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## Monopoly status by Resolution Professionals is a mere façade under CIRP

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*The premise of the paper is that the Committee of Creditors (COC) has significant influence and that the COC is ultimately accountable for the IBC's overall effectiveness. In addition, the COC (Committee of Creditors) and the adjudicating authorities supervise RP's role as a facilitator in the resolution process. I prefer to assess the truth of the assertion about the RP's monopolistic position based on this postulation. The paper examines Resolution Professionals' position in accordance with the central question of "Whether monopoly status is a mere façade, given the specific context of the function played by Resolution Professionals?"*

*The insolvency and bankruptcy resolution mechanisms are founded on the idea that the key tenet is the resolution professional (RP). Because the Corporate Insolvency Resolution Process (CIRP) is a system that demands participation from a variety of stakeholders, we cannot completely disregard the ideas of any one of them in favour of others. Nonetheless, in order for the entire process to operate properly, some components must have greater authority than others for the purpose of the efficient supervisory task. In a similar analogy, it is presented in this paper that a sense of authority is present even in the appointment and removal of officials. As a result, COC has an indirect or direct effect on RP, resulting in a wide spectrum of COC interference. In addition, in the second half that RP's role is unquestionably the backbone of CIRP is highlighted. However, when it comes to the real position, COC has a major role.*

**Keywords:** *monopoly, resolution professional, insolvency.*

## INTRODUCTION

The IB code was created with the goal of increasing the value of an interested person's assets, ease of doing business, and resolving bankruptcy proceedings promptly, all of which demand a lot of effort from numerous stakeholders and adjudicating authorities. The implementation of the insolvency & bankruptcy (IB) Code was intended to address issues in the credit dimension by recognizing all stakeholders, particularly creditors and debtors, resolving and settling non-performing assets, establishing a robust mechanism for resolving credit-related disputes, reducing creditor distrust, and ensuring that businesses remain operational rather than being wound up.

The insolvency and bankruptcy resolution mechanism are based on the foundation notion that resolution professional (RP) is the main tenet. There is a change in position of the debtor in possession to the creditor in control, which is a feature of the IBC, is facilitated by RP. This is a major shift in the ways CIRP works. Additionally, the RP is appointed by the adjudicating. When a corporate debtor is approved to the NCLT's corporate insolvency resolution procedure (CIRP), the RP is in charge of the debtor's full administration and operations, as well as managing the CIRP as a whole. Furthermore, the functions of the board of directors or partners are suspended and passed to the RP elected.

The understanding of the resolution professional according to the IB code is necessary. The provision of Section 5 (27) of the IB Code defines the term Resolution Professional (RP) which means an insolvency professional who has been assigned to oversee the corporate insolvency resolution process, which may also involve an interim-resolution professional (IRP). The term "insolvency professional" (IP) is also defined in Section 3 (19) of the Act as a person enrolled as a member of an insolvency professional agency under section 206 and registered as an insolvency professional with the Board under section 207.' The definition does not provide us with enough information about the RP. However, combining the defining provisions with

other provisions, such as functions, obligations, and responsibilities, gives us a clear picture of the RP's actual position.

The premise of the paper is that the Committee of the creditor (COC) has major power, and it is ultimately COC who is more responsible for the whole effective functioning of the IBC. Additionally, RP is a facilitator in the resolution process whose function is overseen by the COC (Committee of creditors) and the adjudicating authority. From this postulation, I tend to examine the veracity of the claim concerning the monopoly position of the RP. The paper deals with the core question of *'Whether monopoly status is a mere facade, in the specific context of the role performed by Resolution Professionals?'* with the object of examining the position of Resolution Professionals in consonance with the claim of monopoly status under the IBC. **The requirement of rethinking the role with help judgements and provisions in line with reality is required to comprehend the actual state of RP.** I shall illustrate that RP does not have monopoly status using the provisions of the IB code, notably those dealing with Appointment of Resolution Professional (part I), Role of Resolution Professional in CIRP (part II), and COC is integral to the Resolution Process (part III).

