

A CLOSER LOOK AT AVOIDANCE TRANSACTIONS IN CORPORATE INSOLVENCY PROCEEDINGS UNDER THE IBC, 2016

Legal Upanishad Journal (LUJournal.com)

Vol 1 Issue 2 | August 2023 | pp- 3-16

Shivansh Soni, Co-Founder, Yellow Stone Chambers, New Delhi

ABSTRACT

Avoidance Transactions, also known as Vulnerable Transactions, refer to that category of restricted transactions, that a Debtor is barred from entering into, under the provisions of Insolvency laws. The Insolvency and Bankruptcy Code, 2016, which consolidates the present-day insolvency and bankruptcy law in India; incorporates four types of avoidance transactions, i.e., preferential, undervalued, fraudulent, and extortionate transactions (“PUFE Transactions”). Although, till date, all legislations dealing with insolvency law, have in some manner incorporated provisions that include either of the said PUFE transactions, but have dealt with them differently. Thus, in order to understand the evolution of the said transactions under the insolvency jurisprudence of India, and their significance in the present-day code of Insolvency and Bankruptcy Code, 2016; this article would briefly discuss the nature and scope of each of the aforesaid avoidance transactions, and elaborate on the functioning of the key players involved in the entire gamut. In the end, this article would highlight the requirement of having a comprehensive system to deal with the drawbacks/loopholes in the existing mechanism and suggests the possible changes required for better implementation as per the intended scheme and purpose of the IBC, 2016.

Keywords: *Avoidable transaction, Debtor, Extortionate, Fraudulent, Preferential, Undervalued.*

1. INTRODUCTION

The first legislation to deal with the concept of avoidable transactions under the Indian Insolvency regime was the Presidency Towns Insolvency Act of 1909¹ and the Provincial Insolvency Act, 1920². Thereafter, the concept of the avoidable transaction was brought in to deal with the winding up of Companies, and thus Sections 529A to 542 of the Companies Act 1956³ and Sections 326 to 339 of the Companies Act 2013⁴ were introduced. But, with the advent of the Insolvency and Bankruptcy Code, 2016⁵ (IBC, 2016), whereby Sections 43 to 51 and 66 were introduced to deal with the said avoidance transactions, and the aforementioned acts of Presidency Towns Insolvency Act of 1909 and the Provincial Insolvency Act, 1920 stood repealed; whereas, the sections of the Companies Acts, 2013 were to be now to read together with said provisions of the IBC, 2016,

In order to understand, as to what constitutes either of the said avoidance transactions, i.e., Preferential, Undervalued, Fraudulent, and Extortionate, it is crucial to understand the basis/factors, on which any transaction is termed to be an avoidance transaction. Such basis/factors are either provided in the Code or have been ascertained by judicial precedents; which include concepts like ‘relevant time period’ (also known as “look back period/ twilight period”), ‘bonafide transaction/good faith’, ‘ordinary course of business’, ‘financial affairs of the debtor’ and ‘creation of new value’. On the other hand, in order to understand the mechanism i.e., how the legislation has dealt with the said avoidance transaction, it then becomes important to understand the regulatory structure, guidelines/norms, their implementation, and most importantly the powers and responsibilities bestowed upon the key players in the process, i.e., the resolution professional, managerial personnel of the corporate debtors, creditors and the Adjudicating Authority/Courts.

¹ Presidency towns Insolvency Act, 1909, § 55,56 & 57, No. 3, Acts of Parliament, 1909 (India).

² Provincial Insolvency Act, 1920, § 53,54 & 55, No. 5, Acts of Parliament, 1920 (India).

³ Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).

⁴ Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

⁵ Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

Therefore, in order to explain the aforesaid concepts, this article relies upon the approach taken by authorities/courts, along with the opinions of different scholars and committee reports, to highlight the evolution of the concept of avoidable transactions and its significance under the IBC, 2016.

