

Insolvency and Bankruptcy Law in India

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Week 06

Lecture 27

Welcome to all.

As part of the course on insolvency and bankruptcy law in India, we will discuss the concept of persons ineligible to act as resolution applicants today. Even in the previous class, we discussed the persons who are ineligible to act as resolution applicants. Continuing with that, today we will also discuss the individuals who are currently ineligible to act as resolution applicants.

In this class today, we will discuss each class, along with the corresponding judgments. Therefore, we must read these two classes together. So that means Section 29A, which we have discussed in both the previous and this class. So you have to go through these two lessons together. So Section 29A, as we have already discussed in the previous classes, deals with persons who are not eligible to be Resolution Applicants. Now, let us discuss judicial precedence. Section 29A includes a person acting in concert jointly or in concert with such a person. So then, what is the meaning of a person acting jointly or in concert? In the case of *Arcelor Mittal India Pvt. Ltd v. Satish Kumar Gupta*, the Supreme Court held that the term, because of Section 29A, they have used the words “acting jointly” and “acting in concert.” These terms expand the scope of Section 29A because Section 29A does not apply only to one person. Section 29A includes a person, persons acting jointly, and persons in concert. So, from where do we have to refer to the meaning of “person acting jointly” and “person acting in concert”?

In the case of *Arcelor Mittal India Private Limited versus Satish Kumar Gupta*, the Supreme Court held that. Therefore, you can refer to the definitions or meanings provided under the SEBI SAST regulations. It is also known as the takeover code. Under the takeover code, we have a broad definition for a person acting jointly and in concert. When interpreting “acting jointly” and “acting in concert” under the IBC code, you may refer to the takeover code. In another case, *Rajdeep Clothing and Advisory Private Limited versus Brijesh Kumar, Mishra RP of Krishna Knitwear Technologies Limited*, the NCLT Ahmedabad bench held that the object of Section 29A is to bar the CD from falling into the hands of a person responsible for the indebtedness and mismanagement of such CD. So, what is the basic objective of Section 29A? So, in this judgment, it was held

that under Section 29A, certain categories of people are considered to be ineligible. Who are all these categories? These individuals are actually part of the management team at CD. They were already in management at the company, and they are the ones responsible for this indebtedness. That's why the basic object of this section is that the person who is actually responsible for the indebtedness or mismanagement in the corporate debtor, once the CRP process is started, cannot again file an application or file a resolution plan to acquire the company at a cheaper price, whereby haircuts can be more; thus, this IBC code cannot be used to get the company at a cheaper price. So that is the basic objective of this section. In this judgment, it was held that Section 29A clearly imposes a bar on persons who are actually responsible for the mismanagement and indebtedness of the corporate debtor, thereby serving the basic purpose of Section 29A. That's why they are including a person acting jointly or in concert, okay? That is the basic purpose of including not only the person acting jointly, as you understand.

Then, let us discuss further section 29A, subsection clause A. A prospective resolution applicant is an individual who is an undischarged insolvent. So in the previous class, we discussed the section. Now we are discussing the interpretation. One category of persons who are not eligible to be resolution applicants is those who are undischarged insolvents. What is the meaning of "undischarged insolvent"? In the case of *Thampanoor Ravi versus Charupara Ravi*, the Supreme Court held that the term undischarged insolvent must be interpreted in terms of the Provincial Insolvency Act, 1920. We have various legislations dealing with insolvency in relation to individuals in India. Similar to the Presidency Town Insolvency Act and the Provincial Towns Insolvency Act, there is a definition of an undischarged insolvent under both acts. What is the meaning of "undischarged insolvent"? If any person files an application and petitions for a declaration of insolvency, the petition will be admitted by the DRT. Subsequently, a liquidator will be appointed, and a receiver will be appointed in the case of an individual. The receiver will then sell all the assets of the person and settle the debts. Even after paying the money, if the amount is insufficient, it means his debts are not entirely clear; therefore, such a person is considered to be an undischarged insolvent. Subsequently, there is a possibility that he may clear the debts and obtain the status of discharged insolvent.

