PERSONAL GUARANTORS UNDER IBC

Acknowledgements

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Introduction

Personal guarantors under bankruptcy and insolvency laws refers to an individual who is the surety in a contract of guarantee to a corporate debtor. Furnishing a personal guarantee in simpler words refers to a situation wherein, a corporate debtor becomes unable to repay the debt, the individual assumes personal liability for the outstanding arrears/dues.

Section 126 of the Indian Contracts Act, 1882

(Hereinafter referred to as “the Act,1882”) deals with the concept of guarantee and explains it as an obligation on a surety to honour the promise of the principal debtor by paying the principal debtor’s present or future debts.

Let us cite an instance to understand the concept more clearly. In January, 2020, Mr. Jayde Robin gave personal guarantees for two loans worth nearly 5 crores and 10 crores extended to his companies Xicom Private and Strata Dot Tel, respectively by KBC Bank. That loan accounts of Xicom Private and Strata Dot Tel had been declared non-performing assets in September 2020 after companies failed to repay its pay debt. In such a case, Section 128 of the Act, 1882 creates a co-extensive liability between the surety (Mr. Jayde Robin) and the debtor (KBC bank). Hence, Mr. Jayde Robin is liable towards outstanding debts of the KBC Bank. It is to be noted here that any legal proceedings for recovery against the principal debtor shall include personal guarantor.

This article tries to analyse and discuss the status of a guarantor under the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as “Code”). The Parliament to deal with bankruptcy and insolvency issues introduced and passed the Code. However, after 3 (three) years post passing of the Code, provisions rendering insolvency and bankruptcy proceedings against personal guarantors were notified vide **Gazette Notification dated 15.11.2019 commencing effective from 01.12.2019**. An instance of personal guarantee and remedies for creditors is explained below herein for better understanding of the concept.

Let us now discuss the guarantor’s liability under the moratorium period.

Guarantor’s liability under moratorium period

The period of moratorium under Section 14 of the Code would not apply to personal guarantors of a corporate debtor. This view was taken by the Hon’ble Bombay High Court in Alpha & Omega Diagnostics (India) Limited v. Asset Reconstruction Company of India & Ors. Further, the same view was upheld by the Hon’ble Supreme Court Of India in State Bank of India v. Rama krishnan & Anr.

Upon looking closer to the concept of guarantor's liability during the moratorium period, **Sections 96 and 101 have to be contrasted with Section 14 of the Code**. When an application is filed under part III of the Code, an interim-moratorium or a moratorium is applicable in respect of any debt due. However, when we talk with regard to applicability of period of moratorium on personal guarantee/liability it is completely separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution process may be initiated under Part III of the Code. It is to be noted herein that the protection of the moratorium under relevant section of the Code is far greater than of section 14 in that pending legal proceedings in respect of the debt and not the debtors are stayed. The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and in the vast majority of cases, personal guarantees are given by directors who are in management of the companies. Therefore, it can be safely stated that the object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why section 14 is not applied to them.

Now comes the question as to who has jurisdiction to determine guarantor's liability, whether the NCLT or the Debt Recovery Tribunal. To answer it, the article discusses prior scenarios with regard to provision rendering insolvency and bankruptcy proceedings against personal guarantors which was notified vide Gazette Notification dated 15.11.2019. Since, at that time, Part III of the Code was not notified and brought into force and the same is entitled as "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms" under the Code. The repealing provision, namely Section 243 of the Code which repeals the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as "the Act, 1909") and the Provincial Insolvency Act, 1920 (hereinafter referred to as "the Act, 1920") was not been brought into force. Section 249 of the Code, which amends the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as "the Act, 1993") so that the Debt Recovery Tribunals (hereinafter referred to as "the DRT") under the Act, 1993 can exercise the jurisdiction of the Adjudicating Authority conferred by the Code, was also not been brought into force.

Accordingly, as far as personal guarantors were concerned, they continued to be proceeded against under the Act, 1909 and the Act, 1920 prior to commencement of above-mentioned Notification dated 15.11.2019. Hence, at that relevant time, stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the DRT. Therefore, proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 against the guarantors can be continued. The same has been reiterated by the Hon'ble Delhi High Court in its order dated 02.11.2020.

The above situation with respect to jurisdiction to determine liability of guarantor widened after commencement of Notification dated 15.11.2019. The DRT was defined as an "Adjudicating Authority" within Section 3(a)(ii) of the Code for cases other than sub-clause 3 (i) of the Code. Say for instance, the dispute with respect to breach of contract of guarantee can be brought before the DRT for adjudication purposes. It would not be inappropriate herein to state that the sole purpose of the Act, 1993 is recovery of debts. On the contrary, the Code deals with other things as well.

Guarantors right to debt recovery via insolvency proceedings

If the guarantor pays the defaulted amount/debt on behalf of the principal debtor to the creditor. In such a situation, the principal debtor now owes the amount of repaid debt by the guarantor to the principal debtor's creditor. Further, resulting in the guarantor now becoming the creditor of the principal debtor. Say for instance, Mr. Joe White has given personal guarantee for a credit facility worth 2 crore extended to his company M/s Mitubhushi Private Limited by XYZ Bank. That in March, 2017 the company is unable to repay its debts towards the loan account. Now, following the settled principal proposition in view of Section 128 of the Act, 1881 the liability of the guarantor/surety is co-extensive with that of the principal debtor towards the loan account. Owing to the same, Mr. Joe White repays the defaulted amount. In such a scenario, after disposing off the obligations of the company, Mr. Joe White acquires the right to stand in the shoes of the company. The same view was first evolved by the Court in Morgan v. Seymone.

Further, in the case Amrit Lai Goverdhan Lalan v. State Bank of Travancore held that the guarantor is invested with all rights of the creditor against the debtor.

Welcome deviation from the SICA practices

The Parliament of India in the year 1985 introduced and passed a legislation namely, the Sick Industrial Companies Act, 1985 (hereinafter referred to as "the Act, 1985"). The objective of the Act, 1985 was timely detection of sick and potentially sick companies owning industrial undertakings and helping them in its revival and for matters connected therewith or incidental thereto. Under the Act, 1985 a Board was made to take preventive, ameliorative, remedial and other measures to secure the sick company from liquidation. It is to be noted that the regime of the Act, 1985 if a sick company was going through any rehabilitation procedure as mentioned therein, then such proceedings were kept suspended.

