section 13(4) of the act, the Authorized Officer alongwith the Recovery team proceeds to take the possession. In case the possession is given willingly then the Physical possession is taken and notice about the same is published in two newspapers (one essentially vernacular). If the possession is resisted by the owner of the property then symbolic possession of the same is taken and notice about the same is published in two newspaper (one essentially vernacular).

representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate 3[within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

Be it physical or symbolic possession, as a matter of practice the whole incident is to be recorded in camera and inventory is to be prepared.

- v. If the possession is physical then the e-auction notice is published in two newspapers (one essentially vernacular) and the auction is carried out in e-auction mode as per Finance Ministry guidelines by giving mandatory 30 days notice. The e-auction notice should be uploaded on the government website www.etenders.gov.in for better transparency and in addition to this the said 30 days notice is to be sent to the borrowers⁵. After successful bidding the sale certificate is to be registered in the name of successful bidder.
- vi. In case the possession is symbolic then the application under 14 of the Act is to be filed before the CMM/DM as the case may be. On receiving the permission from CMM/DM the physical possession of the property is to be taken with the help Police and personnel as authorized by the CMM/DM. At this stage by virtue of Supreme Court directives in *Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. & Ors.*⁶ and *Vishal N Kalsaria v. Bank of India*⁷ while passing order for possession the interest of the tenants of such properties is to be taken into consideration as provisions of SARFAESI Act, 2002 can't be considered as having overriding effects over the tenancy laws.

In cases the property mortgaged to the Banks or Financial Institution is occupied by tenants then by simple notice the rent payable to the owner can also be attached by the Banks or Financial Institution.⁸

- vii. Once the physical possession is taken with the assistance of the CMM/DM the same procedure of publication of sale notice is followed and property is handed over to the successful bidder.

At any of the stages as mentioned above, if the defaulter clears the outstanding dues then account may be standardized by Bank or the Financial institution. It is

critical to note here that if Banks or financial institution errs in following any of the mandatory steps as listed in the Security Interest Enforcement Rules, 2002 the complete action shall be void *ab initio* and the whole process has to be carried out again.

In addition to the above mentioned steps under SARFAESI Act, 2002 the secured creditor can take over the management of the defaulter.⁹

The SARFAESI Act, 2002 also facilitates incorporation of Special Purpose Vehicles viz. Asset Reconstruction Company which is governed by RBI and is termed as Secured Creditor for the purpose of the act¹⁰. These Companies can purchase the NPAs and carry out all the above mentioned procedure just like any other Secured creditor.

Though SARFAESI was enacted with special purpose of expediting recovery of bad loans, it has failed to achieve its aim because of less number of Debt Recovery Tribunal and pendency of large number of cases in them. Secondly, physical possession is practically difficult in many a cases because of reluctance of the borrowers and tenancy issues leading to failure of the whole SARFAESI action.

3.1.3. By Filing Legal Suit

Before the enactment of SARFAESI Act, 2002 the only legal recourse available with the Institutional creditors was filing of civil suits. Based on the premises that every credit related transaction is based on contractual obligation, the money suit was filed before the Civil Courts as per the Civil Procedure Code, 1908. With the increase in number of defaults it became practically impossible for the already over-burdened and less in number existing Civil Courts to adjudicate the matter leading to large number of pendency. After recommendation of various committees like Tiwari Committee, the "High Level Committee" headed by V.S. Hegde and specifically Committee on Financial Systems headed by Shri M. Narasimham, former Governor of Reserve Bank of India, Parliament enacted The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) by virtue of which specialized Tribunals called as Debt Recovery Tribunals were set-up to

⁵ Rule 8 (6) of the Security Interest Enforcement Rules, 2002

⁶ (2014) 6 SCC 1

⁷ (2016) 3 SCC 762

⁸ Section 13 (4)(d) SARFAESI Act, 2002

⁹ Section 15 of SARFAESI Act, 2002

¹⁰ Section 2(zd) of SARFAESI Act, 2002

adjudicate upon cases with default of Rs. 10 Lakhs and above, for lesser amount the jurisdiction still lies with the regular Civil Courts. The Banks or the Financial institution to whom any due is payable by the borrower can make an application under Section 19 of the said Act. The Act gives a phased and time-bound manner for adjudication of claim by the Banks or Financial institution the darkening fact is that the due to number of cases and stays from higher courts DRTs which were supposed to be specialized Tribunal for Debt recovery have become more or less like regular Civil Courts.

