

Motto

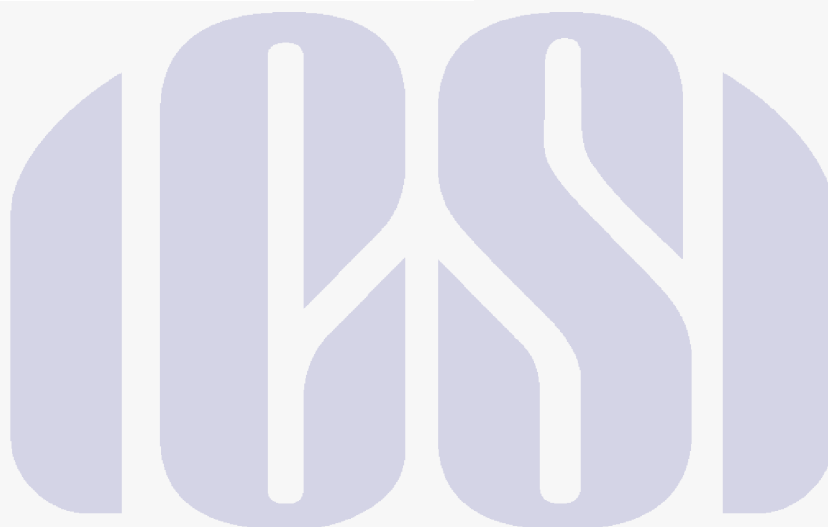
सत्यं वद। धर्मं चर।
 इष्टकारे तैः तृपतिः। शोभते ह्यु तैः त्वज्ज।

Vision

"To be a global leader in promoting
 good corporate governance"

Mission

"To develop high calibre professionals
 facilitating good corporate governance"


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From the Desk of the Chairman, EIRC



"The value of an idea lies in the using of it." – Thomas Edison

Dear Professional Colleagues,

The close of August has given us yet another opportunity to address our members through this newsletter. The annual filing season has dawned upon us and the following few months will be hectic for all our members who are engaged in the work of corporate laws and taxation.

India Inc. has been easing into the new Unlock norms with businesses slowly and steadily reopening and readjusting to the new normal of Covid-19 environment. The ICSI has also launched several new certificate courses for the benefit of the members at large and it is also offering Continuing Professional Education ("CPE") Hours for the courses done. In addition to that, the Institute has been relentlessly carrying out webinars on latest amendments and pressing matters to make sure the professionals can make the most of the time during lock-down.

Several counselling sessions and career awareness programmes were also organized virtually with different schools and colleges in the Eastern Region.

During these pressing times, members of the ICSI had also conducted many webinars from their end to update the stakeholders regarding the latest developments. Our members have also contributed articles, which we have presented in our professional newsletter for the benefit of the stakeholders.

The MCA has released notifications regarding amendment for extract of Annual Return and also brought clarifications regarding extension of holding Annual General Meeting.

Due to lock-down, no physical programmes were held to comply with the Government directions to curb and prevent the spread of corona virus.

The EIRC of ICSI had organized a webinar on Direct Tax Reforms on August 27, 2020, where Sri S K Bajoria, Chairman – S K Bajoria Group and Chairman, Board of Governors was present as Chief Guest and CA K K Chhaparia deliberated on the Reforms announced by Hon'ble Prime

Minister. A Series of Online Masterclass on GST are scheduled from August 31, 2020 to September 3, 2020.

This year, EIRC took a new initiative to celebrate Independence Day in a different way. All the Chapters of EIRC and the Regional Office unfurled the National Flag simultaneously and sang the National Anthem in chorus through videoconferencing in first of its kind of event.

The registration for classes of Foundation level and Executive level is also open for the students of ICSI.

I take this opportunity to appeal to all the members, once again, to enroll to CSBF for not only strengthening the future of our family but also to strengthen the corpus of CSBF. Updated guidelines related to CSBF are separately given on one of the inside pages of this newsletter.

Shri Jinan K R, Hon'ble Member, NCLT Kolkata Bench retired in the month of August 2020 and I take this opportunity to express gratitude, on behalf of entire EIRC, for his kind guidance and valuable support for the activities and endeavours of EIRC.

Before concluding, we would like to remember the story again, and believe that while opportunities may not knock at our door all the time, we must remind ourselves to open the door ourselves often. Rather than waiting for opportunities to cross our path, we must create them ourselves. Then only, we can move steadily and steadfastly towards our goal.

Please feel free to share your views and suggestions for the betterment of the Newsletter to me. My coordinates are given below:

With Warm Regards,

CS PRIYADARSHI NAYAK

Chairman, EIRC of ICSI

E-Mail: nayakfcs@gmail.com

Kolkata, The 31st August, 2020



AVOIDABLE TRANSACTIONS UNDER INSOLVENCY AND BANKRUPTCY CODE 2016



By CS HANSRAJ JARIA
(CS, LLB, M.COM, CAIIB, Insolvency Professional)
Practising Company Secretary & Corporate Law Consultant

Certain transaction under the Insolvency and Bankruptcy Code 2016 (the Code) are regarded as avoidable transactions in order to achieve the objectives of the Code. Section 43 to Section 51 and Section 66 deals with these avoidable transactions. Such transactions are as follows :

1. Preferential Transactions
2. Undervalued Transactions
3. Transactions defrauding creditors
4. Extortionate credit transactions
5. Fraudulent Transactions

A Resolution Professional needs to be very cautious while carrying out Corporate Insolvency Resolution Process (CIRP) of an entity in identifying and dealing with these avoidable transactions. The code has imposed an obligation on the insolvency professional to file an application for avoidance of transactions as per section 25(2)(j). The entity should avoid these transactions either during the insolvency resolution period or before certain period.

A. Section 43 - Preferential transactions and relevant time

(a) Preferential Transactions

A transaction is said to be a 'preferential transaction' if:

- (i) the transaction relates to transfer of the property or interest of the corporate debtor for the benefit of a creditor, surety or guarantor in relation to an antecedent / past liability; and
 - (ii) the transaction has the effect of giving such creditor, surety or guarantor a beneficial position in the distribution of assets in the event of liquidation under Section 53 of the IBC.
- A preference shall be deemed to be given at a relevant time, if it is given –

Person with whom transaction is entered into	Period of transaction
(a) to a related party (other than by reason only of being an employee)	during the period of two years preceding the insolvency commencement date; or
(b) to a person other than a related party	during the period of one year preceding the insolvency commencement date.

(b) Transactions not Included in Preferential Transactions

- (i) Transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
- (ii) Any transfer creating a security interest in property acquired by the corporate debtor to the extent that –
 - Such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and
 - Such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property.

- Any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

(c) Application to the Adjudicating Authority by the Liquidator

Where the liquidator/the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time, entered into preferential transactions, he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

B. Section 45 - Avoidance of undervalued transaction :

- (a) "Undervalued Transactions": A transaction shall be considered undervalued where the corporate debtor–
 - (i) makes a gift to a person; or
 - (ii) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.
- (b) The Resolution professional or liquidator, whenever come across to such transaction, should make an application to the tribunal for declaring such transaction as null and void and to reverse the effect of such transaction.

C. Section 46 - Period of avoidable transactions :

Person with whom transaction is entered into	Period of transaction
With any person	Within the period of one year preceding the insolvency commencement date
With a related party	With a related party within the period of two years preceding the insolvency commencement date.

D. Section 47 - Application by creditor in cases of undervalued transactions

Who can make an application in case of non-reporting of an undervalued transaction by the liquidator or the resolution professional?

- (i) A creditor,
- (ii) A member or
- (iii) A partner of a corporate debtor, as the case may be.

