

# Insolvency and Bankruptcy Hotline

September 26, 2023

## DISSECTING THE INSOLVENCY CODE - EMPOWERING INVESTORS BY EXTINGUISHING ANTECEDENT LIABILITIES

### INTRODUCTION

Section 32A was introduced into the Insolvency and Bankruptcy Code, 2016 ("IBC"), with the aim of shielding existing and incoming investors from the impact of offences committed by the erstwhile management. The provision aims to achieve its objective by extinguishing any liability of the corporate debtor for offences committed by it, prior to the commencement of the corporate insolvency resolution process ("CIRP"). The extinguishment of liability occurs upon approval of a resolution plan by the adjudicatory authority ("NCLT").

Previously, we have embarked upon an interpretative analysis of Section 32A,<sup>1</sup> as well as judicial developments on aspects such as the trigger point of applicability of Section 32A.<sup>2</sup> We have also examined the overlap between legislations such as the Prevention of Money Laundering Act, 2002 ("PMLA") and the IBC and the jurisdiction of NCLT thereunder.<sup>3</sup> However, as the provisions are still in an incipient stage, various Courts and Tribunals continue to take meandering interpretations which could have an impact on the effectiveness and convenience of the CIRP, and by extension, the primary objectives of enacting the IBC.

This article lists and critically appraises such developments with an aim to analyse their impact on investments made by (a) lenders in the corporate debtor, and (b) resolution applicants to acquire the corporate debtor.

### SCOPE OF SECTION 32A OF THE IBC

Section 32A covers any action including attachment, seizure, retention, or confiscation of the property in relation to an offence committed by the corporate debtor before the CIRP, provided that the approved resolution plan results in a change in control of the corporate debtor to a person, not related in any manner to the erstwhile management or the concerned offence. NCLTs have relied upon the provision to extinguish such liabilities of corporate debtors under various statutes.

For instance, in a recent criminal indictment before a Delhi district court, despite an explicit acknowledgement that the corporate debtor was liable to be charged under the **Indian Penal Code, 1100%and Prevention of Corruption Act, 1988**,<sup>4</sup> considering that its management was under the control of the liquidator and its assets were being liquidated for the benefit of the creditors, the Court discharged the corporate debtor from the case.<sup>5</sup> The Court also noted that keeping the proceedings pending against a corporate debtor by framing the charges against it may adversely affect the value of its assets under liquidation. On similar lines of reasoning, the Supreme Court has previously affirmed the clean slate principle<sup>6</sup> which extinguishes all past liabilities of the corporate debtor.<sup>7</sup>

In line with these underlying principles, the Delhi High Court had quashed the prosecution of a corporate debtor by the **Serious Fraud Investigation Office**. The Delhi HC relied on Section 32A to hold that the corporate debtor would not be liable for any offence committed prior to commencement of CIRP upon approval of a resolution plan by NCLT.<sup>8</sup> The Delhi High Court also restrained the **Enforcement Directorate ("ED")** from taking any coercive action against the corporate debtor and its assets, during its liquidation proceedings.<sup>9</sup>

Similarly, criminal proceedings against a corporate debtor under **Section 138 of the Negotiable Instruments Act, 1881** may also be terminated if the grounds set out under Section 32A of IBC are satisfied.<sup>10</sup> The provision has also been relied upon for removal of attachment of a bank account of the corporate debtor by the income tax department.<sup>11</sup>

### DIFFERING APPROACHES OF NCLAT AND NCLT BENCHES

There has been some deviation in the approach of NCLATs and NCLTs towards the aspect of attachment of assets of a corporate debtor during CIRP.

The NCLAT in *Varrsana Ispat Ltd v. Deputy Director of Enforcement (2019)*,<sup>12</sup> held that the moratorium on continuation of proceedings under Section 14 would not act as a bar on continuation of provisional attachment orders passed under PMLA. However, in the judgement of *Directorate of Enforcement v. Manoj Kumar Agarwal*, (2021) ("Manoj Kumar"),<sup>13</sup> the NCLAT Delhi deviated from this position by holding that considering the objectives of IBC, authorities under PMLA (viz., the ED) would be prevented from exercising their powers to attach assets after the imposition of moratorium.