Thereafter, the Parliament of India in the year 1993 introduced another legislation namely, the RDB Act, 1993 with sole purpose of recovery of debts. The problem started when the above stated provision of suspension barred proceedings before the DRT under the Act, 1993 subject to prior permission of the Board for Industrial and Financial Reconstruction established under the Act, 1985. The issue was dealt by the Hon'ble Supreme Court in KSL & Industries Ltd. v. Arihant Threads Ltd. & Ors. Wherein, it was held that section 34(2) of the Act states that the provisions of the Act, 1993 shall be in addition to and not in derogation of the Act, 1985.

Conclusion

This article concludes by laying emphasis and an attempt to show a holistic contrast between the Code and liability of a guarantor upon default committed by the principal debtor arises when the same has been admitted by the Adjudicating Authority under the Code.

References

[1] Section 5(22) of the Insolvency & Bankruptcy Code, 2016

[2] https://indiankanoon.org/doc/53550/

[3] https://indiankanoon.org/doc/1377136/

[4] https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf

[5] Company Appeal (AT) (Insol.) No. 116 of 2017

[6] (2018) 17 SCC 394

[7] https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf

[8] https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf

[9] Kiran Gupta v. State Bank of India & Anr. W.P.(C) 7230/2020

[10] http://www.mca.gov.in/Ministry/pdf/BankruptcyRulesPGCD_15112019.pdf

[11] (1638) 1 Rep Ch 120

[12] 1968 AIR 1432

[13] (2015) 1 SCC 166

I PRELIMINARY

1. Short title, commencement and application.

(1) These regulations may be called the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

(2) They shall come into force from the 1st day of December, 2019.

(3) These regulations shall apply to the bankruptcy process for personal guarantors to corporate debtors.

2. Definitions.

In these regulations, unless the context otherwise requires, -

(a) "associate" in relation to a creditor, a bankruptcy trustee or professionals appointed by the bankruptcy trustee shall have the same meaning as assigned to it in relation to a debtor in sub-section (2) of section 79, as may be applicable;

As per Section 79(2) "associate" of the debtor means –

(a) a person who belongs to the immediate family of the debtor;

(b) a person who is a relative of the debtor or a relative of the spouse of the debtor;

(c) a person who is in partnership with the debtor;

(d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;

(e) a person who is employer of the debtor or employee of the debtor;

(f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor; and

(g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company.

Explanation. - For the purposes of this sub-section, “relative”, with reference to any person, means anyone who is related to another, if-

(i) they are members of a Hindu Undivided Family;

(ii) one person is related to the other in such manner as may be prescribed;

(b) “bankruptcy process costs” shall mean -

(i) the fees payable to the bankruptcy trustee;

(ii) payments and expenses referred to in sub-regulation (1) of regulation 5, sub-regulation

(4) of regulation 6, sub- clause (ii) of clause (c) and clause (f) of sub-regulation (3) of regulation 10, sub-regulation (3) of regulation 28, and sub-regulation (3) of regulation 31;

(iii) such other costs and expenses directly relatable to the bankruptcy process, to the extent approved or ratified by the committee;

(c) “Code” means the Insolvency and Bankruptcy Code, 2016 (31 of 2016);

(d) “committee” means the committee of creditors as defined in sub-section (11) of section 79;

(e) “corporate debtor” means a corporate person for whom the guarantor has given a personal guarantee;

(f) “electronic means” means an authorised and secured computer programme which is capable of producing confirmation of sending communication to the participant entitled to receive such communication at the last electronic mail address provided by such participant and keeping record of such communication;

(g) “form” means a form appended to these regulations;

(h) “participant” means a person entitled to attend a meeting of the committee and includes a creditor, , bankrupt, bankruptcy trustee, and any other person authorised by the committee to attend such meeting;

(i) “registered valuer” means a person registered as such in accordance with the Companies Act, 2013 (18 of 2013) and the rules made thereunder;

(j) “related party” in relation to a corporate debtor shall have the meaning assigned to it in sub-section (24) of section 5;

(k) “section” means a section of the Code;

(l) words and expressions used and not defined in these regulations, but defined in the Code and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019, shall have the respective meanings assigned to them in the Code and in the said rules.

CHAPTER II

BANKRUPTCY TRUSTEE

3. Eligibility of bankruptcy trustee.

(1) An insolvency professional shall be eligible to be appointed as a bankruptcy trustee for a bankruptcy process, if-

(a) he, the insolvency professional entity of which he is a partner or a director, and all the partners and directors of the said insolvency professional entity are independent of the guarantor;

(b) he is not subject to any ongoing disciplinary proceeding or a restraint order of the Board or of the insolvency professional agency of which he is a professional member; and

(c) the insolvency professional entity of which he is a partner or a director, or any other partner or director of such insolvency professional entity does not represent any party in the bankruptcy process.

Explanation. - For the purposes of this sub-regulation, a person shall be considered independent of the guarantor, if he-

(a) is not an associate of the guarantor;

(b) is not a related party of the corporate debtor; and

(c) has not acted or is not acting as interim resolution professional, resolution professional or liquidator in respect of the corporate debtor.

(2) A bankruptcy trustee, who has been an auditor of the guarantor at any time during the preceding three years, shall make a disclosure of remuneration received, year-wise for such audit, to the committee.

(3) An insolvency professional, other than who has filed an application under section 122 or 123 on behalf of a guarantor or a creditor, as the case may be, shall provide a written consent in Form A to the Adjudicating Authority before his appointment as bankruptcy trustee in a bankruptcy process.

4. Fees of bankruptcy trustee.

(1) The bankruptcy trustee shall be entitled to such fee and the fee shall be paid in such manner as decided by the committee.

(2) In all cases other than those covered under sub-regulation (1), the bankruptcy trustee shall be entitled to a fee as a percentage of the amount realised from the estate of the bankrupt and of the amount distributed from such realisation, in accordance with Schedule I.

5. Appointment of professionals.

(1) A bankruptcy trustee may appoint accountants, registered valuers, advocates or other professionals, as may be necessary, to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the bankruptcy process cost:

Provided that the following persons shall not be appointed under this regulation, namely-

(a) a relative of the bankruptcy trustee;

(b) a partner or director of the insolvency professional entity of which the bankruptcy trustee is a partner or director;

(c) an insolvency professional who has acted or is acting as an interim resolution professional, a resolution professional or a liquidator in respect of the corporate debtor;

(d) an associate of the bankrupt;

(e) a related party of the corporate debtor.

(2) Before appointing a professional under sub-regulation (1), the bankruptcy trustee shall obtain a disclosure of details of the existence of any pecuniary or personal relationship with any of the creditors, the bankruptcy trustee, the corporate debtor or the bankrupt, from the professional.

