Insolvency and Bankruptcy Law in India

Dr. A. Sridhar

NALSAR University of Law, Hyderabad

Week 07

Lecture 31

Welcome to all.

As part of the course on insolvency and bankruptcy laws in India, we will discuss the nature, scope, and contents of the resolution plan today. So, in the previous class, we also discussed the nature, scope, and contents of the resolution plan. Continuing with that, today we will also discuss the nature and contents of the resolution plan.

Let us recap what we discussed yesterday. In yesterday's class, we discussed the nature and scope of the resolution plan. Then we discussed the contents of the resolution plan under Regulation 37. We discussed each and every clause in detail. A resolution plan can include the transfer of all or part of the resolution assets and the sale of all or part of the assets, whether subject to any security interest or not. It involves restructuring the corporate debtor and obtaining approval from other relevant authorities. So, what can be included in the resolution plan? We discussed the contents of the resolution plan in detail yesterday.

Today, we will discuss the mandatory contents of the resolution plan. Whenever you are preparing a resolution plan, these are all the mandatory contents that must be included in the resolution plan. Today, our agenda is to discuss Section 30 of the IBC and Regulation 38. Primarily, we will focus on sections 30 and 38. Incidentally, we may also examine other sections, but primarily, we will concentrate on Section 30 and Regulation 38 of the CIRP.

Now, let us start. If you observe section 30, subsection 2, clause A, which provides for the payment of insolvency resolution process costs in a manner specified by the board, in priority to the payment of other debts of the corporate debtor. So, whenever you are drafting the resolution plan, first, the resolution plan shall contain details on how you are going to make the payment towards the resolution process cost. You are supposed to pay the insolvency resolution process cost first; then, you can pay other parties.

First, you must pay the cost of the insolvency resolution process, and you need to determine how you will make the payment; this must be included in the resolution plan, okay? What is the meaning of the resolution process cost, then? The insolvency

resolution process cost is referred to under section 5, subsection 30, which means the amount of any interim finance and the cost incurred in raising such finance. Suppose, while continuing the resolution process, the resolution professional may require some interim finance. If you are incurring any interim finance costs or any other expenses related to raising such finance, that's okay. That is considered to be an insolvency resolution process cost; therefore, the fee payable to any person acting as a resolution professional is, obviously, the resolution professional fee payable to him as per the regulations. Any fee payable to the resolution professional will form part of the insolvency resolution process cost.

Then any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. One of the requirements or obligations of the resolution professional is to run the business as a going concern when they take over management of the company. Therefore, the going concern of the business is one of the essential characteristics of the IBC. Therefore, if any costs are incurred by the resolution professional in running the business as a going concern, such expenses will form part of the insolvency resolution process costs. If the government incurs any expenses to facilitate the resolution process, such expenses must be included in the insolvency resolution process cost.

Then, any other costs as may be specified by the board will be included. The board will specify these costs specifically; thus, all these costs will be part of the insolvency resolution process costs. So, please remember that whenever you are preparing the resolution plan, it should mandatorily include how the payment will be made. First, you should make the payment towards the cost of the insolvency resolution process, as this is one of the mandatory contents of the resolution plan. Then how are you going to make the payment to operational creditors? Here, when you are making payment to operational creditors, we have a minimum value to be payable that is discussed under section 30, subsection 2, clause b, which clearly provides for the payment of debts of operational creditors in such manner as may be specified by the board, which shall not be less than the amount you are supposed to pay to the operational creditors.

When presenting the resolution plan, it should specify these amounts. The amount to be paid to such creditor in the event of liquidation, suppose if the liquidation is happening immediately, is how much you are supposed to pay to the operational creditor; such amount must be paid, then the amount that would have been paid to such creditor if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority. Therefore, under Section 53 of the Act, we have a waterfall mechanism. As part of the resolution plan, if you are distributing the total available assets, how will you distribute them?

In the subsequent lessons, you will discuss the concept of liquidation with another faculty. We will discuss how you are going to make the payment. This is called the waterfall mechanism. What is the minimum amount that you are expected to pay under the waterfall mechanism? That amount is what you are expected to pay to the operational creditor. Thus, this is the minimum value that can be paid to operational creditors. Then, whichever is higher, please note that we will be deducting the amount to be paid to such creator in the event of liquidation and under the waterfall mechanism. Therefore, whichever is higher, that amount must be paid to the operational creditor and provides for the payment of debts of financial creditors who do not vote in favor of the resolution plan.

