EFFECTUATING THE PROCESS OF RESOLUTION AS AGAINST LIQUIDATION: A PROMOTERS' PERSPECTIVE

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ABSTRACT

The term promoters connote those people who possess the requisite intention to form a company and also take necessary steps to bring it into existence. Therefore, the promoters can be comfortably labelled as fiduciary agents of the company. In the earlier legal framework under the Companies Act, 2013, promoters were barred from entering into the liquidation process altogether. However, with the coming up of the Insolvency and Bankruptcy Code in the year 2016, section 29A ensured their re-entry into the liquidation process. The amended law may allow the promoters to propose schemes once the company is in liquidation. This sea change brought by the IBC, 2016 altered the existing legal structure pertaining to liquidation. However, it is to be categorically stated that no 'back-door' entry shall be allowed for ineligible promoters in the liquidation process. The present paper attempts to analyze the sanctity of section 29A of IBC, 2016 vis-à-vis the perspective of promoters. The author also draws a line of comparison of the Indian law as well as the law in United States of America (USA) for the issue in question.

***Keywords: Liquidation, Promoters, back-door entry, fiduciary, Insolvency and Bankruptcy Code, 2016*.**

I. Introduction

A resolution applicant's eligibility to submit a resolution plan had been a lacuna till the insertion of Section 29A under the IBC,[2] which prohibits those persons or related party – significantly promoters - who had contributed to the defaults of the company's debts. Notwithstanding that this amendment managed to prevent the back-door entry of errant promoters, it complicates the resolution process. *Prima facie* the RP is burdened with the responsibility of scrutinizing the eligibility of such applicants; thus, wrenching the statutory period of 330 days[3] for the completion of resolution process. Further, it is imperative that there would be a conflict of opinion between the committee of creditors and the resolution personnel as it happened in the CIRP of MBL Infra. Ltd.[4] It is also pertinent to note the explanation to Cl. (*j*) of Section 29A of the IBC, has a very extensive application than required for the fruitful the completion of the CIRP, as it may render some promoters to lose the company forever due to genuine business failures; not to mention the cases where the promoters bid supersedes the offer made by other bidders in the resolution process, nonetheless still they might be not eligible under 29A. The insolvency of Essar Steel Ltd. is an epitome of such a situation and the bid made by ArcelorMittal was directed to be revised since it was way to lower than the promoters offer. The situation gets even worse if the enterprises are smaller with less or no prospective bidders other than the promoters themselves. At this juncture it is also important to note the observation of Hon'ble Supreme Court of India that the preamble of the IBC discourages liquidation.[5] Though Section 29A of IBC deters errant promoters, before even the process of liquidation could

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[2] The Insolvency and Bankruptcy Code (Amendment) Ordinance 2017.
[3] Section 12(1) of The Insolvency and bankruptcy Code, 2016, Acts of Parliament, No. 31 of 2016.
[4] RBL Bank Ltd. v. MBL Infrastructure Ltd. CA (IB) No.543/KB/2017.
[5] Swiss Ribbons v. Union of India, WP (civil) No. 99/2018

commence, the liquidator could arrange a scheme under Section 230 of the Companies Act, 2013, that may pave way for a back-door entry of the promoters.[6]

In the light of the above stated position of law and practice, this paper would dwell upon the promoter's awe of losing the company on one hand and the objective of the IBC on the other. It is important that it needs to be considered holistically, and thus, would come up with a rationale for having 29A, and the goodness of it as held against the effective resolution of the debt-ridden insolvent companies.

II. An Overview of the Objective of IBC

> "The soul of the code is to keep the firm by balancing the interests of all the stakeholders for which a successful resolution is needed" – M.S. Sahoo, Chairperson of IBBI.

The desideratum of IBC is to consolidate and amend the laws pertaining to resolution and liquidation of insolvencies[7] that caters to almost all types of business entities. The primary objective underlying the IBC is to maximize the value of the assets of the debtors and prevent the degradation of the same with the passage of time.[8] Basically the IBC includes all type creditors under the definition clause in the code,[9] the inclusion of operational creditors is *per se* a big debate[10] which will not be touched upon for the discussions herein. What is more important and attractive feature of the IBC is the 'time bound resolution process. However, this was not followed hard and fast owing to the fact that it being a new legislation and limited resource persons.[11] Therefore, in 2019, it was amended to the effect that the resolution process must be completed within 330 days including extensions if any.[12]

Thus, it can be said that the IBC is a comprehensive mechanism to integrate fragmented corporate insolvency regime which was ambiguous, inconsistent and inefficient[13] so that the flow of credit by preventing liquidity-crisis[14] in the country is not disdained owing to defaulting

[6] SC Sekaran v. Amit Gupta, CA (AT) No. 495&496/2018

[7] Preamble ("An Act to consolidate and amend the laws relating to reorganization and insolvency…") of The Insolvency and bankruptcy Code, 2016, Acts of Parliament, No. 31 of 2016.

