

What Binani case means for the IBC regulation

An absence of balance between value maximisation and statutory compliances might rob the IBC regulation of its teeth as well as its sanctity.

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The Insolvency and Bankruptcy Code (IBC) had been introduced to help reinvigorate the fragmented reorganization and restructuring framework in India. This was sought to be achieved by providing greater control and value maximization opportunities to creditors as well as through stricter adherence to statutory requirements and timelines.

The Reserve Bank ensured that there was baptism by fire by referring some of the largest defaulters for resolution under the IBC regulation. One such defaulter was Binani Cements.

After a long winding and dramatic chain of events, which involved a prolonged legal battle between two bidders (Dalmia and UltraTech Cements), the National Company Law Appellate Tribunal (NCLT) in a recent order finally settled the Binani case.

The NCLAT deemed the resolution plan submitted by Dalmia to be discriminatory in nature as it treated similarly placed financial and operational creditors differently. Operational creditors are as important for the purpose of a corporate entity as financial creditors. By way of background, in the early days of the IBC, operational creditors were being accorded inferior treatment by bidders as compared to financial creditors.

Statutory provisions were being interpreted in a manner, so as to provide operational creditors with a minimum payout of the liquidation value due to them as against their admitted claims, which on many occasions was almost close to nothing.

This could eventually disincentivize operational creditors from extending credit. For this reason, the NCLAT had emphasized the importance of the principle of non-discrimination in resolution plans in the case of Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors, following which there was an amendment to the Corporate Insolvency Resolution Process regulations.

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Further, to extend this logic, the distribution waterfall provided under IBC categorises creditors on the basis of security, providing highest priority of payout to secured creditors, whether financial or operational.

However, lower down the waterfall, unsecured financial creditors are provided a higher priority than operational creditors who are relegated to a residuary category. There could be an amendment to the Code, by which the waterfall is harmonized with the rest of the provisions as well as the judicial interpretation of the same, to give unsecured operational and financial creditors the same priority of pay out.

The NCLAT also had to choose between maximization of returns and procedural compliance. In previous cases various benches of the NCLT have ruled in favor of strict procedural compliance. For instance, by disallowing creditors from withdrawing insolvency applications in the absence of an express enabling provision under the IBC, or by insisting on a certificate from a financial institution for initiation of insolvency proceedings, even from foreign operational creditors.

However, various other cases have held value maximization of assets as a core value under the IBC. The Binani case presented a clash of the two tenets, where the timelines provided under the process documents had to be modified by the Committee Of Creditors (CoC) in order to consider a revised bid submitted by UltraTech which was offering a better return to the creditors.

The NCLAT ultimately privileged value maximization over procedural compliance in the Binani case. It was observed that the process documents could have been amended by the CoC and the resolution professional in the case so as to provide an extension for submission of the final resolution plan or a revised version of an already submitted resolution plan.

This is despite the fact that the revised proposal to be entertained was submitted when the CoC was in advanced stages of negotiations with the highest bidder.

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Generally, a CoC negotiates with the highest bidder in order to tailor the resolution plan in a manner which might be most suitable for all stakeholders involved in the process. Even if it is assumed that the process documents read with the IBC allows the CoC to amend timelines and entertain a revised proposal, the same can be detrimental to the entire process.

If a competing bidder having the benefit of knowing the bid amount of the highest bidder submits a revised bid which has to be compulsorily entertained

by the CoC, we might have a situation where the first bid by all bidders is a bare minimum which will be revised or appreciated as per the highest bid.

Further, we can have a situation where revised bids with a marginal difference are being constantly submitted by rival bidders to become the highest bidder. How does the CoC negotiate with the highest bidder if there are multiple such competing bidders submitting revised bids?

Finding the best offer which allows for maximization of returns for the creditors and the corporate debtor is important, however, there should be some discipline amongst resolution applicants while complying with timelines provided in the process documents. A case in point would be the Essar Case, where all fora unanimously held that the first bids of Numetal and Arcelor Mittal were disqualified under the eligibility criteria. However, both the bidders were allowed to submit revised bids in order to ensure maximization of returns.

Now the promoters of Essar Steel, riding on the same logic, have put in a bid which is substantially higher than all existing bidders and are asking for the same to be considered. If the cardinal rule is to get the highest amount possible then discretionary powers could be used to undo the resolution process which has not been able to provide a better deal than the one being canvassed by the promoters.

A balance has to be struck while trying to ensure that the strict requirements of the process do not overwhelm the larger policy objectives. We already have amendments to the Code which automatically disqualify late submissions beyond the date provided in the process documents.

However, this deemed disqualification is restricted to the first submission of resolution plans and do not provide any method for revised submissions.

The COC will generally allow revised bids to be submitted by the highest bidder post negotiations. However, this should not be a window for entry of all bidders who have participated in the process, simply to maximize returns.

If there is competitive bidding then the same should be provided for in the process documents. If not, then all prospective bidders should be encouraged to provide their best bid which will be evaluated by the COC as per the timelines provided in the process documents. An absence of balance might rob the IBC of its teeth as well as its sanctity.

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