

# **Insolvency and Bankruptcy Law in India**

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**Week 06**

**Lecture 30**

Welcome to all.

As part of the course on Insolvency and Bankruptcy Laws in India. Before discussing the concept of the nature, scope, and contents of the resolution plan, let us recap what we have discussed in the previous session.

In the previous session, we discussed that once the resolution professional is appointed, he is expected to appoint the valuers. A minimum of two valuers must be appointed. Then the valuers are expected to determine the fair value and the liquidation value. What is the meaning of fair value? We discussed the meaning of liquidation value in the previous session. We have then discussed that physical verification is mandatory, which means that whenever the valuer is valuing, Whenever the valuer appointed by the resolution professional conducts the valuation and inspection of the inventory, physical verification is mandatory. This means that if we send any assistants to do the physical verification, such verification is not valid. Therefore, the valuer is expected to do the physical verification personally. We have discussed this concept with the help of judgments. Then, each class must be valued separately. Whenever the valuer evaluates or values the assets, each class must be valued individually. Please remember that while participating in these activities, individuals are expected to maintain confidentiality.

Today, we will discuss the nature, scope, and contents of the resolution plan. We will cover these topics in three lessons: today, tomorrow, and in the next lesson. We will discuss the nature, scope, and contents of the resolution plan in detail. So, what is a resolution plan?

Let us discuss the nature and scope of the resolution plan. Section 5, subsection 26 of the IBC defines the term resolution plan. A resolution plan refers to a plan proposed by the resolution applicant for the insolvency resolution of the corporate debtor as a going concern, in accordance with Part 2. So, what is the meaning of a resolution plan? A resolution plan means a plan proposed by the resolution applicant for the insolvency resolution of the corporate debtor, so any plan proposed by the resolution applicant for the insolvency resolution process is very important as a going concern in accordance with

Part Two of the registration, which is referred to as a resolution plan. The explanation is provided in this section to remove doubts; it is hereby clarified that a resolution plan may include provisions for the restructuring of a corporate debtor, including by way of merger, amalgamation, and demerger. So, if you observe the definition of a resolution plan, The resolution plan can also include restructuring, which encompasses mergers, acquisitions, demergers, and slump sales, encompassing all aspects of restructuring within its meaning. That's why the concept of the resolution plan is broad in nature; we will discuss this concept in detail in the subsequent slides. Then, in the case of Ebix Singapore Private Limited versus the COC of Educomp Solutions Limited, the Supreme Court held that the resolution plan constitutes a code-sanction scheme, which is in rem and binding on all stakeholders of the CD. In this case, it was held that. The resolution plan, once approved by the NCLT, will be discussed previously, and the COC will approve it before submitting it to the NCLT, which will then approve the scheme. Once it is sanctioned, which is in rem, the sanction will be binding on everyone dealing with the company, so it is binding on all the stakeholders. Here, when I use the word stakeholders. Here, when I use the term "stakeholders" it encompasses shareholders, corporate debtors, financial creditors, operational creditors, the board of directors, and all parties related to the company. Therefore, the scheme will be binding on all individuals associated with the company.

Then, how is it different from Section 230? If you observe the definition of a resolution plan and the explanation provided for it, a resolution plan may include the restructuring of a corporate debtor, including through merger, amalgamation, and demerger. These mergers, amalgamations, and demergers are all discussed or are included under Section 230 of the Companies Act. Under Section 230 of the Companies Act, we have the concept of an arrangement. Although they have not specifically used the words 'merger' or 'amalgamation', they have used the word 'arrangement'.