E. Section 49 - Transactions defrauding creditors

- (a) Which transactions are categorized as Transactions defrauding creditors:

Under valued transactions entered into by corporate debtor and Adjudicating authority is satisfied that such transactions was deliberately entered into by such corporate debtor :

- (i) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or
- (ii) in order to adversely affect the interests of such a person in relation to the claim

- (b) Mandatory order by the Adjudicating Authority -
- (i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and
 - (ii) protecting the interests of persons who are victims of such transactions.

EXCEPTION - The order is not applicable to the following :

- (i) Any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and
- (ii) A person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

F. Section 50 - Extortionate credit transactions

- (i) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt
- (ii) during the period within two years preceding the insolvency commencement date,
- (iii) the terms of such transaction required exorbitant payments to be made by the corporate debtor.
- (iv) the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority
- (v) The Board may specify the circumstances in which a transactions which shall be covered.
- (vi) Any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

Section 66 - Fraudulent trading or wrongful trading.

- (vii) Business of the Corporate Debtor has been carried on with the intent to defraud creditors; or
- (viii) For any fraudulent purpose.

G. Remedies Available For Avoidable Transactions

Section 44 - Orders in case of preferential transactions. –

The Adjudicating Authority, may, on an application made by the resolution professional or liquidator, by an order:

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;
- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the

corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

Section 48 - Order in cases of undervalued transactions.

The order of the Adjudicating Authority may provide for the following: -

- (a) require any property transferred as part of the transaction, to be vested in the corporate debtor;
- (b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;
- (c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or
- (d) require the payment of such consideration for the transaction as may be determined by an independent expert.

Section 51 - Orders of Adjudicating Authority in respect of extortionate credit transactions. –

The Adjudicating Authority may by an order –

- (a) restore the position as it existed prior to such transaction;
- (b) set aside the whole or part of the debt created on account of the extortionate credit transaction;
- (c) modify the terms of the transaction;
- (d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or
- (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

Section 66 - Order in cases of fraudulent transactions.

On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

- (a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and
- (b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

H. Responsibilities of Resolution Professional in case of Avoidable Transactions

- (a) Duty of RP to file application for avoidance of transactions in accordance with Chapter III of the Code. Section 25(2)(j)
- (b) Regulation 35A(1) provides that on or before 75th day of CIRP shall form an opinion whether the Corporate Debtor has subjected to any avoidable transactions under Section 43, 45, 50 and 66.
- (c) Regulation 35A(2) provides that on or before 115th day of CIRP, RP shall make a determination on such transactions and would also inform IBBI
- (d) Regulation 35A(2) provides that on or before 135th day of CIRP, RP shall make an application to Adjudicating Authority for appropriate relief and order.
- (e) RP shall submit all the resolution plans along with all transactions under Section 43, 45, 50 and 66, observed found and determined by him.
- (f) RP need to mention details of application filed / pending or orders obtained in Form H (Compliance Certificate) along with submission of Resolution Plan before Adjudicating Authority.

SUSPECT TRANSACTIONS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – JAYPEE INFRATECH LIMITED & BEYOND



By CS KIRAN SHARMA
Practising Company Secretary

The Insolvency and Bankruptcy Code, 2016 ("IBC") was enacted with an objective to reorganize the affairs of the corporate debtor in a time bound manner for maximisation of value of assets of such entities. In consonance with the objective of value maximisation, the IBC casts a duty upon the Resolution Professional under Section 25(2)(j) to avoid those transactions which were undertaken by the corporate debtor to defraud its creditors. This article seeks to examine the scope of such transactions in lights of the ruling by the Hon'ble Supreme Court in the Jaypee Infratech Limited case.

Transactions under IBC:

The provisions dealing with such transactions are generally referred to as 'avoidance provisions', which may collectively be called as "vulnerable transactions". Avoidance provisions can be important to an insolvency law not only because the policy upon which they are based is sound, but also because they may result in recovery of assets or their value for the benefit of creditors generally.

Sections 43 to 51 are mostly about vulnerable transactions, and therefore, the outcome of the proceedings after identification of such transactions is generally the reversal of the effect of successfully impugned transactions.

In addition to the above, Section 66 of the IBC deals with the jurisdiction/power of the Adjudicating Authority to make contribution orders in respect to fraudulent and wrongful conduct of business, without any consideration of the lookback period. The use of the word "transaction" under these sections intends to refer a wide range of legal steps by which assets of the corporate debtor undergoing CIRP or under liquidation, may be disposed of, including by way of transfer, payment, encumbrance, guarantee, loan or release, and may include a composite series of such transactions.

THROUGH THE LENS OF UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly, and in establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade. UNCITRAL aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field.

UNCITRAL Model law ("Model Law") has been structured to develop the insolvency regime of the member states, with an open-end discretion to amend the Model Law in order to comply with the public policy of the respective state. With regards to the Indian Judicial system, the Model Law has been relied upon time and again by the Indian Courts/ Tribunals. After having observed the recommendations of the BRLC vide its' Interim and Final Report on incorporating the avoidance provisions under the IBC, it shall also be prudent to quickly refer the recommendations of the UNCITRAL on the basis of globally accepted avoidance provisions.

A corporate debtor has significant opportunities to attempt to hide assets from creditors, and simultaneously incur artificial liabilities. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position, resulting disadvantages for ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment.¹

Avoidance provisions were introduced for many purposes including to reconstitute the integrity of the estate and ensure the equitable treatment of creditors.

JAYPEE INFRATECH CASE: BRIEF SKETCH OF THE CASE

The CIRP of Jaypee Infratech Limited ("JIL") has, since its inception, clarified upon various entangled matters under the provisions of IBC and has in this process, become a landmark case to test the adaptability of IBC.

Having read the aforesaid background of the avoidance provisions under the IBC, the Supreme Court has dealt with one of the most important questions related to 'never tested' aspect of the IBC i.e. avoidance transactions and delivered its' very first judgment on this subject matter.

JIL was undergoing CIRP under the provisions of IBC since, August 9, 2017 on an application filed by IDBI Limited before NCLT, Allahabad Bench ("NCLT"). Jaiprakash Associates Limited ("JAL") is the holding company of JIL. JIL had created various mortgages over its properties in favour of certain lenders of JAL during the period March 2016 to March 2017. As per the provisions of the IBC, the IRP of JIL filed an application before the NCLT for declaring the mortgage transactions as preferential transactions under section 43 of the IBC ("Impugned Transactions") and are fraudulent and wrongful transactions within the meaning of Section 66 of the IBC.

NCLT's view:

As a result of the said application filed for avoiding the Impugned Transactions, NCLT held that the transactions in question were to defraud the creditors/ stakeholders of JIL, since JIL's property was mortgaged to secure the debt of its related party, JAL, even when JIL was under immense financial crisis, because of no other consideration being paid to JIL. It further held that the mortgage of immovable properties without any consideration fell squarely under Section 45(1) of the Code as an undervalued transaction.²

NCLAT's view on the Order passed by NCLT:

On an appeal preferred by the lenders of JIL, National Company Law Appellate Tribunal (NCLAT) rejected the order passed by the NCLT and was of the view that the Impugned Transactions were entered into between the parties in the ordinary course of business of JIL and that they were not made with the intent to defraud the creditors of JIL.

Supreme Court's Ruling:

On consideration of the matter before the Hon'ble Supreme Court, an elaborate judgment dated February 26, 2020 was passed which quashed the NCLAT order

and has approved the findings of the original NCLT order. The SC dealt with two major questions, firstly whether the Impugned Transactions were preferential transactions, and secondly, whether the lenders of JAL could be termed as the financial creditors of JIL under the IBC.

On a conclusive note, it was pointed by the Supreme Court that where the subsidiary gave its properties as security for loans and advances availed by the holding, given the facts and circumstances of the present case and the nature of Impugned Transactions entered into between the parties, the SC held the transaction to be a preferential transaction hit by section 43 of the IBC. However, Supreme Court did not deal with the question of whether the transactions were undervalued or fraudulent as the scope and purport of requisite queries are completely different.

