

INSOLVENCY AND BANKRUPTCY CODE: FINANCIAL DEATH, AND POSSIBLE RESUSCITATION OF PANDEMIC AFFECTED WORKMEN

1. INTRODUCTION

The Indian Insolvency Regime exhibits characteristics more suited to a pubescent teen, in as much as it is frequently amended, and made to consciously clarify its constitution even on account of any specific activity that might disturb the originally intended objectives of its being.¹ The birth, and constant evolution of the Insolvency and Bankruptcy Code (2016) (“the code”) to better govern the economic needs of a developing nation, is in accordance with the trial, and error procedure with respect to economic legislation, as practiced by the Indian legislature, and validated by the judiciary.²

It is well established that insolvency laws are to only prescribe procedure, and requirements for timely insolvency resolution, and not bind the committee of creditors with resolution plans which might not take into account the peculiarities of a case of a specific debtor.³ The procedure, ideally, is to facilitate timely resolution of insolvency,⁴ and reinstate the corporate debtor,⁵ or as a more final measure see the corporate debtor through liquidation;⁶ but due to the pandemic, the conditions are far from ideal, and the procedure prescribed by the code stands frustrated.

Therefore, to alleviate pressure on the already battered state of Indian economy, sections 7, 9, and 10 of the code, which provide for the initiation of the insolvency resolution process have been suspended by the insertion of section 10-A, with respect to defaults arising on, and after March 25, 2020.⁷ This suspension will continue till six months from the specified date, and would be susceptible to extensions not exceeding an overall period of a year.⁸

¹Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 19.

²Swiss Ribbons Private Limited v. Union of India, 2019 4 SCC 17 ¶ 120; *accord* Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 ¶ 15.

³ *Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Part 2, Sub-part IV (A), 215 ¶ 20, (2005).

⁴ *Preamble*, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

⁵ *Id.* Part-II, Chapter II.

⁶ *Id.* Part-II, Chapter III.

⁷ The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, No. 9, 2020 (India).

⁸ The Insolvency and Bankruptcy Code, 2016, § 10-A, No. 31, Acts of Parliament, 2016 (India).

The aforementioned suspension, coupled with the retrospective raising of the default threshold under section 4 of the code from one lakh to one crore,⁹ would ensure that micro, small, and medium enterprises can utilize the calm period provided by this suspension to evaluate, and deal with the financial damage they sustained due to the ravaging effect of the pandemic. Another section adversely affected by the pandemic is workmen, who are also creditors to whom an operational debt¹⁰ is owed by the corporate debtor.

Though the rights of the labour, especially unorganized labour, are easily overlooked, the placement, and subject matter of certain provisions of the code actually pay heed to the interests of workmen, but considering how the National Company Law Tribunal, and National Company Law Appellate Tribunal are not courts of equity,¹¹ and how they cannot adjudge the validity of the resolution plans approved by the committee of creditors;¹² can the provisions of the code alone carry the workmen from harm's way?

On that backdrop, part II explores the enabled position of workmen through the perspective of the courts, and the provisions of the code, to bring a claim initiating the insolvency process against the corporate debtor. Part III buttresses the importance of workmen in keeping the corporate debtor's company an ongoing concern, which provides them with leverage against the committee of creditors, and further analyses the application of that leverage during a pandemic; part IV recognizes explicit provisions incorporated in the code for the benefit of the workmen, and analyses the shortcomings of those provisions. Part V lays emphasis on the need for an appeal mechanism for the claims of special classes like workmen, , and analyses relevant provisions of the code in light of judge law, part VI introduces a new method of insolvency resolution in the labour intensive sector of real estate, on the adoption of which, the interests of all the creditors, including special classes of creditors can be taken into consideration. Part VII concludes the paper with a gist of the discussion.

2. WORKMEN AS OPERATIONAL CREDITORS

⁹Ministry of Corporate Affairs Notification, Mar. 24, 2020, [F. No. 30/9/2020-Insolvency], <https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>.