Then, let us try to understand how the concept of arrangement under Section 230 of the Companies Act and the resolution plan under the IBC differ. If you observe Section 230, it does not give a clean slate. So, what is the meaning of a clean slate? A clean slate means, for example, that before the CRP process, the company has not yet undertaken any activities. The company may be liable to pay a certain amount or face a penalty once the CRP process is completed and the resolution plan is approved. Please note that the company will not incur any liability subsequent to the approval of the resolution plan. Therefore, it is only required to implement the resolution plan, which must address all these liabilities. Once the resolution plan is approved, it is like a clean slate; everything is cleared. The company will not be liable subsequently; however, in the event of restructuring or merger, amalgamation, etc., under the Companies Act 2013, the concept of a clean slate is not applicable. So that is the basic difference between Section 230 and the resolution plan under the IBC. And that's why the options under Section 230 are

limited in nature, as they only include mergers, amalgamations, and demergers, whereas the resolution plan can encompass a broader range of actions, including capital restructuring. Sometimes, it can involve a reduction of share capital, and sometimes, it can involve a private placement. Various permutations and combinations are possible in a resolution plan. That is the basic difference between a resolution plan under the IBC and a rearrangement under Section 230 of the Companies Act.

Let us then discuss the contents of the resolution plan. Today, we will discuss the details of the resolution plan in depth. What should be in the resolution plan? Regulation 37 of the CRP regulations addresses the contents of the resolution plan, which stipulates that. Let us discuss it in detail. In Regulation 37A, we will discuss each clause separately in this lesson today. Regulation 37A states that the transfer of all or part of the corporate debtor's assets to one or more persons can be included in the resolution plan, allowing for such transfers. Some parts of the asset and all the assets are in good condition, so the transfer can be included. In the case of stressed assets, the Stabilization Fund versus Jane Studios Limited, the NCLT Principal Bench held that the resolution plan should include only the transfer of the corporate debtor's assets. When they use the term "transfer of assets of the corporate debtor," it means that. When the corporate debtor has ownership, then only can you transfer; if the corporate debtor does not have ownership, merely having possession will not be sufficient. Sometimes, due to certain arrangements or agreements, the corporate debtor may have possession of the property. Therefore, such property cannot be included in the resolution plan. So, in this case law, there is a stressed asset stabilization fund versus Jane Studios Limited; the NCLT held that it is a transfer of the asset of the CD only. Therefore, where an asset is not owned by the CD, transferring such an asset is not permissible under the resolution plan. So, whenever you want to transfer, the asset must belong to the CD only. So, ownership must be permitted. Required that the title over the property be there with the CD.

Then, in another case, Law Embassy Property Development Private Limited versus State of Karnataka, the Supreme Court held that any property in the possession of CD under a contractual arrangement, as we have already discussed, is subject to the same rule. Based on some contract, if CD has possession of the property, please remember that merely having possession will not be sufficient. So the CD must have ownership. Unless you have ownership, such property cannot be transferred. Any property in the possession of CD under a contractual agreement must be excluded from the resolution plan. Merely having possession, such property must be excluded from the resolution plan. You cannot include such property. Then, in another case law, Nitin Chandrakant Nayak versus Sanithya Industries LLP, the NCLAT held that the assets of a personal guarantor are not assets of the corporate debtor. Suppose a personal guarantor gave some property as security, or the personal guarantor has some assets. Will it be considered, or can you consider such an asset as part of a resolution plan? No. Okay, why? Because CD cannot

be dealt with in the resolution plan, and why? Because CD does not have ownership, that's why such property cannot be a part of the resolution plan.

Then let us discuss the next clause, Clause B: sale of all or part of the assets, whether subject to any security interest or not. This is very interesting, so if you observe Clause A of Regulation 37. As you can see from the previous slide, it states that the transfer of all or part of the assets is addressed in Clause B, which only pertains to the sale of all or part of the assets. Clause A pertains to the transfer, while Clause B provides for the sale of assets. So clause B includes the sale only, not the transfer. However, if you examine the law, every transaction under Regulation 37, Clause B, would automatically fall within the scope of Regulation 37A. Why? Because transfer is a much broader concept. Transfer includes sale. So that's why every transaction that falls under clause B will automatically fall under clause A. So why? Because clause A is much broader in nature.

