



Insolvency: What If The Winning Bidder Was Lying About Eligibility?

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On June 6 this year, the Insolvency and Bankruptcy Code, 2016 stood altered by what might seem like a minor amendment – a requirement for any bidder to certify his eligibility under Section 29A of the code. But what is the reliability of such an affidavit? What if the bidder lied and won? Could it result in the scrapping of the resolution plan, even years after its implemented?

Section 29A lists down the various criteria of ineligibility for bidders or resolution applicants in an insolvency resolution process. The new Section 30(1), that came into effect in June, states that while submitting a resolution plan, the bidder must also submit an **affidavit** stating that he is eligible to bid under Section 29A.

Before the June amendment, the onus was on the resolution professional to ensure that each bidder is eligible. This entailed extensive diligence, which, experts say, could never really reach a logical conclusion.

What Prompted The Amendment?

The March 2018 Report of the Insolvency Law Committee noted that ensuring that every resolution applicant was in compliance with section 29A was extremely onerous and time consuming for the Committee of Creditors (the lenders that supervise the insolvency process) as well as the resolution professional and as a remedy it recommended inclusion of Section 30(1) to promote timely resolution.

Section 30 (1) A resolution applicant may submit a resolution plan [along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.

Role Of The Resolution Professional

Among the many obligations of the resolution professional is the responsibility of ensuring that each resolution plan is not in violation of any provision of law, including Section 29A.

Resolution expert Dhairat Anjaria, who was also the resolution professional in the Electrosteel Steels Ltd. insolvency that concluded in April this year, told BloombergQuint that the submission of an affidavit does help by bringing in a certain level of responsibility in respect of the

resolution applicant. This is important because there's been a lot of litigation regarding this, with the resolution professional having to shoulder the burden of compliance with Section 29A, he said.

“This amendment brings in a level of accountability viz-a-viz the resolution applicant, but at the same time it may not completely dilute the resolution professional's responsibility. An RP is still required to conduct a reasonable level of diligence while using the affidavit as an important support.”

Dhaivat Anjaria, Resolution Expert

Procedurally, even before the amendment, resolution professionals requested bidders to provide a declaration or an affidavit of 29A eligibility, Anjaria pointed out. Now that this declaration is mandatory and has statutory backing, it makes resolution professionals hopeful that this will serve as a deterrent for defrauding bidders and help with timely resolution, he added.

Effect Of False Affidavit

Courts have determined that an affidavit is a written declaration of truth, an oath. In case it is intentionally false, it could attract penal consequences under the Indian Penal Code for perjury, cheating etc. Historically, the Supreme Court has imposed strict fines and sometimes directed separate criminal proceedings to be initiated against a person found to have lied in an affidavit.

But, so far, this has applied only in case of affidavits given pursuant to a judicial proceeding, explained Simone Reis, the insolvency practice leader at law firm Nishith Desai Associates.

In case of an insolvency process, the affidavit is provided to the resolution professional which would not satisfy the 'judicial proceeding' requirement, she said.

This opens up the debate on whether lying in an affidavit provided under the insolvency code will have the same consequence as in a legal proceeding.

It is interesting to note that the code itself contains various sections regarding penalty for providing misleading information but these apply only to information provided by the corporate debtor and creditors. This could be amended in future to include the potential bidders, given the recent affidavit requirement, Reis said.

“However, offences under the IBC are to be tried by a special court which is yet to be constituted, we will have to wait and see how courts interpret this situation but right now there is no precedent.”

Simone Reis, Leader - Insolvency Practice, Nishith Desai Associates

There is a contrary view.

In the insolvency process, the resolution professional relies on the affidavit provided by the bidder. When the resolution professional certifies to the CoC that an applicant is eligible under the IBC the committee indirectly relies on it as well, Bishwajit Dubey, Partner at law firm Cyril Amarchand Mangaldas told BloombergQuint.

“Finally, the NCLT relies on the RP’s statement that the resolution plan is in compliance with applicable law. Accordingly, the NCLT, as a quasi-judicial authority, is also relying on the declaration. In my view, this implies that if one lies on the affidavit it would amount to perjury under the penal laws.”

Bishwajit Dubey, Partner, Cyril Amarchand Mangaldas

In terms of a civil remedy, the resolution professional may include the requirement to provide an indemnity in case of false statements made by the prospective bidder. If the affidavit turns out to be false, the bidder will then be required to provide a fixed amount in damages, Reis said.

Liar, Liar

Director's Liability

While penalties would be borne by the lying bidder, any criminal proceedings may spell bad news for directors of the bidding company. In case the bidder is found to be guilty of perjury, cheating or fraud, the individuals who have perpetrated the commission of an offence on behalf of a company can also be held liable.

What Happens To A Tainted Resolution Plan

Since there has been no litigation on this aspect yet, lawyers can only speculate on what happens if a resolution plan put forward by an ineligible bidder has been approved and implemented. Here too, opinions vary.

On one hand Dubey thinks that if an approved resolution plan has been based on a dishonest affidavit, this amounts to fraud or misrepresentation which can vitiate the plan, in accordance with contract law.

“In my view, since all parties have been misled, the process needs to be started afresh or, as an alternative, the second highest bid can be considered. But the primary bidder's bid would stand invalidated.”

Bishwajit Dubey, Partner, Cyril Amarchand Mangaldas

On the other hand, Reis believes that the judiciary is likely to weigh the pros and cons of cancelling the resolution plan and process before setting them aside on account of false statements. A court is likely to take into account the nature of mischief, the implication of it and the intent of the parties before coming to a decision.

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