[8] Id.

[9] 3(10). "creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder."

[10] Sunrise 14 A/S Denmark v. Ravi Mahajan, MANU/SC/1052/2018; Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., MANU/SC/1609/2017; Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, MANU/SC/1196/2017.

[11] Singh & Associates, Insolvency Round-Up, 1 Manupatra, 10. (August 2, 2020, 10:45 PM) https://www.manupatrafast.in/NewsletterArchives/listing/Insolvency%20Singh%20Associates/2017/Jul/Vol%20I%20Issue%20I.pdf

[12] Section 12 of IBC (Amendment) Act 2019.

[13] Bankruptcy Law Reforms Committee, The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (Nov 2015) para 3.3.1. (The Sick Industrial Companies (Special Provisions) Act 1985; The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002; The Recovery of Debts Due to Banks and Financial Institutions Act, 1993; Companies Act 2013)

[14] Eu Jin Chua, Bankruptcy Reform in China, 1 Pratt's J. Banking L., 552 (2006).

debtors and instil faith among investors. The code has coherently unified the laws enforcing the rights of creditors and provided a holistic framework for the debtors to revive the company.[15] The dichotomy of resolution and liquidation is inevitable nonetheless, what is more important here is 'appropriate solution' should be strived for rather than liquidation which should be the last resort, as time and again emphasized by the NCLT.[16]

III. Promoters' Perspective

With the might of IBC, the promoters face an apprehension as to they will lose the company unless they settle or resolve the dues. It is pertinent to note that India being a country where promoter run business is prevalent,[17] the tendency of IBC that caters to the promoters, both defaulting and genuine, needs a serious consideration for shaping the law in future. Law should provide a reasonable opportunity for the promoters as well in rehabilitation of their companies. A mere technicality or procedural irregularity should not render prejudicial to the genuine promoters notwithstanding the large number defaulting promoters. It is relevant to note that bankruptcy regime in US more matured[18] as against the conservative position India where promoters can't initiate insolvency[19]

IV. The viability of Section 29A

In the following section, the bar on certain resolution plans will be analysed with respect to the duty of interim resolution personnel (RP). Further, an analysis of the plans brought in by promoters will be undertaken, in which case a lot of intricacies crop up on the basis of the genuineness of the promoters. Moreover, when an entity is financially distressed, it is the promoters get the first taste of it, and they might siphon of assets before even the creditors can take a glimpse at it.[20]

Section 29A provides for the eligibility of resolution applicants. The significance is that these resolution plans by such applicants will be put before the CoC, if approved the resolution shall take place according to the plan. Under this provision certain persons, owing to their contribution directly or indirectly to the insolvency of the company, make them ineligible to submit a resolution plan.[21] The pertinent point here is the observation of Supreme Court on Cl. (c) of Section 29A in *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*[22] that any person who

[15] A Primer on the Insolvency and Bankruptcy Code, 2016, Nishith Desai Associates, February 2019 (August 3, 2020, 05:07PM) http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf

[16] (M M Kumar, President stated that The sole objective of the Insolvency and Bankruptcy Code 2016 is to find solutions for stressed assets arisen out of non-performing assets with best of intent as so many things are involved in the process and liquidation perforce would be the last way out which the tribunal would avoid optimally) IBC's Objective not to emphasise on Liquidation: NCLT, Economic Times, January 2018, (August 3, 2020, 05:45PM) https://economictimes.indiatimes.com/news/economy/policy/ibcs-objective-not-to-emphasise-on-liquidation-nclt/articleshow/62355609.cms

[17] Andrew F. Brimmer, The Setting of Entrepreneurship in India, 69 QJE (1955), pp. 553-576.

[18] See The United States Bankruptcy Code 1978, §1121(b) & (d)(2)(A). (United States)

[19] Supra note 2 at Section 11.

[20] Moon v Franklin (1996) BPIR 196.

[21] Supra note 2 at Section 29A.