To begin with the insolvency process, it is necessary to prove that the accused corporate debtor is insolvent either at the direction of a financial creditor under Section 7 or an operational creditor under Section 9 or Suo moto under Section 10 of the IB Code in order to begin the resolution process of an insolvent firm. The resolution process begins once an insolvency petition is accepted.

## **PART I**

### **Appointment of Resolution Professional -**

*(Under this section, I shall examine the provisions related to the appointment, as well as removal under the IB code, 2016.)*

**Almost every stage of the appointment is subject to COC authorization. The Interim RP is appointed prior to the RP. During the onset of the insolvency, the Adjudicating Authority**

**selects the insolvency professional nominated by the financial or operational creditor in their application as the interim resolution professional.** When an operating creditor's application does not include the name of an insolvency professional, the Adjudicating Authority refers the matter to the Board for a recommendation for an insolvency professional who can function as an interim resolution professional. Within ten days after receiving a reference from the Adjudicating Authority, the Board recommends to the Adjudicating Authority the name of an Insolvency Professional against whom no disciplinary proceedings are underway.

The period of an interim resolution professional lasts until the resolution professional is appointed under Section 22. Following the appointment of the interim resolution professional, he will be in charge of the corporate debtor's affairs. Following that, it will be overseen by the resolution professional when he has been appointed. **When the interim resolution professional is appointed, the powers of the board of directors or the corporate debtor's partners, as the case may be, are suspended.** The interim resolution professional and, if necessary, the resolution professional will exercise these authorities.

In accordance with section 23 of the Code, the resolution professional shall exercise the same powers and perform the same responsibilities as the interim resolution professional upon appointment. The Board of Directors is suspended once the interim resolution professional (IRP) is appointed, according to Section 17 of the Act. which requires corporate debtor officers and management to report to the interim resolution professional. The RP is the one in control of the business. This, however, does not provide us with the entire picture. The Board must remain active, it can report to the RP and work in accordance with the RP's authorization, but it can not be fully defunct and cease to function. The RP is an officer who has been appointed by the court. If company staff refuse to cooperate with an IRP, he might request assistance from the adjudicating body under Section 19 of the Code. This is especially essential in light of the fact that if the Board's powers are suspended, it may be difficult to ensure compliance with the Companies Act, SEBI rules, and other laws if the company's workers are unwilling to cooperate with the RP.

Later, the committee of creditors may, in the first meeting or subsequent meeting, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional with another resolution professional with at least a sixty-six percent voting share, according to Section 22 of the IB code. Another factor to consider is Section 27, which allows the COC to replace resolution professionals under certain circumstances.<sup>1</sup> In *Rajinder Kapoor v. Anil Kumar* <sup>2</sup>, the Adjudicating Authority is duty-bound to consider the name of another Resolution Professional, **if proposed by the Committee of Creditors**, or may call for a name from the IBBI, if no name has been proposed.

In another case of *Bank of India Vs. M/s Nithin Nutritions Pvt. Ltd*<sup>3</sup>, the IRP was replaced as the RP at the third COC meeting. The appellant had applied to the adjudicating authority for confirmation of the appointment of the RP. They denied the application because the COC made its decision at its third meeting (rather than the first meeting, as required by the IBC), and no rationale was presented for not passing the resolution to replace the IRP at the first meeting. The NCLAT stated in its appeal against the ruling which was passed by adjudicating authority **that neither section 22 nor section 27 of the IBC compels the COC to disclose any reasons**. The reason for this is that the RP and the COC have a trusted connection. In light of these provisions, the NCLAT determined that the COC has the authority to propose changes to the IRP at any time after the first one and that there is no requirement that they provide specific reasons for the change.

