

Insolvency and Bankruptcy Law in India

Dr. A. Sridhar

NALSAR University of Law, Hyderabad

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Lecture 34

Welcome to all.

Today, as a part of the course on insolvency and bankruptcy law in India. In the next two lessons, we will discuss insolvency professional agents, and in the following class, we will cover insolvency professionals. Then, we will discuss information utilities. Before that, in the previous class, we discussed Section 12A, where we examined the position prior to the Section 12A withdrawal application, the withdrawal application under Section 12A, and what the position is now, as well as the role of the NCLT in accepting the withdrawal. We then discussed the applicability of Section 29A in the case of withdrawal, specifically whether the ineligibility prescribed under Section 29A is applicable in the case of withdrawal or not. Then, whether withdrawal is allowed during the liquidation is unclear. If you read the legislation carefully, withdrawal cannot be allowed during the liquidation; however, in the interest of justice, the NCLAT, in a few judgments, has allowed withdrawal during the liquidation. The position remains unsettled by the Supreme Court. Whether the right of objection is available to the other creditors, no, the right of objection is not available to other creditors. Then, whether the resolution applicant can invoke Section 12A, the answer is no; the resolution applicant cannot invoke Section 12A. So, these are all the various things that we discussed in the previous class while covering section 12A. Today, we will begin the concept of IPAs, okay? So, insolvency professional agencies. If you observe the legislation, who will implement it? So, prima facie, at the top level, you have the IBBI, which is a board that will monitor IPs and professional agencies. There is another judicial body, the NCLT; the judicial structure includes the NCLT, the NCLAT, and then the Supreme Court. So, that is the structure.

Let us now discuss insolvency professional agencies. What is the legal framework? The Insolvency and Bankruptcy Code IBC 2016 provides for the creation of the following institutional framework. One is the IBBI, which is a regulator; insolvency professional agencies (IPAs) are the first-level regulators of insolvency professionals, as all insolvency professionals must be registered with these agencies. Then, insolvency professional agencies will share the data with the IBBI, and these insolvency professionals are expected to register with the IPAs as well as obtain registration from the IBBI. Then, insolvency professionals, who are the individuals authorized to conduct the

insolvency resolution process, have created a separate profession to oversee the resolution process under the legislation. Then, adjudicating authorities are also present, such as the NCLT for corporates and debt recovery tribunals for individuals. This is a legal framework for insolvency professionals and insolvency professional agents. Today, we will discuss insolvency professional agents. In the next class, we will cover insolvency professionals.

Let us discuss insolvency professional agents, as the insolvency professional agency is an organization registered with IBBI that enrolls and regulates insolvency professionals. So, if you observe what the insolvency professional agency will do. The insolvency professional agency is an organization registered with the IBBI; we will discuss how it is registered, how it regulates, and how it enrolls. First, they will enroll, and subsequently, they will regulate the insolvency professionals, who are considered the backbone of this resolution process, and oversee their conduct and performance. Then, IPAs are governed by the IBC code, and we also have regulations from the IBBI regarding insolvency professional agencies. These regulations define the eligibility, registration, duties, governance, and disciplinary processes related to IPAs.

Now, we will discuss all these things. Now, let us discuss the eligibility criteria. If I want to register as an IPA, can I register? Who is eligible to register as an IPA? As per IBBI IPA Regulations 2016, who is eligible to register as an IPA? The sole objective is to carry out the functions of an insolvency professional agency under the code. If I want to register as an IPA, my sole object of creation must be to carry on the functions of an insolvency professional agency under the code. I am not supposed to do any other activity. My primary objective in creating the entity must always be to uphold the objects under the IPC. Then, it has bye-laws, so you are expected to have the bye-laws and governance structure in accordance with the Insolvency and Bankruptcy Board of India's model bye-laws and the governing board of Insolvency Professional Agencies Regulation, 2016. We have separate regulations for the bye-laws, so you are expected to have both the bye-laws and the governance structure in accordance with the IBC.