¹⁰ The Insolvency and Bankruptcy Code, 2016, § 5 (21), No. 31, Acts of Parliament, 2016 (India).

¹¹ K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶ 45.

¹² K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶ 45.

Since workmen provide services in the form of their labour in return of a financial claim which becomes operational on the date as specified by the employer, the nature of the debt owed to the workmen can be classified as operational debt.¹³ Therefore, on chronic default of payment of their wages, workmen, who are operational creditors,¹⁴ could prefer an application under section 9 of the code to initiate insolvency proceedings against the debtor.

Though the code enables workmen to initiate insolvency resolution against the corporate debtor, maintaining the procedure prescribed by the code might prove financially burdensome to any individual workman who seeks relief through the initiation of insolvency resolution.¹⁵ The aforementioned observation becomes especially relevant if we take into account the recent amendment to section 4 of the code,¹⁶ which has raised the default threshold to one crore, which constructively disqualifies any individual workman to even file a claim under section 9 of the code.

2.1. Standing of Trade Unions as “any other entity established under a statute”

Therefore, it could be plausible that a trade union registered under the Trade Unions Act, 1926,¹⁷ could represent the workmen that are a part of the union, and present their claims as one, allowing accumulation of default to the extent of satisfying the threshold prescribed under section 4, this would also serve to alleviate the financial burden that would be levied on individual workmen on every step of the insolvency resolution process. Further, pursuing legal claims to which any member of the trade union or the trade union is a party, which arise as a result of the relation between the employer and the employee, and might affect the rights arising out of such a relation, is a statutorily recognized function of the trade union.¹⁸

The standing of a trade union however, to file an application for insolvency resolution against the debtor, is not explicitly fleshed out in the code. Section 3 (23) of the code, which clarifies who is a “person” for the objectives of the code, does not in unambiguous terms recognize a trade union as a “person”, who could then be classified as a type of creditor for the purposes of

¹³ The Insolvency and Bankruptcy Code, 2016, § 5 (21), No. 31, Acts of Parliament, 2016 (India).

¹⁴ *Id.*

¹⁵ J.K Jute Mill Mazdoor Morcha v. Juggilal Kamalapat Jute Mills Company, (2019) 11 SCC 332.

¹⁶ Ministry of Corporate Affairs Notification, Mar. 24, 2020, [F. No. 30/9/2020-Insolvency], <https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>.

¹⁷ The Trade Unions Act, 1926, § 8, No. 16, Acts of Parliament, 1926 (India).

¹⁸ *Id.*, 15 § (c).

being recognized as a beneficiary of the corporate debtor's operation. The code does however, recognize "*any other entity established under a statute*" as a person for the purposes of the code.¹⁹

Therefore, a purposive interpretation, keeping in mind the provisions of the Trade Unions Act, 1926,²⁰ and the preceding provisions of section 3 (23) (g) of the code is warranted. The composition of section 3 (23) of the code is teeming with explicitly specified entities,²¹ which are governed by the provisions of a general enactment,²² which enables them to be recognized as those entities for the purposes of regulation, and as a "person" under the code. Therefore, *noscitur a sociis* a trade union registered under the Trade Unions Act, 1926, can easily be classified as "*any other entity established under a statute*", for being recognized as a person. Further, the specified mode for an insolvency application made to the adjudicatory authority by an operational creditor recognizes the fact that claims can be made conjointly.²³

However, unorganized labour would not be able to take recourse to the code for repayment of what they are owed, in lieu of these new amendments, even the pre-pandemic scenario would financially burden, and constructively disqualify unorganized workmen to pursue insolvency. Even trade unions can have a tough time pursuing and presenting their financial interests, as many states have passed ordinances awaiting presidential ratification,²⁴ which entail mass suspension of labour laws to attract foreign investors, a trope expected to revitalize the Indian economy at the cost of the fundamental rights of labour.