6. Registers and books.

(1) Where the books of account of the bankrupt are incomplete on the bankruptcy commencement date, the bankruptcy trustee shall get them completed and brought up-to-date within sixty days of the bankruptcy commencement date.

(2) The bankruptcy trustee shall maintain cash book, ledgers, registers and such other books, as may be required for the administration of the estate of the bankrupt.

(3) Where the bankruptcy trustee is authorised to carry on the business of the bankrupt, he shall keep separate books of account in respect of such business and such books shall, as far as possible, be in conformity with the books already kept by the bankrupt in the course of its business.

(4) The bankruptcy trustee shall keep receipts for all payments made or expenses incurred by him in relation to the bankruptcy process.

7. Reports by bankruptcy trustee.

The bankruptcy trustee shall prepare and submit the following reports to the Adjudicating Authority and the committee -

(a) a preliminary report;

(b) progress reports; and

(c) a final report.

8. Preliminary report.

(1) The bankruptcy trustee shall submit a preliminary report to the Adjudicating Authority and the committee within ninety days of the bankruptcy commencement date.

(2) The bankruptcy trustee shall send a copy of the preliminary report to the bankrupt at the time of submission of the report.

(3) The preliminary report shall include the following details-

(a) a list of the assets and liabilities of the bankrupt as on the bankruptcy commencement date based on the books of the bankrupt:

Provided that if the bankruptcy trustee has reasons to believe, to be recorded in writing, that the books of the bankrupt are not reliable, he shall also provide such estimates based on reliable records and data otherwise available to him.

(b) the proposed plan of action in relation to administration of the estate, including the timeline in which it is proposed to be carried out and the estimated costs;

(c) any further inquiry to be made in respect of the assets, business or affairs of the bankrupt;

(d) details of the assets which are intended to be realised, including the following-

(i) value of the assets, valued in accordance with regulation 33;

(ii) intended manner of realisation of the assets and reasons thereof;

(iii) expected amount of realisation;

(iv) any other information that may be relevant for the realisation of the assets.

(e) details of the excluded assets and other assets under sub-section (2) of section 155.

(4) The preliminary report shall be confidential during the bankruptcy process, unless the Adjudicating Authority permits any person to access it subject to such terms and conditions, as it may consider appropriate.

9. Early completion of administration.

At the time of the preparation of the preliminary report or any time thereafter, if it appears to the bankruptcy trustee that –

(a) the realisable assets of the bankrupt are insufficient to cover the costs of bankruptcy process; and

(b) the affairs of the bankrupt do not require further investigation, he may apply to the Adjudicating Authority for an early discharge order.

10. Progress reports.

(1) The bankruptcy trustee shall submit progress reports to the Adjudicating Authority and to the committee within fifteen days after the end of every quarter:

Provided that if an insolvency professional ceases to act as a bankruptcy trustee during the bankruptcy process, he shall file a progress report for the quarter up to the date of his so ceasing to act, within fifteen days of such cessation.

(2) The bankruptcy trustee shall send a copy of the progress report to the bankrupt at the time of submission of the report under sub-regulation (1).

(3) The progress report shall include-

(a) appointment, tenure of appointment and cessation of appointment of professionals;

(b) a statement indicating the progress in the bankruptcy process containing-

(i) distribution of dividend and interim dividend;

(ii) any material change in the expected realisation for any asset and basis for such change;

(iii) any material change in the value of assets or liabilities of the bankrupt and basis for such change;

(iv) any material change on estimated cost of bankruptcy process and basis for such change;

(v) distribution of unsold property made to the creditors;

(vi) details of any property that remains to be realised;

(vii) list of creditors; and

(viii) any other relevant information.

(c) an asset sale report with the following details of the assets realised–

(i) realised value;

(ii) cost of realisation;

(iii) manner and mode of realisation, including details as per Schedule II;

(iv) reasons for any reduction in the realisable value compared to the value mentioned in the preliminary report; and

(v) details of the persons in favour of whom the property has been realised.

(d) details of fee and remuneration due to and received by the bankruptcy trustee along with a description of the activities carried out by him;

(e) details of the fee and remuneration paid to professionals appointed by the bankruptcy trustee along with a description of activities carried out by them;

(f) other expenses incurred by the bankruptcy trustee in relation to the bankruptcy process;

(g) status of any material litigation by or against the bankrupt;

(h) filing of and developments in relation to disclaimer of onerous properties or leasehold interests under sections 160 and 162, or transactions under sections 164, 165 and 167.

(i) accounts maintained by the bankruptcy trustee showing the receipts and payments made during the period of the report, as well as cumulative receipts and payments made since the bankruptcy commencement date; and

(j) any other relevant aspect of the bankruptcy process.

(4) The progress report for the fourth quarter of the financial year shall enclose audited accounts of the receipts and payments of the bankrupt for the financial year.

(5) The progress reports shall be confidential during the bankruptcy process, unless the Adjudicating Authority permits any person to access it on specified terms and conditions.

Illustration

Where an insolvency professional becomes a bankruptcy trustee on 13th February, 2020 and ceases to act as such on 12th February, 2021, he shall submit progress reports as under:

Report No.	Period covered in the Quarter	Last Date of Submission of Report
1	13th February - 31st March, 2020	15th April, 2020
2	April - June, 2020	15th July, 2020
3	July - September, 2020	15th October, 2020
4	October - December, 2020	15th January, 2021
5	January - 12th February, 2021	27th February, 2021

He shall submit the audited accounts of receipts and payments as under:

Account No	Period covered in the Quarter	Last Date of Submission of Report
1	13th February - 31st March, 2020	15th April, 2020
2	April - June, 2020	15th July, 2020

11. Final report.

(1) The final report shall contain an account of the completion of the administration and distribution of the estate of the bankrupt, including -

(a) manner of realisation of the assets of the bankrupt;

(b) manner of distribution of the dividends amongst the creditors;

(c) details regarding the discharge of the bankrupt;

(d) unclaimed dividend, if any;

(e) surplus dividend, if any; and

(f) if the bankruptcy process cost exceeds the estimated cost provided in the preliminary report, along with reasons for the same.

(2) The bankruptcy trustee shall file the final report with the Adjudicating Authority along with the application under sub-section (1) of section 138.

(2) The bankruptcy trustee shall file the final report with the Adjudicating Authority along with the application under sub-section (1) of section 138.