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<sup>1</sup> Insolvency and Bankruptcy Code 2016, s 27: Replacement of a resolution professional by committee of creditors. - (1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section. (2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.] (3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority. (4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16. (5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section

<sup>2</sup> *Rajinder Kapoor v Anil Kumar* 2017 SCC OnLine NCLAT 263

<sup>3</sup> *Bank of India v M/s Nithin Nutritions Pvt Ltd* Company Appeal (AT) (Insolvency) No 497/2020

Its authority is evident even in the matter of appointment and removal. Therefore, COC affects RP directly or indirectly, resulting in a wide range of COC interference.

## PART II

### **Role of Resolution Professional in CIRP -**

*(This section examines the role of the Resolution Professional in CIRP, specifically the provisions concerning the role of the RP, with a focus on provisions that act as caveats, which provide us with the implication that COC has ultimate authority, i.e. Sections 27 and 28.)* In terms of decision-making, COC has a significant advantage over RP. The RP serves as a link between the debtor and the creditor, ensuring that the debtor's and the creditors' interests are aligned. This paper will not go into great detail about each function, but will instead describe the most important ones to figure out where RP stands.

When we look at the provisions concerning the role such as Section 17 which provides that the administration of the corporate debtor (CD) affairs would be vested in the RP according to which he/ she would execute the powers of the board of directors or the partners of the CD accordingly. Other powers, duties, and authorities would be conferred on the RP under Section 17 such as vesting of management/exercising of powers would continue seamlessly if the IRP remained the RP. When the IRP is replaced by another RP, the administration of the CD's affairs is transferred to the new RP, who assumes the powers of the CD's board of directors/partners as of the date of his appointment under section 22. With such abilities, the new RP would be able to carry out all the acts that the IRP would have been able to carry out.<sup>4</sup>

The RP's tasks and functions are covered in Sections 18, 20, and 25 of the Code. This can make it evident that the RP will be *in charge of the entity's day-to-day operations*. On the other hand, the RP is responsible for maintaining the present management. He/she can appoint agencies to help him with his management responsibilities. The goal of this project is to basically put the RP in charge of the day-to-day operations of the company while enabling creditors to manage

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<sup>4</sup> 'Insolvency and Bankruptcy Board of India: Frequently Asked Questions-Insolvency Professionals' (*Insolvency & Bankruptcy Board of India*) <[https://ibbi.gov.in/uploads/register/FAQ\\_IPs.pdf](https://ibbi.gov.in/uploads/register/FAQ_IPs.pdf)> accessed 20 May 2021

responsibly. Furthermore, Sections 20 and 25 provide the interim resolution professional/resolution professional with the authority to do whatever is required to help the IRP/RP manage the corporate debtor's affairs subject to certain provisions.

Section 18 of the IBC lays down the duties of an IRP, while section 20 lays down his/her powers. Under Section 20 of the IB Code, the interim resolution professional is mandated to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor *as a going concern*. It is after the meeting of the Committee of Creditors that the Committee has to decide whether to confirm the interim resolution professional as the resolution professional or replace the interim resolution professional with another resolution professional.

The *interim resolution professional forms a "Committee of Creditors" under Section 21* of the IB Code after collating all claims received against the corporate debtor and determining the corporate debtor's financial position, and this is followed by a meeting of the Committee of Creditors under Section 24 of the IB Code, which is to be conducted by the resolution professional. Each creditor is required to vote following the voting share assigned to him based on the financial debts owed to such creditor, and it is incumbent upon the resolution professional to determine the voting share to be assigned to each creditor in the manner specified by the Board. *Section 25 lays down the duties of an RP*, besides preserving and protecting the assets of the corporate debtor and continuing its business operations. Subsequent to all these steps, the Committee of Creditors is required to submit a resolution plan for approval of the Committee of Creditors by a vote of not less than seventy-five percent of the voting share of the financial creditors. After such approval, the resolution plan is presented to the adjudicating authority which, if satisfied that the aforesaid plan conforms to the requirements of Section 30 (2) of the IB Code, should approve the resolution plan under Section 31 and the same will be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Moreover, Section 23 RP conducts CIRP subject to Section 27. *This again brings us back to the power provided to the COC to interfere.*

The vital decisions for the work of corporate debtors need ramification by COC under Section 28 IB code which contains various actions that require approval. However, Section 28<sup>5</sup> acts as a limit to the authority of the interim resolution professional/resolution professional – it lists certain acts which shall not be undertaken without the prior approval of the committee of creditors. The acts include raising interim finance above limits approved by the committee of creditors, creating a security interest on the assets of the corporate debtor, changing the capital structure of the corporate debtor, undertaking related party transactions, amending the constitutional documents of the corporate debtor, amongst others.