[22] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta, MANU/SC/1123/2018

wishes to submit a resolution plan should pay off the debt of the debtor to make himself eligible under the provision. Since 'any person' includes those persons who manage or control or be a promoter of a corporate debtor. In light of this, it is pertinent to view this provision in a background where promoter-controlled corporations are prevalent.

V. Widening the scope ineligibility and Restricting eligibility

After the 2018 ordinance, Section 5(25) of the Code is so amended to give effect that a resolution applicant is one who submits the resolution plan upon 'invitation' made under Section 25(2)(h), which further burdens the RP of checking the eligibility criteria for any prospective applicants and not to mention the approval of CoC. It increases the burden on the RP given the time constrained CIRP and amount of resources would it take to investigate the applicants. Most importantly the approval of creditors is the slippery slope fallacy here; once a CIRP commences, the creditors and promoters of the company may not have good relationship as the former might lose trust on the latter. The RP should be mindful of the fact that the resolution plan is not only beneficial to the creditors, it should also be serving the object of resolution.[23]

Further, the language used in the clauses defining the disqualification is ambiguous and opens room for frivolous and unwanted litigations. It states that persons acting 'jointly or in concert', which is vague and requires explanation as to the scope of application. There is high possibility that even genuine promoters who may attributed to the actions of erring promoters will be made ineligible at the behest of creditors who – backed by the promoters competitors[24] - wants to take undue advantage of the corporate debtor.[25] At this juncture, it is also useful advert to the rule of anti-deprivation.[26] The situation gets even worse when Cl. (j) is analysed. It bars any 'connected person' which unscrupulously increases the ground for disqualification.

In the light of above discussion, it would not be wrong to say that the Code's take on resolution strong arms the creditors by leaving the genuine promoters at the mercy of the creditors. This assertion was made in the case of *RBL Bank ltd. v. MBL Infrastructure Ltd,*[27] to the effect that the legislature couldn't have intended to curb genuine resolutions preferred by promoters as against the objective of the Code. Promoters as a class shouldn't be rendered prejudicial in the CIRP. This might not hold good for big businesses with bigger management and attractive business opportunity where the prospective bidders are more. Whereas in case of those companies which is neither a MSME nor a corporate giant are drastically affected. The above-mentioned case is a progressive one which takes the perspective of genuine promoters as well. This is not without substance taking cognizance of the promoter-controlled business regime in India.

[23] Garima Mehra and D Sharma, Section 29A of the IBC: A Pandora's box, IndiaCorpLaw, June 29, 2018 (August 4, 2020, 10:17 AM) https://indiacorplaw.in/2018/06/section-29a-insolvency-bankruptcy-code-pandoras-box.html
[24] Hamish Anderson, THE FRAMEWORK OF CORPORATE INSOLVENCY LAW, 174 (2017); See Central Inland Water Transport Corporation Ltd v. Brojo Nath Ganguly (1986) 3 SCC 156.
[25] In re Jeavons, ex parte Mackay 8 LR CH App 643 (1873).
[26] Moon v Franklin (1996) BPIR 196; Whitmore v Mason (1861) 2 J & H 204; Belmont Park Investments Pty Ltd (Respondent) v BNY Corporate Trustee Services Ltd (Appellant) (2011) UKSC 38.
[27] RBL Bank ltd. v. MBL Infrastructure Ltd, NCLT (Kolkata) C.P(IB)/170/KB/2017

VI. The 'Backdoor' entry – lacunae

Prima facie, it is pertinent to consider the view in *Wig Associates Pvt. Ltd. case,*[28] is unfounded and against the objective of the code. It was held that section 29A doesn't apply to 'ongoing' CIRP, which in the opinion of the author culverts a back-door entry for erring promoters. If the intent of the legislature was very clear to the court as to not allow errant promoter, why did the NCLT take such a view. It could have very well interpreted retroactively. Therefore, this hesitation to take a stand in this regard compromises the corporate maturity in India. The aftermath of the CIRP also holds a possibility of back door entry. That is to say in the case failure of resolution and the corporate debtor is forced to liquidation, the promoters can get shelter under Section 230 of the CA 2013 notwithstanding the 'watch dog' provision, 29A under the code. Section 33 of the Code stipulates for passing liquidation order by adjudicating authority if the CoC wants, whether or not resolution fails.[29]