3. OPERATIONAL LEVERAGE AGAINST THE COMMITTEE OF CREDITORS

Keeping the corporate debtor's company an ongoing concern is one of the paramount objectives of the code, so much so that the chapter dealing with insolvency resolution made no

¹⁹ The Insolvency and Bankruptcy Code, 2016, § 3 (23) (g), No. 31, Acts of Parliament, 2016 (India).

²⁰ The Trade Unions Act, 1926, § 8, 15 (c) No. 16, Acts of Parliament, 1926 (India).

²¹ The Insolvency and Bankruptcy Code, 2016, § 3 (23) (b-f), No. 31, Acts of Parliament, 2016 (India).

²² *See generally*, The Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India); The Indian Trusts Act, 1882, No. 2, Acts of Parliament, 1882 (India); The Partnership Act, 1932, No. 9, Acts of Parliament, 1932 (India).

²³ The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Form 5, *read with* Rule 6 (1).

²⁴ Salik Ahmad, '*Betrayal by Elected Govts*': Activist Aruna Roy on Suspension of Labour Laws, OUTLOOK INDIA, (May 09, 2020), <https://www.outlookindia.com/website/story/india-news-betrayal-by-elected-govts-activist-aruna-roy-on-suspension-of-labour-laws/352425>.

mention of the liquidation process,²⁵ which is covered by the following chapter,²⁶ until an amendment raised the minimum level of financial benefit that was to be ensured by the committee of creditors to operational creditors in the resolution plan.²⁷

Though now explicitly mentioned,²⁸ the committee of creditors which has to assess the feasibility of the resolution plan submitted by the resolution applicant to keep the debtor's company an ongoing concern, cannot do so while ignoring operational debts like electricity dues,²⁹ as on non-payment of dues a key component needed to keep the corporate debtor an ongoing concern would not be available.

Similarly, workmen, especially in labour intensive industries like real estate, could pose significant hindrance in way of keeping the debtor's company an ongoing concern if their interests are not taken care of, therefore, treating the workmen fairly would become a priority of the committee of creditors who intend to keep the corporate debtor an ongoing concern.

The leverage that the workmen possess over the committee of creditors however, is purely physical in nature, in the sense that if the operations have been stayed due to a pandemic, and the workmen have reverse migrated to their villages, this leverage very conveniently disappears. Unlike electricity dues, which can be recovered by the force of the government, and statute, even during a pandemic, workmen just do not hold that kind of power in similar conditions.

4. PROTECTION AFFORDED TO WORKMEN DURING INSOLVENCY RESOLUTION

If an insolvency claim somehow qualifies as valid during the time of the pandemic, by fulfilling the up-scaled mandate of section 4, with respect to a default committed before March 25, 2020;

²⁵ The Insolvency and Bankruptcy Code, 2016, Chapter II, No. 31, Acts of Parliament, 2016 (India).

²⁶ *Id.*, Chapter III.

²⁷ The Insolvency and Bankruptcy Code, 2016, § 30 (2) (b), No. 31, Acts of Parliament, 2016 (India). Subs. by Act No. 26 of 2019, § 6.

²⁸ *Id.*

²⁹ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 44.

can the code then, through its provisions, which are to be interpreted by the committee of creditors,³⁰ protect the rights of the workmen.

4.1. Statutory Safeguards Incorporated in the Code

The code is primarily an economic legislation; ideally, that should mean that private interests would triumph over public interests during insolvency proceedings,³¹ while keeping priority classes to a minimum; but the interests of the workmen, who are vital to the operation of the corporate debtor, should be balanced carefully against the interests of other creditors.³² Additionally, in a developing nation like India, the fundamental rights of the labour depend heavily on the minimal wages they earn.³³ Therefore, a policy oriented approach to the code would be in accordance with the constitutional promise of striving to secure for all workers, living wages, and conditions of work ensuring a decent standard of life.³⁴

Accordingly, Section 36 (4) (a) (iii) of the code explicitly excludes the wages owed by the employer to the workmen from any welfare funds, from the ambit of the liquidation estate, and reserves it solely for the workmen, treating the funds as property which belongs to the workmen. Section 53 (1), which prescribes the placement of the various types of creditors in the liquidation waterfall, prioritizes the dues owed to the workmen by the corporate debtor over any other dues.

