

“Law & Practical Aspects of Personal Guarantor  
against Corporate Debtor under IBC 2016”

# Webinar

## Association of Professional

Organizer :-CA Sangam Kumar Aggarwal

Saturday, 21st Nov 2020

(4.00 evening onwards)

**Presented by:**  
**CA & IP Manoj Kumar Anand**  
**for & on behalf of**  
**Association of Professional**

**"Law & Practical Aspects of Personal Guarantor  
against Corporate Debtor under IBC 2016"**

**All India Insolvency Professional  
Association (AIIPA)**

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# History of Insolvency Laws in India

## ▶ Earlier & Present Law for Individual Insolvency

- I. History of दिवालिया word in India. In ancient India, if a person isn't able to pay his debts than during day time he will lit दिया in his shop & than the whole market knows that he has become दिवालिया. But this process has no legal sanctity.
- II. Presidency Insolvency Act, 1909 & Provincial Insolvency Act, 1920
  - Now Part III of IBC 2016 made applicable wef 1st Dec 2020 only for Corporate Guarantors.
    - ✓ It discharges person in it of it's all past liabilities & he can fresh start his life after bearing pain for around 1 year only.
  - The Insolvency and Bankruptcy Code, 2016 meaning in Hindi is दिवाला एवं शोधन अक्षमता कोड 2016

# Misconceptions

Q:- Limit of Rs 1.00 Crore.

A:- No, it is applicable for Corporate Persons (CIRP) as per amendment in proviso to sec 4 by notification dated 24.03.20.

:- Default Limit in case for Individual and Partnership firms are Rs 1,000/- only as per sec 78 (Part III of IBC 2016)

Q:- Suspension for ONE (1) year (Max).

A:- No, it is applicable for filling u/s 7,9 & 10 wef 25.03.20 as per insertion in Act No. 17 of 2020 in sec. 2 read with sec 10A.

# Stalwarts under Individual Insolvency



# SBI filled application u/s 95 against Anil D Ambani



# Practical Examples

## 1. Huge I-Tax Liability

1. By invoking sec 179 of I-Tax act 1961
2. Bank Cash deposits during demonetisation time

## 2. Huge GST Liability by invoking sec 89/137 of CGST

## 3. Huge VAT Liability by invoking sec 53,54 and 55 of DVAT

## 4. Huge Tax or Other Liability due to any reason.

## 5. Huge losses due to Covid-19

## 6. Start up failure

# Planning & Preparation for Application

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1. Planning for Assets
  - a) Own
  - b) Immediate Family & Relatives
2. Planning to be a personal guarantors to corporate debtors, if not.
3. Application u/s 94 :- Details to prepare as per Form A which includes the followings:-
  - a) List of associates of the guarantor, including relatives, who may be creditors
  - b) Bank account details (Joint and Several)
  - c) List of assets of guarantor and immediate family as on the application date.
  - d) Number of directorships held in the last three years (along with name of company in which directorship is held and Directors Identification Number) and CIN of such companies
  - e) Details regarding guarantee given by guarantor
  - f) Business Particulars Of Guarantor
  - g) Particulars Of Debt [Creditor Wise, As Applicable]
  - h) Particulars Of & Declaration By Insolvency Professional



# Applicable Laws

- Part III of The Insolvency and Bankruptcy Code, 2016 deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms (Sec 78 to 183).
  - ❖ Chapter I deals with Applications & Definitions
  - ❖ Chapter II deals with consisting of sec 94 to 120 deals with Fresh Start
  - ❖ Chapter III consisting of sec 94 to 120 deals with Insolvency Resolution Process and
  - ❖ Chapter IV consisting of sec 121 to 178 deals with Bankruptcy Order, Administration & Distribution

# Applicable Rules

- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019
- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy for Personal Guarantors to Corporate Debtors) Rules, 2019

# Applicable Regulations

- IBBI (Insolvency Resolution Process to Corporate Debtors) Regulations, 2019
- IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019

## Other Important Act/Reports

- Chapter VIII consisting of section 124 to 147 of The Indian Contract Act, 1872 deals with contract of indemnity and guarantee.
- P.K. Malhotra working group report on Individual Insolvency as available at IBBI site dated March 2019.

## Applicability

- Applicability of IBC is defined u/s 2 earlier clause (e) to (d) were made & by this notification clause (e) was made applicable.