There is a basic concept of an undischarged insolvent. Until you clear the entire debt, you are considered an undischarged insolvent. That is the meaning you have to take when interpreting section 29A. If any person is undischarged insolvent, he cannot be a resolution applicant. In another case, *Gulshan Kumar, proprietor of Gulshan Trading Company, versus Bandari Deepak Industries Pvt. Ltd.*, the NCLT, Chandigarh Bench held that a company, even if it is an MSME, cannot, by itself, apply to act as a scheme proponent while it is undergoing liquidation. So, suppose there is a company, there are certain exceptions to the MSME, but still, even with these exceptions, if a company is

undergoing liquidation, it is considered to be an undischarged insolvent because the insolvency process is ongoing; it is not yet settled. That is why, if any company is undergoing the process of liquidation, it is not eligible to be a resolution applicant in such cases.

In another case law, JR Agro Industries Pvt. Ltd. versus RP Swadisth Oil Pvt. Ltd., the National Company Law Appellate Tribunal (NCLAT) held that a company that is an associate of a corporate debtor would also be considered a related party. Suppose a company is already undergoing the process of insolvency. If there is an associate company related to this company, it is also considered a related party. That is why this associate company cannot be a resolution applicant; that is the definition of an associate company.

The next category of individuals who are not eligible is Section 29A, Clause B. A Prospective Resolution Applicant is a Willful Defaulter. So, here, what is the meaning of a willful defaulter? A willful defaulter refers to any person who is unwilling to pay their debts. The RBI has specific criteria for declaring a person a willful defaulter. If any person is declared a willful defaulter, then in such cases, that person is not eligible to be a resolution applicant. Interestingly, in the case of Har Kirat Singh Bedi versus the Oriental Bank of Commerce, the NCLAT held that if a person is declared a willful defaulter, they can approach the court of law under the relevant legislation. Perhaps he can appeal to the High Court or the Supreme Court when a writ petition is pending before a court of law. So, during the pendency, will he be considered a willful defaulter or not? The question is whether, when there is pendency, he will be considered a willful defaulter or not. In this case, the NCLAT court held that a mere declaration as a willful defaulter would be sufficient. So, even though there is a pendency, it cannot be determined whether such a person is a defaulter or not until the petition is disposed of or decided. But here, we are not here to decide whether such a person is a willful defaulter or not. Therefore, if any person is declared a willful defaulter, a subsequent question can be raised before the court of law. Merely because someone is declared to be a willful defaulter, that person is not eligible to be a resolution applicant under this clause.

In another case, Sri Chamundi Mopeds Limited v. Church of South India Trust Association, the Supreme Court held that mere stray proceedings do not discharge or undo disqualification. As we have already discussed, if the RBI declares someone a willful defaulter, that itself is sufficient. Proceedings may be pending, or the willful proceedings may be stayed by the court of law. However, it will not discharge or undo the disqualification under clause B of Section 29A. Then another category is non-performing assets. Any person who has a non-performing asset (NPA) is not eligible to be a resolution applicant. So, under this clause, we have three categories. So, who is not eligible in the first category at the time of submitting the resolution plan has an account

with an NPA. If any person is mentioned, they are referring to the individual; if there is any person with such an NPA at the time of submitting the resolution plan.