12. Persons to extend cooperation.

(1) The following persons shall extend all assistance and cooperation to the bankruptcy trustee to complete the bankruptcy process-

(a) the bankrupt;

(b) creditors of the bankrupt;

(c) employees and workmen of the bankrupt;

(d) partners of the bankrupt;

(e) auditors of the bankrupt;

(f) professionals appointed by the bankruptcy trustee under these regulations;

(g) the resolution professional or the previous bankruptcy trustee of the bankrupt;

(h) the interim resolution professional, the resolution professional and the liquidator in respect of the corporate debtor;

(i) any person who has possession of any of the properties of the bankrupt; and

(j) any other person connected or relevant to the bankruptcy process.

(2) The bankruptcy trustee shall record and maintain the particulars of any consultation he had with the persons mentioned in sub-regulation (1).

(3) Where the bankruptcy trustee after making reasonable efforts fails to obtain the information or cooperation from persons under sub-regulation (1), he may make an application to the Adjudicating Authority for appropriate directions as may be necessary for the conduct of the bankruptcy process.

13. Preservation of records.

The bankruptcy trustee shall preserve a physical or electronic copy of the registers, books, reports, minutes of meetings and other records relating to bankruptcy process, including administration of estate of the bankrupt as per the record retention schedule as may be communicated by the Board in consultation with insolvency professional agencies.

CHAPTER III CLAIMS

14. Future claims.

(1) A person, who is entitled to distribution in the same manner as any other creditor, may submit a claim, which is not due and payable on the bankruptcy commencement date, to the bankruptcy trustee.

(2) Subject to any contract to the contrary, the person under sub-regulation (1) shall be entitled to the principal amount and the interest that has accrued till the bankruptcy commencement date.

15. Negotiable instruments.

Where a person seeks to prove a claim in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature for which the bankrupt is liable, a certified true copy of the same shall accompany the claim.

16. Periodical payments.

In the case of rent, interest and such other payments of a periodical nature, a person may claim only for any amounts due and unpaid up to the bankruptcy commencement date.

17. Determination of quantum of claim.

Where the amount claimed by a claimant is not precise due to any reason, the bankruptcy trustee shall make the best estimate of the amount of the claim based on the information available with him.

18. Debt in foreign currency.

The claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the bankruptcy commencement date.

Explanation. – For the purposes of this regulation, "official exchange rate" means the reference rate published by the Reserve Bank of India or derived from such reference rate.

19. Transfer of debt due to creditors.

(1) Where a creditor assigns or transfers the debt to any person during the bankruptcy process period, both parties shall provide the bankruptcy trustee the terms of such assignment or transfer, and the identity and details of the assignee or transferee.

(2) The bankruptcy trustee shall notify each creditor and the Adjudicating Authority of any resultant change in the committee within two days of such change.

20. Committee of creditors.

(1) The bankruptcy trustee shall prepare a list of creditors, within the timeline mentioned in section 132, containing the following details in respect of each creditor, –

(a) the name;

(b) the amount of claim made;

(c) the amount of claim admitted;

(d) security interest in respect of the claims, if any; and

(e) reasons for rejection or admission of claim.

(2) The bankruptcy trustee shall report the establishment of the committee to the Adjudicating Authority within three days from the meeting of the creditors under sub-section (1) of section 134.

(3) The bankruptcy trustee shall modify the list of creditors and the composition of the committee, if required, on the basis of the proof received under section 171.

(4) The list of creditors, and any modification to the committee, mentioned in sub-regulation (3) shall be filed with the Adjudicating Authority within fifteen days from the last date for receipt of proofs of debt, under intimation to other creditors.

(5) Any modification in the list of creditors under sub-regulation (3) shall not affect the validity of any decision taken in any meeting of the committee prior to such modification.

(6) The list of creditors, as modified from time to time and filed with the Adjudicating Authority, shall be –

(a) available for inspection by the persons who submitted claims with proof;

(b) available for inspection by partners and guarantors of the bankrupt;

(c) displayed on the website, if any, of the bankrupt.

CHAPTER IV
MEETINGS OF COMMITTEE AND VOTING

21. Notice for meeting.

(1) A bankruptcy trustee may convene a meeting of the committee as and when he considers necessary and shall convene a meeting on a request by creditors having not less than thirty three percent of voting share.

(2) The notice under this regulation and for the meeting under section 133 shall be served on every participant at the address provided to the bankruptcy trustee.

(3) A meeting of the committee shall be convened by giving a notice of seven days or such other notice as decided by the committee, provided that such notice shall not be less than forty-eight hours.

(4) The notice convening the meeting of creditors shall inform the participants of the venue, the time, the date of the meeting and of the options available to -

(i) participants to attend the meeting either in person, through video conferencing, or through a proxy; and

(ii) creditors to cast vote in person, through a proxy, by electronic means or by electronic proxy, as the case may be.

(5) The notice of the meeting shall carry the agenda, which shall include the following-

(a) list of matters to be discussed;

(b) list of issues to be voted upon;

(c) relevant documents in relation to the matters to be discussed and issues to be voted upon.

(6) If an option to attend the meeting through video conferencing is made available to the participants, the notice of the meeting shall -

(a) state the process and the manner for attending the meeting;

(b) provide the login ID and the details of a facility for generating password for access to the meeting in a secure manner; and

(c) provide contact details of the person who shall address the queries connected with the video conferencing.

(7) If an option to cast vote by electronic means is made available to the creditors, the notice of the meeting shall -

(a) state the process and the manner of casting vote by such means;

(b) provide the login ID and the details of a facility for generating password for access to the electronic means for casting vote in a secure manner; and

(c) provide contact details of the person who shall address the queries connected with the electronic means.

22. Quorum.

(1) Where a meeting of committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned to the same time and place on the next day and on that day, no quorum shall be required.

(2) The bankrupt shall attend a meeting which the bankruptcy trustee may, by notice, require him to attend and any adjournment thereof.

23. Conduct of meeting.

(1) The bankruptcy trustee shall preside over the meetings of the committee.

(2) At the commencement of a meeting, the bankruptcy trustee shall take a roll call, when every participant, including those attending by proxy or through video conferencing, shall state, for the record, the following -

(a) his name;

(b) the capacity in which he is attending;

(c) the creditor he is representing, if applicable; and

(d) that he has received the agenda and all the relevant material for the meeting.

(3) After the roll call, the bankruptcy trustee shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

(4) The bankruptcy trustee shall ensure that the required quorum is present throughout the meeting.