2. EVOLUTION FROM PRESIDENCY TOWNS INSOLVENCY ACT OF 1909 TO INSOLVENCY AND BANKRUPTCY CODE, 2016.

Under the Presidency Towns Insolvency Act, 1909, Sections 55 and 56 dealt with the law relating to avoidance transactions; whereas, under the Provincial Insolvency Act, 1920, Sections 53-55 dealt with avoidance transactions. As per the said acts, avoidance transaction was divided into two categories i.e., Voidable transactions and Void Transactions⁶. Section 55 of the Presidency Act and Section 53 of the Provincial Act, 1920, provided for 'Avoidance of voluntary transfer', i.e., a transfer made by the insolvent within a period of two years after being adjudged insolvent, was rendered to be voidable against the receiver, and the Insolvency Courts exercised jurisdiction to annul the said transaction. Whereas, in case the debtor gave preference to an individual creditor over other creditors and paid money or transferred any property, three months prior to the filing of a petition for insolvency, it was deemed to be a fraudulent preference and rendered void against the receiver, who was the beneficiary of the transaction under Section 56 of the Presidency Act and Section 54 of the Provincial Act, 1920. However, if the parties could prove the said transaction qualified to be a "bona fide transaction"⁷, the transaction would be exempt from the ambit of avoidance transactions.

Thereafter, came the era of law relating to companies, and the Companies Act, 1956⁸ (hereinafter **1956 Act**) was introduced; which was subsequently replaced by the Companies Act, 2013⁹ (hereinafter **2013 Act**). Therefore, a combined analysis of the provisions of the two acts has been done herein. As such, Sections 328 to 331 of the **2013 Act** which corresponds to Sections 531, 531 A, 532, 553 and 536 (2) of the 1956 Act dealt with

⁶ Joharilal Soni v. Smt. Bhanwari Bai, (1977) 4 SCC 59.

⁷ Presidency towns Insolvency Act, 1909, §57, No. 3, Acts of Parliament, 1909 (India); Provincial Insolvency Act, 1920, §55, No. 5, Acts of Parliament, 1920 (India).

⁸ Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).

⁹ Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

transactions that were expected to be avoided by parties undergoing the liquidation/winding-up process.

Section 328 of the 2013 Act, (S. 531 of 1956 Act) provided requisite powers to the court/tribunal to declare transactions relating to preference transactions related to any property or security with the creditor during the 6 months period preceding the winding up application, that would have not only favoured the said creditor but put him in a position better than what he would be in. The said transactions were deemed to be a fraudulent preference and reversed to nullify the effect as if the company had not given that preference. However, bonafide transactions undertaken in good faith were not held to be one of fraudulent preference.¹⁰ Sureties and guarantors, were also covered in the ambit of the provision. Notably, there existed no references to avoidance transactions in cases of voluntary winding up.¹¹

Whereas, Section 329 of the 2013 Act (S. 531-A of the 1956 Act), dealt with transactions not done by the company during its ordinary course, or done with bad faith and/or sold for an apparent less consideration, during the preceding 1-year time period of filing the winding up petition. However, if the transaction made is in good faith and in favour of the creditor, it wouldn't automatically be rendered void ab initio and the Court exercised the power to order otherwise.¹²

Whereas, Section 330 of the 2013 Act (S. 532 of the 1956 Act), provides that if a company assigns or transfers all its properties or assets, "*to trustees for the benefit of all its creditors*", the said transaction shall be rendered void. As such the said transaction was deemed to be a category of a fraudulent preference by putting the creditors in a much beneficial position.

Lastly, Section 331 of the 2013 Act (S. 553 of the 1956 Act), in effect gives protection to the creditor of the Company that is being wound up, in cases where the creditor has been paid in a fraudulent manner to relieve the responsibility of the surety or guarantor. Section 331 thus ensures that the creditor who is bound to return the money paid to it through fraudulent practice, can seek the payment of the said amount from the surety or guarantor of the company by applying in court.

¹⁰ Morepen Finance Ltd v RBI, (2004) SCC OnLine Del 685.

¹¹ GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE (Taxmann 2022)

¹² Pankaj Mehra v State of Maharashtra, (2000) 2 SCC 756.

Notably, the stark difference that exists between the provisions under the Companies Act 2013 and the IBC, 2016, is the “question of intent” on the part of the corporate debtor, which does not form part of consideration under the IBC, 2016 in ascertaining if the transaction falls within the ambit of preferential transaction. It is merely upon the existence of requisite ingredients as provided under the provisions, the transaction is deemed to be an avoidable transaction under Section 43 of IBC 2016.¹³

3. AVOIDANCE TRANSACTION UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, AND ITS SIGNIFICANCE.

Avoidance Transactions can be divided into four types of transactions under the IBC, 2016¹⁴:

- Preferential transactions, as defined under section 43 IBC, 2016;
- Undervalued transactions, as defined under section 45 IBC, 2016;
- Fraudulent transactions, as defined under section 49 IBC, 2016; and
- Extortionate transactions, as defined under section 50 IBC, 2016.