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The judgement in *Manoj Kumar* was later criticised by a larger bench of NCLAT Delhi in *Kiran Shah v. Enforcement Directorate, Kolkata* (2022) (“*Kiran Shah*”),<sup>14</sup> wherein, it was stated that Section 14 could not cause any obstruction for the Enforcement Directorate to exercise its powers under PMLA.

Yet, it is worth noting that the NCLT Mumbai bench, in the judgement of *STCI v. DSK Southern Projects* (2023), while citing Manoj Kumar, held that the attachment of assets of a corporate debtor by the ED could not have continued after admission of the corporate debtor into CIRP.<sup>15</sup>

The NCLT Jaipur bench recently held that authorities would cease to have power under the PMLA to attach the assets of a corporate debtor when the order of liquidation under IBC had already been passed.<sup>16</sup> It also cited *Manoj Kumar* and the judgement of the Delhi High Court in *Rajiv Chakraborty Resolution Professional of EEIL v. Directorate of Enforcement* (2022),<sup>17</sup> to hold that the “*authorities under the PMLA would cease to have the power to attach or confiscate assets only when a Resolution Plan had been approved or where a measure towards liquidation had been adopted.*”

Similarly, the NCLT Delhi has also held that the CBI cannot attach properties of a corporate debtor or initiate legal proceedings post initiation of CIRP, as the attachment of bank accounts during the moratorium is prohibited under IBC.<sup>18</sup> Consequently, it directed the banks to de-freeze the accounts of the corporate debtor which had been attached by the CBI. The NCLT Delhi also observed that the monies lying in the corporate debtor’s bank account can be utilized by the RP to run the CIRP as well as to maintain the corporate debtor as a going concern.

Furthermore, the Supreme Court in the case of *JSW Steel Ltd v. Mahender Kumar Khandelwal & Ors.*, also remarked that attachment of assets ‘*bought by a new purchaser in an auction lawfully conducted under the IBC*’ would invariably lead to a frustration of the objective of IBC., while asking the Central Government to resolve the conundrum.<sup>19</sup>

The ambiguity in the application of legal provisions leads to lack of clarity for investors. Courts and tribunals have acknowledged that (a) the objective of Section 32A is to ensure that the CIRP results in optimum recovery for creditors and reduces legacy liability for incoming investors; (b) keeping proceedings pending against a corporate debtor by framing charges may adversely affect the value of its assets under liquidation<sup>20</sup>, (c) the RP/Liquidator has a right to take over and manage the assets of the corporate debtor in order to perform the duties conferred on them by the statute;<sup>21</sup> and (d) post initiation of liquidation, framing charges would serve no purpose as action against assets of the corporate debtor like attachment, seizure, retention or confiscation cannot be taken even if such charge is tried and proven.<sup>22</sup>

## WAY FORWARD

### *From the Perspective of the Corporate Debtor and the Incoming Management*

The wording of the legislation, and the focus on the requirement of either the approval of a resolution plan or the sale of liquidation assets, is reflective of the legislative intent to ensure some *finality* with regard to the assets of the corporate debtor. The objective is to ensure that corporate debtor continues to be an attractive and viable purchase for its incoming management. The legislation is extensive and grants the corporate debtor immunity from being prosecuted under a wide sweep of legislations.

It is wholly justifiable for an investor who is acquiring stressed assets to insist that the assets being acquired are not subject to any pending encumbrances imposed by law enforcement agencies. Upon approval of a resolution plan, secured creditors are mandated to release any charge created on the assets of the corporate debtor. Similarly, if any action by the State continues to operate against the assets of the corporate debtor post the completion of the CIRP, the same will seriously jeopardize the value of the CIRP and the IBC. Resultantly, investor- acquirers could be compelled to hedge their risks at the bidding stage and propose a lower acquisition price.