(5) From the commencement of the meeting till its conclusion, no person, other than the participants and any other person whose presence is required by the bankruptcy trustee, shall be allowed access to the meeting, without the permission of the bankruptcy trustee.

(6) The bankruptcy trustee shall ensure that minutes are made in relation to each meeting of the creditors and are circulated to all participants by electronic means within forty-eight hours of the said meeting.

24. Voting share.

(1) Subject to section 135, the voting share of each creditor shall be in proportion to the debt owed to such creditor.

(2) The voting share of a secured creditor shall be in proportion to unsecured part of the debt, if any, if it has opted to enforce its security interest.

(3) The voting share of a secured creditor who has opted to relinquish its security interest shall be in proportion to the amount of debt relinquished.

25. Voting by the committee.

(1) The bankruptcy trustee shall take a vote of the creditors present in the meeting on any item listed for voting, after discussion on the same.

(2) At the conclusion of the meeting, the bankruptcy trustee shall prepare minutes of the meeting, including the names of creditors, who voted for, against or abstained from voting on the items put to vote in the meeting.

(3) The bankruptcy trustee shall-

(a) circulate the minutes of the meeting by electronic means to all participants of the meeting within forty-eight hours of the conclusion of the meeting, and

(b) seek a vote on the items listed for voting in the meeting from the creditors who were not present in the meeting or did not vote at the meeting, by electronic means, where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes as per clause (a).

(4) Unless otherwise provided in the Code, any decision of the committee shall require approval of more than fifty percent of voting share of the creditors who voted.

(5) At the end of the voting period, the bankruptcy trustee shall record the decision arrived at on the items along with the names of creditors who voted for, against or abstained from voting on the items, after considering the voting at the meeting and through the electronic means.

(6) The bankruptcy trustee shall circulate a copy of the record made under sub-regulation (5) to all participants within twenty-four hours of the conclusion of the voting.

26. Voting by proxy.

(1) A creditor, who is entitled to vote, shall be entitled to appoint an individual as a proxy, who shall not be an associate of the bankrupt, to attend and vote on behalf.

(2) For the purpose of sub-regulation (1), a creditor shall deliver Form B, duly completed to the bankruptcy trustee at least twenty-four hours prior to the meeting of committee.

(3) A proxy may vote by electronic means on behalf of the creditor.

CHAPTER V REALISATION OF ASSETS

27. Mode of sale.

(1) The bankruptcy trustee shall ordinarily sell the assets of the bankrupt through an auction as specified in Part A of Schedule II.

(2) The bankruptcy trustee may sell the assets by private sale, in the manner specified in Part B of Schedule II if-

(a) the asset is perishable in nature;

(b) the value of the asset is likely to deteriorate significantly if the sale is delayed; or

(c) the selling price of the asset is higher than the reserve price of a failed auction.

(3) The following persons shall not purchase or acquire any interest in the property of bankrupt, directly or indirectly, without permission of the Adjudicating Authority–

(a) The bankruptcy trustee or any partner or director of the insolvency professional entity of which the bankruptcy trustee is a partner or director;

(b) any professional appointed by the bankruptcy trustee for the bankruptcy process;

(c) any creditor or associate of the bankrupt; and

(d) any company where the bankrupt or a creditor is a promoter or director.

(4) The bankruptcy trustee shall not proceed with a sale, if he has reason to believe that there is any collusion amongst any one or more of the following persons: -

(a) the buyers;

(b) the bankrupt;

(c) the creditors;

(d) associates of the bankrupt or creditors;

(e) the corporate debtor; or

(f) related party of the corporate debtor, and shall submit a report to the Adjudicating Authority for appropriate orders.

28. Acquisition, etc., of after acquired property by bankrupt.

(1) After a notice is given by the bankrupt under sub-section (2) of section 150, he shall not part with any increase in his income or dispose of any property acquired, without the prior permission of the Adjudicating Authority.

(2) If the bankrupt disposes of property before giving the notice under sub-section (2) of section 150, he shall within seven days from such disposal, disclose to the bankruptcy trustee the relevant details of the person to whom the property has been transferred, and shall also provide any other information which may be necessary to enable the bankruptcy trustee to trace the property and recover it for the purpose of bankruptcy estate.

(3) Any expense incurred by the bankruptcy trustee in bringing back any amount or acquiring title to the property referred to in sub-regulation (2) shall form part of the bankruptcy process costs.

29. Disclaimer of onerous property.

(1) The bankruptcy trustee shall notify the bankrupt and the persons interested in the onerous property in respect of the proposed disclaimer, at least seven days prior to serving the notice of disclaimer under sub-section (1) of section 160.

(2) The notification under sub-regulation (1) shall contain the intention of the bankruptcy trustee to disclaim the property, particulars of the property intended to be disclaimed, and details of the interested persons in such property.

(3) The notice under sub-section (1) of section 160 shall be filed with the Adjudicating Authority within three days of giving such notice to the persons mentioned therein.

(4) An application under sub-section (1) of section 163 shall be made within thirty days of the applicant becoming aware of the disclaimer or from the date of the notice of disclaimer under sub-section (1) of section 160, whichever is earlier.

Explanation. –

For the purpose of this regulation, a person interested in onerous property means –

(a) any person who claims an interest in the disclaimed property;

(b) any person who is under any liability in respect of the onerous property; or

(c) where the disclaimed property is a dwelling house, any person who is in occupation of or entitled to occupy the dwelling house, on the date of filing of application.

30. Valuation of assets.

(1) The bankruptcy trustee shall appoint a registered valuer to value the assets, which may or may not form part of the bankrupt's estate, when he is of the opinion that it is necessary or when a resolution to that effect has been passed by the committee.

(2) The registered valuer appointed under sub-regulation (1) shall submit to the bankruptcy trustee the estimates of the realisable value of the asset computed in accordance with internationally accepted valuation standards, after physical verification of the assets of the bankrupt.

(3) The bankruptcy trustee may appoint an additional registered valuer, for valuing the assets of the bankrupt if required in the circumstances of the case, who shall independently submit his estimate as per sub-regulation (2).

(4) In the event an additional registered valuer is appointed under sub-regulation (3), the average of the estimates received from both valuers will be considered to be the value of the assets.

31. Realisation of security interest.

(1) A secured creditor, who seeks to realise his security, shall intimate the bankruptcy trustee of the price at which he proposes to realise the secured asset.

(2) The bankruptcy trustee shall attempt to identify a buyer willing to purchase the security at a price higher than the price intimated under sub-regulation (1), and the asset shall then be sold to such buyer, if any, at the higher price by the secured creditor.