Then what is required is that at least a period of one year has lapsed, so that means NPA is declared? One year from the last one, this is the NPA; at least a period of one year has elapsed from the date of such classification to the date of commencement of the corporate insolvency resolution process of the corporate debtor. So that means, as an individual, if I want to file an application for a resolution plan. Alternatively, if I want to submit the plan when I am not eligible, as I was already one year ago, and an NPA has already been set, it is still continuing, please remember. One year ago, the NPA was in place and continues to be so; its status remains unchanged when I file an application or a resolution plan. As of the date of submission of the resolution plan, if I have any NPA as an individual, I am not eligible; or, in the second category, if I am associated with an account of a corporate debtor under my management or control that is classified as NPA. I have a company that has one NPA, and this NPA has been in place for the last year. As of the date of submission of the resolution plan, if this NPA exists and the company has an NPA, and I, as an individual, have control over the company, So here, NPA belongs to the company in the first category, and NPA belongs to the person in the second category. So, someone has control over the management of such a company. Then this person, whoever has control, is also not eligible. And the third category of such persons is a promoter. Suppose a company has an NPA that has been present for the last year. If a person is a promoter of this company, they are also not eligible to be a resolution applicant. There are three categories: individual, which refers to any person who has some NPA themselves.

For these three categories, a common condition is that the NPA must have been in existence for the past year, and at the time of submitting the resolution plan or during the CRP process, the NPA must still be in existence. So, the first category is the person who has NPA themselves. The second category is the corporate debtor where NPA exists, and any person who has control over the management of such corporate person. The third category includes any person who is a promoter of the corporate debtor, that is, the corporate entity. In these three categories, the person is not eligible to file or submit a resolution plan.

Let us discuss this in detail. In the Arcelor Mittal case law, the Supreme Court discussed the concept of management and control in detail. Why? Because if you observe the clause, it is stated that any person who has control over the management of the applicant is not eligible to be a resolution applicant. That's why they have discussed in detail what the meaning of control and management is. Here, the concept of control encompasses both de jure control and de facto control. Control includes only positive control; it is not a negative control. What is the meaning of a negative control? Suppose someone is able to

stop a special resolution; imagine someone has 26 percent of the votes. Whenever you want to pass a special resolution, you need to have 75% of the votes. If someone has 26%, they will obviously be in a position to stop the special resolution. Does it mean he has control? No. It is a negative control. Why? Because he cannot make the decision, he can still stop it. So if any person has negative control, such control is not considered here. So control means only positive control. That means that if any person is able to make the decision, then only they are considered to have control over the corporate entity. So that is what we are supposed to consider when defining the term 'control'.

In another case law, Brijendra Kumar Mishra, RP of Lakeland Chemicals India Limited, versus BK Mishra, RP of Lakeland Chemicals India Limited, the NCLT Mumbai bench held that the disqualification should be considered at the time of submission of the resolution plan. Therefore, when we discuss disqualification, it must be present at the time of submitting the resolution plan. So, if the disqualification was previously in place, then we do not consider it. This disqualification must be present at that time. Therefore, what is important is that, at the time of submitting the resolution plan, the disqualification must be in place.

In another case, Panch Tatva Promoters Private Limited versus GPT Steel Industries Limited, the NCLAT held that the resolution applicant shall be allowed by the COC to make payment of the overdue amount, provided that this shall not exceed 30 days. This extension should be considered when calculating the CRP period under Section 12. Now, let us discuss this concept in detail. Therefore, if you observe Section 30, subsection 4, and Provisional 2 of Section 30, it provides that if any resolution applicant is disqualified under Section 29A. There is a concept or provision that allows COC to permit such a person to pay the amount. This is because when dues are present and overdues exist, only then is such a person ineligible to submit a resolution plan. Then, COC may allow him; first, you pay the amount, and then you can come back subsequently. Therefore, under Section 30, this provision exists. Now, the COC allows someone to pay the money. So, when he makes the payment, he must pay the total overdue amount, along with the interest. However, please note that COC can grant up to 30 days to repay the money. Additionally, one more thing to consider is that, under Section 12, there are time limitations, as we have already discussed in previous classes: 180, 270, and 330 days, with various other time limitations in place. Under Section 30, the COC has the power to extend the time limitation or grant additional time to any resolution applicant, not exceeding 30 days. But please remember that these 30 days must be included. Therefore, these 30 days must be included while calculating the total number of days. Thus, in no case can the total number of days exceed three 30-day periods. This point you have to consider.