Cont...2

# Applicability

(2)

➤ Sec 2 deals with applicability & states that the provisions of this Code shall apply to—

(a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;

✓ (e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e)

in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

✓ Cont...3

# Applicability

(3)

- Vide notification dated 15.11.19 by MCA following sections were made applicable wef 1.12.19
  - ✓ Sec 2(e)
  - ✓ Sec 78-79 deals with Application & Definitions
  - ✓ Sec 94-187 deals with Insolvency Resolution Process
  - ✓ Sec 239 (e) deals with Power to make Rules by CG delegated to MCA
  - ✓ Sec 240 deals with Power to make Regulations
  - ✓ Sec 249 simply changed the name of `The Recovery of Debt due to Banks and Financial Institution act 1993 to The Recovery of Debt & Bankruptcy act 1993
- ✓ Sec 1 proviso wrt non applicability to J & K deleted wef 18.03.20

# Hurdles in Implementation (Temporary) & Jurisdiction

- Covid-19 delayed all Process
- 19 Suits filled in various High Courts, Now all transferred to SC + NCLAT interpretation of law in the case of `Piramal Enterprise` prompted NCLT's to keep decision in abeyance.
- DRT at all District Headquarters

## Jurisdiction

- Section 60(3) -where CIRP is going on being NCLT
  - ✓ Section 179 - Subject to sec 60, it is DRT
  - ✓ Under Contract Act 1872 :- It is Civil Court being DRT
  - ✓ Q:-Where to file the Application
  - ✓ A:- Either at NCLT or DRT or
    - ✓ Both at NCLT & DRT

# Challenges before Courts

- 1) Provisions are ultra vires as discriminates for a class of persons only especially when CIRP is going on than why recovery be instituted against PG
- 2) Can hair cut amount be recovered from PG after approval of Resolution Plan u/s 31 (1) Adjudicating Authority.
- 3) Can deficit amount be recovered from PG after approval of liquidation/s 54 (2) by Adjudicating Authority.
- 4) Jurisdiction under Contract Act 1872 is Civil Courts (DRT) & under IBC 2016 it is Adjudicating Authority (NCLT).
- 5) Jurisprudence at Apex Court after transfer of all High Court cases therein.
- 6) Stay position at High Courts
  - 1) Existing Cases
  - 2) Future Cases
- 7) Expected time in reaching clarity on all these issues by Supreme Court.

Cont....2

# Challenges before Courts

(2)

## 8) Practical Q & A

- Q:- If CIRP proceedings are going on at different places
- ✓ A:- Clue from Videocon Case
- Q:- If more than one CIRP proceedings are going on in the same court for different CD's against same PG
- ✓ A:- Emaar case
- Q:- If residence of PG lies under different jurisdiction wrt CIRP
- ✓ A:- No precedence
- ✓ Q:- Can same R.P be appointed for more than one Guarantor of same debtor
- ✓ A:- Independence may be jeopardised but Videocon Case



# Definitions & Fresh Start Process

- ▶ Amount of the default is not less than one thousand rupees
  - ▶ CG has power to enhance it up to 1 Lakh
- ▶ Important Definitions
  1. Associates & Immediate Family
  2. Bankrupt etc
  3. Discharge Order
  4. Undischarged Bankrupt
- ▶ Chapter II Fresh Start Process (Not made Applicable)
  - ▶ Sec 80 to 93 deals with it
  - ▶ Sec 80 (2) deals with eligibility
    - ❖ GTI < 60,000
    - ❖ Value of Assets < 20,000
    - ❖ Qualifying Debts < 35,000
    - ❖ Not owning a dwelling unit

# Application & Important Terminology similar to CIRP

- Application to be filled under
  - Section 94 read with Rule 6 by Debtor
  - Section 95 read with Rule 7 by Creditor
- ❖ Lot of Information to be filled alongwith application
  - ✓ A Ltd, B Ltd & C Ltd - CIRP Going on where the application against Debtor to be filled
    - Answer- Where debt is higher or Closer to Debtor address or AA shall decide
- Important terminology similar to CIRP
  - ❖ Financial & Operational Creditor changed to Creditors
  - ❖ Corporate Debtor(CD) Changed to Debtor
  - ❖ Moratorium Changed to Interim Moratorium u/s 96 & Moratorium u/s 101
  - ❖ Information Memorandum Changed to Asset & Liabilities
  - ❖ Resolution Plan Changed to Asset Repayment Plan
  - ❖ Committee of Creditors (COC) changed to Meeting of Creditors (MOC)