(3) Where the secured asset is realised under sub-regulation (2), the cost of identification of the buyer shall form part of bankruptcy process cost.

(4) If the bankruptcy trustee does not identify a buyer under sub-regulation (2), or the person so identified does not buy the secured asset, the secured creditor may realise the secured asset in the manner it deems fit, but at least at the price intimated under sub-regulation (1) and shall bear the cost of identification of the buyer.

(5) Where a secured creditor realises his security and the amount realised is in excess of the debts due to the secured creditor, such creditor shall tender such excess to the bankruptcy trustee.

CHAPTER VI

PROCEEDS OF BANKRUPTCY PROCESS AND DISTRIBUTION OF PROCEEDS

32. Bank account for bankruptcy process.

(1) The bankruptcy trustee shall open a bank account in the name of the bankrupt followed by the words 'in bankruptcy process', in a scheduled bank, for the receipt of all moneys due to the bankrupt.

(2) The bankruptcy trustee shall deposit in the bank account opened under sub-regulation (1) all moneys, including cheques and demand drafts received by him as the bankruptcy trustee of the bankrupt, and the realisations of each day shall be deposited into the bank account, without any deduction, not later than the next working day.

(3) The bankruptcy trustee may maintain cash of ten thousand rupees or such higher amount, as may be permitted by the Adjudicating Authority to meet bankruptcy process costs.

(4) All payments out of the account by the bankruptcy trustee above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account.

33. Distribution of dividend to claimant of deceased creditor.

(1) In the event an application is made by a claimant or heir of a deceased creditor for receiving dividend payable to such deceased creditor, the bankruptcy trustee shall satisfy himself as to the claimant's right and title to receive the dividend, and may call for evidence regarding such right or title.

(2) On being satisfied of the veracity of the claim as per sub-regulation (1), the bankruptcy trustee may apply to the Adjudicating Authority for sanctioning the payment of such dividend or return to the claimant.

34. Distribution of dividend.

(1) Subject to the provisions of sections 174 and 178, the bankruptcy trustee shall not commence distribution of dividend unless a preliminary report is filed with the Adjudicating Authority.

(2) The bankruptcy process cost shall be deducted before any dividend is distributed under this regulation.

35. Return of amount.

A creditor shall forthwith return any amount received by him in distribution, which he was not entitled to at the time of distribution, or subsequently.

36. Unclaimed proceeds of bankruptcy or undistributed assets.

(1) After filing the final report under regulation 11, the bankruptcy trustee shall, within three days from the date of such filing, apply to the Adjudicating Authority for an order to credit to the Insolvency and Bankruptcy Fund formed under the Code, any unclaimed dividends of bankruptcy process or undistributed asset or any other balance amount payable to the creditors, left with him.

(2) Without prejudice to any penalty that may be imposed by the Board, the bankruptcy trustee shall be liable to pay interest at the rate of twelve percent per annum on the amount retained by him under sub-regulation (1), if he fails to-

(a) apply to the Adjudicating Authority within three days from the date of filing;

(b) credit to the Fund within three days from the date of order of the Adjudicating Authority.

(3) The bankruptcy trustee shall, when crediting the amount referred to in sub-regulation (1), furnish to the Board, a statement setting forth the following –

(a) the names and last known address of the creditors entitled to the unclaimed dividend or undistributed asset or any other balance;

(b) the amount of the unclaimed dividend or any other balance for each creditor under (a);

(c) the value of the undistributed assets.

(4) The bankruptcy trustee shall be entitled to a receipt from the Board for any amount deposited by him under sub- regulation (2), and such receipt shall be proof of credit by him.

(5) A person claiming to be entitled to any amount paid into the Insolvency and Bankruptcy Fund may apply to the Board for an order for payment of the amount claimed.

(6) The Board may, if satisfied that the person referred to in sub-regulation (5) is entitled to the whole or any part of the amount claimed, make an order for the payment to that person of the sum due to him, after taking such security from him as it may think fit.

(7) Any amount paid into the Insolvency and Bankruptcy Fund under sub-regulation (1), which remains unclaimed for a period of fifteen years, shall be liable to be utilised for the purposes of the Insolvency and Bankruptcy Fund.

37. Debt counselling.

Debt counselling in relation to bankruptcy process may be provided to a bankrupt by such person as may be recognised by the Board or the Central Government, as the case may be.

FORM A

WRITTEN CONSENT TO ACT AS BANKRUPTCY TRUSTEE

(Under regulation 3(3) of the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019)

[Date]

To

The Adjudicating Authority [Name of Bench]

From

[Name of the Insolvency Professional]

[Registration number of the Insolvency Professional]

[Address of the Insolvency Professional registered with the Board]

Subject: Written consent to act as bankruptcy trustee.

1. I, [name], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board, note that I have been proposed to be appointed as bankruptcy trustee for the bankruptcy process of [name of the bankrupt].

2. In accordance with regulation 3(3) of the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, I hereby give consent to the proposed appointment.

3. I declare and affirm as under: -

(a) I am registered with the Board as an insolvency professional.

(b) I am not subject to any disciplinary proceedings initiated by the Board or the Insolvency Professional Agency.

(c) I do not suffer from any disability to act as a bankruptcy trustee.

(d) I am eligible to be appointed as bankruptcy trustee of the bankrupt under regulation 3 of the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and other applicable provisions of the Code and regulations.

(e) I shall make the disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

(f) I have the following processes in hand:

Sl. No. Role as No. of processes on the date of consent

1 Interim Resolution Professional

2 Resolution Professional of:

a. Corporate debtors

b. Personal guarantors or individuals or partnership firms

3 Liquidator of:

a. Liquidation Process

b. Voluntary Liquidation Process

4 Bankruptcy Trustee

5 Authorised Representative

6 Any other (please state) Date:

Place:

(Signature of Insolvency Professional)

Registration No……

FORM B

Form to appoint proxy

(Under regulation 26(2) of the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019)

Full name of the bankrupt: [Insert matter name / application number for the bankruptcy process]

Full Name of Creditor				
Address	Present	Permanent	Business	
Identification number	Aadhaar Number	PAN	CIN	GSTIN
Email				

I, being [insert name of creditor] holding [insert voting share] of the debt of the bankrupt, hereby appoint:

1.	Full name				
	Address	Present	Permanent	Business	
	Identification Number	Aadhaar Number	PAN	CIN	GSTIN
	E-mail				
	Signature				

or failing him;

