UNVEILING THE ROLE OF A LIQUIDATOR: POWERS AND DUTIES UNDER THE INSOLVENCY AND BANKRUPTCY CODE

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ABSTRACT

This research paper delves into the multifaceted role of liquidators under Section 35 of the Insolvency and Bankruptcy Code (IBC) in India. It explores the authority, responsibilities, and impact of liquidators on insolvency proceedings, examining pivotal cases and legislative amendments. The IBC's introduction revolutionized corporate insolvency resolution, emphasizing revival over closure. Section 35 serves as the epicenter of a liquidator's authority, encompassing duties such as verifying creditor claims, managing assets, and overseeing business operations. The interplay of Section 29A and Section 34 prevents disqualified entities from benefiting during liquidation. The Rajive Kaul Vs. Vinod Kumar Kothari & Others case exemplifies the extent of a liquidator's authority. Additionally, Section 35(1)(i) empowers liquidators to enlist professional assistance when needed. Stakeholder consultations, highlighted in Section 35(2) and supported by the Stakeholder Consultation Committee (SCC), promote transparency and cooperation. In conclusion, Section 35 and associated regulations adapt to the evolving insolvency landscape, ensuring equitable and transparent liquidation processes.

Keywords: Liquidator, Section 35, SCC, IBC.

INTRODUCTION

This exploration delves into the intricate landscape of a liquidator's powers and responsibilities as defined under Section 35[1] of the Insolvency and Bankruptcy Code (IBC). As we navigate through the realms of insolvency and liquidation, we unearth the nuanced authority bestowed upon liquidators and the consequential impact on the course of proceedings. Section 35, in conjunction with Chapter III of the Liquidation Process Regulations, 2016[2], unveils the pivotal role of a liquidator in the insolvency resolution process. Within this legal framework, we shall

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[1] The Insolvency and Bankruptcy Code 2016, s 35

[2] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016

scrutinize the scope of a liquidator's powers and duties, touching upon pivotal cases and amendments that have reshaped the contours of their responsibilities.

BACKGROUND

Businesses require efficient procedures for closure or dissolution when they become financially insolvent. Consequently, the legal framework should facilitate the orderly exit of nonviable businesses, aiding entrepreneurs in efficiently shutting down unprofitable ventures and initiating viable ones. This approach ensures the continuous redirection of human and economic resources, fostering a dynamic environment that bolsters overall economic productivity and supports entrepreneurship.

For corporate entities, the Insolvency and Bankruptcy Code (IBC) outlines two types of liquidation processes. In cases of a "default," a Corporate Debtor (CD) can enter the Corporate Insolvency Resolution Process (CIRP) initiated by a Financial Creditor (FC), Operational Creditor (OC), or the CD itself. If the CIRP proves unsuccessful, the CD proceeds to the liquidation phase. Alternatively, a corporate entity can opt for voluntary liquidation, known as solvent liquidation, under section 59 of the IBC[3], even when there is no default.

Before the implementation of the IBC, the Companies Act of 1956 governed the winding up and liquidation of companies. Section 433(e) of the Companies Act, 1956[4], dealt with winding up a company due to its inability to meet its financial obligations. Under this provision, an official liquidator was appointed to oversee the company's liquidation without any provision for resolution or reorganization. This process was notorious for significant delays, often resulting in a substantial loss of the debtor company's assets. Moreover, it failed to provide an effective framework for addressing various levels of financial distress.

Under the IBC, a company facing default must first go through the CIRP phase before proceeding to liquidation. The IBC introduces a market-based mechanism for reviving potentially failing but viable CDs and closing unviable ones. It aims to strike a balance between revival and closure by implementing a two-stage process for addressing corporate insolvency. In the initial stage, the CD undergoes the CIRP, during which creditors attempt to resolve its

[3] The Insolvency and Bankruptcy Code 2016, s 59
[4] The Companies Act 1956, s 433(e)

insolvency in a time-bound manner. If the CIRP fails, the CD moves on to the second stage for liquidation.

In essence, liquidation is a step triggered by the inability to resolve insolvency through the resolution process. The IBC emphasizes the need for timely efforts during the moratorium period to assess and, if feasible, revive a business. If revival attempts prove unsuccessful, the business should be liquidated promptly. The goal is to provide potentially viable businesses with a fair chance of revival with stakeholder consensus and proceed with closure only when revival or rehabilitation is evidently unattainable.

SECTION 35: THE EPICENTER OF A LIQUIDATOR'S AUTHORITY

Section 35(1)[5] serves as the epicenter of a liquidator's authority, delineating their powers and duties. In accordance with this section, subject to the directives of the Adjudicating Authority (AA), a liquidator is endowed with a myriad of responsibilities and abilities. These encompass the verification of claims lodged by creditors, the assumption of control over all assets, properties, and actionable claims pertaining to the Corporate Debtor (CD), and the evaluation of these assets and properties as specified by the Insolvency and Bankruptcy Board of India (IBBI). A critical facet of their role lies in safeguarding and conserving the CD's assets and properties, thereby facilitating their effective liquidation. The liquidator is further empowered to oversee the CD's business operations as deemed necessary for its advantageous liquidation.

