

Insolvency and Bankruptcy Law in India

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Week 07

Lecture 35

Welcome, everyone.

As part of the course on insolvency and bankruptcy law in India. Today, we will discuss insolvency professionals.

In the previous class, we discussed insolvency professional agencies. In the previous class, we discussed the legal framework related to IPA. We then discussed the eligibility criteria for registering an IPA. We have discussed the paid-up share capital requirement, the minimum number of directors, and other relevant details. Then the functions and duties of IPA were discussed, along with the governing structure. As we have discussed, the IPA must have a managing director, who is then expected to be accompanied by independent directors and shareholder directors. So, that is how we discussed the governing structure of IPA. Then, we have discussed the registration of IPA. Therefore, if you wish to register, unless you are already registered with the IBBI, you cannot act as an IPA. Then, disciplinary proceedings will be conducted by the IPA. Therefore, the IPA will regulate insolvency professionals. Then, if there is any misconduct by the insolvency professional, the IPA insolvency professional agency will take disciplinary proceedings against the IPA. So, all these things we discussed in the previous class.

Today, we will discuss insolvency professionals. Let us now discuss enrollment and the registration of persons to act as insolvency professionals, who can serve as resolution insolvency professionals. So, as per section 206 of the Act, no person shall render his services as an insolvency professional under this code without being enrolled as a member of an insolvency professional agency. So, who can be or who can act as an insolvency professional? Any person who is enrolled and registered under the IBC and is registered as an insolvency professional with the Insolvency and Bankruptcy Board of India is eligible to act as an insolvency professional under the legislation.

Then, if you observe section 207, which provides that every insolvency professional shall, after obtaining the membership of an insolvency professional agency, register himself with the board. There are various stages to becoming an insolvency professional; you are expected to qualify for the insolvency IP examination first. There are various modes, so you are expected to qualify for the examination. Then, you are supposed to undergo mandatory training hours subsequently. Then, subsequently, you will be

admitted as a member of one of the professional agencies, IPA. You may be able to enroll with ICAIP, ICSAIP, or CMAIP. Then, you are supposed to be registered with IPA first, and subsequently, with IBBA as well. If you wish to practice as an insolvency professional, registration with the IBBA is mandatory. The board may then specify the categories of professionals or persons possessing such qualifications and experience in the fields of finance, law, management, insolvency, or other relevant fields as they deem fit. So, who is eligible to become an insolvency professional? The board, which is the IBBI, is going to prescribe the qualification. In the next slide, we will discuss the qualifications of individuals who can act as insolvency professionals. Eligibility Regulation 5 deals with eligibility; what is the definition of eligibility? Who can become an insolvency professional if he has passed the limited insolvency examination within 12 months before the date of their application for enrolment with the insolvency professional agency? So, you are expected to qualify for the limited insolvency examination first.

Then, within 12 months, you are expected to make an application for enrollment. The limited insolvency examination is valid for a period of one year. Therefore, within one year after qualifying for the insolvency examination, you are expected to make an application, complete the training program, and then enroll with the insolvency professional agency. Then, he has completed a pre-registration educational course within 12 months from the date of payment of the non-refundable application fee, as per the regulation. Okay, so you are expected to undergo the educational course, and there will be mandatory hours that you are required to complete. So, after completing the educational course. You are expected to complete the mandatory hours of the educational course you are required to take. After completing the educational course, you are also expected to pay the non-refundable application fee.

Then, after his enrollment as a professional member, he may be required by the board to undergo training from an insolvency professional agency. Successfully completed the national insolvency program as may be approved by the board, so the national insolvency program will be available; you have completed the national insolvency program, which is one route, or alternatively, successfully completed the postgraduate insolvency program as may be approved by the board. There is a program called the PGIP (Post Graduate Insolvency Program), offered by the IICA (Indian Institute of Corporate Affairs). Okay, so maybe you've completed it. Post-graduate PGAP program, which is approved by the board, or else you must have 10 years of experience in the field of law after receiving your bachelor's degree. So, perhaps you have a PGIP program qualification, or you have a minimum of 10 years of experience in the field of law after receiving your bachelor's degree, or you are expected to have 10 years of experience in management after receiving your master's degree. So, if you are in management, then a minimum of 10 years of experience is required. In management, after receiving a degree or a 2-year full-time postgraduate diploma in management as per the norms, you are expected to complete the

postgraduate studies. You are then expected to have 10 years of experience in management, which is one of the eligibility requirements. After receiving a bachelor's degree, if you do not hold a master's degree, 15 years of experience are required to be eligible to become an insolvency professional.