3.1 NATURE AND SCOPE OF AVOIDANCE TRANSACTIONS

3.1.1 Preferential transactions

Section 43 of the IBC, 2016 deals with Preferential transactions and relates to transactions executed by the corporate debtor during the ‘relevant period/ before the initiation of CIRP/ liquidation proceedings.

As suggested by the term ‘preferential’ the provisions intended to curb any of such transaction, that can provide undue benefit to a creditor/surety/guarantor (together referred to as ‘creditor’) towards any liability be it antecedent or operational, which can, in effect put the

¹³ Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and others, (2020) 8 SCC 401.

¹⁴ Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

said creditor(s) in a 'better position' which they otherwise would not enjoy under the 'water fall mechanism', as provided under Section 53 of the IBC, 2016.¹⁵

Whereas terms like 'transaction', 'transfer' and 'transfer of property', which are already defined under Section 3 sub-section 33, 34 and 35 of the IBC,2016, respectively, provide the scope of all such transactions that can be included in the purview of avoidable transactions.

As mentioned above, it is crucial that the said transaction(s) were undertaken by the corporate debtor during the 'relevant time period' or 'look back period' to be adjudged as a preferential transaction. Thus, Section 43 provides for two different timelines, i.e., for related parties¹⁶ transactions, for which the time period of 2 years before the commencement of CIRP is prescribed, whereas, for all other parties, the said period is limited to 1 year before the commencement of resolution process. Pertinently, the look-back/relevant period has a correlation with the CIRP commencement date, and it is not counted from the liquidation commencement date. Lastly, the onus to prove that a transaction is not a preferential transaction lies on the person to whom the transfer has been made. Although, the legislation has not provided any definite reason for granting a larger time period for related parties, however considering the fact that "*related parties usually have superior information of the corporate debtor's financial affair and may collude with the corporate debtor to siphon off assets with the knowledge that the corporate debtor may become insolvent in the near future*"¹⁷ justifies for creating such distinction.

However, when the transaction is found to have been done in the 'ordinary course of businesses' or is related to 'financial affairs of the corporate debtor', or the transfer 'creates/secures a new value', and/or the transfer was registered with the information utility, such transactions have been exempted under Section 43(3) of the IBC,2016. The provision also provides a safeguard to any such person(s) who had purchased the property in good faith or 'bonafide transferee' which is based on the commercial doctrine of good faith. The said exceptions shall be further discussed in detail in the second part of the article.

Upon being satisfied that all the ingredients of terming a transaction as a preferential transaction are met, and the transaction does not fall under any exception, the resolution

¹⁵ Insolvency and Bankruptcy Code, 2016, §53, No. 31, Acts of Parliament, 2016 (India).

¹⁶ Insolvency and Bankruptcy Code, 2016, §5(24), No. 31, Acts of Parliament, 2016 (India).

¹⁷ *Insolvency and Bankruptcy Code Bill, 2015*, PRS INDIA (July 19, 2023, 6:00 PM), https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf

professional/liquidator is required to file an application notifying the preferential transaction under Section 44 of the IBC, 2016, for the Adjudicating Authority to rule on avoidance of such preferential transaction.

3.1.2 Undervalued transaction

As per Section 45 read with Section 46 of the IBC, 2016, if the resolution professional/liquidator is of the opinion that the corporate debtor, has entered into transactions, during the 'relevant time', the RP can file an application before the Adjudicating authority to render the said sale as a 'void transaction' and reverse its effect.

If upon assessing the books of accounts, any transaction in terms of a gift or sale of an asset by the corporate debtor for a value that is 'significantly' less than what was paid by the corporate debtor himself, the said transaction is deemed to be undervalued in terms of the provision, unless done during the 'ordinary course of businesses'.

Whereas, the 'relevant time' for ascertaining undervalued transactions, is similar to that of preferential transactions, i.e., 2 years in case of related parties¹⁸, and 1 year for all other parties, is to be counted from the date of commencement of CIRP.

The objective of the provision is *"to prevent the siphoning away of corporate assets by the management of the corporate debtor, which has knowledge of the corporate debtor's poor financial condition and may enter into such transactions in the vicinity of insolvency."*¹⁹

3.1.3 Transaction defrauding creditors

Section 49 of IBC 2016, is an extended part of Section 45 of the IBC, 2016, as it deals with undervalued transactions deliberately executed by the corporate debtor, with the intention of denying its creditors or any other person, who can make a claim against the said transfer of property or assets, and thereby adversely affecting their claims.