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# Application & Important Terminology similar to CIRP

(2)

- ❖ CIRP Failed than automatic Liquidation but here Bankruptcy Application u/s 123 read with 121 is to be filled separately
- ❖ Directors have no role in Resolution Plan but here Repayment Plan is prepared by PG in consent with RP or by RP
- ❖ Constitution of COC under CIRP is must but constitution of MOC is discretion of RP.
- ❖ Supervision & Implementation of Resolution Plan by Monitoring Committee but here by RP only
- ❖ In case of CIRP, application is filled by FC/OC/CD but here application has to be filled through RP if his name is proposed in it.
- ❖ Liquidator changed to Bankruptcy Trustee
- ❖ Concept of Pre-Existing dispute u/s sec 8 of CIRP isn't there. Creditor has to simply send demand Notice in Form B
- ❖ Creditor can file Bankruptcy if application isn't admitted for Insolvency.
- ❖ Discharge of all liabilities (New Concept)

# Excluded Assets (Sec 79 (14))

## ➤ These are the Assets which can't be taken by RP

- ❖ Unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,
- ❖ Unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;
- ❖ Any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;
- ❖ Any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and
- ❖ An unencumbered single dwelling unit owned by the debtor of such value as may be prescribed;

## Excluded Debt (Sec 79 (15))

- These are the Debts which Debtor has to pay even after discharge
  - ❖ liability to pay fine imposed by a court or tribunal;
  - ❖ liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
  - ❖ liability to pay maintenance to any person under any law for the time being in force;
  - ❖ liability in relation to a student loan; and
  - ❖ any other debt as may be prescribed

# Appointment of Resolutional Professional Sec 97 Read with Regulation 4

- **Application u/s 94 Or 95**
  - ❖ Thorough RP than to be signed by him
  - ❖ **By Creditor/Debtor themselves than by A.A.**
    - ✓ Disposal by A.A. within 14 days
      - **Form A by R.P.**
- **Who can be appointed as RP- Regulation 4**
  - ❖ **Independent of Guarantor**
  - ❖ **Entity :- Not representing in Resolution Process**
  - ❖ **Q:- CIRP conducted by partner of IPE, Can other partner be appointed as RP/BT for Guarantor**
  - ❖ **A:- No or Yes (2 School of thoughts)**

## Replacement of Resolutional Professional Sec 98

- Debtor or Creditor can replace
  - ❖ But newly appointed R.P shall not be of their choice
  - ❖ A.A. shall appoint new R.P. out of their panel.

### Public Notice Sec 102

- Sub Sec (1) To be issued by A.A.
- Sub Sec (2) Contents
  - ❖ Order Detail
  - ❖ R.P. Particular
- Sub Sec (3) :-Publication, Affixation & Website

# Claim, Creditors, SOA

- **Registration of Claim - Form B + (Section 103 & Regulation 7)**
  - ❖ Verified by RP (Not Collated as in CIRP)
  - ❖ **Regulation 8**
    - Any change with in 2 days to be notified to all Creditors & A.A.
- **Report by RP**
- **List of Creditors (Section 104 & Regulation 7(5) & (9))**
- **Statement of Affairs u/s 107 (3) (b) read with Regulation 10**



## Statement of Affairs (SOA) Sec 105 read with Regulation 10

The statement of affairs shall include the following information of the guarantor -

- (a) assets and liabilities for the preceding three financial years and the current financial year;
- (b) details of the excluded assets and excluded debts;
- (c) income statement for the preceding three financial years and the current financial year;
- (d) income-tax returns filed by the guarantor, if any, for the preceding three financial years;
- (e) creditor wise amount due, broken up into secured and unsecured debts for the preceding three financial years;

# Repayment Plan

- Repayment Plan has to be submitted with Report of RP Section 106 with in 21 days from the last date of submission of claims
- Chapter V (Regulation 17 to 22) deals with it as follows:-
- Regulation 17 deals with Contents of repayment plan.
  - ❖ Terms of Repayment, Sources of Funds, Financing, Conduct of Existing business, excluded debt/Assets & terms of discharge
  - ❖ Regulation 18 deals with non purchase of Assets by certain persons
  - ❖ Regulation 19 deals with filling of Repayment Plan with A.A. with in 180 days from the resolution process commencement date.
  - ❖ Regulation 20 deals with Breach of repayment plan by the guarantor

# Statement of Affairs (SOA)

## Sec 105 read with Regulation 10

(2)

The statement of affairs shall include the following information of the guarantor -

(f) details of debt owed by guarantor to his associates for the preceding three financial years;

(g) guarantees given in relation to any of his debts, and whether any of the guarantors is an associate of the guarantor; and

(h) details of the financial statements for the business owned by the guarantor, or of the firm in which he is a partner, as the case may be, for the preceding three financial years, if applicable.