Then, with 10 years of experience as a Chartered Accountant registered as a member of the Institute of Chartered Accountants of India, he should be a CA with 10 years of experience, or a Company Secretary registered as a member of ICSI, or a Cost Accountant registered as a member of the Institute of Cost Accountants of India. Either the individual must have 10 years of experience as a CA, CS, CMA, or advocate, or the person seeking to become an insolvency professional must have 10 years of experience as a CA, CS, CMA, or advocate. As shown in the previous slide, the career paths include 10 years in the field of law after receiving a bachelor's degree, 10 years in management after obtaining a postgraduate degree, and 15 years after receiving a bachelor's degree. So, if you satisfy any one of these conditions, you can take an examination. Then, after qualifying, you are supposed to undergo the training program and obtain membership with one of the IPAs.

As we have already discussed in the previous class, IPAs are available, so you are required to register with them. Now, let us discuss the functions and obligations of insolvency professionals and what they are expected to do. So, section 208 of the Act, okay. They act as insolvency professionals in the following matters, so they are supposed to act as the insolvency professionals in the matter of fresh start orders. Under Chapter 2 of Part 3, you can initiate the fresh start process; in this case, you can act as the insolvency professional. The individual insolvency resolution process, as outlined in Chapter 3 of Part 3, and the CIRP process are what we discussed in the last classes. The CIRP process, or Corporate Insolvency Resolution Process, enables him to act as a resolution professional.

Then, the pre-packaged insolvency resolution process. In the next classes, we will discuss PPIRP, also known as the pre-packaged insolvency resolution process, which allows an insolvency professional to act in these matters. The individual bankruptcy process under Chapter 4 of Part 3 is not notified, so the individual bankruptcy process is followed by the liquidation of the corporate debtor firm under Chapter 3 of Part 2. In all these cases, there may be infrastructure processes, individual insolvency, corporate insolvency, pre-packaged insolvency, and, ultimately, real bankruptcy, which involves the liquidation of the corporate debtor. So, in all these cases, a person can act as an insolvency professional. Let us then examine the functions and obligations of insolvency professionals. Therefore, he has an obligation to exercise reasonable care and due diligence when performing his duties. Maybe he is an IRP, maybe he is an RP. In the previous classes, we discussed the IRP and RP in detail. Therefore, he is expected to exercise reasonable care and due diligence in performing his duties.

Then, to comply with all the requirements, terms, and conditions specified in the bylaws of the insolvency professional agency of which he is a member. As we have already discussed in the previous class, insolvency professional agencies are going to enroll members, so if you want to be an insolvency professional, you should be enrolled with one of the professional agencies. It is up to you with whom you register, so you can register with one of the agencies. Therefore, each professional agency will have its own bye-laws, and you are expected to comply with all of them. Additionally, regulations are applicable to you. Therefore, these professionals are also expected to follow these regulations. Then, to allow the insolvency professional agency to inspect his records whenever the agency requests to inspect them, you should permit it. As a professional, you should allow this professional agency. Then submit a copy of the records of every proceeding before the adjudicating authority to the board, as well as to the insolvency professional agency. Whenever you are submitting any records, you are supposed to submit the records to the NCLT, which is the adjudicating authority, and also to the board, which is the IBBI, and to the IPA, as per the law. Not all documents need to be submitted, so only the required documents should be provided. So, these documents must be submitted to both the IPA and IBBI, along with the adjudicating authority, which is the NCLT. Then to perform its functions in such manner and subject to such conditions as may be prescribed.

So, we have detailed rules and regulations. In these rules and regulations, they are going to prescribe the functions you are supposed to follow as an insolvency professional. Then what are all the powers? If you observe the powers of insolvency professionals, they are scattered; they are not centralized in one place. These powers are present in various places; that's why we have divided them for our convenience into powers during the CIRP and those during the liquidation. So, the powers of the insolvency professional during the CIRP. So, the first power is Section 17. As per Section 17, we have already discussed it in previous classes: the management of the affairs of the corporate debtor by the interim resolution professional.