There is one provision where, if a resolution applicant is not eligible due to overdue amounts, the COC may grant time for the applicant to pay the money and subsequently

return. However, for this process, the COC cannot extend the time beyond 30 days. The next clause is that a person convicted of an offense is not eligible to be a resolution applicant. So, in the case of Renaissance Steel India Private Limited versus Electrosteels India Limited. In this case, the NCLAT held that. So certain conditions were laid down. There shall be conviction. To apply this clause, Clause D, the following conditions must be satisfied: there must be a conviction, and the conviction must be for an offense punishable by imprisonment. So if conviction is not punishable by imprisonment, then this clause is not attracted. Then the sentence of imprisonment shall be for two years or more. Therefore, if these conditions are met, they are the three conditions. So first, there shall be conviction, and conviction shall be for an offense that is punishable by imprisonment. Therefore, imprisonment must be imposed, and such imprisonment shall be for a term exceeding two years.

Then, if these three conditions are met, such a person is not eligible to be a resolution applicant under clause D. Then, under Clause E, disqualified from acting as a director under the Companies Act. So Section 264 provides for the disqualification of directors. There are also interesting case laws, such as Yashodara Shroff versus Union of India, decided by the Karnataka High Court, and G. Vasudevan versus Union of India. Although the time will not be sufficient to discuss these cases in detail, let us briefly examine them. Under Section 164, which provides that if any company fails to file its financial statements for a continuous period of two or more years, then every director of such a company is not eligible to act as a director in any other company.

This was previously questioned before the court of law on the grounds of Articles 14, 19, and 21 of the Constitution of India. The constitutional validity of such provisions has been questioned. Why? If any company is in default, the section states that all the directors are not eligible to act as directors in any other company. Additionally, in all other companies, they are supposed to vacate their offices. They are supposed to vacate the office except in cases where there is a default. That means, if Mr. X is the director of A company, and a default design filing is required for the financial statements, then Mr. X must vacate the office from all other companies, except for X company and A company. Because someone should be there who is responsible for compliance. Therefore, that is why, except for this A company, there is a default. In all other companies, he is supposed to vacate the office of directorship. This was questioned before the court of law, and the court held that this is constitutionally valid.

Anyway, come back to our discussion. So, if any person is disqualified from acting as a director under the Companies Act, then such person cannot be a resolution applicant under section 29A. The next class, clause F, 29A, is prohibited by SEBI from trading in securities or accessing the securities market. In the case of Arcelor Mittal, the Supreme Court held that if any person is prohibited by SEBI, it is straightforward. If any person is prohibited by SEBI, then they are not eligible to submit the resolution plan. Therefore, it

is possible that someone is prohibited by SEBI due to a violation of insider trading regulations, the takeover code, or the LODR regulations. There are numerous regulations that have been passed by SEBI. If any person violates those regulations, under certain sections, SEBI has the power to prohibit such a person from accessing the market. Therefore, if any person is prohibited from accessing the market under the SEBI Act or regulations made thereunder, such a person is not eligible to be a resolution applicant in such cases.

The next clause, Clause G, pertains to a person involved in a transaction that has been avoided under the tenets of the IBC. Therefore, if a person has been a promoter, in management, or in control of a CD that involves preferential transactions, we have already discussed PUEF. So, if there are any preferential transactions, undervalued transactions, extraordinary credit transactions, or fraudulent transactions. Then, if any person is in the management of such a corporate debtor, that person cannot be a resolution applicant. And in respect of which an order has been passed. An order has already been passed by the NCLT tribunal that such a person is ineligible to present the resolution plan. Therefore, if there are any PUEF transactions, all promoters of the corporate debtor will not be eligible to act as resolution applicants.

Then another class of guarantor to the corporate debtor. Therefore, if any guarantor is present for the corporate debtor, they are liable under the CRP process. So that's why the guarantor of a corporate debtor is not eligible to file an application for a resolution plan. Clause I, subject to any disability corresponding to clauses A to H under any law, is applicable in any jurisdiction outside India. Therefore, in your jurisdiction outside India, they may not have the same provisions; however, if they have corresponding provisions, similar provisions are likely to be in place. If someone has a disability outside India, that is, any foreign national, then such a person is not eligible to be a resolution applicant.