Further, the meaning of “workmen dues” in the code, is interpreted through section 326 of the Companies Act, 2013,³⁵ which is titled “overriding preferential payment”, and defines what constitutes workmen dues,³⁶ and further buttresses the emphasis supplied to the placement of workmen in the liquidation waterfall; though section 326 places workmen dues as frontrunner in the event of liquidation, the *non obstante* incorporated in section 53, renders workmen dues

³⁰ The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India), *read with* The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39 (3).

³¹ Leroy, Anne-Marie, and Gloria M. Grandolini, *Principles for effective insolvency and creditor and debtor regimes*, No. 106399, THE WORLD BANK, C 12.3 (2016).

³² *Id.* C 12.4.

³³ *Bandhua Mukti Morcha v. Union of India*, (1984 AIR 802).

³⁴ INDIA CONST. art. 43.

³⁵ The Insolvency and Bankruptcy Code, 2016, § 53 (3) Explanation (ii), No. 31, Acts of Parliament, 2016 (India).

³⁶ The Companies Act, 1956, § 326, No. 1, Acts of Parliament, 1956 (India).

second only to the payment in full of insolvency resolution process costs, and the liquidation costs.³⁷

4.2. Actual Application of Statutory Safeguards

The actual application of these safeguards however, are restricted to the advanced stage of liquidation. Section 30 (2) (b) of the code which prescribes a minimum amount to be paid to operational creditors during insolvency resolution, has been inserted to better aid the committee of creditors in lieu of the recent enabling of financial creditors who might not be able to assess the viability of a resolution plan.³⁸ It further reduces the scope of review by company tribunals in case the debt owed to an operational creditor has not been dealt with properly, as they would not be able to adjudicate the treatment meted out to operational creditors, so long as the minimum standard set by the code is met.³⁹

Section 30 (2) (b) talks about operational creditors, and not specifically workmen; whenever the code intends anything for the benefit of the workmen, it explicitly refers to them as “workmen”.⁴⁰ Further, Form C of Schedule II, of the Insolvency, and Bankruptcy Board of India (Liquidation Regulations) 2016, clearly negates the possibility of any familiarity between the claims of operational creditors, and workmen, and specifies another form, form F of Schedule II, which provides for filing of claims by employees, and workmen with the resolution professional, to avail benefit as a result of liquidation; as section 30 (2) (b) is just porting the applicability of section 53 (1) in terms of minimum benefit guaranteed to the operational creditors as a result of liquidation, there would be no significant benefit availed due to it by the workmen.

Therefore, though statutory safeguards preserving workmen’s interests are present, they are confined to the advanced stage of liquidation, and during the resolution of insolvency, the code mostly depends on the operational leverage that the workmen possess over the corporate debtor, as they are necessary to keep his operation an ongoing concern. During a pandemic however, workmen would not be needed to keep the debtor’s company an ongoing concern, and the committee of creditors can very conveniently ignore the dues owed to them.

³⁷ The Insolvency and Bankruptcy Code, 2016, § 53 (1) (a), No. 31, Acts of Parliament, 2016 (India).

³⁸ The Insolvency and Bankruptcy Code, 2016, § 5 (8) (f), No. 31, Acts of Parliament, 2016 (India).

³⁹ K. Sashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257 ¶45.

⁴⁰ See generally, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

Further, the scope of review of the company tribunals is explicitly circumscribed,⁴¹ and as they are not supposed to act as courts of equity,⁴² they would not be able to question the financial wisdom of the committee of creditors, as the committee has, through the approval of such a resolution plan, met the minimum standards set by the code, and its regulations, and kept the corporate debtor an ongoing concern.

⁴¹ K. Sashidhar v. Indian Overseas Bank, 2019 SCCOnline SC 257 ¶ 39.

⁴² K. Sashidhar v. Indian Overseas Bank, 2019 SCCOnline SC 257 ¶ 45.

