

Insolvency and Bankruptcy Law in India

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Week 10

Lecture 50

Hi, we are kicking off with the 50th session on liquidation under the IBC. It reminds me that you have patience; with a lot of patience, I heard about 50 sessions, 49 rather. This is the 50th session in which we are going to cover more of the IBBI regulations, which we started in the previous session.

So, let's quickly recap what we discussed in the previous session. In the previous session, we covered Regulations 3 to 8, which talk about the appointment of a liquidator, as I have mentioned before. The liquidator shall be independent; that's the crux of Regulation 3. If he is not, he must inform the IBBI and the Adjudicatory Authority. Regulation number 4 talks about the liquidator's fee. It is based on the value of the realization of the asset and can range from 6% to 3%, depending on how much money is realized through the sale of the assets. Then there is something called reporting. After regulation 4, we have regulation 5, which speaks about reporting. Reporting, we said, can be a preliminary report, a report on the sale of assets, and a report that is a final report, among such reports. After that, we spoke about Regulation 6, which specifies the registers, records, and accounting of the corporate debtor that the liquidator should maintain.

Then Regulation 7 talks about the appointment of various other professionals, how the liquidator can appoint them, whether he can pay them money, and how he recovers the cost of engaging these professionals. Lastly, we come to Regulation 8, which is consulting with various stakeholders. Though we realize that the liquidator has the right and power to consult various stakeholders, it is not mandatory for him to be bound by these suggestions or consultations; hence, he can still make his own decisions in spite of the consultation. This is what we have precisely discussed in the previous session. Now, let's go forward and start with Regulation 9 of the IBBI regulations. Regulation 9 of the IBBI regulations speaks about personnel to extend cooperation to the liquidator. This is a very important provision within the IBBI regulations.

In the past, we have seen that a lot of resolution professionals and liquidators have struggled immensely in bringing about the resolution process of an insolvent corporate debtor. Why was that? It is because the personnel, including officers, employees, and various other people involved in the operations of the corporate debtor, do not actually

cooperate with the liquidator or a resolution professional, and hence, there are a lot of hindrances caused. So eventually the law became more cooperative; it has been giving more powers to the insolvency professionals, liquidators, resolution professionals, and adjudicatory authorities, who have been giving a lot of orders that went in favor of, you know, the liquidators and resolution professionals.

Now, Regulation 9 of the IBBI regulations talks about how the personnel involved in the operations of the corporate debtor should actually cooperate with the liquidator. The liquidator may make an application to the adjudicating authority for a direction that a certain person shall cooperate with him in the collection of information. Remember, these powers, though inherent, may be obstructed; they may be hindered by various persons. The liquidator lacks manpower and lacks a legally binding authority. Therefore, he might have to make an application to the adjudicator and seek appropriate relief at the right time so that he can get cooperation from all the people surrounding him. Therefore, regulation 9 makes it an obligation for insolvency professionals to file an application to the adjudicating authority seeking relief where they can get cooperation from various people involved. A liquidator can get this order from the adjudicating authority, against whom that's a very important question, so the following are the personnel against whom an order can be made by the adjudicating authority on the application of a liquidator. The number one officer of the company who is involved in administration, who is involved in operations, who is involved in the manufacturing process, or finance, or any such officer; then the auditor of the corporate debtor, an employee of the corporate debtor, a promoter, or any partner of the corporate debtor in case the corporate debtor is a partnership like an LLP.

Then, any person who was in the past an IRP, an RP, or a liquidator of the corporate debtor, with whom a lot of information is available, the liquidator presently appointed for the case may seek information from all these parties. Lastly, any person who is believed to have information about any property belonging to the corporate debtor against all these people may get an order from the adjudicating authority, and remember, the crux of the order is cooperation. Provided an application can only be made if the liquidator has made reasonable efforts to obtain the information and has failed. Remember, adjudicating authorities are very busy actually deciding more important matters in insolvency issues.

Most of the process should be handled by the insolvency professional who is appointed to handle the case. But if he is coming back to the adjudicating authority every now and then seeking some relief or the other, then it results in a lot of unnecessary time consumption for adjudicating authorities. Hence, we are saying that as a liquidator, you should first make your reasonable efforts to obtain the information from the persons involved. If you fail and face any kind of obstruction, only then should you come to the adjudicatory authority; otherwise, handle it yourself.

Let's turn to regulation 10: Disclaimer of an onerous property. In, sessions 48 and 49, we heard about onerous property, and I explained to you that onerous property is a property on which the expenditure for maintenance and legal battles is much greater than the value of the asset. Hence, having such an asset will not make any sense, and therefore, the liquidator might disown this asset; however, the decision is not his. He has to make an application to the adjudicatory authority, and the adjudicatory authority may, by order, allow him to disown such an asset. So, regulation 10 refers to property that is burdensome or subject to liabilities in case of insolvency. If a debtor's assets are encumbered or pose a financial burden, they can be classified as onerous property. Regulation 10 allows the insolvency professional to disclaim ownership of any onerous property that could adversely affect the insolvency process. This means the insolvency professional has the authority to reject the property if it is detrimental to the interests of the creditors or if its liabilities outweigh the benefits.