Please note that if any financial creditor does not vote in favor of the resolution plan, the committee of creditors will convene and approve the plan. Therefore, in the committee of creditors, financial creditors will be present; however, there is a possibility that some of them may not accept the resolution plan. So, whoever is not accepting, whoever is not consenting, and whoever is not voting in favor of the resolution plan is also entitled to receive the payment, in priority to others. Then, payment to operational creditors is to be made in priority; therefore, this section further provides that you are required to make the payment in priority before making payments to others. So, if you observe regulation 38 of the CRP regulations, the amount payable under the resolution plan to the operational creditor shall be paid in priority over the financial creditors.

When you are making a payment to the financial creditors, the amount payable must be given priority over the financial creditors. So, in the case of the JP Kensington case law, the Supreme Court held that payment in priority means payment in cash, not in kind. So, when the law says that payment is in priority, don't be under the impression that you can pay in kind. You are expected to pay in cash only. In another case, Pallavi Joshi Bakhru versus Universal Buildwell Private Limited, the NCLT New Delhi bench held that they rejected the resolution plan, which provided for payment in kind.

As we have already discussed, Regulation 38 clearly states that payment must be made in cash only; payment in kind is not permitted. Therefore, if any plan proposes payment to operational creditors in kind, such a resolution plan cannot be approved. Okay, so that's why in the case of Pallavi Joshi Bakru versus Universal Buildwell Private Limited, they rejected the resolution plan. Now, when you are making a payment to the operational creditor, as we have already discussed in the previous slides, the payment must be a priority. There is one condition: you must pay the minimum value. So, the minimum value is one condition, and the payment must be a priority. The third condition is that, when you look at the screen, it must be in a fair and equitable manner. This means that whenever you make a payment, it must be done in a fair and equitable manner. It is provided under Section 30, Subsection 2, Clause b. If you observe this section, the explanation is there. In the explanation, it is provided that for the removal of doubts, it is

hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable.

So, whenever you are distributing in accordance with section 30, it should be fair and equitable. In the Essar Steel case, the Supreme Court held that the explanation did not mandate equal treatment. So, when you use the word or look at the explanation, please observe the explanation. For the removal of dots, it is hereby clarified that the distribution, in accordance with the provisions of this class, shall be in a fair and equitable manner. They are not saying that it is equal; it is an equitable manner. So, there is a difference, is there, between equal and equitable, so we are not expecting equal treatment because All creditors are classified differently. They are in different classes. That's why you cannot treat unequals equally. What we are expecting is that equals must be treated equally. Unequals must be treated unequally. A proportionate payment to all classes of creditors will be sufficient. Suppose I am making a payment of 30% to one class; then, to another class, I'm also supposed to pay 30% only. Okay, so not all creditors may be considered, but in each class, I should treat them equally.

Then, as we have already discussed, dissenting financial creditors are also expected to provide a minimum payment in priority. Therefore, if you observe Section 30, Section 2, Clause b, which provides for the payment of debts of financial creditors who do not vote in favor of the resolution plan, then in such cases, you are expected to make the payment in priority. In the case of Rahul Jain versus Rave Seen's Private Limited, the Supreme Court held that the dissenting financial creditors may be treated differently from the assenting financial creditors. Why? Although they belong to the financial creditors category, one is a dissenting financial creditor, and another is an assenting financial creditor. So, the resolution plan can treat both of them separately. Dissenting financial creditors and assenting financial creditors can be treated separately.

Then, let us look at the mandatory statement to be included as part of the resolution pair. So, what are all the mandatory contents? So, if you observe Regulation 38(1)(a), which provides that a resolution plan shall include a statement as to how it has dealt with the interests of all the stakeholders, how are you going to deal with the interests of all the stakeholders? Are you going to protect how you make the payment? So, what is the guarantee that after the resolution plan is successful, you will not close the company? When discussing the interests of stakeholders, employees are also included. If you are closing the company after taking it over, then employees will lose their jobs. Okay, so here you are supposed to provide information on how you will protect the interests of all stakeholders, including your financial creditors, operational creditors, corporate debtor, employees, and the government. Everyone must be considered when framing the resolution plan. As per Regulation 38(1)(b), a resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to

implement or contributed to the failure of implementing any other resolution plan approved by the adjudicating authority at any time in the past.

So, when you are a prospective resolution applicant and you submit the resolution plan, the plan shall specifically state whether there has been any prior default; I can say, okay, so previous default. So, whether they follow, I mean, is there already an existing CRP process resolution plan? Is there whether such a plan was implemented properly or not? Has there been any failure in implementing such a plan previously? Are you the contributor? Are you the related party? Therefore, you are required to provide a declaration stating that we are not responsible for the failure to implement any resolution plan. Why? Because if there is a failure, there was one previously, and obviously, there is a possibility of failure in the near future as well. That's why the law stipulates that there should be no failure. Then, in the case of Punch Tatwa Promoters Private Limited versus GPT Steel Industries Limited, NCLJT held that a person who has failed to implement a resolution plan or has contributed to such failure. Please note that they are implicitly treated as disqualified. However, when discussing the disqualification of resolution applicants in previous classes, we have already addressed the ineligibility to act as a resolution applicant in those classes.