The next class has connected persons. Therefore, if any person is connected to the above categories we have already discussed, such a person is not eligible to be a resolution applicant. So now let us discuss the role of the resolution professional. What is he expected to do during this process? Please note that RP has the authority to determine who is not eligible. No, RP does not have the power to decide. The role of the RP, which is the resolution professional, is only advisory.

He is a facilitator. We don't have the power to decide, nor does he have the power to decide whether someone is disqualified. So, he has to prepare a note. As we have already discussed in previous classes, the resolution professional, upon receiving the resolution application or resolution plans, is supposed to conduct due diligence. During the due diligence process, he is required to verify all these details and present them to the COC. In the Arcelor Mittal case law, the Supreme Court held that Section 30, Subsection 2, Clause E does not empower the RP to decide who is supposed to determine whether

someone is disqualified or not. It is the COC who is supposed to decide whether a Resolution Applicant is disqualified or not. So, in another case law, Everest Organics Limited versus Leesa Lifesciences Private Limited, the NCLAT held that the RP cannot reject on the grounds of ineligibility. So RP is supposed to point it out. While conducting due diligence, he is supposed to note that the person in question is not eligible, and he must present this information to the COC, as we have already discussed. Therefore, it is the responsibility of the resolution professional to present all the resolution plans to the COC. So, he is supposed to just highlight it. So, whether someone is eligible or not. Therefore, COC must make the decision.

Please note that once the COC makes a decision, it will be final. No, it is not final. Okay, in the case of Raghavan Srinivas versus RS Doddabyregowda, RP of Southern Batteries Private Limited, the NCLT Bengaluru bench held that the decision of the COC on ineligibility is not final. Any person who agrees with the decision taken by the COC can go to the court of law. That is always amenable to judicial review. Even the COC decision is not final. In another case law, Bank of India versus Agnipa Energo Private Limited, the NCLT Guwahati bench held that various COCs disqualified a prospective resolution applicant based on a misconception. There is a misconception about the facts. In such cases, a fresh invitation for expression of interest may be directed. So, there is a possibility. So, based on the expression of interest, the COC found that someone was not eligible.

However, the facts are that some defects do exist. There is a misconception. In such cases, there is a possibility that the resolution professional may invite expressions of interest again, allowing for a public announcement; once again, it could be an expression of interest from the director. Then, in another case law, Navneet Jain versus Manoj Sehgal, the NCLAT held that the decision of the COC can be challenged after the decision of the COC has been made under Section 30. So, when can you challenge the decision? So RP is going to propose, and subsequently COC is going to decide. So you cannot challenge before that. Therefore, even if you know that someone is not eligible, they cannot challenge this unless and until the COC officially declares that the person is ineligible.

Let us now discuss the applicability of Section 29A to schemes in liquidation and auctions conducted during the liquidation process. If any company is undergoing liquidation, and Section 29A is applicable in that scenario, there is a question mark. In the case of Arun Kumar Jagatramka, the Supreme Court held that Section 29A also applies to proceedings in liquidation. So, even when the liquidation proceedings are going on, Section 29A will also be applicable. Because if you observe Section 35, subsection 1, clause f, which mandates that the liquidator shall not sell immovable property or movable property, when the liquidator is appointed, he is going to realize the assets of the company. Therefore, when selling immovable or movable property, such as through an

auction sale, the liquidator is not supposed to sell it to a person who is not eligible to be a resolution applicant. So it was clearly provided under Section 35, subsection 1. So, section 29A is applicable not only during the CRP process but also during the liquidation process. You will discuss the liquidation process in the subsequent lessons.