Also, it has been clarified that, any third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor. It was thus held by the Supreme Court, that the lenders of JAL pursuant to such Impugned

Transactions may though fall in the category of 'secured creditors' of JIL but cannot be said to be 'financial creditors' of JIL, as there was no disbursement of debt by the lenders of JAL to JIL and therefore, there was no direct engagement such lenders with JIL, as JIL has only mortgaged its property to secure debts of JAL.

Conclusion:

The SC ruling in the matter of JIL is an elaborate guide to understand preferential transactions, though the discussion on undervalued and fraudulent transactions, still remains open to be examined in an appropriate case. Since this law is evolving with day-to-day progress, it will open a lot of questions on the practical aspects of the avoidance provisions as envisaged under the IBC. An important aspect, which remains open ended as discussed above, is the look-back period related to fraudulent transaction. Interestingly, avoidance and undervalued transactions have a look-back period, there is no such look back period for fraudulent transactions covered under Sections 49 and 66 of IBC.

¹ UNCITRAL Legislative Guide on Insolvency Law, Avoidance Proceedings.

² [https://ibbi.gov.in/webadmin/pdf/order/2018/May/16th%20May,%202018%20In%20the%20matter%20of%20IDBI%20Bank%20VS%20Jaypee%20Infra%20Ltd.%20CA%20No.%2026-2018%20in%20CP%20No.%20\(IB\)%2077-ALD-2017_2018-05-17%2022:46:14.pdf](https://ibbi.gov.in/webadmin/pdf/order/2018/May/16th%20May,%202018%20In%20the%20matter%20of%20IDBI%20Bank%20VS%20Jaypee%20Infra%20Ltd.%20CA%20No.%2026-2018%20in%20CP%20No.%20(IB)%2077-ALD-2017_2018-05-17%2022:46:14.pdf)

REVISED ANNOUNCEMENT

COMMENCEMENT OF REGISTRATION FOR COMPANY SECRETARY EXECUTIVE ENTRANCE TEST (CSEET), NOVEMBER, 2020 SESSION

The November, 2020 Session of COMPANY SECRETARY EXECUTIVE ENTRANCE TEST (CSEET) shall be held on 21st November 2020 (Saturday). (Earlier it was announced to be held on 28th November 2020, which is now rescheduled).

It is hereby informed that the registration for the Company Secretary Executive Entrance Test (CSEET), November, 2020 Session has already commenced.

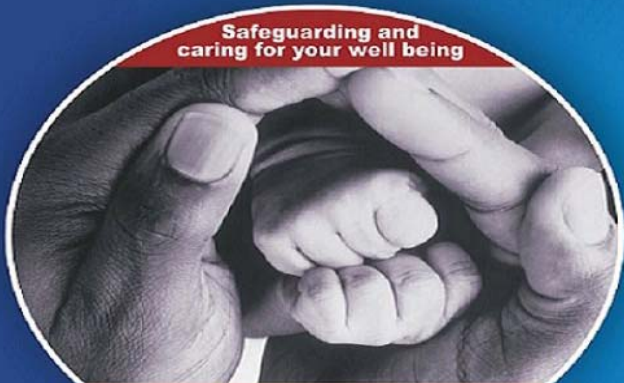
The last date for registration to Company Secretary Executive Entrance Test (CSEET), November, 2020 Session shall be 27th October, 2020.

Students may register for the CSEET at the following link :

<https://www.icsi.edu/online-services/register-cseet/>

It may be noted that students who have registered for the CSEET upto 27th July, 2020 shall be eligible to appear in the first CSEET scheduled to be held on Saturday, the 29th August, 2020.

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SPECIAL INSOLVENCY RESOLUTION FOR MSMEs UNDER IBC

By FCS AMIT PAREEK
Insolvency Professional



INTRODUCTION

The Ministry of Micro, Small and Medium Enterprises, an undertaking of the Government of India, is an apex executive body for the formulation and administration of rules, regulations and laws relating to micro, small and medium enterprises in India. It is a crucial element for a self-reliant India not only because it contributes almost 30% of the GDP, but also for its ability to create jobs, replace imports and the entrepreneurial opportunities it offered.

As such, MSME are a boost for the economy and so the Government is focusing to enhance the operations of such companies by relaxing various provisions and providing numerous exemptions to charge up the enthusiasm of the promoters of MSMEs to re-built confidence among them.

This Article tries to forecast the relaxation to defaulting Promoters of MSME to gain a chance of regaining position of the company under IBC.

INSERTION OF SECTION 29A OF IBC

Two years back in the year 2018, Section 29A was inserted to keep out the errant and willful defaulters from buying back stressed assets. This was essential to prevent chronic defaulters and fraudulent promoters. It laid down a multiple layered and comprehensive standard of disqualification that will exclude bona fide Resolution Applicants. This provision also asserts protection to the creditors of the company by safeguarding them against unscrupulous persons who irrespective of their earlier defaults are trying to reward themselves by undermining the whole objective of the Code and do not aim to contribute to the revival of the Corporate Debtor.

The Supreme Court in Chitra Sharma v. Union of India, while dealing with the question of eligibility of a resolution process by means of a backdoor entry, effectuate public interest and ensure effective corporate governance.

PROBLEMS FACED BY MSME DUE TO INSERTION OF SECTION 29A

The insertion of section 29A was done to engrave a hindrance for defaulting promoters however it also caused various difficulties for MSMEs. It came up under much scrutiny and criticism on the grounds that Section 29A has excessively enlarged the scope of disqualification to the extent of drastically reducing the prospective resolution applicants on the basis of what could be labeled as generalized criteria for disqualification wherein it does not differentiate between a genuine applicant and one with antecedents. The insertion of section 29A also caused various difficulties for MSMEs' since these enterprises were more labour intensive small business units which could not be able to attract much interest from bidders thereby leading to liquidation.

Due to the insertion of Section 29A and inclusion of clause (c) and (h) therewith, the promoters and other connected persons were debarred to apply for a Resolution Plan under the Code.

Clause (c) of Section 29A debars a person or a person acting jointly or in concert with such person who -

- (i) has an account classified as NPA
- (ii) is a promoter of a corporate debtor the account of which has been classified as NPA;
- (iii) is in the management of a corporate debtor the account of which has been classified as NPA

- (iv) Is in control of a corporate debtor the account of which has been classified as NPA. At least a period of 1 (One) year should have elapsed from the date of classification till the insolvency commencement date.

Therefore, any company (including the promoters/persons in the management of or control of such company) which has its account classified as NPA for last 1 (One) year will not be able to file a resolution plan. However, the Code provides for a carve out that such person shall be eligible to submit the resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

Clause (h) of section 29A debars the person who has executed a guarantee in favor of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part.

These clauses caused a restriction in accessing the preparation of Resolution Plan. However, later on MSME sectors were relaxed by providing exemptions by way of inserting Section 240A of IBC.

INSERTION OF SECTION 240A OF IBC

Realising that the earlier amendment might have been too harsh for the sector, where it becomes difficult for the genuine Resolution Applicants to file a resolution plan, the Government has now introduced certain exemptions from the provisions of the stringent Section 29A. This is done by inserting section 240A which specifically dispenses the applicability of Section 29A clause (c) and (h) in case the Corporate Debtor is a Micro, Small or Medium Enterprise. It is expected that with the introduction of these exemptions, the relatively smaller companies may find acquirers and they won't have to face liquidation.

WHAT IS SECTION 240A?

Section 240A inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 being an overriding section is a boost for the MSME sector. It provides that the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any Micro, Small and Medium enterprises.