Under section 230 of the CA 2013, the promoters and the creditors can arrive at a settlement at the liquidation stage. It might be argued that it has to be approved by a majority of 75% whereas the IBC provides for 66%, so if one cannot get the latter, how could he possibly get the former.[30] But it should be understood that the situation in the former and latter case is entirely different. Until the CIRP, the CoC has the tuft of the corporate debtor, as soon as the CIRP is rendered nugatory, then market forces would determine liquidation which highly risky and nobody has control. In certain cases, the haircut the creditors get is too short as the sums barely add up. So, it wouldn't be wrong to say that in liquidation, the creditors are at the mercy of the promoters.
Therefore, using this provision – Section 230, power to Compromise or make arrangements with creditors and members, the promoters can easily regain the lost business and start afresh. This is not without substance, since there are many instances of liquidation[31] where the promoters have successfully regained the control of the corporate debtor at a very cheap price than the actual dues that should have been paid.

VII. Committee of Creditors versus 'Actual Resolution'

It is obvious and rationale to point out that the CoC hold the tuft of the corporate debtor in the CIRP in India as opposes to the 'debtor in possession' model in US. As we are aware of the objective of IBC - lean towards liquidation as last resort only, wouldn't the CoC' manage to bypass resolution to liquidate swiftly. It is pertinent to take note of Section 33 of IBC that RP can submit before the tribunal for liquidation, and the tribunal may pass an order accordingly if the majority (51%)[32]of creditors whims so.

[28] Wig Associates Pvt. Ltd., NCLT (Mumbai) C.P.No.1214/I&BC/2017
[29] 33(2). "Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order…"
[30] Sanjeev Ahuja, Defaulting promoter getting 'backdoor' entry to regain companies under IBC, in Dipak Mondal (ed.) BusinessToday, April 19, 2019 (August 4, 2020, 12:45 PM) https://www.businesstoday.in/current/economy-politics/defaulting-promoters-getting-backdoor-entry-to-regain-companies-under-ibc/story/338638.html
[31] Liquidation of Amar Dye Chem., Gujarat NRE Coke, Hindustan Dorr, etc.
[32] (Previously 75%) The IBC (Amendment) Ordinance, 2018.

Thus, it would not be wrong to conclude that spirit of the code can be bypassed at the behest of creditors at the initial stage of CIRP itself. This statement is not made without substance owing to various cases in which the tribunal had passed liquidation order at the initial stage itself, which might look too good for the creditors, it causes serious prejudice to the corporate debtor which strives for perpetuity, and the promoters who aim to revive the business.[33] The interest held by the promoters over the company, that too in India, in the view of the author has a higher force and this should not be abruptly blockaded solely on the presumption of 'promoters at default'.
The interpretation of Section 29A would render nullity if there is no ample time and consensus between the RP and CoC. It is pertinent to draw attention to the proviso to Section 30(4) of the Code by virtue of 2018 ordinance,[34] which gives power to the CoC to given the resolution applicant a period of thirty days to clear the debt so as to become eligible under the 29A. But the time taken for the process will only stiffen the CIRP time period rather than giving an opportunity to prospective promoters, rendering the whole purpose of the Code useless.[35] Whereas in US, the corporate debtor given 120 days which is extendable up to 18 months.[36] The implications this position will be discussed in the next sub-section.

VIII. Instances of CoC' betrayal on the IBC

At this juncture it would rational to access certain cases where the creditors have acted against the spirit of the code. In *Omkara Asset Reconstruction Company (India) Ltd. v. Unimark Remedies ltd.,*[37] the CoC conveniently in its meeting refused to even open the envelope containing the resolution plan solely on the ground that it was submitted after the cut-off date set by the RP. Clearly it is a case of procedural lapse but the contention of the applicant is not without force. The accord of the creditors seems to be arbitrary application of the law so as to cause prejudice to the resolution applicant herein. However, the NCLAT rightly pointed out, though the applicant might have approached time barred, but it was made before the completion of resolution process and the facts suggests there wasn't any undue delay. So, in the interest of IBC, it would be proper to consider such a plan.