**Conflict:-** Regulation 10 says it shall be prepared by R.P but sec 105 says it shall be prepared by Debtor in consultation with the R.P.

## Repayment Plan, Discharge Order, Non Co-operation

- Regulation 20 deals with Breach of repayment plan by the guarantor than R.P. shall within 3 days issue Notice to Guarantor & Guarantor shall address it within 15 days & consequently R.P. shall report the failure to Creditors within 7 days Or Apply to A.A. for directions if it is going to effect Repayment Plan

### Discharge Order Sec 119 read with regulation 21

- R.P. shall apply to A.A. & A.A. may pass an order.
- R.P. can apply for early discharge order also.
- Shall not discharge third person of his liability.

### Non-cooperation by guarantor (Regulation 21)

- R.P. shall apply to A.A. for directions

# Meetings Sec 107 to 113 read with regulation 11 to 16 (Chapter IV)

- **Summoning of Meeting of Creditors dealt in Section 107**
  - ❖ 14 days before
  - ❖ Only to List of creditors as per sec 104
  - ❖ State address of A.A. also along with Repayment plan etc as per circumstances
- **Conduct of Meeting are dealt in Section 108**
  - ❖ Adjournment maximum for 7 days
- **Voting Right are dealt in Section 109**
- **Right of Secured Creditors Section 110 in relation to repayment plan**
  - ❖ Secured Creditor to exercise right only in respect of Unsecured portion if he doesn't release security.
- **Approval of Plan Sec 111**
  - ❖ 3/4<sup>th</sup> only (75 %)



# Bankruptcy (Chapter IV & V)

# Application

- Application u/s 121 can be made
  - ❖ By debtor himself u/s 122 be accompanied with
    - ✓ The records of IRP
    - ✓ The SOA
    - ✓ The AA order
    - ✓ Can't be withdrawn without the consent of AA
- By Creditor u/s 123 be accompanied with
  - ❖ The records of IRP
  - ❖ The AA order
  - ❖ Details of debt owed
  - ❖ Any other prescribed information

Cont....2

# Application (2)

- **Circumstances under which Application can be made**
  - ❖ **Sec 100(4) Defraud Creditor/R.P.**
  - ❖ **Sec 115(2) Rejection of Resolution Plan**
  - ❖ **Sec 118(3) Repayment Plan coming to end**



# Interim Moratorium, Appointment, Order

- **Interim Moratorium (Sec 124)**
  - ❖ Legal Proceedings stayed
  - ❖ If against firm than Interim Moratorium for all partners
- **Appointment of I.P. as Bankruptcy trustee (BT) (Sec 125)**
  - ❖ By debtor or Creditor
  - ❖ Otherwise by AA
- A.A. shall pass order with in 14 days (Sec 126)
- Order is valid till Debtor is discharged (Sec 127)
- Effect of Order (Sec 128)
  - ❖ Estate with BT .....

# Other Provisions (Bankruptcy)

Section	Provisions
129	Statement of financial position.
130	Public notice
131-132	Registration of claims & Preparation of list of creditors
134-135	Meeting of creditors & Voting rights of creditors
136-137	Administration and distribution
138-139	Discharge order and it's Effect
140 to 142	Disqualification, Restriction & Modification of AA Order
143-148	B.T. related (Conduct, Fees, Replacement, Resignation, Vacancy & Release)

## Discharge Order & it's Effect

- **Discharge Order u/s 138 :- BT shall apply**
  - ❖ On expiry of 1 year
  - ❖ With in 7 days of the approval by COC of completion of administration
- **Effect of discharge u/s 139 :- Shall release the bankrupt from**
  - ❖ **All the bankruptcy debts Provided that a discharge shall not**
    - ✓ Affect the functions of the bankruptcy trustee; or
    - ✓ Affect the operation of the provisions of Chapter IV and V of Part III:
    - ✓ Release the bankrupt from any debt incurred by means of fraud or breach of trust to which he was a party; or
    - ✓ Discharge the bankrupt from any excluded debt.