3.1.4. By declaring wilful defaulter

Banks in their discretion as per RBI guidelines can send notice to the borrowers asking them to repay within the stipulated time failing which Bank can declare the borrowers as wilful defaulter. Once a borrower is declared as wilful defaulter, availing further credit facility from any Bank or Financial Institution becomes next to impossible within the legal framework. Secondly, once declared as Wilful Defaulter the person is disqualified for the Insolvency and Bankruptcy procedure under the IBC, 2016. However, it again works against only small scale borrowers and large scale borrowers are not affected as they are expected to be. That is the reason that despite decline in NPA portfolio of PSBs there has been surge in the number of wilful defaults by almost 60% in the last five years. (As on 2014-15 number of cases was 5349 which has increased to 8582 as on March 2019)¹¹

3.1.5. By issuing notice for publishing photograph in newspaper

Banks as per their Policy within the RBI guidelines framework can issue notices to the borrowers for publishing their photographs in newspapers. However, this measure of "Naming and Shaming" is the least resorted to because of difference of opinion among different High Courts in India e.g. as per the judgment of Hon'ble High Court of judicature at Bombay in *D.J.*

¹¹ <https://www.thehindubusinessline.com/money-and-banking/number-of-wilful-defaulters-inpsbs-up-60-to-8582-in-5-years/article28127619.ece> (Sept.20, 2019, 08.52 AM)

¹² (2015)1CompLJ138(Bom)

¹³ <https://indiankanoon.org/doc/49088301/> (Sept. 20, 2019, 11.37AM)

¹⁴ 1995 AIR 264, 1994 SCC (6) 632

*Exim (India) Pvt. Ltd. & ors. v. State Bank of India & ors.*¹² banks can publish the photograph & name of the defaulting borrower but the Hon'ble High Court of judicature at Calcutta in *Ujjal Kumar Das & Anr vs State Bank Of India & Ors*¹³ has held that Banks have no right to publish the photograph of the defaulters. Further, the right of the banks to adopt any lawful method for the recovery of its dues, including the publication of the photograph of the defaulter has come directly into conflict with right to privacy and dignity of the borrower, which is a part of the right to life guaranteed under Article 21 of the Constitution of India. The Supreme Court of India in *R.Rajagopal vs. State of Tamil Nadu*¹⁴ and *PUCL vs. UOI*¹⁵ has eloquently interpreted the right to privacy as an implicit right in the right to life.

3.1.6. By declaring as Fugitive Economic offender

Indian legislation has recently enacted the Fugitive Economic Offenders Act, 2018 to deal with economic offenders who leave the country in order to evade the legal system. For the purpose of the Act the "fugitive economic offender"¹⁶ as any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who—

- (i) has left India so as to avoid criminal prosecution; or
- (ii) being abroad, refuses to return to India to face criminal prosecution.

The Scheduled offence referred to herein above has been given in the Act itself and includes various offences as defined under Section 255-260, 417, 418, 420-24 etc of Indian Penal Code, 1860, Section 213(b), 447, 452 etc of the Companies Act, 2013 (18 of 2013), Section 69 under the Insolvency and Bankruptcy Code, 2016 etc among other offences provided under Prevention of Corruption Act, SEBI Act etc. Once declared as a fugitive economic offender under the captioned Act by the Special Court following properties of the person

¹⁵ (1997) 1 SCC 301

¹⁶ Section 2 (f) The Fugitive Economic Offenders Act, 2018- "fugitive economic offender" means any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who— (i) has left India so as to avoid criminal prosecution; or (ii) being abroad, refuses to return to India to face criminal prosecution;

declared so stand confiscated to the Central Government—

(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and

(b) any other property or benami property in India or abroad, owned by the fugitive economic offender¹⁷

Due to the retrospective applicability¹⁸ of the act procedure for declaring large corporate borrowers like Vijay Mallaya, Mehul Choksi and Neerav Modi etc as Fugitive economic offender has started.