As we already know, once the application is filed under sections 7, 9, or 10 of the IBC, the interim resolution professional will be appointed by the adjudicating authority upon the recommendation of the financial creditor or corporate debtor. In the case of an operational creditor, there is still an option. Therefore, once a resolution professional is appointed, please note that the resolution professional will replace the board of directors.

Therefore, this is why the resolution professional is responsible for managing the affairs of the corporate debtor. In the case of CIRP, he is going to replace the board of directors. Then management of operations as a going concern. So, one of the requirements under the IBC is that when the IRP or RP takes over the management of the company, they are supposed to run the company as a going concern; that is one of the essential features of the IBC. Then RP will conduct CRP and manage the office. Okay, so regarding the CRP

process, in the previous classes, we discussed the timelines within which you are supposed to complete everything. He is expected to comply with all these rules and regulations that we discussed in the previous classes. Okay. So, the next duties of the resolution professional are outlined in section 25, which speaks about the duties of resolution professionals. Apart from this, he also has general duties, as I have already told you. These duties are not all in one place. Okay, so till now, whatever we have discussed in the previous classes has been done by the resolution professionals only. For our convenience, let us outline a few points for discussion that provide for powers during the CRP process. So, take control of the corporate debtor.

Once the IRP or resolution professional is appointed, he is going to take over the management of the return. He will replace the board of directors and will be in a fiduciary position towards the company. When the resolution professional replaces the board of directors, he will be in a fiduciary position. There are a few judgments where it was held that the resolution professional has a fiduciary position towards the company. Then custody of the assets, so once the IP takes over the management of the company, they immediately have to take over and take control of all the assets, including the financial and operational records. Then operate the bank account, as we have already discussed in the previous classes, once the resolution professional is appointed. So, once the order is given, it has to be immediately intimated to the bank, so that the banker does not pass any checks that were issued by the previous management. The resolution professional is expected to have the power to sign. That's why he has the power to operate the bank accounts. Then collect and verify claims.

As we have already discussed, one of the basic duties of a resolution professional is to collect and collate the information. He is also going to collect and verify the claims. We have various categories of creditors: operational creditors, financial creditors, and workmen's dues, other than the operational creditors. The professional is supposed to collect the information and verify the claims from the creditors, and he is expected to update the list whenever he receives new information. Then constitute the committee of creditors. We have already discussed all these topics in previous classes. Therefore, the resolution professional is expected to constitute a committee of creditors and then operate the business as a going concern. So, this is one of the crucial roles of a resolution professional. Therefore, he is expected to run the business as a going concern to ensure its smooth operation. Therefore, because it is generally impossible for one person to manage the entire company, this is also practically impossible. That is why he can appoint other professionals, consultants, and accountants. Depending on the circumstances, he can appoint various people to assist him. Therefore, this is why, in the previous classes, we discussed how the resolution professional has the power to appoint various professionals and is expected to do so. So, he shall appoint the two valuers

immediately after his appointment. Therefore, he will appoint various individuals to ensure the smooth operation of the business.

Then raise the interim finance with the CoC approver. Suppose the resolution professional is of the opinion that the company cannot be run without raising capital; further capital may be required. In such cases, you can raise interim finance, but please remember that whenever you raise interim finance, it must be approved by the CoC. Without the approval of the CoC, you cannot raise the interim finance. Then file the application before the adjudicating authority. As we have already discussed, once the CRP process is started, all the applications from the CD to the adjudicating authority must be routed through the resolution professional only. Therefore, the resolution professional is required to submit an application to the adjudicating authority on behalf of the corporate debtor. Then invite resolution plans and present them to the COC. So, once the resolution professional is appointed, he is going to give the public announcement, then the expression of interest, subsequently, he is going to prepare the prospects for resolution applicants, and then he is going to invite them to submit the resolution plan by providing the evaluation matrix and other things we have discussed in detail. Then, all the resolution plans must be submitted to the COC for their approval.

Then, these are all the various powers under the CRP process. Let us discuss a few powers of the resolution professional during the liquidation. Therefore, the powers and duties of the liquidator are specifically outlined in detail in Section 35. Then, he has access to the information consolidation of claims; he has the power to access and consolidate the claims information. These sections you are going to discuss subsequently in detail in the next classes. Then, take custody and control of all the corporate debtor's assets. Once the liquidation is initiated, it is the responsibility of the resolution professional, who serves as the liquidator, to take custody. He is supposed to maintain the estate, which consists of the debtor's assets. You are responsible for maintaining and taking custody of all the assets of the corporate debtor, which is referred to as the liquidation estate. Then evaluate and sell assets, including a going concern sale or slump sale. He is supposed to evaluate and sell the assets. As a going concern, he can sell the assets; he can have the slump sale, so he can do everything.