So, if any resolution applicant who has already filed a resolution plan in some other case and who failed to implement such resolution plan previously, then in such cases, such resolution plan is not eligible to act as a resolution applicant in this case. Therefore, the resolution plan should provide for the management of the corporate debtor after its approval. So, when you take over the company after the resolution plan is proposed and approved, how will you manage the corporate debtor? So, how will you implement the resolution plan? The resolution plan shall include details on how you intend to implement it and how you plan to raise the necessary finance; every detail must be included in the resolution plan. So, if you observe section 30, subsection 2, clause c, which clearly provides that the resolution plan shall provide for the management of the affairs of the corporate debtor after approval of the resolution plan, how are you going to manage the company? Please give the details in the resolution plan.

Okay, then you are supposed to provide the details as per Clause D regarding the implementation and supervision of the resolution plan, including how you plan to implement it. Perhaps you could provide a time framework, stating that within three years, we will complete the resolution plan, as it sometimes takes several years. Okay, then, who will supervise? Who will be appointed at the C-level, such as CEO, CFO, or COO? Okay, so who will be appointed? Who will supervise the resolution plan? All the details must be included in the resolution plan. In the Essar Steel case law, the Supreme Court held that the plan must also specify the term of the plan. Okay. So, when you are implementing the plan, maybe the term may be five years or six years. Okay. And management and control of the business of the CD during such term: who will manage,

and who will control? So, are you appointing anyone exclusively who is an expert in that? Okay. And its implementation also demonstrates that it is feasible and viable. You should provide a convincing answer or an explanation of how the resolution plan you are proposing is feasible and how you intend to achieve it. If it is viable, explain how you plan to help the company recover from its debts. This is what you are supposed to include in the resolution plan.

In another case, SM Milkos Limited versus Parvinder Kumar Bhatt, the NCLAT held that an agency or a committee in the nature of a monitoring committee is a mandatory requirement. When proposing the resolution plan, please consider, as I mentioned earlier, suggesting the CEO, Managing Director, CFO, or any other person with relevant expertise or knowledge. That's why the resolution plan may propose an agency or a committee. Obviously, you cannot run the company with just one or two people; therefore, a committee may be required, and in the interest of monitoring, the committee is a mandatory requirement to be established. Okay, so the committee or agency that will manage the company must specify the details about this agency and committee in the case of the resolution plan, which is responsible for supervising and implementing the resolution plan. Then, provide for the continuation of the proceedings for the avoidance of transactions, so you are going to discuss more about the avoidance of transactions in the subsequent lessons.

When you start discussing the concept of liquidation, you will delve into the details of transaction avoidance. In the resolution plan, you are expected to outline how you will proceed and address the avoidance of transactions. So, these things must be included in the resolution plan. So, if you observe Regulation 38(2)(d), which provides that the manner in which proceedings in respect of the avoidance of transactions, if any, under Chapter 3 are fraudulent or wrongful trading under Chapter 6 of Part 2 will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed. So, how will you deal with avoidance transactions? How will you distribute such proceeds? After realizing the proceeds, how will you distribute them among the creditors? So, you should be very clear about these things. These things must be specified in the resolution plan, okay, mandatorily.

So, in the case of Venus Recruiters Private Limited versus the Union of India, the Delhi High Court held that the primary benefit. You will mention avoidance transactions and also outline how to recover from them. When recovering these avoidance transactions, please remember that the primary benefit of these proceedings should be allocated to the creditors only. First, it should go to the creditors because they are the victims. Let us then discuss the other mandatory contents in the resolution plan. If you observe Regulation 38, these are all the various mandatory contents. It addresses the cause of default. Then, is it feasible and viable? It includes provisions for its effective implementation and outlines the steps for executing the plan. It should include provisions for the required approval

and the corresponding timeline. Therefore, the possibility exists as part of the resolution plan, or when implementing this plan, you may need to obtain approval from various authorities, including the RBI, TRAI, and CCI, among others. So, what is the time limitation that you propose must be included in the resolution plan? Okay, the resolution applicant has the capability to implement the resolution plan. Do you have the capability to implement the resolution plan? Please consider that these things must be present.