5. EXTINGUISHMENT OF CLAIMS ON APPROVAL OF A RESOLUTION PLAN

5.1. Necessity of an Appeal Mechanism

Sub-classification in the two already divided classes of creditors (operational, and financial), depending on the number of classes identified, causes the process of insolvency resolution to be relatively more costly, and complex.⁴³ Special treatment however, is recognized as a need for certain classes who are due to their circumstances, heavily dependent on the outcome of the insolvency process, or in pursuit of a social, or moral objective.⁴⁴ In a developing country like India, the insolvency process cannot afford to be extraordinarily expensive, and should balance considerations of fairness towards special classes, against timely reinstatement of the corporate debtor, with balances tilting in the favour of the timely reinstatement if we pay heed to the objectives of the code.⁴⁵

Therefore, through the imposition of a moratorium through section 14, a calm period is provided to the resolution professional, and the committee of creditors to swiftly reach a resolution plan which takes care of the interests of all creditors, complemented by an effective implementation scheme,⁴⁶ which would bind even the dissentient creditors.⁴⁷ As mentioned earlier, though the code recognizes social objectives, private interests supersede public interests, and the resolution plan is expected to reinstate the corporate debtor while adhering to the requirements of the code, and the regulations.

In light of the aforementioned observations, it is also pertinent to note that the adjudicating authority has to give in to the financial wisdom of the committee of creditors, and can only reject the plan, or suggest modifications if the plan majorly contravenes the mandate of the code. Further, the resolution professional is merely an administrative body tasked with providing *prima facie* opinions which serve as nothing but lubricant to the process of insolvency resolution.⁴⁸

⁴³ *Legislative Guide on Insolvency Law*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 218 ¶ 20.

⁴⁴ *Id.*, pp: 218 ¶ 27.

⁴⁵ *Preamble*, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

⁴⁶ The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 38 (2).

⁴⁷ The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India).

⁴⁸ *ArcelorMittal India Private Limited v. Satish Kumar Gupta*, (2019) 2 SCC 1 ¶ 80.

Considering the explicitly circumscribed jurisdiction of the adjudicating authority,⁴⁹ and the resolution professional, who are inarguably the only non-biased entities involved in insolvency resolution, the need for providing special classes of creditors with an appeal mechanism is paramount, and strikes a balance between the timely reinstating the corporate debtor, and taking care of the interests of the special classes of creditors, like the workmen.

5.2. Extinguishment of Claims

However, the Supreme Court has held that the resolution applicant who raises to the occasion sufficiently, as evidenced by his response to the request for proposal, its subsequent approval by the committee of creditors, and the adjudicating authority, should be welcomed with a fresh slate,⁵⁰ as in, all claims before commencement of insolvency resolution, that were submitted through the resolution professional during insolvency resolution would stand extinguished on the approval of the resolution plan.⁵¹

Building upon that proposition, the Apex Court, shunned “mandatorily” from the composition of section 12,⁵² and in light of judge law, which makes a strong case for directional nature of procedural timelines,⁵³ considered the word to be against the spirit of the constitution,⁵⁴ hence, providing the resolution professional with more time than that prescribed by section 12 of the code to settle all claims before passing a resolution plan by the adjudicator authority to effectively bind all creditors of the corporate debtor.⁵⁵ Therefore, all the claims arising as a result of default, prior to the commencement of insolvency resolution will need to be settled before the approval of the resolution plan, as after approval of a resolution plan, they would stand extinguished.

The aforementioned proposition was further buttressed by summoning the problematic history of the preceding trial legislations, and their errors which led to the dragging out of the resolution process through litigation pursued by dissentient creditors.⁵⁶ Further, a robust enforcement

⁴⁹ K. Sashidhar v. Indian Overseas Bank, (2019) SCCOnline SC 257 ¶ 46.

⁵⁰ State Bank of India v. V. Ramakrishnan, (2018) (9) SCALE 597 ¶ 22; *accord*, Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 86.