3.1.7. By issuing Look Out circular

A look out circular is in form of an order by the Bureau of Immigration in respect of Indian citizens and foreigners on the request of an authorised originator, which includes an officer, not below the rank of Deputy Secretary to the Government of India or an officer not below the rank of Joint Secretary in the state government, which prevents the person named in the circular from escaping the country. Recently, in order to prevent wilful defaulters and fraudsters from fleeing the country, the government has empowered CEOs of public sector banks to request look-out circulars against suspects even before FIRs are filed against them. As per a recent news piece the largest public sector bank in India SBI has sought issuance of 147 Look out Circulars against its defaulters.¹⁹

3.1.8. By Filing FIR

Filing of FIRs against the defaulters is least resorted to when it comes to being used as a means of recovery of dues. In spite of advisories and circulars issued by RBI from time to time for initiating criminal proceedings against the defaulters Banks show reluctance because of the complexities involved in the procedure. Secondly, that is resorted as the last means because the criminal proceedings can't bring back the amount.

3.1.9. Restructuring of advances

¹⁷ Section 12(2) the Fugitive Economic Offenders Act, 2018

¹⁸ Section 3 the Fugitive Economic Offenders Act, 2018

¹⁹ <https://www.thehindubusinessline.com/money-and-banking/sbi-sought-issuance-of-147-look-out-circulars-in->

Restructuring of advances is not a means of recovery in Non Performing Assets but restructuring helps in upgrading the Non Performing Assets to Performing Assets. Restructuring when done in accordance with RBI guidelines assists in coming out of NPA portfolio but when done surpassing the RBI guidelines it is termed as "Window Dressing". As per the RBI guidelines²⁰ Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower's financial difficulty, grants concessions to the borrower. Restructuring may involve modification of terms of the advances / securities, which would generally include, among others, alteration of payment period / payable amount / the amount of instalments / rate of interest; rollover of credit facilities; sanction of additional credit facility/ release of additional funds for an account in default to aid curing of default / enhancement of existing credit limits; compromise settlements where time for payment of settlement amount exceeds three months.

3.2. Proceeding under the Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which strives at consolidating the existing framework by creating a single law for insolvency and bankruptcy. Following are the highlights of the IBC, 2016 with reference to its utility in recovery of NPAs.

3.2.1. Corporate Debtors: Two-Stage Process

To initiate an insolvency process for corporate debtors, the default should be at least INR 100,000/- (the limit of which may be increased up to INR 10,000,000/- by the Central Government).²¹

The Code contemplates two independent stages:

- a. Insolvency Resolution Process; and
- b. Liquidation

(a) The Insolvency Resolution Process (IRP)

[bank-fraud-cases/article29367342.ece](https://www.thehindubusinessline.com/money-and-banking/sbi-sought-issuance-of-147-look-out-circulars-in-bank-fraud-cases/article29367342.ece) (Oct. 15, 2019, 07:32 AM)

²⁰ RBI/2018-19/203 DBR.No.BP.BC.45/21.04.048/2018-19 dated 7th June 2019

²¹ Section 4 Insolvency and Bankruptcy Code, 2016

Under the IRP, the financial creditors assess the viability of the debtor's business and after that the exploring of options for its rescue and revival takes place. The IRP provides for a collective mechanism to the lenders for dealing with the overall distressed position of a corporate debtor. This is a significant departure from the past legal framework under which the primary onus to initiate a reorganisation process lied with the debtor and lenders have the option to pursue different actions for recovery, security enforcement and debt restructuring. Considering the surge in NPA level and the deteriorating financial health of the Banks and Financial Institutions in India the Central Bank vide circular DBR.No.BP.BC.101/21.04.048/2017-18 dated 12th February 2018 the past restructuring mechanism like Structural Debt Restructuring (SDR) and Corporate Debt Restructuring (CDR) were scrapped and gave new norms for stressed asset classification i.e. delays in payment for even one day to seen as a stress. Further, it empowered lenders to begin the resolution of such stressed asset who have defaulted even for one day. The circular was issued with the intention to detoxify the Credit system from toxicating effect of NPAs, however it turned out to be the most discussed circular by RBI due to its effect on the Companies specially infrastructure companies who claimed that at times the non-payment is not deliberate but is due to the reasons beyond control like non-payment of due by third parties including government agencies, change in statutory regulations, financial hardships etc.

The abovementioned circular was challenged before the Hon.ble Supreme Court and interim stay was granted on the circular and finally in *Dharani Sugars and Chemicals Ltd. vs. Union of India & Ors.*²² the captioned circular was declared as unconstitutional. Consequent to it RBI vide circular DBR.No.BP.BC.45/21.04.048/2018-19 dated June 7, 2019 released new Prudential Framework for Resolution of Stressed Assets which provides a framework for early recognition, reporting and time bound resolution of stressed assets.