Moreover, the liquidator wields the authority to instigate the sale of the CD's immovable and movable assets, as well as actionable claims, either through public auctions or private contracts, the latter contingent upon Section 52.[6] The liquidator's purview extends to transferring such assets to individuals or corporate entities or selling them in parcels, as per specified modalities. They are also vested with the prerogative to initiate legal actions, including suits and defenses, on behalf of the CD in any legal proceedings.

A noteworthy dimension of a liquidator's role pertains to scrutinizing the CD's financial transactions to unearth instances of undervalued or preferential dealings. This multi-faceted authority vested in the liquidator underscores their pivotal role in the insolvency resolution process.

[5] The Insolvency and Bankruptcy Code 2016, s 35(1)
[6] The Insolvency and Bankruptcy Code 2016, s 52

THE INTERPLAY OF SECTION 29A AND SECTION 34: CURBING DISQUALIFICATIONS

The introduction of Section 29A in the IBC[7] ushered in pivotal changes that reverberated in the realm of liquidation. Simultaneously, Section 34[8] underwent amendments aimed at aligning it with the evolving landscape of insolvency proceedings. Section 34 now explicitly states that a liquidator is barred from selling immovable and movable assets or actionable claims of the CD in liquidation to individuals or entities ineligible to be Potential Resolution Applicants (PRAs). This alignment underscores that the disqualifications enumerated in Section 29A, pertaining to PRAs, hold equal sway over prospective purchasers of liquidation assets. In essence, individuals or entities ineligible to participate as PRAs are precluded from deriving any benefits or advantages during the CD's liquidation phase or from gaining a foothold in the CD's assets.

RAJIVE KAUL VS. VINOD KUMAR KOTHARI & OTHERS: AN ILLUSTRATIVE PRECEDENT

The legal precedent set in the case of Rajive Kaul Vs. Vinod Kumar Kothari & Others[9] exemplifies the far-reaching implications of a liquidator's authority. In this case, the National Company Law Appellate Tribunal (NCLAT) grappled with the question of whether a liquidator possesses the power to remove nominee directors of the CD from the board of another company.

The crux of the matter revolved around the non-cooperation and unresponsive demeanor of the appellant nominee directors, which prompted the liquidator's move to oust them from their positions as nominees of the CD on the board of NICCO Parks and Resorts Limited (NPRL). The appellants, however, vehemently contested their removal, asserting that they were no longer nominee directors since they had been re-appointed as directors in their individual capacity by the shareholders. Moreover, they questioned the liquidator's authority to intercede in the management and business affairs of a company beyond the CD.

The AA, in response to the liquidator's request, directed the appellants to vacate their roles as nominee directors. In a series of appeals contesting this order, the NCLAT upheld the AA's

[7] The Insolvency and Bankruptcy Code 2016, s 29A
[8] The Insolvency and Bankruptcy Code 2016, s 34
[9] *Rajive Kaul v Vinod Kumar Kothari & Ors* [2020] Company Appeal (AT) (INS) No 44 of 2020

decision. Significantly, the NCLAT elucidated that during liquidation, a company acts through the liquidator, who effectively steps into the shoes of the board of directors for the purpose of fulfilling statutory obligations.

Crucially, the NCLAT emphasized that the CD's property remains vested in the company even during liquidation. In light of the appellants' ineligibility under Section 29A of the IBC, they were precluded from reaping any advantages or gains during the CD's liquidation phase or from benefiting from the CD's assets. The NCLAT categorically rejected the appellants' contention that they had been appointed to the NPRL board in their individual capacity. Furthermore, it expressed disapproval of the appellants' lack of wholehearted cooperation with the liquidator.

The NCLAT underscored the absence of any restrictions in the Articles of Association of the CD regarding the transfer of shares held in NPRL, along with the attendant rights. In line with Section 238 of the IBC, the NCLAT asserted that the maximization of the liquidation estate's value could only be assured if the CD's shares in NPRL, coupled with class rights, were deemed integral to the liquidation estate and, consequently, assignable. A contrary stance would not only detrimentally affect the shares' value but also have catastrophic consequences for the CD's liquidation estate. The NCLAT firmly affirmed that the liquidator possessed the requisite authority to oust the appellants as nominee directors and nominate new directors in their stead.