The provision empowers the Adjudicating authority to pass such orders, that may nullify the impugned transaction and restore the earlier position, in order to protect the interest of the affected parties. However, if the third parties are able to prove that the transactions were undertaken in good faith, for value and that such a party was not aware of the relevant circumstances, he shall be exempted from the purview of this section.

¹⁸ Insolvency and Bankruptcy Code, 2016, §5(24), No. 31, Acts of Parliament, 2016 (India).

¹⁹ *Insolvency and Bankruptcy Code Bill, 2015*, PRS INDIA (July 19, 2023, 6:00 PM), https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf

On the other hand, if the directors or partners of the concerned debtor can prove their due diligence to avoid or reduce the loss to the corporate debtor's creditors; or that they were unaware of the corporate debtor's anticipated insolvency proceedings, they too can be exempted from the ambit of the IBC, 2016.

3.1.4 Extortionate credit transactions

Section 50 of the IBC, 2016, which deals with Extortionate credit transactions, has been included in the Code, to specifically deal with exorbitant payments that can be made by corporate debtors to its lenders on account of loans/credit arrangements. The ambit of the provision extends to all such transactions, done by the Corporate debtor.

The RP/liquidator, under this provision, is required to examine if the corporate debtor has, during a period of 2 years before the commencement of CIRP, entered into any credit facility wherein he has either paid an exorbitantly high-interest rate or the terms of the agreement was prima facie unfair to the corporate debtor. Once the RP/ liquidator, has either come across such a transaction or is being informed about the same, he is under an obligation to apply to the court for setting aside or modification of the said transaction.

The burden, unlike other avoidable transactions, is on the creditor to prove that the transaction was not extortionate or unfair. However, in order to get the transaction reversed, the duty lies to the liquidator/resolution professional to demonstrate that the transaction was unfair and extortionate.

Although, if such a debt is being financed by any financial service provided, which is regulated by law, the said transaction shall be included within the purview of Section 50 of the IBC, 2016.

Notably, and unlike all other avoidable transactions, the relevant period prescribed for avoiding extortionate credit transactions is fixed at two years, and no difference has been created in terms of parties i.e., related or otherwise.

Interestingly, under this provision, the RP/liquidator is also granted the liberty to seek the assistance of the employees of the corporate debtor, to point out such transactions wherein the debtor company was forced to enter such transactions.²⁰

²⁰ 1 ADITYA SHIRALKAR, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (Thomson Reuters 2021)

3.2 EXCEPTIONS, MANDATES AND DUTIES UNDER THE IBC, 2016 QUA AVOIDANCE TRANSACTIONS.

3.2.1 Exceptions to avoidable transactions not defined under the Act.

As observed during the aforesaid discussion, all the transactions provide for certain exceptions, which if proved, do not render the transaction to be an avoidable transaction. However, certain exceptions not defined in the Code, are subjected to a variety of interpretations, thereby giving undue benefits to the wrongdoer. The said exceptions are thus discussed in detail hereinunder:

A. Ordinary course of business.

As the language states, ‘ordinary course of business’ includes any transaction that forms part of routine transactions done by the corporate debtor, even during the ‘relevant period’, “*which are either continued, or contemplated to be continued with a profit motive*”²¹, like deduction effected by bank from corporate debtor current account²² or transaction of sale of flats/properties by real estate developer to non-related party²³. However, if in a case wherein the corporate debtor even while making loan payment had preferred one party (specially a related party) and failed to pay the other creditor during the ordinary course, it attracts the provision of Section 43 of IBC, 2016²⁴.

B. Creation of new value by the security interest.

Under this concept, any transaction undertaken by the Corporate Debtor end result of which is a gain of ‘something new’ or ‘of value’, like the purchase of stock, goods or a charge created on the company’s asset to procure a loan and using the same to acquire a new property; would be an example of ‘creation of new value’.

Thus, in order to claim an exemption under this head, it is essential that upon a *prima facie* view of the transaction, it appears that the transaction resulted in ‘value enhancement’ or

²¹ State of Andhra Pradesh v. Abdul Bakshi & Bros, (1964) STC 644.

²² ICICI v. Shailendra Ajmera, (2019) Company Appeal (AT) (Insolvency) 370.

²³ Anup Kumar, Resolution Professional of M/s Shivkala Developers Pvt. Ltd. v. BDR Builder & Developers Pvt. Ltd. & Ors. (2018) Company Appeal (AT) (Insolvency), 679.

²⁴ Tirumala Balaji Alloys v. Sumit Binani, (2019) SCC OnLine NCLAT 1459.