Once the advance has been classified as stressed Asset in light of RBI Circular dated June 7, 2019, Resolution process can be started in the following manner:-

(i) Commencement of the IRP

A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate an IRP against a corporate debtor at the National Company Law Tribunal (NCLT).

The defaulting corporate debtor, its shareholders or employees, may also initiate voluntary insolvency proceedings.

(ii) Moratorium

The NCLT may order a moratorium on the debtor's operations for the period of the IRP. As per the provisions of the code this operates as a '*calm period*' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.

(iii) Appointment of Resolution Professional

After moratorium, the NCLT appoints an "*Insolvency Professional*" or "*Resolution Professional*" to administer the IRP. The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business. This is similar to the approach under the UK insolvency laws, but distinct from the "debtor in possession" approach under Chapter 11 of the US bankruptcy code. Under the US bankruptcy code, the debtor's management retains control while the bankruptcy professional only oversees the business in order to prevent asset stripping on the part of the promoters.

Therefore, the object of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors have the option of carrying out the business of the debtor with the Resolution Professional acting as their agent.

(iv) Creditors Committee and Revival Plan

The Resolution Professional further identifies the financial creditors and constitutes a creditors committee. Operational creditors above a certain threshold are allowed to attend meetings of the committee but they are not conferred with any voting power. Each and every decision of the creditors committee requires a 75% majority vote and it is binding on the corporate debtor and all its creditors.

The creditors committee considers proposals for the revival of the debtor and must decide whether to proceed with a revival plan or liquidation within a period

²² <https://indiankanoon.org/doc/15876695/> (Dec. 30, 2019, 10.23AM)

of 180 days (subject to a one-time extension by 90 days). Anyone has the liberty to submit a revival proposal, but it must necessarily provide for payment of operational debts to the extent of the liquidation waterfall.

(b) Liquidation

The process of liquidation is to be resorted only if the IRP fails or financial creditors decide for winding down and distribution of the assets of the debtor. Under the Code, a corporate debtor may be put into liquidation in the following cases:

- (i) A 75% majority of the creditor's committee resolves to liquidate the corporate debtor at any time during the insolvency resolution process;
- (ii) The creditor's committee does not approve a resolution plan within 180 days (or within the extended 90 days);
- (iii) The NCLT rejects the resolution plan submitted to it on technical grounds; or
- (iv) The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the corporate debtor.

Once the order of liquidation is passed, a moratorium is imposed on the pending legal proceedings against the corporate debtor and the assets of the debtor (including the proceeds of liquidation) is vested in the liquidation estate. Subject to the provisions of IBC 2016, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor, however with the prior approval of the Adjudicating Authority a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor.²³

3.2.2. Priority of Claims

The Code significantly changes the priority criterion for distribution of liquidation proceeds. After the costs of insolvency resolution (including any interim finance), secured debt together with the workmen dues for the preceding 24 months rank highest in priority. Central and state Government dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors unlike under the earlier regime where Government dues were

immediately below the claims of secured creditors and workmen in order of priority. This is a significant departure from the earlier regime.

Upon liquidation, a secured creditor may choose to realise his security and receive proceeds from the sale of the secured assets in first priority. In case the secured creditor enforces his claims outside the liquidation, he must contribute any excess proceeds to the liquidation trust.

3.2.3. Insolvency Resolution Process for Individuals/Partnerships

For individuals and partnerships, the Code applies in all cases where the minimum default amount is INR 1000 and above (the Central Government may later revise the minimum amount of default to a higher threshold).

The Code contemplates two distinct processes in case of insolvencies:

- i. Automatic fresh start and
- ii. Insolvency resolution.

Under the automatic fresh start process, eligible debtors on the basis of gross income have the option to apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.

The IRP, in this case consists of preparation of a repayment plan by the debtor for approval of creditors. If approved, the DRT passes an order which is binding on the debtor and creditors with respect to the repayment plan as mentioned in the IRP. In case, the plan is rejected or fails, the debtor or creditors have the option to apply for a bankruptcy order.

3.2.4. Institutional Infrastructure

(a) The Insolvency Regulator

The Code provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (Board) whose primary role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities and regulating the insolvency process.