## Disqualification & Restrictions' (Sec 140 & 141 read with

### ➤ Disqualification as per Sec 140

- ❖ Remained disqualified under respective act e.g. CA can't do practice, IP can't do practice
- ❖ No Public Servant or Office as per election or local authority

### ➤ Restriction as per Sec 141

- ❖ Can't be director,
- ❖ Can't create charge on estate or take debt
- ❖ Inform business partners of bankruptcy
- ❖ Inform for all transaction above 1 Lakh
- ❖ No legal action
- ❖ Can't travel overseas without permission of AA

# Landmark Judgements

1. **IBBI Vs Lalit Kumar Jain & Ors (SC) Transfer Petition (Civil) No (s).1034 of 2020 order dated 29th Oct 2020**
  - a. All 19 High Court Petitions challenging validity of personal guarantors vide Notification dated 15.12.20 transferred to honourable Supreme Court

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# Landmark Judgements

(2)

2. Vishnu Kumar v. Piramal Enterprises Company Appeal (AT) (Insolvency) No. 346 of 2018 ("Piramal Enterprise Case") order dated 8th Jan 2019

a. The brief facts of the case are that Dr Vishnu Kumar challenged the admission order by Principal Bench New Delhi against 2 Corporate Guarantor for guarantee given against lending of Rs 38.00 Crores to non-corporate (Principal Borrower) for same set of debt, default and record.

# Landmark Judgements

(3)

3. NCLAT after referring earlier SC judgements concluded that

- a. It is not necessary to initiate CIRP against Principal Borrower before initiating CIRP against Corporate Guarantor as after invocation of Guarantee financial debt is due to him as per sec 5 (8) & default is committed as per sec 2(12) & consequently application u/s 7 is maintainable.
- b. However, for same default, no 2 applications are maintainable, hence first admission order against Corporate Guarantor 2 is accepted & second admission order against Corporate Guarantor 1 is dismissed.

Cont.....4

# Landmark Judgements

(4)

4. Mr Anil Sayal 589(PB)/2019 NCLT Court-III order dated 28th Oct 2020 :-  
Application filled u/s 94(1) by Guarantor himself is admitted
5. Mr. Manohar Singh Gulati (IB)-955(ND)-Bench Court II order dated 23.10.20  
appointed RP Mr. Navneet Kumar Jain
6. MS Sahoo, chairman of the Insolvency and Bankruptcy Board of India (IBBI),  
said: "The Covid-19 default has been suspended for the purpose of the CIRP  
(Corporate Insolvency Resolution Process), and not for other purposes under  
the Code, including individual insolvency."

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# FEEES



Monday, Bank Holiday, and Christmas (August), and Christmas or Sunday, the following  
**bankruptcy** n. The state of being insolvent (compare with bankrupt's affairs and debtor's assets)



# Schedule 1 :- Fees

Amount of realisation in rupees (less bankruptcy process cost)	Percentage of fee on the amount realised			
	In the first six months	In the next three months	In the next three months	Thereafter
Up to the first 25 lakh	10.00	7.50	5.00	3.75
On the next 50 lakh	7.50	5.00	3.75	2.80
On the next 1 crore	5.00	3.75	2.50	1.88
On the next 9 crore	3.75	2.80	1.88	1.41
On the next 40 crore	2.50	1.88	1.25	0.94
On the next 50 crore	1.25	0.94	0.68	0.51
On further sums realised	0.25	0.19	0.13	0.10
On the next 50 crore	0.63	0.48	0.34	0.25
On further sums distributed	0.13	0.10	0.06	0.05

# Schedule 1 :- Fees

Amount of realisation In rupees (less bankruptcy process cost)	Percentage of fee on the amount realised			
Amount of distribution In rupees distributed				
Amount of realisation In rupees distributed	Percentage of fee on the amount distributed			
	In the first six months	In the next three months	In the next three months	Thereafter
On the first 50 lakh	5.00	3.75	3.00	1.88
On the next 75 lakh	3.75	3.00	1.88	1.41
On the next 1 crore	2.50	1.88	1.25	0.94
On the next 9 crore	1.88	1.40	0.94	0.71
On the next 40 crore	1.25	0.94	0.63	0.47
On the next 50 crore	0.63	0.48	0.34	0.25
On further sums distributed	0.13	0.10	0.06	0.05

Thank  
You

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