‘strengthening’ of the corporate debtor’s book/business²⁵. Such transaction would then deem to be an exception and not be treated as preferential or any other avoidable transaction.

C. Good faith/bonafide transfer

The defence of good faith/bonafide transfer is applicable to an individual, who acquires a property (subject to CIRP/liquidation proceeding) in ‘good faith’ and ‘for a considerable value’, from a third party, other than the corporate debtor.

However, in case it is satisfactorily proved that the purchaser was a ‘related party’²⁶ and/or had ‘sufficient information’ of the initiation/commencement of the CIRP proceedings of the corporate debtor, then the defence of good faith/bonafide transfer cannot be permitted.

3.2.2 MANDATES AND DUTIES

A. THE RESOLUTION PROFESSIONAL / LIQUIDATOR

The Resolution Professional (RP) has access to all of the corporate debtor's books, records, and papers and is thus in charge of conducting the company's operations. He also works as a representative and agent of the debtor. As such, the RP is been granted the most crucial role to not only handle the affairs of the corporate debtor but also examine if the corporate debtor's business was conducted for some unlawful purpose or with the intent to deceive the creditors; after which, he is responsible for apprising the adjudicating authority of the said misdeeds, by filing an application under Sections 25 2 (j), 43,45 and 50 of the IBC, 2016. In fact, the finding of any avoidable transaction or any such exceptions that may apply to the transaction, is based on the factual inquiry of the Resolution Professional, thus granting enormous discretion to the RP to report such transactions to the Adjudicating authority.

Regulation 35A of CIRP Regulation 2016²⁷ requires the RP to have when opinion regarding the undertaking of any avoidance transaction on or before the 75th day from the date of commencement of the CIRP. Whereas, if the RP is of the opinion that any ‘avoidance transaction’ has been undertaken, then the RP is required to make a determination on or before the 115th day of the CIRP and be confirmed in form H annexed to CIRP regulations. However, the High Court of Delhi, by its recent judgment of Tata Steel BSL Limited v.

²⁵ KRISTIN VAN ZWIETEN, GOODE ON PRINCIPLES OF CORPORATE INSOLVENCY (Sweet and Maxwell 2018)

²⁶ Insolvency and Bankruptcy Code, 2016, §5(24), No. 31, Acts of Parliament, 2016 (India).

²⁷ IBBI (Insolvency resolution process for corporate persons) Regulations, 2016.

Venus Recruiter²⁸, clarified that the said timelines are to be directory in nature, and concluded that adjudication of avoidance application can continue even after the resolution process ends.

Notably, the RP cannot himself conduct the audit and is thus supposed to appoint independent professionals to conduct the same²⁹. Moreover, there being no consent required by the CoC to conduct a ‘transaction audit’, the process cannot be denied.

The liquidator, on the other hand, is also responsible for conducting an investigation into the corporate debtor’s matters in order to identify devalued or preferential transactions, and if he reasonably believes fraud by the corporate debtor or its employees, he is also under an obligation to file an application holding such individuals accountable³⁰. Thus, even in case the RP is of the opinion that no avoidance transaction had taken place, the Code provides the liquidator with ample power to file additional applications for avoidance, which in his opinion, the RP failed to disclose.

B. THE ADJUDICATING AUTHORITY

Section 44 of the Code, empowers the tribunal to pass such corrective orders to nullify the effect of preferential transactions by directing the transferred property or its proceeds to be vested back to the Corporate Debtor or be given to the RP/Liquidator. The authority may also, under this provision, direct the guarantor who during the relevant period would’ve disposed of its property to be liable to pay off the debt.

Whereas, in respect of undervalued and fraudulent transactions, the Authority may not only avail the services of experts to ascertain undervalued transactions, but can also declare the entire transaction to be null and void, and accordingly nullify the same by restoring the same. Similar action of restoring of prior position by setting aside any extortionate transaction, whether in whole or in part, can be done by the Authority under Section 51 of IBC, 2016.

Further, under Section 48 of IBC 2016, the Authority enjoys powers to initiate proceedings against the RP/liquidator on disciplinary grounds for intentionally not reporting any avoidable transaction; whereas under Section 49 of the IBC 2016, enjoys the power to direct investigation of any transaction by the police authorities.

²⁸ Tata Steel BSL Limited v. M/s Venus Recruiters Pvt Ltd. 2023 SCC OnLine Del 155

²⁹ Manish Aggarwal, Timely identification and reversal of avoidance transactions, KPMG (July 19, 2023, 4:45 PM), <https://kpmg.com/in/en/home/media/press-releases/2021/08/timely-identification-and-reversal-of-avoidance-transactions.html>

³⁰ Insolvency and Bankruptcy Code, 2016, §35, No. 31, Acts of Parliament, 2016 (India).