Without a doubt, the role performed by RP is the lifeblood of CIRP. However, when it comes to the actual role, practically every choice must be approved according to the law outlined in the IB code.

### **PART III**

#### **COC is Pivotal to the Resolution Process -**

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<sup>5</sup> Insolvency and Bankruptcy Code 2016, s 28: (1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:— (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting; (b) create any security interest over the assets of the corporate debtor; (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company; (d) record any change in the ownership interest of the corporate debtor; (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting; (f) undertake any related party transaction; (g) amend any constitutional documents of the corporate debtor; (h) delegate its authority to any other person; (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties; (j) make any change in the management of the corporate debtor or its subsidiary; (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business; (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor. (2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1). (3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of seventy five per cent. of the voting shares. (4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. (5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code

*(To support the claim that COC is pivotal in the Resolution Process, I shall substantiate it with the help of judgment.)*

In a Corporate Insolvency Resolution Process, the Committee of Creditors (COC) is the ultimate decision-making body in the CIR. Its primary function is to accept or reject a resolution plan provided by a resolution applicant based on its practicality and viability, as well as the method by which the resolution amount is distributed. This is stated in section 30 (4) of the law, which, since the Insolvency and Bankruptcy Code (Amendment) Act of 2019, includes the COC's ability to investigate how resolution monies are distributed. Moreover, some provisions explicitly laid down certain permissions as provided by COC for example in section 28 (as discussed in the above section).

The COC is permitted under the IB code to utilise its business acumen to assist debt-ridden corporate debtors in regaining their financial footing. This is because of a preconceived notion that the creditors' committee with the highest stake in the company has a better grasp of the company's predicament and can better adjudicate it. The approval/rejection or modification of a resolution plan, as per Section 30 (4) of the Code, is likely the most important job undertaken by the COC.

This is also exemplified by the case of the *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors.*<sup>6</sup>, The RP's role was clarified by the Hon'ble Supreme Court of India, who stated that it is the RP's responsibility to manage the corporate debtor's affairs as a going concern, appoint and convene meetings of the committee of creditors to decide on resolution plans, and collect, collate, and distribute the debtor's assets. However, COC's commercial decision cannot be contested since it is protected by commercial wisdom; the only exception is if the IBC's aim is violated.

Besides, the 2016 Regulations outline the means by which the COC meetings should be run, as well as the elements of a resolution plan. According to Regulation 39 (3), the COC shall assess proposed resolution plans by comparing them to the assessment matrix and approving the

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<sup>6</sup> *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & Ors* Civil Appeal No 8766-67 of 2019

best resolution plan with amendments. Any changes proposed by the COC while accepting the resolution plan are not subjected to any scrutiny. *The RP must, however, affirm that the resolution plan complies with the IBC Code and its regulations, as well as with any other applicable laws.*

Significantly, the IBC does not subject the resolution plan to judicial review in and of itself, and judicial review is limited to the criteria set out in Sections 30 (2) and 61 (3) of the IBC. In this way, the IBC has encircled the whole bankruptcy system, ensuring that once the COC is established in accordance with Section 21, the COC has exclusive access to talks and has the last say in business decisions. Furthermore, the primacy of the COC has been frequently maintained by the courts. In light of this legal framework, the courts have consistently refused to intervene in business decisions that have previously been authorized by the COC.