CAN INELIGIBLE MSME PROMOTERS U/S 29A PARTICIPATE IN THE SCHEME OF ARRANGEMENT U/S 230 OF THE COMPANIES ACT, 2013

GENERAL PROVISION

Section 29A debars delinquent promoters from bidding in the resolution plan, but it was unclear if it specifically interdicted them from participating in the scheme of arrangement under section 230 of the Companies Act, 2013.

Later on a new insertion was made in the Regulation 2B(1) of the INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016 by Notification No. IBBI/2019-20/GN/REG053, dated 6th January, 2020 (w.e.f. 06-01-2020). As per the proviso a person, who is not eligible under the Code to submit a Resolution Plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

In the matter of Jindal Steel and Power Limited Vs. Arun Kumar Jagatramka & Anr. [CA(AT) No. 221/ 2018], the NCLAT removed the ambiguity around this and held that promoters ineligible under Section 29A of the IBC cannot participate in the scheme of Compromise

or Arrangement under Section 230 of the Companies Act, 2013.

RELIEF TO MSMEs

It has been further clarified in the NCLT Special Bench, Chennai - in the matter of Ravindranath Narayana Rao Vs. Maruthanayagam Kathiresh – NCLT Chennai.

The tribunal is of the view that, since the corporate debtor is an MSME, even if the promoters-directors have been declared as 'wilful defaulters', they can apply under the provisions of Section 230 of the Companies Act, 2013 as they

are exempted from Section 29A of IBC, 2016. Even after the declaration of initiation of liquidation proceedings, tender definite plan for taking over the company as a going concern or under the provisions Section 230 of the Companies Act, 2013.

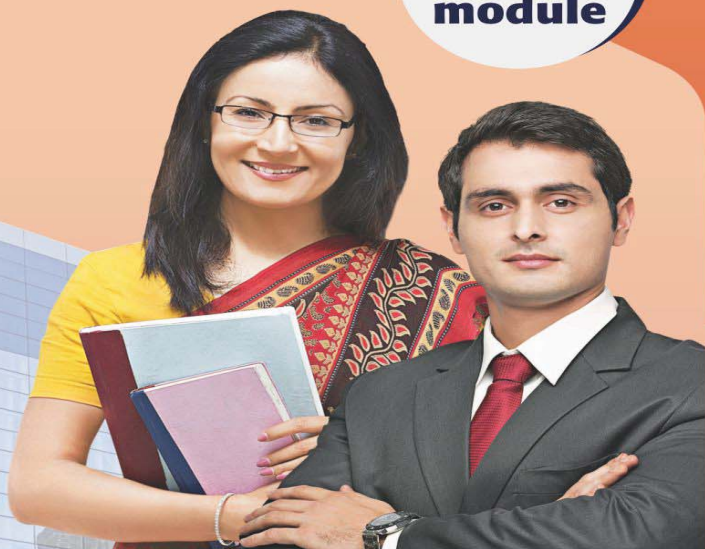
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- ▲ www.msme.gov.in
- ▲ www.mca.gov.in
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Last Date for Registration approaching :
30th September, 2020 (17:00 Hrs)
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SUPERPOWERS UNDER IBC : COMMERCIAL WISDOM OF CoC

By CS NEHA SOMANI

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Introduction :

This article is a Critique and it delves upon the various aspects of the enormous powers vested upon the Committee of Creditors ("CoC") under the regime of the Insolvency and Bankruptcy Code 2016 ("IBC"), and the primacy given to the commercial wisdom of CoC, by way of judicial pronouncements and not by the legislation itself.

The superpowers that have been bestowed upon the CoC have grave repercussions on the other stakeholders. In the garb of the enormous superpowers, bequeathed to the CoC by the judiciary, every controversial aspect that comes to light during the Corporate Insolvency Resolution Process ("CIRP") under the provisions of IBC, being attributed to the commercial wisdom of CoC, has become a commonplace.

A novel law requires reasonable and liberal interpretations and one that takes into consideration the interests of all and sundry. However, the credulousness and reliance placed upon the commercial wisdom of CoC have become so rampant, giving rise to acres of virgin forests, in the form of provisions that will never see the light of reasonable or liberal interpretations because of such myopic approach to a law which is still at a nascent age; a law that is still capable to be interpreted in ways more than one; a law that has evolved by way of judicial pronouncements.

Common meaning of "commercial wisdom" :

"Wisdom" is defined to mean the ability to use knowledge and experience to make good decisions and judgments. However, commercial wisdom is not defined anywhere. In the language of a lay man, it may be referred to as the decisions pertaining to the business, affairs and operations of an entity being taken after due consideration of its feasibility and viability in light of the commercial aspects of the business and the business environment, i.e. practical virtues of good judgment, foresight, experience, depicting business acumen.

Relevant provisions of IBC :

The IBC had been promulgated with an objective to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

SECTION 30 OF IBC : SUBMISSION OF RESOLUTION PLAN

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(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section(1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

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(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) The implementation and supervision of the resolution plan;

(e) **does not contravene any of the provisions of the law for the time being in force**

(f) confirms to such other requirements as may be specified by the Board.

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(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.

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SECTION 31 OF IBC : APPROVAL OF RESOLUTION PLAN -

(1) **If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom**

statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

- (2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

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[EMPHASIS SUPPLIED]

Doctrine of “commercial wisdom” laid down by the Hon’ble Supreme Court :

K SASHIDHAR VS. INDIAN OVERSEAS BANK & ORS. [February 5, 2019]

In the matter of *K Sashidhar vs. Indian Overseas Bank & Ors.*, the Hon’ble Supreme Court vide its judgment dated February 5, 2019¹, decided the following important issues :

- The provisions in Part II of the Code are self-contained, providing for the procedure for consideration of the resolution plan by the CoC.
- If CoC approves the resolution plan by requisite percentage of voting share, it is imperative for the Resolution Professional (“RP”) to submit the same to the Adjudicating Authority (“AA”). On receipt of such proposal, the AA is required to satisfy itself that the plan approved by CoC meets the requirements specified in section 30 (2). No more no less.
- Upon receipt of a “rejected” resolution plan, the AA is not expected to do anything more; but is obligated to initiate liquidation process under section 33(1). **The legislature has not endowed the AA with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting FCs.**
- The Code provides a swift resolution process to be completed within 270 days failing which, initiation of liquidation process is inevitable and mandatory. **It grants paramount status to the commercial wisdom of the CoC, without any judicial intervention, for ensuring completion of the processes within timelimit. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual FCs or their collective decision before AA.**
- There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. **The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.**
- **Neither the NCLT, nor the NCLAT has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.**
- The resolution professional is not required to express his opinion on

matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I & B Code. **At best, the Adjudicating Authority (NCLT) may cause an enquiry into the “approved” resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I & B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be.**

- **Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds Under Section 61(3) of the I & B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting.** To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority Under Section 31 of IBC dealing with approval of the resolution plan.
- **The powers and functions of the Insolvency and Bankruptcy Board of India (“IBBI”) are delineated in section 196 of IBC. None of the functions of the IBBI directly or indirectly pertain to regulating the manner in which the FCs ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under section 30(4) of IBC.**
- **From the legislative history there is contra indication that the commercial or business decisions of FCs are not open to any judicial review by the NCLT or NCLAT.**

COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LIMITED VS. SATISH KUMAR GUPTA AND OTHERS [November 15, 2019]

In the matter of *Committee of Creditors of Essar Steel India Limited VS. Satish Kumar Gupta and Others*, the Hon’ble Supreme Court vide its judgment dated November 15, 2019², restored the primacy of the secured creditors over unsecured creditors by staying the order of the NCLAT, wherein the Hon’ble NCLAT held that the operational creditors should be treated at par with the financial creditors. It upheld the commercial wisdom of the CoC in the matter of resolution and distribution of the proceeds of the resolution plan.