However, none of the aforesaid actions can be taken by the Authority 'on its own accord, as held in the recent judgment of NCLAT in Sahara India v. Shri Nandkishor Vishnupant Deshpande and Anr³¹, to observe that “NCLT does not have the power to suo-moto classify a transaction as a preferential transaction under the provisions of the Insolvency and Bankruptcy Code, 2016”

C. CREDITORS AND OTHER PARTIES

Section 47 of the Code which was incorporated to supplement Section 45 and to keep a check on the functioning of the liquidator and the resolution professional; provides a remedy to the creditor or any party to approach the authority against the RP, who despite having sufficient knowledge and opportunity to report an undervalued transaction, fails to report it to the adjudicating authority.

4. DRAWBACKS/LOOPHOLES IN THE PRESENT MECHANISM

It may seem like the judgment of Tata Steel v Venus Recruiters Private Limited³² had indeed provided clarity qua timeline for adjudication of avoidance application vis a vis CIRP process, but the fact that there exists nothing to prescribe a definite time for disposing of the said avoidance applications, may in itself become one of the biggest issues moving ahead. Keeping in mind the scheme of the Code, and the mandatory timelines prescribed for completion of the CIRP, situations related to pendency of avoidance application may become the new issue at hand.

Further, as observed in the judgment of Anuj Jain³³, terms like 'ordinary course of business' and 'financial affairs', as provided under Section 43, have been subject to contrary interpretation by the courts and authors respectively, and therefore require regular intervention by the court. Though considering that fact no such amendment to define the said concepts has been proposed till date, the scope of misuse of the exceptions is definitely available.

³¹ Sahara India v. Sh Nandkishor Vishnupant Deshpande and Anr [2021] S.C.C. OnLine NCLAT 875.

³² Tata Steel BSL Limited v. M/s Venus Recruiters Pvt Ltd. 2023 SCC OnLine Del 155

³³ Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and others, [2020] 8 S.C.C. 401

Further considering the fact that there are in some instances considerable delays in admitting the application under Section 7,9 or 10 of the IBC, 2016, it might lead to an ineffective “relevant period” which is counted from the date of commencement of the CIRP.

5. POSSIBLE SOLUTIONS

Firstly, as suggested by the Report of the Insolvency Law Committee, the entire issue raised in the Venus judgment requires a legislative amendment that makes the proceedings dealing with avoidance transactions to be independent of the CIRP process, which would grant more flexibility to deal with such transactions, and not make them subject to the stringent timelines of the process.³⁴ The Report also provided a much-needed solution to the issue concerning the timeline for the “relevant period”, and suggested that the “threshold date for the look-back period for avoidable transactions under the Code must be the date of the filing of the application for initiation of the CIRP i.e. the initiation date. Further, transactions from the initiation date until the insolvency commencement date should also be included in the look-back period”³⁵

It is also crucial that the Resolution Professional while examining the transactions and counting the relevant period, follows a more purposive/practical manner, rather than by following a more literal approach. As such, following the literal approach can not only affect the scrutinization process but also end up including the transactions in the exceptions category. Thereby, frustrating the entire scheme and object of the IBC, 2016. Lastly, but most importantly, the requirement of an exhaustive definition and robust guidelines to deal with the exceptions which are not defined under the Code.

6. CONCLUSION

A mere glance at the provisions of all the aforementioned acts would suggest that the definition and manner to deal with avoidance transactions have more or less remained the same, except the transactions being more classified and detailed with the subsequent acts. However, with time, it was understood by the legislature that a more robust framework for identifying the said avoidance transactions was required, along with requisite powers and checks on all the interested parties, to ensure that no such avoidable transaction goes away

³⁴ *Report of the Insolvency Committee*, MINISTRY OF CORPORATE AFFAIRS (20 July 2023, 5:30 PM), <https://ibbi.gov.in/uploads/whatsnew/7c9bde175431a4abb8c33bb105e1f2dd.pdf>

³⁵ Id

from the radar of the Adjudicating authority. Although, there still exist various challenges that still need to be addressed by the legislation, it cannot be ignored that both the legislators and the judiciary have been proactive to ensure that the mechanism provided keeps developing to protect the interest of the creditors and the public in general.

LEGAL UPANISHAD JOURNAL