Then, if you observe section 32E, it states that it does not contravene any provisions of the law for the time being in force, so you should provide a declaration in the resolution plan that you are proposing. The prospective resolution applicant, who is proposing the resolution plan, must provide a declaration that it will not contravene any provisions of the law. So, perhaps other legislations may be attracted, such as the PMLA or FEMA, or the CCI; there are many other legislations. You are required to declare that you will not violate or contravene the provisions of any other law currently in force. Then, if you refer to Section 238 of the IBC, it states that the IBC will supersede other legislation. Does it mean that you can contravene other provisions? No. Okay. So, when the IBC is not in contravention, then you cannot invoke section 238. Section 238 will protect you only if any other legislation is in contravention of the IBC or if there is any contradiction between the IBC and other legislation; then only can you use Section 238. Otherwise, under normal circumstances, you cannot use Section 238. So, in the case of the JP Kensington case law, the Supreme Court held that the resolution plan cannot seek more than what other laws permit and cannot be used as a ruse to escape binding procedures and conditions under other applicable laws. Because Section 238 of the IBC states that the IBC will have an overriding effect over other legislation, it does not mean that you are contravening the other provisions. So, you cannot use the IBC proceedings to circumvent or bypass the procedures under the other legislation. You will need to provide a declaration accordingly.

Okay, then, Provident Fund usage. Suppose you have a provident fund. Okay, then, how will you address the use of provident funds in the resolution plans? Section 11 of the EPF Act clearly provides that the money owed to the provident fund authority shall enjoy the first charge over the assets of the CD. In the event of liquidation, the money owed to the provident fund authority shall have a first charge. You are supposed to give priority to the provident fund, okay. So even not only under section 11 of the EBC, but also under section 36 of the IBC, which clearly provides that section 36 subsection 1 class a subclass 3, it clearly states that the following shall not be included in the liquidation estate; therefore, it shall not be used for recovery in the liquidation. What cannot be included are all sums due to any workman or employee from the provident fund, pension fund, and gratuity fund. If money is maintained, if any fund is maintained by the employer. Okay, which is related to workman's dues, provident fund, pension fund, and gratuity. Although the fund is held by the company, it cannot be used or considered an asset. Okay, so you

cannot use it. So, in the case of Kushal Limited versus Regional Provident Fund, the Supreme Court held that the Provident Fund, including any penalty, must be paid in full. Therefore, there is no other question. Thus, the Provident Fund cannot be touched or used; you cannot consider the Provident Fund an asset, even though the company has some funds in its account.

Then, let us discuss the Obligation of Resolution Professionals. Therefore, if you refer to Section 30, Subsection 2, the resolution professional is required to conduct due diligence. This point has already been discussed in the previous clauses; also, the resolution professional must conduct due diligence. Then, Regulation 33 provides that the resolution professional shall present to the committee of the creditors for its approval such resolution plans which confirm the conditions referred to in subsection 2. After conducting due diligence, you are required to present the resolution plans to the committee of creditors. Then, Regulation 39, subsection 39, provides that the resolution professional shall submit to the committee all resolution plans that comply with the requirements of the Code and regulations made thereunder. As we have already discussed in the previous classes, it is the responsibility of the resolution professional to submit all the plans before the COC, which will then decide. Okay, the power to decide whether a resolution plan is valid or not is not vested with the resolution professional; it has to be decided by the COC. Then, how will you conduct the voting? Here, we will briefly discuss the voting. Why? Because we have already discussed voting rights in detail in previous classes. So, if you observe Section 30, subsection 4, the committee of the creditors may approve a resolution plan by voting of not less than 66 percent. NCLT, in the case of UCO Bank versus PMT Missions Limited, Mumbai bench, held that where none of the plans voted upon, for example, they have placed various plans, the resolution professional placed various plans before the COC, and none of the plans is approved with a 66% majority, then in such cases. Okay, the resolution plan that has received the highest vote below 66 percent must be placed once again. Then you have to cast a vote, put it to a vote, and re-vote. Okay, you have to conduct the re-voting once again. Then, accordingly, if the same is voted on with 66 percent approval, then such a plan will be considered approved. Okay, that is how you are supposed to do the voting. So let us recap what we have discussed in this class once again.

In this class, we have discussed the mandatory contents of a resolution plan and what should be included in it. Then, we subsequently discussed what insolvency resolution costs are and what is considered to be an insolvency resolution cost. We then discussed the payment to operational creditors. When making payments to operational creditors, you should consider the concept of minimum value and payment priority. Suppose that any financial creditor is a dissenting financial creditor, which means he has not approved the resolution plan; then he also has the right to receive the payment in priority. This concept we have discussed in this class. Then, contents relating to the avoidance of

transactions: How are you going to address the avoidance of transactions in the resolution plan? What should be included in the resolution plan? Then, regarding the treatment of the provident fund, how will you address the provident fund in the resolution plan? The resolution plan must not contravene any other provisions. So, although the IBC overrides other provisions or legislations, it does not mean that you will violate other legislations.

So, these are all the various points that we have discussed, and subsequently, we have discussed voting on the resolution plan. These are all the various points we have discussed in this class.

Thank you.