In the present case, resolution plans for the resolution of Essar India Ltd., the corporate debtor, were submitted by Arcelor Mittal, Nu Metal and Vedanta. After heavy rounds of litigation, the CoC approved the resolution plan of Arcelor Mittal. However, when the plan was filed with the Hon’ble NCLT, Ahmedabad Bench, for approval, the Hon’ble NCLT approved the resolution plan of Arcelor Mittal, but with a modification to allot 15% of the resolution amount to the operational creditors and the remaining to be distributed among the financial creditors.

The order passed by the Hon’ble NCLT, Ahmedabad Bench was appealed against, and the Hon’ble National Company Law Appellate Tribunal (“NCLAT”) held that there cannot be differential treatment between financial and operational creditors and each class deserves equal treatment. Due to the conflict of interest, the CoC was not empowered to decide the distribution between classes of creditors. The Hon’ble NCLAT redistributed the resolution proceeds to ensure that financial and operational creditors were paid 60.7% of their admitted claims.

The order passed by the Hon'ble NCLAT, was appealed against and the Apex Court, relying on Section 30(4) of IBC and Regulation 39(3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, held that IBC accorded supremacy to the CoC's commercial wisdom.

- The Hon'ble Supreme Court held that the NCLT does not have the authority to analyse or evaluate the commercial decisions of the CoC and cannot enquire into the fairness of the decision. The enquiry by the NCLT is primarily limited by section 30(2) of IBC to ensure priority in payment of the insolvency resolution process costs, payment to operational creditors as prescribed and implementation and supervision of the resolution plan. **Regulating the exercise of commercial wisdom during the voting on the resolution plan is not within the power of the NCLT. Further, the NCLT cannot decide whether the CoC was correct to reject a resolution plan. Similarly, the NCLAT cannot trespass on a business decision of the majority of the CoC.**
- The Apex Court rejected the premise that secured and unsecured creditors should be treated equally under a resolution plan to ensure equity and fair play. **Citing its judgment in the matter of Swiss Ribbons Pvt. Ltd. and Ors. Vs. Union of India and Ors., dated January 25, 2019³, the Apex Court held that the equity principle cannot stretch to treat unequals equally, as that would destroy the very objective of the code, which is to resolve stressed assets.**
- **Relying upon its judgment in K. Sashidhar VS. Indian Overseas Bank, the Court re-iterated that the limited judicial review that is available, can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, and has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned.**
- A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of the NCLT under Section 60(5)(c) cannot, in any manner, whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority.
- **Judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force.**
- **The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.**

MAHARASHTRA SEAMLESS VS. PADMANABHA VENKATESH [January 22, 2020]

The Apex Court in the matter of Maharashtra Seamless Limited VS. Padmanabhan Venkatesh, vide its judgment dated January 22, 2020⁴, over-ruled the decision of the Hon'ble NCLAT, and accepted the decision of the CoC approving the Appellant's Resolution Plan which quoted an upfront payment at an amount lesser than the

liquidation value of the corporate debtor. The Hon'ble Supreme Court ruled that the NCLAT exceeded its jurisdiction by delving into the rationale behind the CoC's commercial wisdom.

The Hon'ble Supreme Court held :

- No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- **The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom.**
- On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. **Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code.**
- Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. **The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel's case. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.**

Recent judgments pertaining to the application of "commercial wisdom" by the Hon'ble NCLAT :

Rai Bahadur Shree Ram and Company Pvt. Ltd. and Ors. VS. Bhuvan Madan and Ors. [March 12, 2020]

In the matter of **Rai Bahadur Shree Ram and Company Pvt. Ltd. and Ors. VS. Bhuvan Madan and Ors**, the Resolution Plan submitted by Respondent No. 4, Sterlite Power Transmission Ltd. (SPTL), was approved by 95.15% of the voting share of the CoC and the same was further approved by the National Company Law Tribunal ('NCLT'), Cuttack Bench, vide its order dated January 30, 2020. The Hon'ble Tribunal passed another order on the same date, rejecting the application filed by the Appellants to direct the CoC to consider the settlement proposal, in view of the Resolution Plan being approved with requisite majority of CoC, leaving no scope for the Hon'ble Tribunal to direct reconsideration of the settlement proposal.

The Appellants filed two Appeals before the Hon'ble NCLAT wherein they contended that the NCLT, Cuttack Bench, while passing the impugned Orders dated January 30, 2020, failed to consider whether the approved Resolution Plan conformed with Section 30 of IBC and its objective of maximization of value of assets of the Corporate Debtor. The impugned orders were further assailed by the Appellants as being non-speaking cryptic orders, without application of mind.

The Hon'ble NCLAT placed reliance on the judgments of the Hon'ble Supreme Court in cases of: *K. Sashidhar VS. Indian Overseas Bank*, *Maharashtra Seamless VS. Padmanabha Venkatesh and Committee of Creditors of Essar Steel India Limited*

VS. Satish Kumar Gupta and Others, thereby dismissing both the Appeals vide a combined order dated March 12, 2020⁵, and held :

"It is the settled proposition of law that the commercial wisdom of the Committee of Creditors in approving or rejecting a resolution plan is essentially based on a business decision, which involves evaluation of the Resolution Plan based on its feasibility besides the Committee of Creditors being fully informed about the viability of the Corporate Debtor. Such commercial wisdom of the Committee of Creditors with requisite voting majority is non-justiciable and the discretion on Adjudicating Authority is circumscribed to scrutiny of Resolution Plan as approved by the requisite majority voting share of the Financial Creditors. The enquiry postulated under Section 31 of the I&B Code is limited to matters covered under Section 30(2) of the I&B Code when the Resolution Plan does not confirm the stated conditions. Therefore, the Appellants cannot question the commercial wisdom of the Committee of Creditors in rejecting the settlement proposal emanating from the Appellants, with the requisite majority and in approving the Resolution Plan of SPTL. No material irregularity in Corporate Insolvency Resolution Process before the Resolution Professional has been demonstrated. Merely because the Adjudicating Authority has declined to direct reconsideration of the already rejected settlement proposal of Appellants does not impinge upon the legality and conformity of the approved Resolution Plan with the conditions stated in Section 32 of the I&B Code."

[EMPHASIS SUPPLIED]

Shrawan Kumar Agrawal Consortium and Ors. Vs. Rituraj Steel Private Limited and Ors. [March 5, 2020]

In the matter of **Shrawan Kumar Agrawal Consortium and Ors. Vs. Rituraj Steel Private Limited and Ors.**, three appeals emanated from the common order passed by the Hon'ble NCLT, Kolkata Bench, on December 10, 2019, in C.A.(IB) No. 1577/KB/2019, under Section 31 of IBC, whereby the Hon'ble NCLT, Kolkata Bench had issued directions for fresh bidding within 15 days and for filing the reapproved Resolution Plan by December 31, 2019 and conclude the CIRP process, thereby ignoring the approval of the Resolution Plan by the CoC, with a voting share of 84.70%.

The Appellant in Appeal No. 1490 of 2019, City Mall Vikash Private Limited (the relevant appeal in context of this article) challenged the legality of the impugned order on the following grounds:

- ❑ The Appellant was the successful resolution applicant (H1 bidder), after approval of its Resolution Plan by the Committee of Creditors with 84.70% of voting share.
- ❑ The Appellant contended that after the approval of the resolution plan by the CoC, the Resolution Professional filed the same before the Hon'ble NCLT, Kolkata Bench, for its approval under Section 31 of IBC. But during the hearing for the approval of Resolution Plan, the two other unsuccessful Resolution Applicants preferred applications before the Hon'ble NCLT.
- ❑ The Appellant further contended that the Hon'ble NCLT ignored the settled position of law and reversed the commercial decision of CoC.
- ❑ The Appellant further contended that after the approval of the Resolution Plan with requisite majority of CoC, the Adjudicating Authority has jurisdiction under Section 31(1) of IBC, which is circumscribed by Section 30(2).
- ❑ The Appellant further placed reliance on the judgments of the Hon'ble Supreme Court in cases of: K. Sashidhar VS. Indian Overseas Bank, and Committee of Creditors of Essar Steel India Limited VS. Satish Kumar Gupta and Others.