The situation peaks to a boiling point as in the case of *Binani Industries Limited v Bank of Baroda & Anr,*[38] where the resolution plan of the Promoter company, Ultratech Ltd. was rejected on the ground that it was made contravening the process prescribed in the process document. 90% of the CoC approved another plan by Rajpuatana Pvt. Ltd. The rest 10% had a dissenting view that their haircut was done inequitably[39] in the second plan which was not the case in the first plan. The NCLAT was of the view that just because there was procedural lapse and being

[33] VIP Finvest Consultancy Pvt. Ltd. v. Bhupen Electronics, NCLT (Mumbai) C.P.No. 03/I&BP/2017; Chivas Trading pvt.ltd. v. Abhayam Trading Ltd., NCLT(Chennai) C.P.No. 491 (IB)/CB/2017; C.A. Rajendra K. Bhuta v. Best Deal TV Pvt. Ltd., MANU/NC/2275/2018.
[34] Supra note 31.
[35] See KSK, Supreme Court decodes Section 29A of the IBC, November, 19 2018 (August 4, 2020, 07:37 PM) https://ksandk.com/insolvency/3006/#_ftn1
[36] The United States Bankruptcy Code 1978, §1121(b), (d)(2)(A).
[37] Omkara Asset Reconstruction Company (India) Ltd. v. Unimark Remedies ltd. (through resolution professional) & Anr, NCLAT, C.A.No. 131/AT/IB/2019.
[38] Binani Industries Limited v Bank of Baroda & Anr., C.A.No. 82/AT/IB/ 2018
[39] See Andrew Keay, In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions, 18 Sydney L. Rev. 55 (1996).

the promoters, it should not render the spirit of the code to nullity. The action of the CoC was held to be arbitrary and doesn't warrant any merit. In fact, the first plan when tabled for voting, received 100% approval.

It is pertinent to delve upon a landmark case of promoter-creditor stifle in insolvency of Essar Steels ltd. In this CIRP, the promoter, Ruis missed deadline to settle the dues. So the promoter was declared NPA and with the advent of 2018 ordinance they were ineligible. A bid was made to acquire the company to which Arcelor Mittal's bid was accepted. In this situation, the promoter comes back to bid for a higher value with attractive features for resolution.[40] On the other hand, simply invoking the provisions under Section 29A of IBC, the CoC rejected the plan went on with the latter's offer. The SC also affirmed the action of the CoC as it was consistent with the Code.[41] At this juncture, it is pertinent to draw attention to Section 12A, which allows reverting the insolvency application and settle the dues. Since the ordinance has only prospective application, the promoters in the present case couldn't have taken the shelter of such a progressive provision. Therefore, they had to bid for acquiring and reviving the company which failed at the behest of the CoC.

In the light of above discussion, it should be understood that the legislature couldn't have intended unscrupulous power to the CoC. It is the duty of the creditors to maintain the CIRP at revival and not liquidation. Further, the Code's take on the errant promoters, invariably affects the genuine promoters as well.

Lessons from US

The US followed the creditor control regime till 1938. There are studies which shows that the 'great depression' is due to this creditor controlled corporate resolution.[42] There was high volume of collusion between creditors and debtors for the latter to acquire the business without paying the whole debt and start the business afresh, and this was frowned upon in the early 20th century.[43] However, the US realized this lacuna and changed the position to debtor controlled regime which also benefitted the by creditors as it induced the creditors to conduct efficient due diligence before extending credit, ensuring that reckless and bad lending is prevented.[44]

IX. Key Points to Ponder upon

The objectives of the IBC is three fold; primary objective is towards 'resolution', secondary objective is maximization of the value of stressed assets and the tertiary objective is to promote entrepreneurship, availability of credit and balancing interests. Corporate resolution is not 'sale'

[40] Paragon Finance Plc v. Nash, (2002) 1 WLR 685; White v Davenham Trust Ltd (2010) EWHC 2784 (ch);
[41] Suresh P Iyegar, Upholding IBC tenets, apex court says promoters cant bid for stressed assets, BusinessLine, January 25, 2019(August 5, 11:57 PM) available at https://www.thehindubusinessline.com/companies/apex-court-bans-founders-from-buying-back-bankrupt-companies/article26087833.ece
[42] Walter Chandler, The Revised Bankruptcy Act of 1938, 24(11) ABA J. 880 (1938).
[43] Walter D. Coles, The Solicitor General's Bankruptcy Report and New Bankruptcy Bill, 18(5) ABA J. 293 (1932).
[44] See Joseph Stiglitz, GLOBALISATION AND ITS DISCONTENTS, 237 (2002).

or 'auction' per se, rather it should be construed to give effect of a going concern. Further, it is not only about recovery of dues as, it also aims at reviving the corporate debtor back to life.
Liquidation should be the last resort. Moreover, the resolution plan so approved by the CoC should not render certain creditors' haircut as that of liquidation.[45] Section 29A aims at preventing the direct and indirect intervention of all persons who were responsible for the downfall of the corporate debtor. With this advent, the promoters as a class are being made ineligible to submit resolution plan, albeit it is not expressly mentioned.

