

## Regulatory Hotline

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### LAW APPLIED IN A VACUUM

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The Supreme Court of India recently issued two contrasting rulings involving Article 142, its extraordinary power to deliver "complete justice," both highlighting protracted litigation.

Within the same week, the Supreme Court of India recently issued two significant judgments — one concerning the power of the courts to modify arbitral awards, and the other regarding an approved resolution plan under the Insolvency and Bankruptcy Code (IBC), 2016.

A shared theme in both cases was the issue of protracted litigation. Both rulings also involved Article 142 of the Constitution of India, which grants the Supreme Court an extraordinary power to render complete justice. In the first ruling, a Constitution bench of the Supreme Court, by a 4:1 majority, held that courts do have a limited power to modify arbitral awards under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996.

It determined that an award could be saved by modifying it under Article 142 in specific circumstances. This power, the court explained, could be exercised to prevent prolonged litigation, ultimately saving time and costs for the parties involved. Just two days later, a two-judge Bench of the Supreme Court took a different approach in the second ruling; it rejected a resolution plan that had been approved by the National Company Law Tribunal (NCLT) six years earlier. Here, the court exercised its power under Article 142 not to save the plan, but to put the company concerned into liquidation.

The insolvency case revolved around JSW Steel's resolution plan for acquiring Bhushan Power and Steel (BPSL) under the IBC. The plan, approved by BPSL's committee of creditors (CoC) and the NCLT in 2019, and later affirmed with modifications by the National Company Law Appellate Tribunal in 2020, faced appeals in the Supreme Court. JSW Steel, however, implemented the plan while the appeals were pending, transforming BPSL into a profitable venture. Considering BPSL's successful turnaround and current operational scale, one would have expected the Supreme Court to issue a ruling that safeguarded its going concern status. Instead, it took the opposite approach, ordering its liquidation and putting its future at risk. There is no denying that the Supreme Court's concerns regarding the delayed execution and approval of the resolution plan merit serious consideration.

Several lapses were highlighted, including the resolution professional's failure to meet statutory obligations, like the timely application for the plan's approval, procedural violations of the IBC, the applicant's potential ineligibility to submit the plan, the CoC's failure to exercise its commercial wisdom, and implementation delays. Yet, a strong case could be made in the public interest to avoid ordering BPSL's liquidation. It stems from the procedural posture of the case. In the absence of a stay, BPSL operated as a going concern, attracting numerous stakeholders, from employees to third parties that engaged with it after its revival.

The order overlooks these stakeholders' reliance interests on the now-invalidated plan. Moreover, by dismissing the plan, the Supreme Court's ruling has the effect of returning all parties to their preinsolvency position. This requires unwinding a plan that has been completed for years — a task complicated by the intricacies and reliance interests involved. Furthermore, the Supreme Court in its Essar Steel insolvency judgment enunciated the "clean slate" principle, which aimed to shield successful resolution applicants from past claims. The BPSL verdict effectively resurrects such past claims against BPSL too.

Could a different outcome have been achieved through the Supreme Court's power under Article 142? Perhaps, by applying the "equitable mootness" doctrine used by US bankruptcy courts. This doctrine aims to bring nality to bankruptcy proceedings by mooted an appeal against a lower court's confirmation order if its reversal would adversely affect third parties, who have relied on a reorganisation plan. It also addresses situations where intervening circumstances make it impractical to undo settled transactions.

Both scenarios apply to the BPSL case: unwinding the resolution plan will upset the legitimate expectations of third parties who relied on it, and the time that has elapsed since implementation of the plan makes reversal impractical. Therefore, by combining this doctrine with Article 142, the Supreme Court could have maintained BPSL's operational continuity while still holding the wrongdoers accountable. Such a ruling would have served the cause of justice and acted as a deterrent in future cases.

While the applicability of Article 142 to modify arbitral awards is debatable, as evidenced by the dissent in the arbitration ruling, the majority judgment emphasises the need for this extraordinary constitutional power to be

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exercised with great care and caution, and in consonance with the core principles of the Arbitration and Conciliation Act, 1996. Likewise, using Article 142 in insolvency cases should align with the policy goals of the IBC, the most important of which is to revive a financially distressed entity in a manner that maximises value for all stakeholders while preserving its going concern status. The Supreme Court's order directing liquidation of BPSL, a company successfully revived years ago, contradicts this goal.

In a latest development, the Supreme Court has ordered status quo on the liquidation proceedings of BPSL. This follows JSW Steel's intention to file a review petition. This action offers hope that the court will consider the interests of all stakeholders while ensuring a just outcome.

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