Then it has a minimum net worth of 10 crore rupees. Okay, then the minimum paid-up share capital is 5 crore rupees, so the net worth is 10 crore rupees, and the paid-up share capital is 5 crore rupees. Then what is the other condition? It is not under the control of any person resident outside India; therefore, the IPA should not be under the control of any person resident outside India. We are familiar with the definitions of 'resident' in India and 'resident' outside India. If a person is staying in India for more than 180 days, they are considered a resident of India. We have already discussed the definition of a resident in India and a resident outside India. The control of the IPA shall not be in the hands of a person resident outside India. And not more than 49% of its share capital is held directly or indirectly by a person resident outside India. Therefore, the minimum share capital of more than 51 percent must be held by residents in India.

Then, it is not a subsidiary of a body corporate through more than one layer, so it should not be a subsidiary's subsidiary. If that is not possible, then a maximum of one body corporate is allowed to be a subsidiary of another body corporate; it is a subsidiary. So, it cannot be more than one layer. Therefore, it cannot have a holding company, and holding companies, like other companies, are not possible. The applicant, its promoters, its directors, and its shareholders are fit and proper persons. So, what they are going to do is outline the functions and duties of IPAs, which have the following responsibilities. According to the regulations, IPs have the following responsibilities: enrollment and regulation of insolvency practitioners.

One of the major functions of IPAs is to enroll and regulate insolvency practitioners, so they will admit qualified members to the next class. We will discuss the eligibility criteria for becoming an insolvency professional in the next class. Therefore, these IPAs (Insolvency Professional Agencies) will admit members who are qualified to become IPs. Ensure that members meet both the eligibility and competency criteria. How will you build the competency? You are expected to regularly attend conferences and seminars, and you must complete the required credit hours. Anyway, we will discuss all these things in the subsequent lessons. The code of conduct for the IPA will prescribe the code of conduct and ethical standards for insolvency professionals, as I previously mentioned that the IPA is the primary authority responsible for regulating insolvency professionals. They will therefore prescribe the code of conduct and ethical standards for the IPs and ensure compliance with the model code of conduct. Therefore, they have provided the model code of conduct, which remains unchanged. Okay, in total, that is adopted by the IPs, so ensure that their members are following the code of conduct.

Then, training and development will organize continuing professional development, also called a CPE program. Continuing professional education helps the members stay updated with regulatory changes. As a member of IPE, you are expected to complete the minimum credit hours required each year. CPE hours are required, so you are expected to complete the CPE hours. Then, the grievance redressal and disciplinary mechanism, IPA, will set up a system for redressing complaints against IPs. If any third party or customer has grievances against the insolvency professionals, they can file a complaint before the IPAs. Then, they will conduct the investigation and take disciplinary actions in coordination with the IBBI. Please remember that whenever disciplinary actions are taken, they are always in coordination with the IBBI, as both the IBBI and IPA will be involved. Then, monitoring and compliance should assess the professional performance of IPs, including how they are performing, and they are required to submit reports to the IBBI on IP activities. If any misconduct is present or if there are any internal complaints, these matters must be reported to the IBBI on a timely basis.

Then, how will it be governed? What is the governing structure of IPA? Let's examine the regulatory level. Regulation 5 of the IBBI Model Bye-laws and the Governing Board

of Insolvency Professional Agencies Regulations, 2016, provides for the governing structure. So, what is the composition of the governing board? The governing board shall consist of a managing director, independent directors, and shareholder directors, comprising three distinct categories. So, there are managing directors, independent directors, and shareholder directors. Then, provided that the governing body has a minimum of seven directors, these three categories must have a minimum of seven directors on the governing board.

Then the managing director shall not be considered either an independent director or a shareholder director. Therefore, when calculating these three categories—managing director, independent director, and shareholder director—the managing director cannot be included as an independent director or shareholder. This is managing separately, apart from him; you are expected to have shareholders, a director, and other directors. Then any employee of an insolvency professional agency may be appointed as a director in addition to the managing director. Please note that an employee of the insolvency professional agency can also be appointed; however, they cannot serve as a managing director. A managing director is separate; however, such a director shall be deemed to be a shareholder director. Then, more than half of the directors shall be residents of India. At the time of their appointment, they must be residents of India and remain so throughout their tenure as directors. Therefore, more than half of the directors must be residents of India. Then, who are all the registered IPAs in India? As of now, IBBI has recognized only three IPAs: Insolvency Professional Agencies. One professional agency is promoted by ICAI, the Institute of Chartered Accountants of India, which is the Indian Institute of Insolvency Professionals of ICAI, also called ICAI IIP. Another is promoted by the Institute of Company Secretaries of India (ICSI) and the Institute of Insolvency Professionals of India (IIP). The third is the Insolvency Professional Agency of the Institute of Cost Accountants of India, which is promoted by ICAI.