The Hon'ble NCLAT, allowed the said Appeal vide its order dated March 5, 2020⁶, and held :

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In the instant case, the Adjudicating Authority has overturned the decision of the CoC regarding approval of the Resolution Plan despite being approved by 84.70 percent of the vote share of the CoC, on the pretext of maximisation of value of the corporate debtor. The provisions investing jurisdiction and authority in the NCLT has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. In the circumstances as stated above, it is clear that the Adjudicating Authority cannot interfere with the commercial wisdom of CoC. The direction for rebidding for maximisation of the value of the corporate debtor also amounts to an interference in the business decision of the CoC, which is not permitted in law.

Thus it is clear that the Adjudicating Authority is having limited power of judicial scrutiny under Section 31, which has to remain within the four corners of Section 30(2) of the Code and the same cannot, in any circumstance, trespass upon the commercial wisdom of the CoC. The directions of the Adjudicating Authority for rebidding, after the approval of Resolution Plan by the requisite majority, is not in consonance with the law laid down by Hon'ble Supreme Court in K. Shashidhar, as a Resolution Plan is neither a sale nor an auction but it all depends on the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority and 'that is made non-justiciable'.

[EMPHASIS SUPPLIED]

Section 30(2)(e) of IBC :

In the matter of Committee of Creditors of Essar Steel India Limited VS. Satish Kumar Gupta and Others, the Hon'ble Supreme Court held that the Resolution Professional is to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29A of IBC, but, it only means that his prima facie opinion is to be given to the CoC that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law.

Further, it held that when the CoC exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account the key features of IBC before it arrives at a commercial decision to pay off the dues of financial and operational creditors. Though the ultimate discretion of what to pay and how much to pay to each class or subclass of creditors is with the CoC, but, such decision must reflect that it has taken into account maximising the value of the assets of the corporate debtor and has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the CoC has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e) of IBC, as the provisions of IBC are also provisions of law for the time being in force.

Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of.

However, despite laying down the fact that the commercial decision taken by the CoC should be in tandem with the aims and objectives of IBC, the same has practically never been considered as a violation of Section 30(2)(e) of IBC, when maximization of the value of the assets is ignored by the CoC and when the interests of all other stakeholders including operational creditors are not taken care of. IBC is also a statute and the objectives of the statute form an integral part of the statute itself. Not adhering to the same should definitely be considered as a violation of Section 30(2)(e), or to put it in other words, while approving a resolution plan what should be indispensable is the fact that the aims and objectives of IBC are first met. Only then the compliance of the other provisions should be checked, failing which the resolution plan should be rejected outright, irrespective of the application of 'commercial wisdom' by the CoC.

Adherence of CoC's commercial wisdom to the aims and objectives of IBC:

In the matter of *Committee of Creditors of Essar Steel India Limited VS. Satish Kumar Gupta and Others*, it was seen how the Hon'ble Supreme Court, despite recognising the concept of commercial wisdom, in unequivocal terms, thrust an unwavering limitation upon the powers of the CoC by subjecting it to the preamble, aims and objectives of IBC, failing which their decisions would be subject to a thorough examination by the NCLT, based on merits.

However, the judgment passed by the Hon'ble Supreme Court, in the matter of *Maharashtra Seamless Limited VS. Padmanabhan Venkatesh*, has bolstered the ambit of 'commercial wisdom' exponentially and has taken a giant stride towards giving more wings to the CoC to act as a free bird.

It may be inferred that considering the present scenario, the future of an insolvent company will be determined only by the commercial wisdom of the CoC, without any judicial intervention, come what may. This is antithetical to the legislative intent of IBC.

It needs to be understood that once the financial creditors get a full pay-out in the resolution plan, or once they are able to sail across the sea with a minimal haircut, why would they even bother to consider the interests of the operational creditors and other stakeholders?

It is no rocket-science to gauge that their 'commercial wisdom' would be mostly limited to their interest only.

Conclusion :

The Adjudicating Authority is definitely not expected to venture into the realm of convoluted analysis, that is done thoroughly by the CoC and the other professionals involved during the CIRP process. However, the Adjudicating Authority should surely be given enough powers to right a wrong, to weigh the Resolution Plan in terms of the objectives of IBC, and to check whether the Plan is fair, reasonable, conscionable and is not contrary to any provisions of the statute. The power of judicial review would certainly balance the 'commercial wisdom' of the CoC, which more often than not turns out to be sheer desires and fancies of a few; when the CoC conveniently ignores the interests of all other stakeholders, if their own interests are duly met in the Resolution Plan.

A business runs only by the collective efforts of all the stakeholders, and not by one category of stakeholders, single-handedly. It is commendable that the financial creditors who finance the business of a company and have the maximum exposure, have been given numerous powers under IBC, to aid in the resolution of an insolvent company. However, placing blind trust and reliance on the commercial wisdom of the CoC, and not giving powers to the NCLT and NCLAT, to implement the checks and balances on the commercial wisdom of the CoC, shall reduce the Hon'ble Tribunals to mere stamp affixing authorities even when they have a strong opinion against the commercial wisdom of the CoC, which might be in the interest of all other stakeholders. On one hand, the powers of the NCLT and NCLAT to exercise their viewpoints have been curtailed, and on the other hand, the authority to approve a Resolution Plan, has been given to them, which means that a great scope is given to the CoC for taking decisions as per their whims and fancies, in the garb of commercial wisdom, and compelling the NCLT and NCLAT to concede to the decisions taken by the CoC, by merely checking whether the procedural requirements have been duly met or not.

A conspectus of all the provisions and precedents exhibit that the NCLT and NCLAT act like umpires in the game of cricket who only have to see that both the teams play according to the prescribed rules and do not overstep the limits. Sadly, how the game is to be played is left to the discretion of the players only, and not the umpires. Therefore, though the legislative intent of the statute and the judicial pronouncements are presently poles apart and parted with each other, all we can hope is that in times to come, the relevance of co-existence will be realized and we will get all the answers that we have been seeking, in the form of amended provisions and judgments, imposing checks and balances on the "commercial wisdom" of CoC, that are in the interest of all stakeholders.