Then, whether a scheme under section 230 can be proposed by any person who is not eligible. Therefore, it was held that a scheme under Section 230 cannot be proposed by a person who is disqualified. Therefore, if any person is disqualified under Section 29A, they cannot propose a scheme because they are a person responsible for the company's distress. In the case of Atiuttam Prasad Singh, liquidator of SNS Diagnostics Limited versus Utsav Securities Private Limited, NCLAT held that a person who is a non-executive independent director will not be disqualified. Therefore, if any person is a non-executive director or independent director of a corporate debtor, they will not be disqualified under Section 29A.

In another case, Kanti Mohan Rastogi vs. Redbrick Consulting Pvt. Ltd., the NCLAT held that the disqualification also applies to sales and liquidations. As we have already discussed in the previous slides, the disqualification is also applicable to the liquidation process. Is it applicable to MSMEs? Yes. In MSME, there is an exception in Section 240, but this exception applies only in the cases of Clauses C and H. You are requested to refer to clause C and clause H in the slides that have already been explained. Please note that the exception provided under Section 240A is applicable only in the cases of Clauses C and H. Therefore, it is not applicable to other classes. That means Section 29A shall not apply to the resolution applicant in respect of the corporate CRP process or the pre-packaged insolvency process. So, although you are an MSME, exceptions exist, but only in the cases of clauses C and H.

The remaining clauses will be applicable as usual. This is a special privilege available to MSMEs that you should remember. In the case of Saravana Global Holdings Limited versus Bafna Pharmaceuticals Limited, the NCLAT held that the exemption is granted only from two clauses. Therefore, it is not granted in total; it is from two clauses of Section 29. So, in another case, Mahalingam Suresh Kumar versus Mahalingam Suresh Kumar, liquidator of GB Raja Top Weaving Pvt. Ltd., versus the officer of the tax recovery officer DIT Coimbatore. In this case, the NCLT Chennai bench held that in the case of willful default, the exemption is not applicable because the exemption under section 240A is applicable only in the case of C and H. In the case of willful default, that is not in clauses C and H. That is why that exemption is not applicable in the case of willful default.

Let us recap what we have discussed today.

Today, we have discussed the concept of a person who is ineligible to act as a resolution applicant. Even in the previous session, we also discussed the concept of a person who is ineligible to act as a resolution applicant. Then we discussed section 29A in detail. The meaning of “person” and “person acting jointly or in concert” with such other person is important. If you observe section 29A, it uses the words “person,” “person acting jointly,” and “person acting in concert. So, these three terms are used. So that’s why we have discussed the meaning of a person, a person acting jointly, and a person in concert.

Then we discussed Section 29A, Clause B, which states that a prospective resolution applicant is a willful defaulter in accordance with the RBI guidelines. So, if a prospective resolution applicant is a willful defaulter, and if an appeal is pending against the RBI’s order, is he eligible to file an application or a resolution plan? We have discussed that no, he is not eligible to file an application or a resolution plan under this section. We then discussed the scenario of non-performing assets and how to address them.

Then there is a conviction for an offense. So, if a person is convicted of an offense, are they eligible? No, he is not eligible to act as a resolution applicant. Then, if any person is disqualified from acting as a director under the Companies Act, is he eligible to be a resolution applicant? We have discussed that. No, he is not eligible to be a resolution applicant under section 29A. Then, under section 29A, clause F, the SEBI prohibits them from trading in securities. So, if any person is prohibited by the SEBI from trading in securities or accessing the securities market, then in such cases, such a person is not eligible to act as a resolution applicant.

We then discussed the role of the resolution professional in determining whether any person is eligible or not. We then discussed the applicability of Section 29A to the scheme in liquidation and auction sales during the liquidation process. Whether section 29A is applicable during the liquidation process is also under consideration. So this is the question we have answered in this session. Then we discussed the applicability of Section 29A to the MSME, as it offers special privileges for this sector.

That is why we discussed in this lesson whether Section 29A is applicable to MSMEs or not. So, with this, we have completed the concept of a person who is ineligible to act as a resolution applicant.

Thank you.