⁵¹ The Insolvency and Bankruptcy Code, 2016, § 32-A (1), No. 31, Acts of Parliament, 2016 (India).

⁵² Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 108.

⁵³ Neeraj Kumar Sainy v. State of Uttar Pradesh (2017) 14 SCC 136 ¶ 29, 32.

⁵⁴ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 108.

⁵⁵ The Insolvency and Bankruptcy Code, 2016, § 31 (1), No. 31, Acts of Parliament, 2016 (India).

⁵⁶ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 99; *accord*, Madras Petrochem India Limited v. BIFR, (2016) 4 SCC 1 ¶ 17-23.

mechanism which would bind dissentient creditors, and operational creditors, is in accordance with the universal mandate of insolvency laws.⁵⁷

These constructions however, should be subject to the need for an appeal mechanism, especially in lieu of a pandemic where dealing with all classes equitably is of paramount importance. Therefore, Section 31 (1), which entails the approval of the resolution plan approved by the committee of creditors,⁵⁸ approved by the adjudicating authority,⁵⁹ and binds all creditors, should be harmoniously construed with the requirement of an appeal mechanism.

5.3. Extinguishment with respect to the Claims of Workmen

A plain reading of section 31 (1) brings to notice the attention paid to specifically naming each creditor which would be bound by the approved resolution plan, the relevant part of the provision reads:

*“...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.”* (emphasis supplied).

Though the workmen have been classified as operational creditors,⁶⁰ to enable them to initiate insolvency resolution against the corporate debtor, the code has gone at lengths to specify their entity whenever a reference has been made to them in the code.⁶¹ Further, whenever an explicit mention has been made to the “workmen”, the code has ensured them a heightened level of security against other operational creditors, as they have been prioritized in the liquidation waterfall,⁶² and the welfare funds owed to them by the corporate debtors have been excluded from the liquidation estate.⁶³

⁵⁷ See *Legislative Guide on Insolvency Law*, United Nations Publication, and pp.: 226 ¶ 54.

⁵⁸ The Insolvency and Bankruptcy Code, 2016, § 30 (4), No. 31, Acts of Parliament, 2016 (India).

⁵⁹ *Id.*, § 31 (2).

⁶⁰ *J.K Jute Mill Mazdoor Morcha v. Juggilal Kamlatpat Jute Mills Company*, (2019) 11 SCC 332.

⁶¹ See generally, The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

⁶² The Insolvency and Bankruptcy Code, 2016, § 53 (1), No. 31, Acts of Parliament, 2016 (India).

⁶³ The Insolvency and Bankruptcy Code, 2016, § 36 (4) (a) (iii), No. 31, Acts of Parliament, 2016 (India).

Therefore, their absence in section 31 (1), should also be given a purposive interpretation so as to exclude them from other creditors who are to be bound by the approved resolution plan, and accordingly, the reasoning employed by the Apex Court, which dictates that their shall lie no appeal with respect to claims against the corporate debtor after the approval of a resolution plan,⁶⁴ should not be applicable to workmen, who are a special class owing to their socio-economic standing.

Therefore, they should have the right to an appeal with respect to prior claims even after the resolution plan has been approved by the committee of creditors,⁶⁵ and passed by the adjudicating authority.⁶⁶ As the workmen need to be dealt with equitably, and the primary objective of the code is to speedily reinstate the corporate debtor, for which maximum reliance has been placed on the wisdom of the committee of creditors, which may or may not be able to equitably deal with the interests of the workmen.

Insertion of section 32-A (pandemic amendment) in the code however,⁶⁷ defeats the aforementioned construction, as it explicitly bars any claims with respect to offences committed by the corporate debtor before the initiation of the insolvency resolution process, on the approval of a resolution plan, even the claims of special classes, like the workmen. The care infused in this section with respect to mitigating collusion however, does provide space for accommodating a judicial innovation which might mitigate the effects of all the pandemic related, non-workmen friendly amendments made to the code.