So, these three IPAs are there right now. The role of the Insolvency and Bankruptcy Board of India is to oversee its activities; the IBBI is the apex regulatory authority, overseeing insolvency professionals (IPs) and insolvency professional agencies (IPAs). The key role includes registering and regulating IPAs and IPs, which are both regulated by the IBBI (Insolvency and Bankruptcy Board of India), so they are going to register IPAs and IPs. Then, setting eligibility criteria for the examination process, so the IP examinations are conducted by the IBBI. Then, the training requirements are prescribed by the IBBA. Then, issuing rules, regulations, and guidance for IPAs on how they are supposed to regulate IPs, their internal control mechanisms, and everything else is prescribed by the IBBA. Then are they complying? Are they complying with the rules and regulations? The IBBI will regularly monitor and take enforcement actions. Then, supervising the conduct of IPs through IPAs. IBBA can directly interact with IPs, but

generally, they'll interact through IPS. So through the insolvency professional agencies. They will supervise the conduct of insolvency professionals.

Then, disciplinary proceedings are okay. How can IPA take the disciplinary proceedings? When IPA receives a complaint or identifies misconduct by a member of IP, because we have three agencies, these three agencies will have the members. If they find misconduct by any of their members, they can conduct an internal investigation. Therefore, an internal investigation will be conducted. Then the disciplinary committee will be formed. They will examine the case and receive evidence from both parties. Accordingly, they will make a decision. So what actions can they take? They can issue a warning or reprimand, or they can impose a suspension; sometimes, they can even expel the member. In exceptional cases, they can consider expelling the member; alternatively, they can also report the matter to the IBBI for further action. There are instances where they have given the order to the member to undergo training once again, so mandatory hours of training will be there before admission to the insolvency professional. There are instances where they have given orders for the member to undergo training again, depending on the circumstances, so they can issue the orders accordingly.

The importance of IPAs in the insolvency ecosystem lies in their role in professionalizing and standardizing insolvency practice, as there should be a mechanism in place. Therefore, an internal control mechanism must be in place, as the majority of these IPs belong to professionals, including advocates, company secretaries, and chartered accountants. In most cases, they are all professionals. There should be a mechanism for how they are going to be regulated, so these IPAs will create the ecosystem where you can regulate them. And they are going to standardize the insolvency practice. Then serve as a self-regulatory organization under the IBBI's oversight. So, it will regulate itself. It will also regulate the IPs. Then, facilitate the capacity building of professionals. As I mentioned earlier, there is a concept of CPE, which involves continuous training programs. These programs will enable capacity building for professionals. Then it acts as a bridge between the regulator and the insolvency professional, as I have already mentioned: the insolvency professional, then above them, the IPA, and then the IBBI. This IPA will serve as a bridge between IBBI and the professionals.

Then, who can be an IPA? If you observe section 199 of IBC, it provides that, save as otherwise provided in this code, no person shall carry on its business as an IPA under this code and enroll any insolvency professionals (IPs) as its members except in accordance with the certificate of registration. Therefore, you are expected to obtain the certificate of registration if you wish to act as an IPA. If you want to enroll any IPs under you or act as an IPA, you are expected to obtain the certificate of registration. What are the principles governing the registration of an insolvency professional agency? These are all the various principles that are to be there. These are all governing principles. Prima facie, it is to promote the professional development and regulation of insolvency professionals.

Essentially, this IPA must be established to promote professional development and to provide services of competent insolvency professionals, catering to the needs of debtors, creditors, and other specified individuals. So they are there to promote the services of competent insolvency professionals. So they are supposed to groom the insolvency professionals.