Now, let us examine another clause. Clause B(a) involves the restructuring of the corporate debtor through merger, amalgamation, and demerger. So here we have some judicial precedents. Interpretation is also required here. The resolution plan can include the restructuring of the corporate debtor, which may be achieved through merger, amalgamation, or demerger. If you observe Section 5, Clause 26, it clearly states that the explanation in Section 5, Subsection 26, indicates that the resolution plan may include provisions for the restructuring of the CD. Okay, so it includes mergers, amalgamations, and demergers. Even if you observe the contents of the resolution plan, it can also involve the restructuring of the corporate debtor through merger, amalgamation, and demerger. The question is whether the process for the resolution plan is different. Under the IBC, a specific process is in place. That is what we have been discussing from the beginning in this lesson. The process differs, and it must be approved by the NCLT. The process is different. If you observe the process for merger, amalgamation, and demerger, that is, if you observe the process for arrangements under the Companies Act, the procedure is totally different.

Now the question is whether, when the resolution plan includes arrangements under the Companies Act, I need to follow only the IBC or both the IBC and the Companies Act, specifically section 230 of the Companies Act. To state the fact, it is not clear. In the case of J Prakash Associates Limited versus IDBI Bank Limited, the Supreme Court noted that whether the resolution applicant must follow the procedure under Section 230 is not entirely clear. So, under section 230, who can file an application? Under section 230, members, creditors, companies, and liquidators can file an application. Thus, four categories of people can file an application under section 230 of the Companies Act, whereas under the IBC, the resolution professional and resolution applicant can also file an application.

Therefore, these individuals are excluded, so when you say that a transaction is a resolution plan, a resolution professional and a resolution applicant will be involved. Normally, the board of directors of the company will be suspended when the resolution professional is appointed; the board of directors will be suspended. And the board of directors is replaced by the resolution professional. The resolution professional will oversee the day-to-day management of the company. Now the question is whether, under section 230, members, creditors, the company, and the liquidator can only file an application.

Now we don't have a company; a company means it is always run by the board of directors. The board of directors can file an application before the NCLT; however, in this case, we don't have a board of directors. Therefore, a resolution professional is in place of the board of directors. Now, under section 230, the resolution professional is not mentioned at all. Why? Because there is no scope in the legislation. Therefore, it is unclear whether we need to revisit Section 230. Or whether we follow IBC, that itself is more than sufficient. Why? Because if you observe some of the provisions we are going to discuss, you will see that the provisions of the IBC have an overriding effect over all other legislation. Parallel to this, the IBC also stipulates that, in addition to following the procedures under the IBC, you are expected to adhere to the basic procedures under the Companies Act as well. Therefore, we must harmoniously interpret the Companies Act and the IBC.

Let's examine a few cases. In the case of Edelweiss Asset Reconstruction Company Limited versus Synergies Dooray Automotive Limited, the NCLT held that the IBC has an overriding effect. Once the scheme is approved under IBC, the argument is that the resolution plan cannot include merger or amalgamation, which is not tenable. Why? Because IBC is broader in nature, as we have already discussed, and even if you observe section 5, subsection 26 of the act, the definition explanation is there. According to the explanation, it is clearly stated that the resolution plan can include mergers, amalgamations, and other similar measures. Therefore, in this judgment, the NCLAT held that the IBC has an overriding effect; once it is approved, a merger or amalgamation under the scheme is not tenable.

This means you can always have a merger or amalgamation, etc., as part of the resolution plan only under the scheme. Then, Section 66 of the Companies Act requires consideration of the provisions regarding the reduction of share capital. Can the reduction of share capital occur? Yes, it can happen through a resolution plan. In another case, Law Reliance Industries Limited versus Ajay Joshi, the NCLAT allowed the successful resolution applicant to pursue delisting through the resolution plan. Can I go for delisting or not? Yes, you can also go for delisting. So, you can opt for a merger, amalgamation, takeover, or delisting; you can also consider a reduction of share capital, okay? The buyback of share capital, as per Section 68 of the Companies Act, can be implemented as

part of the resolution plan. In another case, Venkateshan Shankar Narayanan versus Tech Pro Systems Limited, the NCLT Principal Bench held that the reduction of share capital is also permitted. As we have already discussed, under Section 66, the reduction of share capital is also allowed under the Companies Act. Therefore, you are not required to follow the procedure outlined in the Companies Act; instead, you can follow the procedure outlined in the IBC.