6. REVERSE CORPORATE INSOLVENCY RESOLUTION PROCESS

6.1. *Need for a Tailor-Made Process.*

Labour intensive industries depend heavily on workmen to keep their operation an ongoing concern, as evidenced by the office memorandum circulated by the Ministry of Housing, and Urban Affairs,⁶⁸ which places emphasis on the reverse migration of labour to their villages, as

⁶⁴ Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, 2019 SCC Online SC 1478 ¶ 88.

⁶⁵ The Insolvency and Bankruptcy Code, 2016, § 30 (4), No. 31, Acts of Parliament, 2016 (India).

⁶⁶ *Id.* § 31 (2).

⁶⁷ The Insolvency and Bankruptcy Code (Amendment) Act, § 10, No. 1, Acts of Parliament, 2020 (India).

⁶⁸ *Office Memorandum*, GOVERNMENT OF INDIA MINISTRY OF HOUSING & URBAN AFFAIRS, No. O-17024/230/2018-Housing-UD/EFS-9056405, (May 13, 2020).

one of the contributing factors to cause disruption in the real estate sector, as a result of which, *force majeure* under the Real Estate (Regulation, and Development) Act, 2016,⁶⁹ has been invoked, granting relaxation to builders with respect to projects due on or after March 25, 2020.

Although, financial creditors have been tasked with deciding the fate of the corporate debtor, and his company, due to their vested interest which goes beyond immediate financial implications; creditors who would be incentivized to vote for liquidation, and those who cannot assess the viability of a resolution plan,⁷⁰ might hurt the objective of the process, which calls for a tailor fit approach to insolvency in labour intensive industries,⁷¹ so that the interests of operational creditors, labour, organized or unorganized, and the corporate debtor, do not stand defeated at the hands of the rogue interests of financial creditors.

Therefore, taking in consideration the fact that the company tribunals do possess supervisory jurisdiction,⁷² which includes the power to give directions, and make modifications in schemes which contravene the mandate of the code, the same can be used to the benefit of corporate debtor, and all his creditors, in an event where the financial creditors cannot be relied on to deal fairly with all creditors, or in case of overriding circumstances, like the pandemic, where the financial creditors would be incentivized to overlook the interests of a certain class of creditors. Especially since the offences of the corporate debtor prior to the commencement of the insolvency resolution process are to stand extinguished on approval of a resolution plan,⁷³ unless the management is under a promoter or a similar entity who might have abetted in the commission of the aforementioned offences.⁷⁴

6.2. Reverse Corporate Insolvency Resolution Procedure

Reverse Corporate Insolvency Resolution Procedure (Reverse CIRP) is a judicial innovation of the National Company Law Appellate Tribunal,⁷⁵ which eases the burdens of following the procedure of insolvency resolution when a real estate allottee files a claim of insolvency

⁶⁹ The Real Estate (Regulation, and Development) Act, 2016, § 6, No. 16, Acts of Parliament, 2016 (India).

⁷⁰ Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT 42, ¶8.

⁷¹ *Id.* ¶25.

⁷² Mihir R. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 571 ¶ 28, 29.

⁷³ The Insolvency and Bankruptcy Code, 2016, § 32A, No. 31, Acts of Parliament, 2016 (India).

⁷⁴ *Id.* (2)

⁷⁵ Flat Buyers Association Winter Hills, Gurgaon v. Umang Realtech Private Limited, through IRP and Others, 2020 Indlaw NCLAT 42 ¶25.

resolution under section 7 of the code. The objective of adopting such a process, as stated by the NCLAT:

*“Reverse Corporate Insolvency Resolution Process' can be followed in the cases of real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which **provides employment to large number of unorganized workmen.**”⁷⁶*

To adopt Reverse CIRP however, the parties to the insolvency resolution including financial creditors need to waive their right to decide the fate of the corporate debtor, and his company, which would be unlikely where all faith has been lost in the corporate debtor's operation. Further, Reverse CIRP is tailor made for pursuing insolvency in the real estate sector, which is restricted to a single project of the corporate debtor, for which the real estate allottees have initiated insolvency resolution. Nevertheless, this judicial innovation on adoption can possibly resuscitate the financial health of the despondent workmen in the labour intensive real estate industry.