However, as in the case of contingent liabilities which have not crystallized as on the date of initiation of CIRP, there should be some provision for recoupment of fines or penalties which had to be levied on the corporate debtor.

Therefore, there should be some balance created through legislative amendments which ensure that (a) investor pool for acquisition of stressed assets does not suffer from interference of law enforcement agencies post CIRP, and (b) blanket immunity granted to the corporate debtor does not encourage wrongdoing.

### *From the Perspective of the Creditors of the Corporate Debtor*

One of the most significant impact of the legislation is felt by the creditors of the corporate debtor. The provision protects investor/creditors from being unfairly penalised for their *bona fide* investments. By ensuring that the assets of the corporate debtor remain in the asset pool available for distribution to the creditors, it maximises the recovery that may be made on the investments by the creditors, despite the insolvency of the corporate debtor.

Section 32A offers great potential to boost the recovery of investments in spite of the uncertainties of insolvency. It enriches the insolvency ecosystem by aiding in the creation of a secondary market for stressed assets. However, the meandering approach of courts allowing attachment of assets of a corporate debtor during CIRP has made it difficult to reasonably assess the fate of a corporate debtor and its assets as well as the obstacles that may be faced by its incoming management. Thus, it is apparent that while the provision has succeeded in striking a balance between the interests of various stakeholders of the CIRP *to an extent*, it may require some revisions to achieve the true effects as intended.

### *From the Perspective of Investigating and Regulating Authorities*

Investigating and regulating authorities have expressed their apprehensions with regard to the extinguishment of antecedent liabilities of corporate debtors. It is anticipable that prohibiting the attachment of assets that were otherwise liable to be attached due to offences committed by the erstwhile management of the corporate debtor could lead to significant losses to the exchequer. As discussed above, even if the attachment of assets is enabled during the CIRP, if a claim is to be extinguished on approval of a resolution plan or on sale of liquidation assets, any

exercise carried out by a law enforcement authority could potentially be inconsequential.

The Securities and Exchange Board of India (“SEBI”) in one of its report has mentioned that the immunity under Section 32A of IBC would result in a violation of securities laws being committed by the corporate debtor and would adversely impact the effectiveness of penalties under securities law. It has proposed the introduction of an exception under Section 32A in order to create some scope for disgorgement or refund under securities law.<sup>23</sup>

Concerns have also been expressed over the implication of the provisions on environmental laws and the possibility of violation of the polluter pays principle.<sup>24</sup> This also points to the potential risks due to a blanket immunity to the corporate debtor undergoing CIRP. Such immunity could frustrate objectives across various legislations, by omitting (or significantly diminishing, by only requiring compensation from the individuals behind the offences) the entire process of remedy and damages to be paid by the wrongdoer, which could impact members of society who have no connections to the corporate debtor, the authorities, or the CIRP.

– Adimesh Lochan, Ritika Bansal & Arjun Gupta

You can direct your queries or comments to the authors.

The authors would like to thank Sanjana Shrivastav for her contribution to this article.

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<sup>1</sup>Nishith Desai Associates, Insolvency and Bankruptcy Hotline, “Ring Fencing Antecedent Liabilities of Companies: IBC Saves Investors!” <https://www.nishithdesai.com/SectionCategory/33/Insolvency-and-Bankruptcy-Hotline/12/31/InsolvencyandBankruptcyHotline/4253/1.html> (May 06, 2020).

<sup>2</sup>Nishith Desai Associates, Insolvency and Bankruptcy Hotline, “Dissecting the Insolvency Code: Will Threat of Attachment of Assets by ED Resurface During Liquidation Process under IBC?” <https://www.nishithdesai.com/SectionCategory/33/Insolvency-and-Bankruptcy-Hotline/12/31/InsolvencyandBankruptcyHotline/5318/1.html> (February 10, 2022).