Then, when the restructuring of the CD is permitted under the resolution plan, the NCLT should enable compliance with the Companies Act as closely as possible while ensuring full compliance with the IBC. So, what does it mean? As we have already discussed, the IBC has an overriding effect. Additionally, IBC also provides that whenever you are following the procedure, you are expected to follow the procedure in addition to the IBC procedures under the Companies Act. Therefore, observing the above judgments, such as the Edelweiss judgment, Reliance Industries, or the Venkatesan judgment, you can understand that you are expected to follow the Companies Act as closely as possible. Okay. And parallelly, you are expected to have full compliance with the IBC. First, you must comply with the IBC in its entirety. Apart from this, you are also expected to follow the Companies Act. Then let us discuss other content. Clause C, Regulation 37, Clause C: the substantial acquisition of shares of the corporate debtor or the merger or consolidation of the corporate debtor with one or more persons, so the resolution plan can also have a substantial acquisition of shares.

When I discuss the substantial acquisition of shares of the corporate debtor, it is worth noting that, if the company is listed, this may not be applicable in all cases. Then SEBI SAST regulations will be applicable. That is, the Substantial Acquisition of Shares and Takeovers Regulations 2011 will be applicable. According to SAST regulations, generally, whenever a person or persons acting in concert acquire the shares of any company, triggering points are present. If it exceeds the triggering points, they are expected to give an open offer. But if, as a part of the resolution plan, you are acquiring the shares of the corporate debtor, then you need not give the open offer provided under regulation 10(1)(da) of the SAST Regulations 2011; so the assumption is that there is no need to give the open offer to the resolution plan. In the case of ATO India Limited versus Gandhamardhan Sponge Industries Pvt. Ltd., the NCLT Kolkata Bench held that, in this case, the resolution plans were approved by the NCLT and that an open offer under the takeover code was not required; thus, it was held that since it is a listed company, they approved the resolution plan, which contains the acquisition or takeover of the company, so it was approved. Then, the NCLT held that when it is followed under the IBC, the IBC has an overriding effect, and also under the SAST regulations, that is, the takeover code, there is an exemption from giving an open offer.

That's why you don't need to make an open offer under the takeover code. Clause D addresses the cancellation or delisting of any shares of the corporate debtor, if applicable,

so that the resolution plan can include the cancellation or delisting of such shares. So, when I am talking about delisting, if it is a listed company, obviously, the question of delisting will not come into the picture, unless it is a listed company. So, perhaps you are referring to the resolution plan of the listed company. In that case, when discussing delisting, the SEBI Delisting of Equity Shares Regulations, 2021, will be applicable. So, if you observe Regulation 3 of the SEBI delisting regulations, which clearly provides that the regulation shall not apply to any delisting of shares, that is, equity shares of a listed company made in pursuance of the IBC, then when you are going for delisting in pursuance of the IBC, the delisting regulations will not be applicable. The only thing is that the public shareholders should be provided with an exit opportunity. Therefore, when you are delisting as per the delisting regulations, you are expected to provide an exit opportunity to the existing shareholders. In the case of V Shankar RP of Sri Ramanjaneya ISPAT Private Limited versus Sri Ramanjaneya ISPAT Private Limited, the NCLT Hyderabad bench approved a transaction that involved the delisting of securities.

So, when you are talking about the delisting of securities, the law relating to, I mean, I'm not talking about the only delisting, okay? If the resolution plan includes a delisting, it is not entirely clear. Although there are exemptions under SEBI's SAST regulations, to protect the interests of public shareholders and prevent the abuse of securities in the market, SEBI and IBBI are expected to work together. Accordingly, they are supposed to amend the legislation because the law relating to IBC interfaces with the delisting process. That means, as part of the resolution plan, whenever delisting occurs, there is a possibility that they may abuse the provisions of the IBC to circumvent the delisting regulations. Therefore, it is essential that we exercise caution; SEBI and IBBI are expected to collaborate to safeguard the interests of public shareholders. Then, Regulation 37, Clause D states that a resolution plan may include satisfaction or modification of any security interest.