Then, to promote good professional and ethical conduct amongst insolvency professionals to protect the interests of debtors, creditors, and such other persons. So, IPAs are expected to protect the interests of debtors and creditors, as they serve the community and stakeholders at large, and to promote the growth of insolvency professional agencies for effective resolution plans. Then, how will you handle the registration? The application for registration shall be submitted to the board, and the board will issue the registration certificate. Once you submit an application, there are prescribed formats. Once you submit an application to the board, if the conditions are satisfied, we refer to the requirements regarding net worth, turnover, and minimum paid-up share capital. If you satisfy these conditions, they can issue the certificate of registration; otherwise, they may reject it. They may accept or reject. So if they are rejecting, then they shall be given an opportunity to be heard; a compulsory opportunity to be heard must be given before rejecting. Then the certificate of registration must be in the prescribed format; there are prescribed formats available, and you are expected to provide the certificate of registration in the prescribed format only. Then the renewal of the certificate will be there, so the certificate will be valid for a particular period of time. Once the period is completed, you have to make an application; it's a regular process.

Then, if any IPA fails to follow the terms and conditions, as I have already mentioned, the IBBI will prescribe its internal rules and regulations. Therefore, if any IPA fails to comply with the rules and regulations, it may be subject to suspension or cancellation of registration. So if any IPA is not satisfied, then where can they go? Section 202 of the IBC provides that any insolvency professional agency, which is agreed upon by the order of the board, made under Section 201, may prefer an appeal to the NCLAT. Please note that this is an appeal before the NCLAT. It is not an appeal before the NCLT. Therefore, you are supposed to make an appeal before the NCLAT in the specified manner as may be described. Then, how is the governing board? So, what is the constitution? So, section 203 is the basic section, which provides for the governing board of the insolvency professional agency. So, according to section 203, the board may, for the purpose of ensuring that every insolvency resolution professional takes into account the objective sought to be achieved under this code, make specific regulations relating to the setting up of the governing board, how the governing board must function, and what its composition should be, so they can establish the rules and regulations. As previously discussed, we have addressed this issue.

Then the minimum number of independent directors must be present. The number of insolvency professionals who shall be members of the governing board is also important. So, how many insolvency professionals must be on the board of insolvency professional agencies? Even insolvency professionals will be members of the governing board. All these things are prescribed. The IBBI will prescribe the rules and regulations. Then, let us discuss the functions of insolvency professional agencies and what they are responsible for. So, if you observe section 204, which clearly provides that they have the power or an obligation to grant membership to persons who fulfill all the requirements set out in the bye-laws upon payment of the membership fee. In the next lesson, we will discuss who can be an insolvency professional, the eligibility criteria, and other relevant details. Once an individual satisfies the eligibility criteria, it is the responsibility of the insolvency professional agency to grant membership. Then they will lay down the standards, including those of professional conduct, as well as how to conduct the CRP process, etc. Internal circulars will be issued, and guidance notes will be given. Then, monitor the performance of its members; they will be doing the monitoring. Then safeguard the rights and privileges of insolvency professionals, who are all members. Then suspend or cancel the membership of insolvency professionals. In the bye-laws, if any fraud is involved and the members are found to be involved in fraudulent activities, there are grounds on which the IPA has the power to suspend membership.

Then, redress the grievances of consumers against insolvency professionals so that consumers can be either creditors or debtors; anyone can be a consumer in this case. Then publish information about its functions, a list of members, the performance of its members, and such other material or information as may be prescribed by the rules and regulations. Accordingly, the IBBI will prescribe the content to be published, and the IPA will publish all such data. Then, insolvency professional agencies are expected to make the bye-laws. If you observe section 205, it clearly provides that, subject to the provisions of this code and any rules or regulations made thereunder, after obtaining approval from the board, every insolvency professional agency is expected to make the bylaws specified by the board under section 196. This is how insolvency professional agencies will work. In this lesson, we have discussed the legal framework related to IPA. We have discussed various sections and regulations, as well as the eligibility criteria for registering as an IPA, including the turnover and share capital requirements, and that there should be no more than one layer. Thus, we have covered the eligibility criteria.

We then discussed the functions and duties of IPA, as well as its governing structure, which includes shareholders, directors, independent directors, and the managing director. Therefore, a structure is in place, and we have discussed the governing structure. Then we discussed the registration of IPA, how to make an application for registration, and the disciplinary proceedings by the IPA insolvency professional agencies.

Thank you.