2.	Full name				
	Address	Present	Permanent	Business	
	Identification Number	Aadhaar Number	PAN	CIN	GSTIN
	E-mail				
	Signature				

2.	Full name				
	Address	Present	Permanent	Business	
	Identification Number	Aadhaar Number	PAN	CIN	GSTIN
	E-mail				
	Signature				

as my proxy to attend and vote for me and on my behalf at the meeting of the committee to be held on [insert date and time of meeting] at [insert venue of the meeting], and at any adjournment thereof in respect of the matters indicated in the notice of the meeting [provide details of the notice], as listed below:

[insert matters as listed in the agenda]

Signed this [insert date] day of [insert month] [insert year] Signature of creditor:

Signature of proxy:

SCHEDULE I

FEES OF BANKRUPTCY TRUSTEE

[Under regulation 4(2)]

Amount of Realisation in rupees (less fee on the amount realised bankruptcy process cost)	**Percentage of fee on the amount realised bankruptcy process cost)**			
	In the first six months	**In the next three months**	**In the next three months**	**Thereafter**
On the first 25 lakh	10.00	7.50	5.00	3.75
On the next 50 lakh	7.50	5.00	3.75	2.80
On the next 1 crore	5.00	3.75	2.50	1.88
On the next 9 crore	3.75	2.80	1.88	1.41
On the next 40 crore	2.50	1.88	1.25	0.94
On the next 50 crore	1.25	0.94	0.68	0.51
On further sums realized	0.25	0.19	0.13	0.10
Amount of distribution in rupees	**Percentage of fee on the amount distributed**			
On the first 50 lakh	5.00	3.75	3.00	1.88
On the next 75 lakh	3.75	3.00	1.88	1.41
On the next 1 crore	2.50	1.88	1.25	0.94
On the next 9 crore	1.88	1.40	0.94	0.71
On the next 40 crore	1.25	0.94	0.63	0.47
On the next 50 crore	0.63	0.48	0.34	0.25
On further sums distributed	0.13	0.10	0.06	0.05

SCHEDULE II

Mode of sale

[Under regulation 27]

PART A. AUCTION

(1) Where an asset is to be sold through auction, the bankruptcy trustee shall do so in the manner specified herein.

(2) The bankruptcy trustee shall prepare a sale strategy in writing for the sale of the asset and may take help of marketing professionals if it is required, which shall be submitted to the Adjudicating Authority along with the progress report under regulation 10.

(3) The marketing strategy may include-

(a) releasing advertisements for auction of the asset;

(b) preparing information sheets for the asset;

(c) preparing a notice of sale; and

(d) liaising with agents.

(4) The bankruptcy trustee shall prepare terms and conditions of sale, including reserve price, earnest money deposit, pre-bid qualification, and time period for full payment.

(5) The reserve price shall be the value of the asset arrived at in accordance with regulation 30 and such valuation shall not be more than six months old:

Provided that in the event an auction fails at such price, the bankruptcy trustee may, in consultation with the committee, reduce such reserve price up to seventy-five percent of such value to conduct subsequent auctions:

Provided further that in the event of an auction failing in spite of reducing the price up to seventy-five percent, the price may further be reduced with the approval of the committee.

(6) The bankruptcy trustee shall provide any assistance, if necessary, for the conduct of due diligence by interested buyers.

(7) The bankruptcy trustee shall sell the assets through an electronic auction on an online portal, or on a portal designated by the Board (if any), where the interested buyers can register, bid and receive confirmation of the acceptance of their bid online.

(8) The bankruptcy trustee may sell assets through a physical auction, with prior permission of the Adjudicating Authority, if he is of the opinion that it will maximise the realisation from the sale of the assets and is in the best interest of the creditors.

(9) The bankruptcy trustee may engage the services of qualified professional auctioneers specialising in auctioning the assets, provided that such auctioneer fulfils the requirements in regulation 5.

(10) The auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders unless the bankruptcy trustee has received permission from the Adjudicating Authority allowing otherwise regarding the visibility of the bid price.

(11) If required, the bankruptcy trustee may conduct multiple rounds of auctions with a view to maximise the realisation from the sale of assets, and to promote the best interests of the creditors.

(12) On the close of the auction, the payment schedule shall be communicated to the highest bidder. On payment of the full amount, the bankruptcy trustee shall execute the sale and the asset will be transferred in the manner specified in the terms of the sale.

PART B. PRIVATE SALE

(1) Where an asset is to be sold through private sale, the bankruptcy trustee shall conduct the sale in the manner specified herein.

(2) The bankruptcy trustee shall prepare a sale strategy in writing to approach interested buyers for assets to be sold by private sale, which shall be submitted to the Adjudicating Authority along with the progress report under regulation 10.

(3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximise the realisations from the sale of assets.

(4) The completion of sale, and the delivery of the assets shall be as per the terms of sale.

Dr. M. S. SAHOO, Chairperson [ADVT.-III/4/Exty./299/19]

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https://www.livelaw.in/top-stories/supreme-court-ibc-notification-anil-ambani-reliance-corporate-debtors-170071

The supreme court on Thursday heard the arguments of Senior Advocate Harish Salve on behalf of Reliance Communications head Anil Ambani on a plea challenging the Central Government notification extending provisions of the insolvency law to personal Guarantors.

You cannot specify the subject matter as regards which the section comes into force, you can only specify the section". Salve submitted challenging the Centre November 15, 2019 notification bringing into effect certain provisions of Part III of the IBC, i.e., Insolvency Resolution and Bankruptcy for Individuals and Partnership firms, from December 1, 2019 as regards only personal guarantors to corporate debtors.

The Bench of Justices L. Nageswara Rao and Ravindra Bhat was hearing a batch of 58 matters. The supreme court three-judge bench headed by Justice Rao had on October 29, 2020 said it would transfer to itself and decide a host of cases filed in different high courts challenging bankruptcy proceedings initiated against personal guarantors of corporate debtors such as Reliance Communication Chairman Anil Ambani. Other, profile individuals facing bankruptcy proceedings as individual guarantors of ailing corporate debtors include Kapil Wadhawan, Sanjay and Arti Singhal, Lalit Jain, Yogesh Mehra, Atul Punj, Bala Chhabra, Ram Mehar Garg, Mahendra Kumar Rajpal, Ajay Mehra, Sabbineni Surendera

Mr. Salve indicated that the impugned notification was issued in exercise of the power under section 1(3) of the IBC which states that the code shall come into force on such date as the Central government may, by notification in the Official Gazette, appoint.