(b) Insolvency Resolution Professionals

²³ Section 52 Insolvency and Bankruptcy Code, 2016

The Code provides for insolvency professionals as intermediaries, having minimum standards of professional and ethical conduct, who would play a key role in the efficient working of the bankruptcy process. The role of the insolvency professional is to verify the claims of the creditors, constitute a creditors committee, run the debtor's business during the moratorium period and help the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

(c) Information Utilities

A remarkable feature of the Code is the creation of information utilities to collect, collates, authenticate and disseminate financial information of debtors in centralised electronic databases.

(d) Adjudicatory authorities

The adjudicating authority for corporate insolvency and liquidation is the NCLT. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal and thereafter to the Supreme Court of India. For individuals and other persons, the adjudicating authority is the DRT, appeals lie to the Debt Recovery Appellate Tribunal and thereafter to the Supreme Court. The role of the adjudicating authorities is limited to ensuring due process rather than adjudicating on the merits of the insolvency resolution.

4. ESSAR STEEL CASE

One of the most high profile and magnificent cases on IBC, 2016 is the latest resolution proceeding going on in the case of Essar Steel Case. The defaulter company owes money to the tune of Rs 54,547 crore to its financial creditors and operational creditors. The Committee of Creditors (Financial) have moved under the IBC before Ahmedabad Bench of National Company Law Tribunal under IBC, 2016. The Tribunal after initiating the proceeding under the newly enacted code accepted the bid of Arcelor Mittal for takeover of Essar Steel, accordingly the proceeds were to be distributed between the financial and operational creditors. The decision has been opposed by the operational creditors on the ground that majority of the amount is paid towards the dues of the Financial creditors like SBI who are already secured creditors and operational creditors who are unsecured creditors have only been paid notionally. The Supreme Court in the month of July 2019 has ordered status-quo in the case.

5. THE INSOLVENCY AND BANKRUPTCY AMENDMENT ACT, 2019

Taking into consideration the rift that arose between operational creditors and the financial creditors in the Essar steel case the amendment to IBC, 2016 was proposed and received the assent of the president on 5th August 2019. The amendment act clarifies the position of the committee of creditors and puts it in control of the distribution of proceeds from a successful resolution plan under the IBC. The act further clarifies that the unsecured financial creditors and operational creditors need not be treated on par with secured financial creditors.

In light of all the above measures of recovery be it through SARFAESI Act, 2002, RDBFI Act, 1993 or Insolvency and Bankruptcy Code, 2016 or other ways like filing of suit, FIR, declaring as wilful defaulter or Fugitive Economic Offender, it can be said that the law is suitably placed at its place and new provisions like issuing look out circulars etc are being implemented, however the implementation is not proper. The basic philosophy of the Insolvency and Bankruptcy Code, 2016 that insolvency resolution must be commercially and professionally driven (rather than court driven) in itself is self-explanatory of the intention of the legislators. However, the IBC, 2016 suffers from a major setback that for Individuals and partnership firms the adjudicatory authority is DRT, which is already overburdened with original applications filed under RDBFI Act and Securitization Applications filed under SARFAESI Act, 2002. This insolvency proceeding under Insolvency and Bankruptcy Code, 2016 shall over burden the DRTs and DRATs with insolvency petitions which will in return lead the Recovery procedure to nowhere.

6. CONCLUSION AND SUGGESTIONS

It is not unknown to anyone that Non-Performing Assets have the ability to bring devastating results to any Banks and Financial Institutions, as the case maybe. Latest being the case of Yes Bank, India's 4th largest Private Sector bank wherein RBI has intervened and issued moratorium due to Bad financial conditions caused by the surging NPAs of the Bank. Considering the latest example of Yes Bank, it's rightly said that the time has

come to address the elephant in the room and bring into spirit the letters of law.

As a way of suggestion, the Government may consider establishing independent adjudicatory authority on lines of NCLT for insolvency proceedings with respect to individuals and firms etc. Secondly, in the interest of financial health of the country it is expedient to note that there is urgent need to increase the number of DRTs and DRATs with officers not only having legal knowledge but also with practical knowledge in Banking Sector so as to ensure timely bound recovery procedures. Further, the "one size fits for all" formula shouldn't be applied for recovery of advance. The Banks and the Financial Institutions must work out recovery strategies for each account on a case to case basis.

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