In the case of Vijay Kumar Jain versus Standard Chartered Bank, the Supreme Court held that the secured creditor may be required to relinquish its security for the amount received under the resolution plan. So, there is a possibility that you can relinquish the security given. Then, in another case, Anuj Jain versus Axis Bank, the Supreme Court held that the security interest, as defined in Section 3, subsection 31, refers to a right, title, interest, or claim of property created in favor of the secured creditor. Whenever I create any right, title, or interest in, or claim over, property, it is referred to as a security interest. Please remember that the relevant documentation required to provide effective satisfaction charges must be registered under the law. So, though you are satisfying or modifying the security interest subsequent to the satisfaction, you are supposed to follow certain other formalities, maybe under the Registration Act, maybe under the Stamps Act, and maybe under the Companies Act; you are supposed to follow certain other procedures depending on the transaction, and other procedures are to be followed. Okay,

so this procedure is to be followed even though it is a part of the resolution plan. If you observe Regulation 37, Clause E, it speaks about curing or waiving any breach of the terms of any debt due from the corporate debtor. They may cure or waive any breach of the debt terms, stating that you are not liable.

Another important clause is that, generally, in the majority of cases, this clause will be included in the resolution plans: a clause for reducing the amount payable to the creditor. The possibility exists that the resolution plan may stipulate that the creditor is entitled to receive 100 rupees. I'm just giving the example of 100 rupees. The resolution plan may specify that it will provide you with 10 rupees, 50 rupees, or 80 rupees. Okay, so this is called a haircut. In most cases, this is actually happening. In the case of JP Kensington Boulevard Apartments Welfare Association versus NBCC India Limited, the Supreme Court held that the regulation permits a resolution plan to reduce any debts owed to creditors. Is there a possibility that any debts owed to the creditor can be reduced? This is the most commonly used clause in the resolution plan, as I mentioned earlier; in the majority of cases, this clause is generally used. The plan can provide for a haircut; this helps the financial creditor to invest and reinvest such an amount into the economy. So, what is the logic behind the haircut? Why are the financial creditors willing to accept a plan where there is a haircut? So, the logic is that, suppose we take the example: imagine I am the financial creditor, maybe one of the banking institutions.

I gave a 100-rupee loan to one company. 100 rupees is due, imagine. Out of the 100 rupees, if I don't approve the scheme, maybe I will receive 80 rupees or 70 rupees, as the case may be. So, if I don't approve the scheme, I may also lose these 70 rupees. Okay, so that's why I generally say that the bank's tendency is to accept the haircut, and the remaining 70 rupees will be reinvested into the economy. So, as a whole, at the macro level, if you observe, this is going to help the economy instead of blocking the amount in one place where business is not taking place. It's better if you can withdraw the money and reinvest it elsewhere, which is the logic behind accepting haircuts in the case of a resolution plan. So, regulation 37, clause G, states that a resolution plan can have an extension of the maturity date or a change in the interest rate or other terms of the debt due from the corporate debtor. So, you can have an extension of the maturity date. Maybe I am liable to pay today, or maybe you can say that after one year, okay, the maturity date I may extend. After one year, the corporate debtor can pay. So, you are giving some leverage to the corporate debtor, is that correct? Or a change in the interest rate. Instead of losing all the money, if I can reduce the interest rate, maybe I can receive the money, okay? So, changes in the interest rate or other terms of the debts can be made as part of the resolution plan; even that is also possible.

Now, the resolution plan can include amendments to the constitutional documents. So, what are these constitutional documents? They include the memorandum of association and articles of association, as a company in India is incorporated based on these

documents. The resolution plan can include amendments to the constitutional documents, which encompass amendments to the articles of association and the memorandum of association. In the case of Next Orbit Ventures Fund versus Print House India Private Limited, the NCLAT held that the resolution plan can include any changes to the memorandum of association or articles of association, including modifications to the main objectives.