You can't say that the section will apply only so far as this and this is concerned. This is conditional legislation, not delegated legislation, he urged

He took the bench through section 2(e), which provides that the provisions of the Code shall apply to personal guarantors to corporate debtors. He advanced that section 2 extends the application of the Code to the following entities-

a) Any company incorporated under the Companies Act, 2013 or under any previous company law
b) Any other company governed by any special Act for the time being in force
c) Any Limited Liability Partnership
d) Such other body incorporated under any law for the time being in force, as the central government may, by notification specify
e) Personal guarantors to corporate debtors

f) Partnership firms and proprietorship firms

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

It is there misunderstanding that section 2(e) is to be read with an implied power that the Centre can extend the provisions of the Code to only personal guarantors to corporate debtors, argued Mr. Salve

He took the bench through the other provisions which have been brought into force by the impugned notification, beginning with section 78, by virtue of which the applicability of Part III of the Code is extended to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees.

He advanced that there is no power in the central government to say that section 78 shall apply to any one class of individuals. It was his argument that this would result in a criss-cross of problems that the centre has not realised- bankruptcy of individuals goes to the DRT. The resolution also goes to the DRT. They have tried to pick out personal guarantors to corporate entities and place their resolution before the NCLT. If one individual says that he has no money, where is the question of resolution, he advanced

By virtue of section 60 (The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT), the adjudication in relation to corporate debtors lies before NCLT. I assume that they have intended that where there are resolution proceedings, the Adjudicating Authority will in that case be the NCLT. But the problem is the language of section 179- we don't know if Insolvency is limited to insolvency resolution or bankruptcy also. If it is so, then as awkward situation will result where one bankruptcy runs in the NCLT and one in the DRT, continued Mr. Salve

Section 179 stipulates that subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal.

The SBI has filed a detailed affidavit saying that since the expression personal guarantor to corporate debtor is defined, so it is a class in itself and the central government could have notified the Code qua this. I did a word search of the phrase personal guarantor to corporate debtor.

It only shows up in section 5(22) (defining 'personal guarantor' as a surety of a corporate debtor), section 31 (an approved resolution plan to also bind the guarantor of the corporate debtor), and section 165 which is in the context of fraudulent preferences (a bankrupt shall be deemed to have entered into a transaction giving preference to any person if the person is the creditor or surety or guarantor for any debt of the bankrupt)", he advanced, explaining that the said references have a different connotation.

"Section 1(3) does not authorise the picking of one class. The Ministry of Corporate Affairs in its reply has submitted that the government of India was so empowered under section 1(3) and that it has only effected the mandate of the Parliament. It has denied that the notification issued is in violation of Section 1(3). It says that the proviso of 1(3) read with section 2 implies that the government has the power. Can it be that they are not familiar with the basic principles of conditional legislation?", pressed Mr. Salve.

"The Parliament has not empowered the central government to divide the section. They should have gone back to the Parliament and had section 1(3) amended so as to add 'different classes of creditors' or 'different classes of debtors' to it. Section 78 does not use the term 'guarantors'. Section 2(e) only says that the Code is to apply to the guarantors of the debtors", he continued.

The centre government has exercise legislative powers and bisected the section. They have sought power to extend the provisions with modifications here, concluded Mr. Salve.

Background

By a Notification dated 15.11.2019, the Ministry of Corporate Affairs, Government of India in exercise of its power conferred under Section 1(3) of the Insolvency and Bankruptcy Code, 2016 brought into force the following provisions of the Insolvency and Bankruptcy Code, 2016 insofar as they related to 'personal guarantors to corporate debtors' with effect from 01.12.2019: -

i. Clause (e) of Section 2;

ii. Section 78 (except with regard to fresh start process) and Sections 79;

iii. Sections 94 to 187 (both inclusive);

iv. Clause (g) to Clause (i) of sub-section (2) of Section 239

v. Clause (m) to Clause (zc) of sub-section (2) of Section 239;

vi. Clause (zn) to Clause (zs) of sub-section (2) of Section 240; and

vii. Section 249.

Writ petitions were filed in the High Court of Delhi and other High Courts challenging the Notification dated 15.11.2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. The writ Petitioners also sought a declaration that section 95, 96, 99, 100, 101 of the Insolvency and Bankruptcy Code, 2016 are unconstitutional in so far as they apply to personal guarantors of corporate debtors.

The Insolvency and Bankruptcy Board of Indian had filed Transfer petitions under Article 139 (A) read with Article 142 of the Constitution of India Seeking Transfer of the Writ Petitions filed before High Courts to the top court.

Transferring the pleas from all High Courts to itself, the apex court had in October last year clarified that any interim orders passed by the High Courts shall continue.

In a plea moved by Anil Ambani challenging the appointment of a Resolution Professional for a personal guarantee given by him for loans taken by Reliance Communications Ltd (RCom) and Reliance Infratel Ltd (RITL) from the State Bank of India, the Delhi High Court had in October last year issued notice and stayed the proceedings initiated against him under Part III of the Insolvency & Bankruptcy Code. A Division Bench of Justice Vipin Sanghi and Justice Rajneesh Bhatnagar had, however, restricted Anil Ambani from alienating his assets till the next date of hearing.

On September 17, 2020, the supreme court had declined to vacate a stay, earlier granted by Delhi High Court towards the ongoing IBC proceedings against Reliance Group Chairman Anil Ambani.

In August 2016, Mr. Anil Ambani had given personal guarantees for two loans worth nearly INR 5,65,00,00,000 (Rupees five hundred and sixty-five crore) and INR 6,35,00,00,000 (Rupees six hundred and thirty-five crore) extended to his companies Reliance Communications (RCom) and Reliance Infratel Ltd (RITL) respectively. Reportedly, the loan accounts of RCom and RITL had been declared non-performing assets in 2017 after they failed to pay off the debt.

In March 2020, the State Bank of India (SBI) had filed a petition before the National Company Law Tribunal (NCLT) Mumbai bench under Section 95 of the IBC, requesting the NCLT to appoint a Resolution Professional within seven days to look into the case. Last week, the NCLT had ordered insolvency proceedings against Mr. Anil Ambani for defaulting on the aforementioned loans and appointed a Resolution Professional in the matter. Mr. Anil Ambani led a petition before the High Court of Delhi, challenging the appointment of a Resolution Professional by the NCLT to verify the factum of whether or not he had given a personal guarantee of approximately INR 12,00,00,00,000 (Rupees one thousand two hundred crores) against its loans to RCom and RIPL.