The purpose of this provision is to help streamline the insolvency process by removing unprofitable or problematic assets from the estate, allowing a focus on assets that can generate value for the creditors. Now we move on to regulation 11, which talks about extortionate credit transactions. If you remember, we also talked about sections 49 and 50 that dealt with extortionate credit transactions; I mean 49 about fraudulent transactions and 50 and 51 precisely on extortionate credit transactions.

Now, Regulation 11 of IBBI also talks about the same transactions. Maybe some of you are thinking that if there is a provision in the law dealing with a certain topic or matter, why would there be a regulation on the same matter again? The reason is very simple: the law, the enactment framed by legislators, is rather rigid; it is not very flexible. Therefore, any enactment generally gives a basic framework within which the law should operate. However, the same legislation will give powers to the regulators who can make regulations from time to time that will govern the processes mentioned in the entire law, and these regulations are slightly flexible in nature; hence, the regulator can keep modifying them without needing to go back to the parliamentarians for amending the law; therefore, regulations play a significant role. Therefore, sometimes you see that the enactment and its provisions overlap with the regulations, or the regulations overlap with the provisions, as both can operate independently; both of them are valid.

However, if a conflict arises between the enactment and the regulation, the enactment will prevail and the regulation will be subordinate to it. Therefore, they may not be valid if there is a direct conflict of interest. So, having said that, regulations also deal with extortionate credit transactions; we are specifically focusing on Regulation 11. A transaction shall be considered an extortionate credit transaction under section 50, subsection 2, where the terms require the corporate debtor to make exorbitant payments in respect of credit provided or are unconscionable under the principles of law relating to contracts. So are they reasonable or unreasonable? The moment the element of

unreasonability arises, it is almost likely to be termed an extortionate credit transaction if the credit terms are absolutely unreasonable.

Then Regulation 12 talks about public announcements by the liquidator. In previous sessions, we have understood that a public announcement is an important element of the entire liquidation process because it is going to invite the claims again. So what is Regulation 12 saying? The liquidator shall make a public announcement in Form B of Schedule 2 within 5 days of his appointment. Remember this timeline of 5 days. The public announcement shall call upon stakeholders and require them to submit or update their claims as of the liquidation commencement date.

So, we said whatever claims you submitted at the time of CIRP is a different story. But as far as liquidation is concerned, it is a fresh process under the order of the adjudicating authority. Hence, the creditors and all claimants must either modify their previous claim or lodge a fresh claim, but the liquidator shall have a record of all these claims once again. The public announcement shall also provide the last date for submitting or updating claims, which is 30 days from the LCD, which we call the liquidation commencement date. There is a Part C to the whole provision. It states that where a stakeholder doesn't submit claims during the liquidation process, the claims previously submitted and collated during the CIRP will be deemed submitted under Section 38, and hence, they may not need to make a fresh claim if they do not have anything to modify. The announcement shall be published.

This is important, you know. If I am a creditor of a company that is under liquidation, I will not receive any personal communication from the company that the corporate debtor is under liquidation, and hence I have to make a claim. Therefore, as a creditor, the only way for me to be informed about the liquidation process and claims is to follow the newspapers where advertisements and public announcements are made, and to make my own claim based on this public announcement. However, the question is who is reading which newspaper, right? Maybe I don't read newspapers at all, or I might read a local newspaper that is published in a vernacular language, and somebody else might read a newspaper that is published in the national language. Hence, it is important to understand where this public announcement should be published, especially if it's a newspaper. Please follow this carefully. It should be published in one English newspaper and one regional language newspaper with a wide circulation at the location of the registered office.

Let's quickly recall how many newspapers you remember that are circulated in your locality, either in English or in a vernacular language. Most of us may not remember any newspapers at all, so if I publish the public announcement in a newspaper with the lowest circulation and probably no one reads it, then it is impossible for the claimant to obtain this information. Hence, the law says, especially the IBBI regulations, that you must

publish such a regulation or advertisement in newspapers that are widely circulated at the location of the registered office. Though you might have 100 different offices, we don't care; the registered office is the key as far as we are concerned. It must also be published on the website, if any, of the corporate debtor, and lastly on the website, if any, designated by the board for the purpose of such public announcements.