6.3. Protecting the Interests of all Creditors.

Reverse CIRP revolves around a tripartite arrangement between the Adjudicating Authority, the Resolution Professional, and a promoter of the corporate debtor for the benefit of the corporate debtor;⁷⁷ it entails the issuance of directions by the Adjudicatory Authority, ensuring excessive implementation of the corporate debtor's assets to keep the corporate debtor's company an ongoing concern, while paying heed to the varying interests of the different creditors of the corporate debtor.

Much like normal insolvency resolution process, Reverse CIRP prioritizes keeping the corporate debtor's company an ongoing concern, but does not require the involvement of the resolution applicant,⁷⁸ as the plan that is needed to keep the debtor an ongoing concern is substituted by the directions issued by the adjudicating authority, which is an unbiased entity, and would be able to take into consideration the interests of all classes of creditors, including special classes like workmen.

⁷⁶ *Id.*

⁷⁷ *See generally, Id.*

⁷⁸ *See generally, Id.*

The Promoter is tasked with discharging necessary funds to ensure the smooth functioning of the resolution process,⁷⁹ which alleviates the financial burden of pursuing insolvency resolution for special class of creditors like workmen. Further, the financial wisdom of the committee of creditors can aid the adjudicating authority by nudging them in the correct direction as, and when the need arises.

On adopting Reverse CIRP, there is no need for passing of a resolution plan, as the function of the resolution applicant is fulfilled by the adjudicating authority, therefore, an appeal mechanism for creditors, including workmen, is still preserved, as pre-insolvency commencement claims are not to be extinguished if a promoter like entity resumes the operation of the corporate debtor on successful resolution of insolvency.⁸⁰

6.4. Additional Benefits of Adopting Reverse CIRP

Further, the code does not ensure job security to the workmen, the *non obstante* incorporated in the code makes it clear that the code would override any other law inconsistent with the code,⁸¹ which would mean that the provisions of the Industrial Disputes Act, 1947, which assure a body of more than 100 workmen working in a company, a consequential say in the closure, retrenchment, and transfer of ownership,⁸² providing job security to the workmen, would not be paid heed unless an actual court of law harmoniously construes the provisions of the code, and the Industrial Disputes Act, and ensures security to the workmen, which can certainly be done if Reverse Corporate Insolvency Resolution Process is adopted. The adjudicating authority is an unbiased entity, and would pay heed to the interests of the workmen, and would be able to provide them job security while ensuring that the corporate debtor's company remains an ongoing concern.

7. CONCLUSION

The desperation of the government can be gleaned through the excessive steps taken to cushion the impact endured by the economy due to the pandemic; retrospective amendments have ensured that micro, small, and medium enterprises are out of the clutches of the code. The nexus between these amendments, and the objectives of the code lies in the refinement of the

⁷⁹ *Id.* ¶13.

⁸⁰ The Insolvency and Bankruptcy Code, 2016, § 32A (2), No. 31, Acts of Parliament, 2016 (India).

⁸¹ The Insolvency and Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India).

⁸² The Industrial Disputes Act, 1947, Chapter V-B, No. 16, Acts of Parliament, 1947 (India).

economy, but the situation calls for a balance. Practical functioning of any company relies not only on its financial creditors, but also on those special classes that put in their labour to ensure that the company remains an ongoing operation.

Therefore, the rejuvenation of the economy should not come at the cost of diluting the financial interests of special classes like workmen, who have suffered enough at the hands of the pandemic, and the state governments who turn a Nelsonian eye to their basic fundamental rights.⁸³ Therefore, if explicit provisions cannot be incorporated for the benefit of the workmen, special mechanisms like reverse CIRP need to be adopted, which take into account the interests of the workmen, while paying heed to the objectives of the code, and enable the process to be laced with the warmth of equity, which in current conditions, is the need of the hour.

⁸³ *Supra* note 24.