The prospective application of 29A opens a back door for promoters in the ongoing CIPR, which in all fairness dilutes the stand of IBC vis-à-vis promoter-controlled businesses in India. Further, the existence of Section 230 of Companies Act, 2013 renders the provision of the former to nullity, and also derogates the time constrained CIRP. Widening the scope of ineligibility of resolution applicant has burdened the CIRP and owing to the powers conferred on the CoC during the CIRP, even genuine resolution application from the promoters are at the mercy of them. The application of Section 12A is made in such a way that even genuine withdrawal from the CIRP is impossible.

The action of CoC while entertaining the resolution plan is highly subjective to arbitrary disapproval and rendering against the spirit of resolution. Further, it is natural that creditors distrust the promoters and such have affect invariably on genuine promoters as well.

Lessons to be Takes from Certain Cases

Taking cue from the recent cases of stressed companies are better to formulate the code accordingly. The case of Jetairways ltd. is one such instance where the promoter is genuinely trying to pay off the debts, the creditors doesn't seem to give way. The creditors are much bothered about recovering the dues from the defunct Jetairways than perceiving a going concern. This is evident from the fact that promoter was forced leave control of the company, who is in a better position to revive the company given his experience in the field. Consequently, the company is losing the business owing to the apprehensive action of the creditors.
There is another side to the position of promoters, that too in India where family-controlled business is prevalent and the family members bail out the errant promoters from losing control of the company, more so from being jailed. This was the typical case in the insolvency of RCom, where the debt due to the creditor was settled at a very low-level owing to the errant management of the corporate debtor. Further, this kind of arrangement is not done for charity but the promoters carve a scheme so as to get unduly benefited from it. For instance, if the RCom is going to be liquidated, the first bidder in the auction of spectrum would be RJio. Because only RJio can use such bandwidth for operation and it only be a prospective bidder.[46] There are also

[45] Rebecca Parry, Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343), in Rebecca Perry et al (eds), TRANSACTION AVOIDANCE IN INSOLVENCIES, 197 (3rd ed. 2018).

[46] With RCom deal terminated, Jio is ready to buy spectrum from open, Business Standard, January 2019 (August 5, 2020, 06:17 PM) https://www.business-standard.com/article/companies/with-rcom-deal-terminated-jio-is-ready-to-buy-spectrum-from-open-market-119041900909_1.html

talks over RJio selling its stake to foreign company to colourably bid in the process.[47] In this manner the promoter might have lost the entity but mange to retain the business within the family.

X. Conclusion

It is commendable that the legislature was able come up with a 'multiple layered broad criteria'[48] for disqualification of applicant whoever have some connection with the insolvency of the corporate debtor. At the same time, it should also be understood that those are the persons who might have experience or familiarity in that field which is very crucial for revival of the debtor. What is done is 'done' by the legislature. There can be no less restrictions put to catch the erring promoters, now it is the responsibility of the judiciary to balance the revival of the corporate debtor in one hand and protect the interests of creditors.

Creditors should work with RP for revival of the company, for they know that businesses aren't risk free. In spite of knowing the fact that business fail at some point, they should work for going concern notwithstanding the 'haircut' they receive. It should also be understood that they should not have a mentality of an enforcer of law. Any procedural lapse or technicalities which may otherwise be meritorious should be given it due regard. Nonetheless, under the IBC regime creditors imputed with enormous powers so that there is no scope for the applicants or promoters to meddle with them.

Therefore, it should be understood that business is prone to risks and creditors are well aware of this fact during investment. So, they should look for revival than recovery. This is possible only if the promoters who have the experience, are allowed to intervene to some extent. The present stringency it the IBC will hold good for now and it will definitely teach a lesson to errant promoters, but at the same time in future if India is able to attain a more mature corporate business regime apart from the promoter controlled, the version of genuine promoters should be given due consideration.

[47] Softbank investing in Jio as Mukesh Ambani deleverages business, The Economic Times, April 24, 2019 (August 6, 2020, 11:59 PM) https://economictimes.indiatimes.com/industry/telecom/telecom-news/softbank-investing-in-jio-as-mukesh-ambani-deleverages-business/articleshow/69011732.cms
[48] Supra note 22.