APPOINTMENT OF PROFESSIONALS: SECTION 35(1)(I) UNVEILED

Section 35(1)(i)[10] of the IBC ushers in an important dimension of a liquidator's powers and responsibilities: the ability to enlist professional assistance when necessary. This pivotal provision empowers the liquidator to seek the expertise of professionals to aid in discharging their duties, obligations, and responsibilities. This may encompass a range of specialized services, each contributing to the seamless execution of the liquidation process. The regulation accompanying this section underscores the requirement for such professionals to be independent, preventing any conflicts of interest. Professionals must not have familial or corporate ties with the liquidator or the CD. Additionally, they must promptly disclose any pecuniary or personal relationships with stakeholders or the CD as soon as they become aware of them.

STAKEHOLDER CONSULTATION: A COLLABORATIVE APPROACH

[10] The Insolvency and Bankruptcy Code 2016, s 35(1)(i)

In addition to the appointment of professionals, Section 35(2)[11] extends the liquidator's authority to consult with stakeholders entitled to proceeds under Section 53.[12] Although these consultations are not binding on the liquidator, they serve as a crucial avenue for stakeholders to voice their perspectives and concerns. The records of these consultations must be made accessible to all stakeholders, ensuring transparency and inclusivity.

Regulation 8 of the Liquidation Process Regulations[13] reinforces the importance of stakeholder cooperation in the liquidation process. It stipulates that stakeholders must extend wholehearted assistance and cooperation to the liquidator to facilitate the successful conduct and culmination of the liquidation.

THE BIRTH OF THE STAKEHOLDER CONSULTATION COMMITTEE (SCC)

A significant development in the realm of liquidation is the introduction of the stakeholder consultation committee (SCC), mandated by the Liquidation Amendment Regulations. Under Regulation 31A of the Liquidation Process Regulations[14], the liquidator is tasked with establishing an SCC within 60 days of the Liquidation Commencement Date (LCD). The formation of the SCC hinges on the compilation of a stakeholder list under Regulation 31.[15]

The formation of this committee presents an opportunity for stakeholders, representing various classes, to actively participate in advising the liquidator on matters related to sales under Regulation 32.[16] While constituting the SCC, the liquidator may call upon stakeholders from each class to nominate their representatives for inclusion. However, if certain classes of stakeholders fail to nominate their representatives, the liquidator has the prerogative to include stakeholders with the highest claim amounts in those classes.

The representatives forming the SCC are granted access to relevant records and information essential for advising the liquidator, aligning with the provisions of the IBC and the Liquidation Process Regulations. Furthermore, the liquidator is responsible for convening SCC meetings when necessary or upon the request of at least 51 percent of the representatives in the SCC.

[11] The Insolvency and Bankruptcy Code 2016, s 35(2)
[12] The Insolvency and Bankruptcy Code 2016, s 53
[13] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, reg 8
[14] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, reg 31A
[15] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, reg 31
[16] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, reg 32

These meetings, chaired by the liquidator, serve as forums for deliberation and the recording of observations.

Crucially, the SCC plays a pivotal role in the decision-making process, particularly in cases where the Committee of Creditors (CoC) has evaluated the sale of assets as a going concern under Regulation 39C[17] of the Corporate Insolvency Resolution Process (CIRP) Regulations. While the advice of the SCC is not binding on the liquidator, it is paramount in influencing the direction of proceedings. In instances where the liquidator's decision diverges from the SCC's advice, the liquidator is obligated to furnish written reasons for the deviation.

CONCLUSION: THE EVOLVING ROLE OF LIQUIDATORS IN THE IBC

The role of liquidators within the Insolvency and Bankruptcy Code represents a dynamic and evolving landscape. Section 35, with its multifaceted powers and duties, situates liquidators as key protagonists in the insolvency resolution process. The interplay of Section 29A and Section 34 reinforces the need to prevent disqualified entities from gaining a foothold in the CD's assets during liquidation.

The landmark case of Rajive Kaul Vs. Vinod Kumar Kothari & Others exemplifies the far-reaching ramifications of a liquidator's authority, affirming their power to remove nominee directors when necessary. Additionally, the appointment of professionals under Section 35(1)(i) ensures that the liquidation process benefits from specialized expertise while maintaining strict independence.

Stakeholder consultations, governed by Section 35(2) and complemented by Regulation 8, promote transparency and cooperation, essential for the successful conduct of liquidation. The advent of the stakeholder consultation committee (SCC) ushers in a new era of collaborative decision-making, where stakeholders actively contribute to advising the liquidator.

In conclusion, the IBC's Section 35 and its associated regulations have an intricately woven fabric of responsibilities and authorities for liquidators, adapting to the ever-evolving landscape of insolvency. As liquidators navigate these provisions, they not only facilitate the efficient liquidation of assets but also uphold the sanctity of the insolvency resolution process, ensuring equity and transparency for all stakeholders involved.

[17] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, reg 39C