¹ [2019]213CompCas356(SC)

² (2020)1CompLJ1(SC)20(IB)%2077-ALD-2017_2018-05-17%2022:46:14.pdf

³ [2019]213CompCas198(SC)

⁴ [2020]154CLA280(SC)

⁵ Company Appeal (AT) (Insolvency) Nos. 207-208 of 2020

⁶ Company Appeal (AT) (Insolvency) Nos. 1490 of 2019, 78 of 2020 and 184 of 2020

ATTENTION MEMBERS

To publish the ICSI-EIRC Newsletter more informative, members are requested to contribute the Article on current topics / Check-Lists / Corporate and Legal Updates / Juridicial Pronouncements etc. to Shri Tamal Kar, Assistant Director at : tamal.kar@icsi.edu

HAPPY TEACHERS' DAY

ICSI-EIRC takes this opportunity to wish all the Faculties of Class Room

Teaching (CRT) being conducted by the EIRC of ICSI. The following are the Faculties as on date for CRT

Foundation Programme

CS Shruti Singhania
CS Govind Dewan
Ms. Arundhati Ghosh

Executive Programme

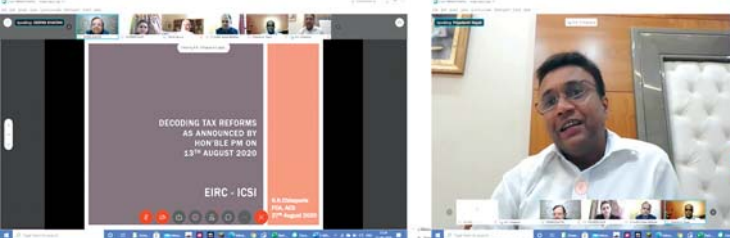
CS Mohit Saluja
Sh. Angshuman Bhattacharya
CS Karan Bansal, CS Vikram Agarwal
CS Mohit Agarwal, CA Aditya Pachisia
Sh. Pranab Kumar Sikdar
CS Sakshi Karnani

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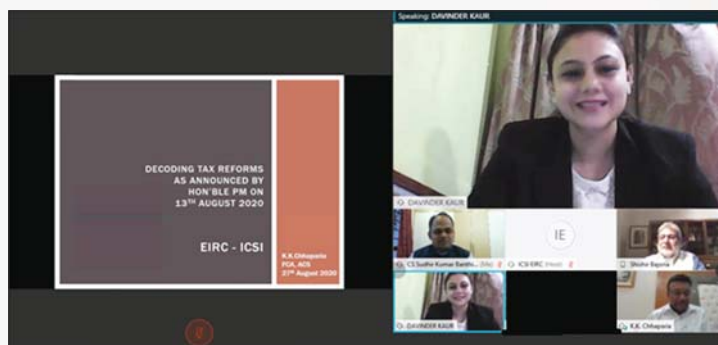
Ms. Arundhati Ghosh
CS Govind Dewan
CS Vikram Agarwal
CS Mohit Agarwal
CS Anil Dubey

NEWS & EVENTS

EIRC Webinar on Direct Tax Reforms held on 27th August, 2020



Chief Guest : **Shri S K Bajoria**
 Chairman, IFGL Refractories Ltd
Guest Speaker : **CA K K Chhaparia**
 Practising Chartered Accountant
Moderator : **CS Davinder Kaur**



Online Masterclass Session on GST held on 31st August, 2020

Guest Speaker : **CA Nikita Shah**
 Practising Chartered Accountant
Moderator : **CS Kshama Khetan**
CS Sudhir Kr. Banthiya, Vice Chairman, EIRC and
CS Siddhartha Murarka, Ex-officio Member, EIRC
 are also seen in the photograph



CHAPTERS' NEWS

BHUBANESWAR CHAPTER

Date	Name of the Programme	Topic with Speaker	Venue	Total Participants
05/08/2020	Meeting with the Director, DDCE, Utkal University, Bhubaneswar	For Career Awareness Programme & Academic Collaboration Reg	DDCE, Utkal University, Bhubaneswar	3
10/08/2020	Inauguration of 1st Joint Online Classes of Bhubaneswar Chapter for Executive Programme in association with Jamshedpur, Siliguri & Dhanbad Chapter	Executive Programme Online Classes	Virtual Platform	25
12/08/2020	Meeting with Birla Global University, Bhubaneswar	Academic Collaboration reg	Virtual Platform	6
14/08/2020	Career Awareness Programme	Mayurbhanj Law College, Odisha	Virtual Platform	40
14/08/2020	301st Meeting of the Chapter Managing Committee	—	Virtual Platform	8
15/08/2020	Celebration of 74th Independence Day	—	Virtual Platform	10
18/08/2020	Meeting with the Vice Chancellor, National Law University, Odisha	For Academic Collaboration	Virtual Platform	14
27/08/2020	Meeting with Dr. Surjya Narayan Patro, Hon'ble Speaker, Odisha	For inviting for the Teachers Conference	Bhubaneswar	3
29/08/2020	302nd meeting of the Chapter Managing Committee thru virtual platform	-	Virtual Platform	6

CHAPTER'S WORKSHOP AT A GLANCE



Inauguration of Joint Online Classes for Executive Programme of Bhubaneswar Chapter on 10/08/2020

Career Awareness Programme with Mayurbhanj Law College, Odisha on 14th August 2020.



DHANBAD CHAPTER

Date	Name of the Programme	Topic with Speaker	Venue	Total Participants
15.08.2020	Independence Day Celebration	CS Roshan Lal Nad, Chairman, Dhanbad Chapter of ICSI	Dhanbad Chapter of ICSI	15 (Fifteen)
29.08.2020	Online Session	Corporate Social Responsibility Speaker : CS Rahul Roy, Secretary, Dhanbad Chapter of ICSI	Online	14 (Fourteen)
Total No. of Career Awareness Programmes organised during February, 2020				Nil

HOOGLHY CHAPTER

Date	Name of the Programme	Topic with Speaker	Venue	Total Participants
15.08.2020	Independence Day Celebration	–	Chapter Premises of Hooghly Chapter, Rishra	10
15.08.2020	5th Webinar on "Role of Professional Amidst Pandemic"	"Role of Professional Amidst Pandemic" Dr. (h.c.) CS Mamta Binani Past President, ICSI CS Siddhartha Murarka Central Council Member, ICSI CS Aditya Purohit Past Chairman, ICSI Hooghly Chapter	Webinar on BlueJeans	23
31.08.2020	6th Webinar on "Myths & Misconception on Interest and Penalties under GST Regime"	"Myths & Misconception on Interest and Penalties under GST Regime" CA Gagan Kedia Practising Chartered Accountant, Kolkata	Webinar on BlueJeans	30
Total No. of Career Awareness Programmes organised during August, 2020				01

CHAPTER'S WORKSHOP AT A GLANCE



Independence Day Celebration by Hooghly Chapter of ICSI

Glimpses of 5th Webinar of Hooghly Chapter on "Role of Professional Amidst Pandemic" held on 15th August, 2020

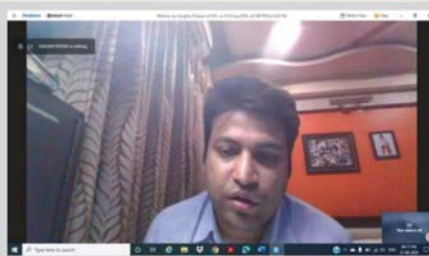


Guest Speaker CS Siddhartha Murarka,
Central Council Member, ICSI



CS Shashank Joshi, Chairman, Hooghly
Chapter of ICSI

Glimpses of 6th Webinar of Hooghly Chapter on "Myth and Misconception on Interest & Penalties under GST regime" held on 31st August, 2020



CA Gagan Kedia, Practising Chartered Accountant



CS Shashank Joshi, Chairman, Hooghly Chapter of ICSI

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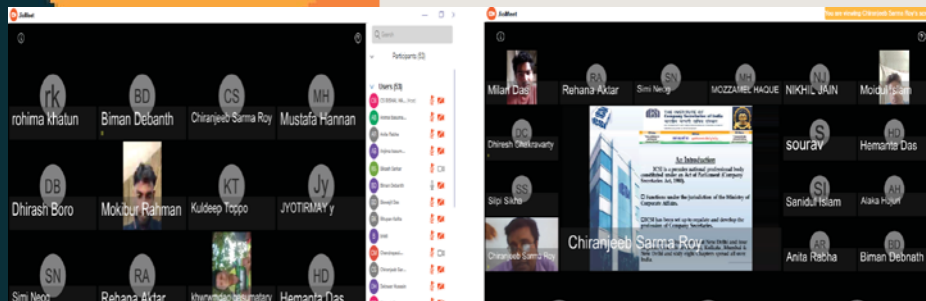
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Members are requested to contribute by giving advertisements in the ICSI-EIRC Newsletter. The fund so generated will strengthen the financial position of EIRC of ICSI.