The Hon'ble Apex Court recognized the COC as a custodian of the public interest in *K. Sasidhar vs. IOB*<sup>7</sup> and reasoned that judicial involvement in the CoC's commercial decision was forbidden to ensure completion of all stipulated processes within the IBC. The Supreme Court determined after a careful examination that the legislation was not intended as a challenge to the financial creditors' business choices or decisions. The court ruled that the COC's acceptance or rejection of a resolution plan is a business decision and that no investigation into the justness or fairness of that decision may be undertaken. The reason for this decision is consistent with the well-established legal norm that courts and tribunals should not intervene in expert economic organizations like the COC's conclusions.

The other role performed by COC is to meets on a regular basis to discuss the corporate debtors' situation. It supervises the Resolution Professional's (RP) work and has the authority to refer a case to the Adjudicatory Authority if there is any wrongdoing. It also confirms all administrative decisions made by the RP. Moreover, The COC ensures that the insolvency resolution process runs smoothly. The COC may decide to seek an extension of time in line with Section 12 of the Code if it believes it's necessary. Further, it assesses the viability of the corporate debtor's company, considers the feasibility of future operations, CIRP payments, and

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<sup>7</sup> *K Sasidhar v IOB* 2019 SCC OnLine SC 257

may decide to liquidate the corporate debtor immediately if it believes that the insolvency resolution is doomed to fail.

Recently, *Kalpraj Dharamshi and Anr. Vs Kotak Investment Advisors Ltd and Anr.*<sup>8</sup> Appellant argued that the COC's commercial wisdom is non-justiciable and can not be subjected to judicial scrutiny, citing *K. Sashidhar, Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, whereas other party claimed that its Resolution Plan had already been deliberated upon, and Kalpraj's plan was similar to defendant's with minor differences. This depicts the COC's injustice, lack of openness, and favoritism. In this respect, the Hon'ble Supreme Court considered the decisions in the judgments of *K. Sashidhar, Committee of Creditors of Essar Steel India Ltd. and Maharashtra Seamless Limited v. Padmanabhan Venkatesh*, as well as the Bankruptcy Law Reforms Committee (BLRC) Report of 2015.<sup>9</sup> The combined reading of all of these elements leads to the conclusion that the commercial wisdom of COC cannot be interfered with and the only acceptable forum for reviewing the bankruptcy process is one in which all financial creditors have a voting share proportional to the amount of debt they owe.<sup>10</sup>

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (amendment act) reaffirms that the COC's decision on a resolution plan cannot be the subject of a routine investigation and reaffirms the Supreme Court's ruling in the *K Sashidhar* case. However, the amendment legislation leaves several questions unanswered, such as whether the COC has the authority to discuss the resolution plan with the RAs. Either via legislative modification or judicial declaration, the function of the COC in developing a settlement plan must be specified.

In essence, the creditor's committee decided on the company's status and approved all the most important issues. The COC also oversees the routine operation of the corporate debtor/company through the meetings that are held and plays a major role in the CIRP.

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<sup>8</sup> *Kalpraj Dharamshi & Anr v Kotak Investment Advisors Ltd & Anr* Civil Appeal No 2943, 2944 of 2020

<sup>9</sup> BLRC, 'The report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design' (Ministry of Corporate Affairs, 2015) <[https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 25 May 2021

<sup>10</sup> *Dharamshi* (n 8)

## **CONCLUSION**

The CIRP is a mechanism that requires effort from multiple stakeholders, we cannot wholly abandon the idea of any specific stakeholder and give prominence to others. Nevertheless, in every system, there needs to be some part that has more authority over others to have effective functioning of the whole process. In a similar analogy, we have seen in this paper that a sense of authority is evident even in the matter of appointment and removal. Therefore, COC affects RP directly or indirectly, resulting in a wide range of COC interference.

Furthermore, we have seen in the second half that RP's role that's without a doubt the backbone of CIRP. When it comes to actual roles, however, nearly every alternative must be authorised following the IB code by COC. Finally, the creditor's committee determined the company's condition and approved all of the significant issues. Under the IB code, the COC is entitled to use its commercial expertise to help debt-ridden corporate borrowers in restoring financial footing. Therefore, it can be said that in some sense COC is creating monopoly status.