Generally, whenever you alter the memorandum of association, you are required to follow the procedure prescribed under the Companies Act. Here, you do not need to follow the procedure. It's a part and parcel of the resolution plan. As a part of the resolution plan, you can alter any clauses in the MOA or AOA as may be required. Then, in the next clause, Regulation 37, Clause I, states that the corporate debtor may issue securities for cash, property, securities, or in exchange for claims or interests, or for other appropriate purposes. Therefore, you can issue the securities of a corporate debtor instead of paying the amount or clearing the debts. Another clause is the issuance of securities by the corporate debtor for cash, property, securities, or in exchange for claims, interests, or other appropriate purposes. Then, clause K changes in the technology used by the corporate debtor, so the resolution plan may also include changes in technology.

Then, L must obtain the necessary approvals from the central government, state government, or other authorities so that the resolution plan may include, sometimes, whenever you are approving the resolution plan. If you wish to proceed with the scheme, you may need to obtain approval from the local authorities. In one of the famous case laws, the JP Kensington case, the Supreme Court held that approval from local authorities is required. Although the IBC Act states that it has the overriding effect over all other legislation, Regulation 37(l) clearly provides that the resolution plan can include a provision where approval from the central government, state governments, or other authorities is necessary. In this case, they are actually supposed to obtain approval from the local authorities; however, the company argued that, as it is part of the resolution plan, approval from the local authorities is not required. However, the court of law held that no, because the section or regulation clearly provides that approval is required whenever there is a requirement, as each regulatory authority has a different perception and purpose. Therefore, not everything can be addressed to the IBC; that is practically impossible. That's why approval from local authorities is required whenever necessary, so you are supposed to obtain approval in addition to the IBC.

Next clause M: the sale of one or more assets of the corporate debtor to one or more successful resolution applicants, submitting a resolution plan for such assets and the manner of dealing with the remaining assets. So, the plan can have the sale of one or more assets, and it is also possible for the successful resolution applicant. To date, we have discussed Regulation 37 in detail.

Let us recap what we have discussed so far. So, in this lesson, we have discussed the nature and scope of the resolution plan. So, what is the meaning of the resolution plan? Okay, what is the nature of the resolution plan we have discussed? Then we began discussing the contents of the resolution plan, focusing on Regulation 37 in detail. Regulation 37 has several clauses. We have discussed a few key clauses, including the transfer of all assets of the corporate debtor. The resolution plan can have a provision for the transfer of all the property.

So, we have discussed the difference between Clause A and Clause B, okay? Clause A, speaking about the transfer, and clause B, talking about the sale, raise the question: what is the difference between transfer and sale? We discussed that a sale is a part of the transfer; therefore, the transfer is always broader in nature. Thus, clause B will always be within the scope of clause A. We have discussed those points. The sale of all or part of the assets, followed by the restructuring of the corporate debtor, we have discussed. Okay, whether restructuring of the corporate debtor can be a part of the resolution plan? Yes, even restructuring can be a part of the resolution plan. In such cases, the question is whether you need to follow the procedure under section 230 of the Companies Act. The court is of the opinion that if you observe the various instances of paucity of time, we may not be in a position to discuss all the judgments, but if you review the various judgments given by the NCLAT, the Supreme Court will understand that although you are not expected to follow Section 230 in detail, you are expected to follow the procedure under the IBC. Especially in the case of restructuring the corporate debtor as part of the resolution plan, you are expected to follow the IBC in full.

The IBC itself provides that you are also expected to follow the Companies Act procedure. So, unless there is a contrary provision between the Companies Act and the IBC, you are first expected to follow the IBC, and additionally, you are expected to follow the Companies Act as well. Therefore, whenever you are interpreting these two legislations, you are expected to interpret them harmoniously. To obtain approval from the authorities so that the resolution plan can include the provisions you are taking over, you may need to obtain approval from the other relevant authorities. The amendment of the constitutional documents may include amendments to the memorandum of association and articles of association; also, the resolution plan can include these, so these are all the various things that we have discussed in this lesson.

Thank you.