<sup>3</sup>Nishith Desai Associates, Insolvency and Bankruptcy Hotline, “Dissecting the Insolvency Code: Attachment by Enforcement Directorate of a Corporate Debtor’s Assets” <https://www.nishithdesai.com/SectionCategory/33/Insolvency-and-Bankruptcy-Hotline/12/31/InsolvencyandBankruptcyHotline/6283/1.html> (August 30, 2022).

<sup>4</sup>Underlying offences were cheating and engaging in criminal conspiracy with public servants

<sup>5</sup>*CBI v. Sunil Hi-Tech Engineers Ltd. and Ors.*, (2023) MANU/OT/0034/2023 (Case No. CBI/318/2019 before Special Judge (PC Act) (CBI), Coal Block Cases-01, Rouse Avenue District Court, New Delhi).

<sup>6</sup>*Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others*, (2020) 8 SCC 531.

<sup>7</sup>*Ghanshayam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited* (Civil Appeal No. 8129 of 2019, decided on April 13, 2021).

<sup>8</sup>*Tata Steel BSL Limited and Another vs Union of India and Anr.*, 2020 SCC Online Del 1985.

<sup>9</sup>*Nitin Jain Liquidator PSL Limited v. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director PMLA*, W.P.(C) 3261/2021.

<sup>10</sup>*Ajay Kumar Radheyshyam Goenka v. Tourism Finance Corporation of India Ltd.*, 2023 INSC 232.

<sup>11</sup>*Subha Pal v. Income Tax Officer* ITO-14 (3) Mumbai, IA(I.B.C) - 389/2021.

<sup>12</sup>Company Appeal (AT) (Insolvency) No. 493 of 2018

<sup>13</sup>*Directorate of Enforcement v. Manoj Kumar Agarwal*, 2021 SCC OnLine NCLAT 121.

<sup>14</sup>*Kiran Shah v. Enforcement Directorate, Kolkata*, 2022 SCC OnLine NCLAT 2.

<sup>15</sup>*STCI v. DSK Southern Projects* (2023), IA-383/2022 in CP.(IB)178/MB-IV/2021

<sup>16</sup>*Mr. Satyendra P. Khorania Liquidator of M/s Emgee Cables and Communications Ltd. Vs. Deputy Director, Jaipur Zonal Office, Directorate of Enforcement*, IA NO. 15/JPR/2022.

<sup>17</sup>*Rajiv Chakraborty Resolution Professional of EEIL v. Directorate of Enforcement*, 2022 SCC OnLine Del 3703.

<sup>18</sup>*Jagat Pal Paliwal and Anr. v. JassumPropcon Projects Private Limited* (2023), I.A. 2028/2020 IN IB-1756/PB/201.

<sup>19</sup>Hindustan Times, SC Urges Govt to Resolve PMLA v IBC Deadlock, <https://www.hindustantimes.com/india-news/sc-urges-govt-to-resolve-pmla-vs-ibc-deadlock-101649182048745.html> (April 06, 2022).

<sup>20</sup>*Supra*, Note 5.

<sup>21</sup>*Supra*, Note 18.

<sup>22</sup>*Supra*, Note 5.

<sup>23</sup>SEBI, Report of High Level Committee Under the Chairmanship of Justice (Retd.) Anil R. Dave on the Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues, [https://www.sebi.gov.in/reports-and-statistics/reports/jun-2020/report-of-high-level-committee-under-the-chairmanship-of-justice-ret-d-anil-r-dave-on-the-measures-for-strengthening-the-enforcement-mechanism-of-the-board-and-incidental-issues\\_46863.html](https://www.sebi.gov.in/reports-and-statistics/reports/jun-2020/report-of-high-level-committee-under-the-chairmanship-of-justice-ret-d-anil-r-dave-on-the-measures-for-strengthening-the-enforcement-mechanism-of-the-board-and-incidental-issues_46863.html) (June 16, 2020).

<sup>24</sup>Indian Institute of Management, Ahmedabad, Working Paper on Environmental Claims under Indian Insolvency Law: Concepts and Challenges, <https://www.iima.ac.in/sites/default/files/2023-04/WP-2023-02-01-updated.pdf> (April 11, 2023).

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