NORTH EASTERN (GUWAHATI) CHAPTER

Date	Name of the Programme	Topic with Speaker	Venue	Total Participants
06.08.2020	6th Online CAP	Chief Guest : CS Biman Debnath, Secretary of EIRC of ICSI Guest of Honour : Dr. Bibhuti Bhusan Panda , Principal P.B. Chaliha College, Special Invitee : Dr. Dhires Chakravarty, Coordinator, IQAC, B.P. Chaliha College., Ms. Simi Neog, Head, Department of Commerce, B.P. Chaliha College., Mr. Bikash Jain, Asst. Prof., Department of Accountancy, K C Das Commerce College. Speaker : Mr. Chiranjeeb Sarma Roy, Senior Office Assistant, & Mr. Hemanta Das, Office Assistant. Moderator : CS Nikhil Jain Gangwal, MC Member & Past Treasurer, NE Chapter of EIRC of ICSI.	Online	53 (Fifty three)

CHAPTER'S WORKSHOP AT A GLANCE



CHAPTER'S WORKSHOP AT A GLANCE



Independence Day -2020 Celebration by Patna Chapter of ICSI

PATNA CHAPTER

Date	Name of the Programme	Venue	Total Participants
15.08.2020	Celebration of Independence Day 2020	Patna Chapter (Online)	5
Total No. of Career Awareness Programmes organised during July, 2020			Nil

CHAPTER'S WORKSHOP AT A GLANCE



Flag hoisting on 74th Independence Day

RANCHI CHAPTER

Date	Name of the Programme	Venue	Total Participants
15.08.2020	74th Independence Day celebration	Ranchi Chapter of ICSI	03
Total No. of Career Awareness Programmes organised during July, 2020			Nil

CHAPTER'S WORKSHOP AT A GLANCE

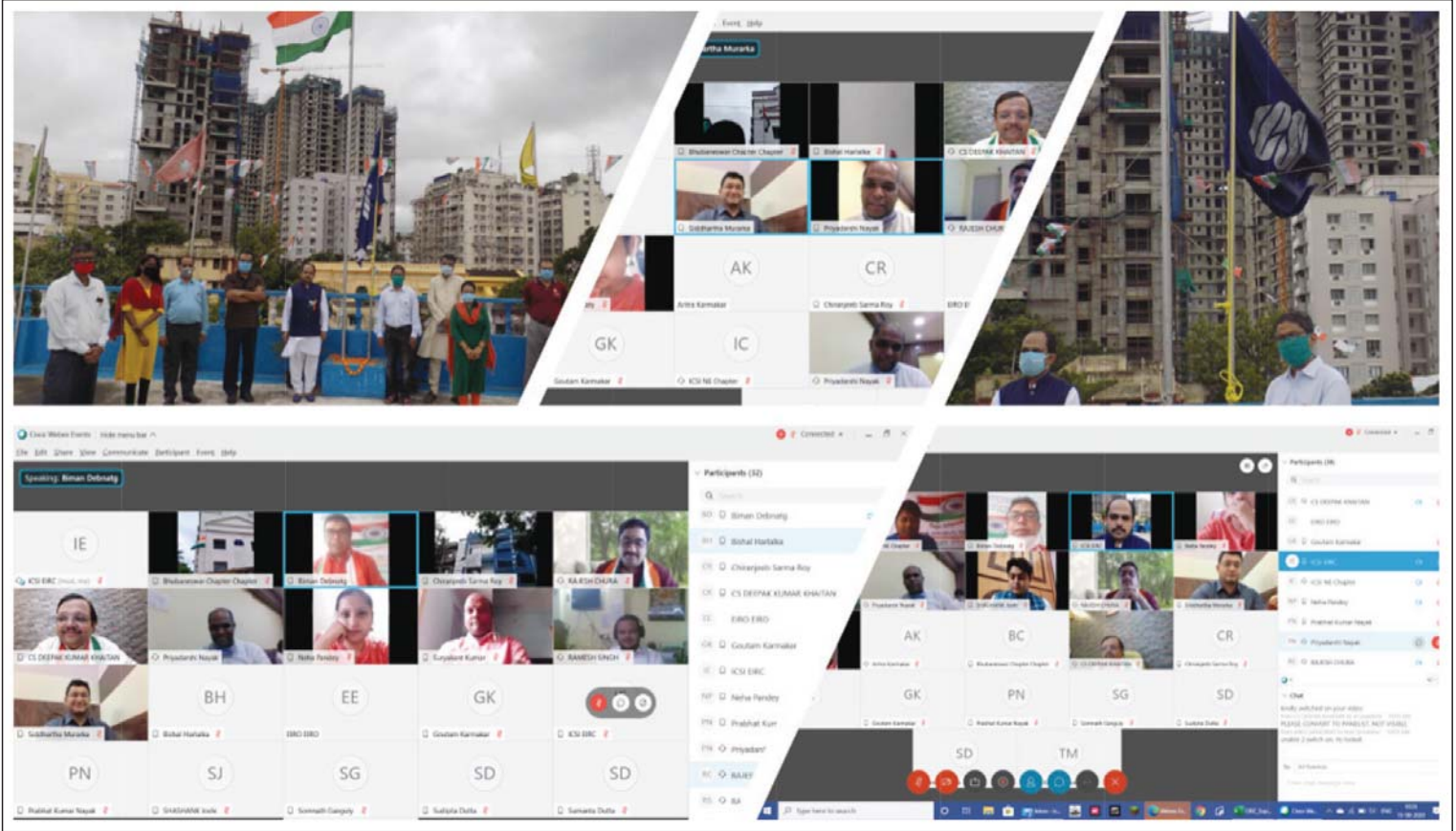


Independence Day Celebration on 15.08.2020

SILIGURI CHAPTER

Date	Name of the Programme	Venue	Total Participants
15.08.2020	Independence Day Celebration	Siliguri Chapter	3
Total No. of Career Awareness Programmes organised during July, 2020			Nil

EIRC and all the Chapters of EIRC jointly celebrated Independence Day on 15th August, 2020



The **74th Independence Day celebration at EIRC** was one of its kind in the current pandemic situation. EIRC and all the Chapters of EIRC jointly celebrated Independence Day on 15th August, 2020 on a virtual platform. CS Priyadarshi Nayak, Chairman, EIRC welcomed all the members of the Regional Council, the Chapters' Chairmen and the Managing Committee Members of the Chapters and said that it's a one of the rare opportunity where all the Team leaders are in a single (virtual) frame. CS Sudhir Kumar Banthiya, Vice Chairman, EIRC unfurled the National Flag at EIRO where Dr. Tapas Kumar Roy, Regional Director (E) and other officials of EIRO were also present. All the Chapters hoisted the National Flag simultaneously and sang the National Anthem in chorus. ICSI Moto song was also sung after that. CS Siddhartha Murarka and CS Deepak Kumar Khaitan, Ex-officio

Members appreciated Chairman, EIRC for this novel thought of joint celebration through video conferencing due to social distancing which had forced all of us to keep safe distance but at the same time it had united us in a way where we all are just a click away.

The team leaders of the all the Chapters namely CS Prabhat Kumar Nayak, Chairman, Bhubaneswar Chapter; CS Shashank Joshi, Chairman, Hooghly Chapter; CS Bishal Harlalka, Chairman, NE Chapter; CS Ramesh Kumar Singh, Chairman, Jamshedpur Chapter; CS Suryakant Kumar, Chairman, Patna Chapter; CS Neha Pandey, Chairperson, Ranchi Chapter and CS Somnath Ganguly, Chairman, Siliguri Chapter participated in this event from their respective Chapter's location. The programme ended with the vote of thanks by CS Biman Debnath, Secretary, EIRC.

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