Then, investigate the corporation's financial affairs. During the liquidation process, he is supposed to investigate the financial affairs so that he can identify pure transactions and avoid them. In the subsequent lessons, you are going to discuss more about the avoidance of transactions that you are supposed to avoid. There are also PUEF transactions, and we will discuss them further. So, the resolution professional has the power to investigate the financial affairs of the corporate debtor. Then he may summon the person who may have information about the company's affairs. During the liquidation, if he believes that someone else holds crucial information, he may issue a summons to that person to provide the information. Then institute or defend suits and legal proceedings on behalf of

the debtor. So, once the liquidation process starts, if the company wants to file a case against any other person or if any other person is filing the case, then he is the person who is going to defend, or else he is the person who is going to institute the case, because he is the person who is going to make the decision. So, he is going to institute and defend and institute suits. Then distribute the proceeds from the asset sales according to the waterfall mechanism. In the subsequent lessons, you will discuss the waterfall mechanism in detail. According to the waterfall mechanism, once the liquidation process is completed, it is the responsibility of the resolution professional, i.e., the liquidator, to distribute all the assets in accordance with the waterfall mechanism under Section 53.

Let us then examine the role of RP as recognized by the judiciary. Even the judiciary has recognized the role of RP in various cases. Let us discuss a few judgments. In the case of SBI versus Ramakrishnan, the Supreme Court clarified the role of IPs under the moratorium, and this clarification is also applicable to personal guarantors. Then, in another case law, Swiss Ribbons Private Limited versus Union of India, the Supreme Court held that it has recognized the central role played by IPs because insolvency professionals are the people who are going to manage the affairs of the company and replace the board of directors; that is why the Supreme Court has recognized them and their role in facilitating the committee of creditors and ensuring the realization of maximum assets. That is one of the primary objectives of the IBC. Therefore, all these tasks can be accomplished with the assistance of insolvency professionals. Therefore, this is why the Supreme Court has recognized the central role played by IPs in the resolution process, emphasizing that they are expected to possess professional competencies. Thus, it upheld the constitutional validity of the IBC. In this case, the question was raised as to whether it is constitutionally valid for resolution professionals to practice and appear before the NCLT. The court of law held that these are all specific and specialized individuals who are trained in a particular manner to meet industry requirements, which is why, constitutionally, it is valid.

Then, in another case, Law Phoenix Arc Private Limited versus Spade Financial Services Limited, the NCLAT held that they dealt with a conflict of interest. It was held that the IP must disclose all possible relationships, and it is the responsibility of the IP to ensure that he is independent. He is not expected to have any interest, and he should preserve neutrality. That is the role expected of the resolution professional. Then, in another case, Law State Bank of India versus Metenere Limited, the NCLT ruled that a resolution professional cannot be appointed if they are disqualified under Section 29A. So, if any resolution professional is disqualified under Section 29A, then such a resolution professional cannot be appointed. So, let us recap what we have discussed so far. In this lesson, we have discussed the legal framework related to insolvency professionals. So, what are all the various legislative sections applicable? Then, one can enroll as an insolvency professional.

Then we discussed the eligibility criteria, which include having a minimum of 10 years of experience as a CA, CS, or CMA in the role of an advocate. They should have 10 years of experience after their last graduation and 10 years of experience after their PG course, as well as 15 years of experience in management after qualifying with their bachelor's degree. Similarly, we have discussed the eligibility criteria for becoming an insolvency professional, and then we have discussed the functions and obligations of insolvency professionals. Then we discussed the powers of insolvency professionals. When we were discussing their powers, we found that they are scattered and not consolidated in one place. However, we tried to discuss a few of these powers during the CIRP process and the liquidation process. We then discussed the judicial interpretation of how the judiciary recognizes the role of insolvency professionals during either the CRP process or the liquidation process, as applicable. Thus, we have now completed the concept of insolvency professionals and the laws relating to them.

Thank you.