Then Regulation 12A. Process email ID. This is also a very important provision that says that the liquidator must use the process email ID, which is specific to an account. If I'm an insolvency professional, I have my personal email ID. If I'm inviting emails to my personal email ID, I might have an enormous number of emails. I might lose track. Therefore, all of us insolvency professionals, what we do is open a separate email ID for a specific CD's account, whether as an RP or as a liquidator. So, all the correspondence with reference to such corporate debtors' accounts will come to that email ID. This liquidator must use the process email account provided by the resolution professional, following Regulation 4C. In the event of his replacement, email credentials must be transferred to the new liquidator, and remember that whoever may be the liquidator, there is only one email ID for the corporate debtor regarding that liquidation process. Therefore, the liquidator may change, but the email ID will not change.

As we discussed, there are some important reports to be delivered by the liquidator periodically, so we are trying to understand what those reports are. The liquidator must submit a preliminary report. Remember this word. This is the first report ever submitted by the liquidator and is therefore called a preliminary report, although it doesn't contain many details about the corporate debtor. This preliminary report shall be submitted within 75 days, covering corporate debtors' capital structure estimates of assets and liabilities as of the liquidation commencement date. The liquidator must submit a report within 75 days, covering the first two, plus three or four, which includes plans for any further inquiries into the debtor's promotion, formation, business conduct, and a proposed liquidation plan. Remember, this is a key starting point for the entire preliminary report, outlining how he plans to complete the liquidation process, the timelines involved, and the estimated costs of liquidation. This is Regulation 13 that we have covered; now we move on to Regulation 14.

Regulation 14 talks about early dissolution. After preparing the preliminary report, if the liquidator finds that the debtor's realizable properties can't cover liquidation costs, no further investigation is needed; then he must consult the consultation committee and, if advised, apply to the adjudicating authority for early dissolution with a detailed report, because now we know that there are no realizable assets and it does not make sense for us to proceed, and no further investigation into these proceeds or assets is required. Then talk to the consultation committee, take their opinion, and apply to the adjudicating authority for dissolution straight away. Therefore, there is no liquidation process involved here. When is that likely? If you think very simply, this is likely to happen when the

company does not have a single realizable asset, has zero assets, and more liabilities; in such cases, it is a waste of time to even run the liquidation process. Therefore, directly dissolving the company is the best solution. We have earlier seen a preliminary report, and now we are talking about a progress report.

The liquidator must submit progress reports to the adjudicating authority and the board as follows: the first report within 15 days after the end of the quarter in which the liquidator is appointed. So, if the liquidator is appointed during the month of July, I repeat, the quarter will commence in July and end in September. July, August, and September are the months in the quarter, and by September 30th, the liquidator must submit their first report within 15 days. This is the progress report. Then, subsequent reports should be submitted within 15 days from the end of each quarter.

So, if the first report is submitted within 15 days from the end of September, the next report will obviously be submitted within 15 days from the end of December. After that, for every quarter, whenever it ends, like March, June, September, and December, you should keep submitting one report within 15 days from the end of the quarter. The progress report shall include this important information. The moment I say you must report what I should report and what the content of the report should be, firstly, it should discuss appointments and address the tenure and succession of professionals involved in the liquidation process. Then progress in liquidation: where did you start, and what is the current position? The progress report must include details of fees and expenses, developments in any material litigation by or against the corporate debtor, filing updates on applications for avoidance of transactions under Part Two of the Code, which we have seen includes avoidance transactions called preferential, undervalued, fraudulent transactions, and lastly, extortionate transactions.

If you have filed any of these applications, you should also report the status of those applications and details. Any changes in the estimated liquidation cost must also be mentioned in this progress report and submitted. The progress report must include an account showing liquidators' receipts and payments during the quarter, the cumulative total of receipts and payments since the liquidation commencement date until the end of the quarter for which he is filing the report. So, this brings us to the end of today's discussion on the various IBBI regulations, which include the following regulations that we have discussed. Regulation 9 states that we understand what order the liquidator can obtain against the personnel for cooperation. Regulation 10 discusses the disclaimer of onerous property; we should submit an application to disclaim it. As for extortionate credit transactions, we can obtain an order; however, remember that there are conditions regarding when you can actually classify them as extortionate transactions, which are outlined in Regulation 11.

Then we come to 12. You should make a public announcement within five days. Then 12A talks about creating a process email ID specifically for a liquidation account, and that should continue.13 talks about the preliminary report, which should come within 75 days, and then we talk about early dissolution. If you find there is no realizable value to the assets of the corporate debtor, you can make an application to the adjudicating authority and call for an early dissolution; if the authority is satisfied, it can order a dissolution, and lastly, progress reports must be filed on a quarterly basis. In the case of a first report at the end of the quarter, which is appointed within 15 days, and after that, for every subsequent quarter, you must file a report within 15 days from the end of the quarter. So, friends, this brings us to the end of the 50th session.

I congratulate you for patiently attending 50 sessions; we look forward to the next sessions again on IBBI regulations and further studies.

Thank you.