Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

A Disquisition of Section 32 of Insolvency and Bankruptcy Code, 2016

Abhishek Bhardwaj[a]

[a]Amity University, Noida, India

Received 22 August 2021; *Accepted* 18 September 2021; *Published* 22 September 2021

At a time when the non-performing asset crisis was at an all-time high, the Insolvency and Bankruptcy Code was enacted. Solving the issue was at the top of a desperate government's priority list as it attempted to save the banking industry as well as the debt market. The Bankruptcy and Insolvency Code was a revolution. Through its time-bound and creditor-in-control approach, it has been mainly successful in boosting recovery rates. The regime is still in its infancy, and in 2020 it was revised for the fourth time. The modification included Section 32A to the corporate insolvency resolution process, which accelerated the process even more. The Section, on the other hand, has raised some suspicions due to its broad scope and authority. The Section modifies well-established company law concepts, with potentially far-reaching consequences that cannot be fully anticipated at this time. The overriding clause, the interpretation and contradiction with other laws, and the benefits to resolution seekers have been the focus of the extant literature on the amendment and the Section. The debate has neglected to address and challenge the theoretical underpinnings of what could be one of the most significant challenges to the notion of independent corporate personality in recent memory. This study discusses how they fit within the scope of the Section and its ramifications, as well as the growth of the principle of separate corporate personality and its acknowledged exceptions. It also discusses the concept of corporate criminal culpability and how, as a result of the provision, it has been reduced to a simple example position. Overall, the argument pits economic efficiency against the body of common law and the necessity for stability within it, implying that one need not always take precedence over the other.

Keywords: *section 32, insolvency, bankruptcy.*

INTRODUCTION

By the fourth amendment to the Insolvency and Bankruptcy Code, 2016 ("IBC"), Section 32A was introduced. Section 32A states that any liability of the corporate debtor for an offence committed prior to or during corporate insolvency resolution proceedings ("CIRP") will stand extinguished from the date the resolution plan is approved by the National Company Law Tribunal ("NCLT"). This immunity, however, is subject to conditions set out in Section 32A, which have been analysed in this article.

The rationale behind the amendment is that an incoming investor who is going to invest a significant amount of money, resources, and time into turning around a corporate debtor should not be penalised for offences committed by the previous management prior to the CIRP's initiation or during the CIRP's pendency.

INCEPTION OF SECTION 32

From the day a resolution plan is approved by the NCLT, the corporate debtor's culpability for offences committed by the corporate debtor and/or involving its property, as well as procedures launched therefrom ("Proceedings"), will cease. Section 32A includes any action involving the attachment, seizure, retention, or confiscation of the corporate debtor's property as a result of such Proceedings in instances involving property of a corporate debtor. However, immunity under Section 32A is available only when the approved resolution plan requires a change in the corporate debtor's management or control to a person who (a) was not a promoter or in the corporate debtor's management or control; or (b) has not been implicated by the investigating authority for aiding or conspiring in the commission of the offence that has caused the case to be filed.

Notably, those in charge of the corporate debtor's affairs, such as a designated partner of a limited liability partnership or an officer in default as defined in the Companies Act, 2013, will

continue to be liable if they were in any way responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor. Persons in Default shall continue to be accountable under the applicable statutory provisions in these cases, and the immunity given to the corporate debtor and its property will not apply to such Persons in Default.

As a result, Section 32A's most important features are twofold:

(a) The corporate debtor / its assets are ring-fenced from any liability arising out of an offence alleged against it if the offence was committed prior to or during CIRP,

(b) the Persons in Default are not afforded any protection and thus remain liable under the CIRP if they were associated with the corporate debtor and involved in the commission of the offence.

RAISON D'ETRE OF SECTION 32

The amendment can be traced back to the NCLAT's decision in JSW Steel Ltd v Mahender Kumar Khandelwal & Ors.,[1] in which the NCLAT had to decide whether the Enforcement Directorate could attach assets of Bhushan Power & Steel Ltd. ("BPSL") (the corporate debtor), given that the resolution plan submitted by JSW (the successful resolution applicant) had already been approved by the NCLAT.

While stakeholders have the opportunity to voice their objections prior to the NCLT approving a resolution plan for a corporate debtor, the NCLAT concluded that once a resolution plan is approved, that opportunity is lost, and no stakeholder, including a government agency, is allowed to raise an objection afterward. The NCLT's resolution plan must be adhered to by all stakeholders. The MCA went on to say that incoming investors cannot be held liable for the corporate debtor's previous wrongdoings. The Amendment Act was enacted as a result of the NCLAT's order.

[1] *JSW Steel v Mahender Kumar Khandelwal* Company Appeal (AT) (Insolvency) No 957 of 2019

In *Deputy Director Directorate of Enforcement Delhi v. Axis Bank & others*.,[2] the Delhi High Court looked at how the IBC and the Prevention of Money Laundering Act, 2002 ("PMLA") interact. The Delhi High Court had to examine whether a company's property / assets would be available to the Enforcement Directorate for seizure as proceeds of crime if it was subject to CIRP under the IBC.

The Delhi High Court held that in such cases, the moratorium imposed on a corporate debtor under Section 14 of the IBC cannot obstruct the Enforcement Directorate's statutory authority to deprive a person of such proceeds of crime, because otherwise, it would provide a corporate debtor with an escape route by allowing them to obtain a discharge. As a result, the Court stated that the IBC and the PMLA were not in conflict, and that the former would not triumph over the latter. The court in the above case also looked into the rights of a third party, stating that if a corporate debtor's asset in relation to which the third party has acquired rights was not acquired with the intent of frustrating the PMLA, then the third party has the right to seek enforcement, and the PMLA provisions would apply to the residual value of the asset in question after such enforcement.

IN-DEPTH ANALYSIS OF SECTION 32

In Deputy Director Directorate of Enforcement Delhi v. Axis Bank & others, the Delhi High Court declared that the IBC's provisions would not take precedence over the PMLA. However, because no obligation will be imposed on the corporate debtor under Section 32 A, no procedures against the corporate debtor can be pursued. This could reopen the dialogue between the IBC and the PMLA. In addition, Section 32A, in its current form, only applies to corporate debtors, not a group company. It will be fascinating to examine the regulatory implications of another entity (for example, a corporate debtor's group entity) committing an offence and depositing the proceeds with the corporate debtor.

In addition, certain practical issues arise from the perspectives of the many parties involved:

[2] *Deputy Director Directorate of Enforcement Delhi v Axis Bank & Ors* AIR Online [2019] Del 1553

(a) Investigating authorities

While there is no definition of a "investigating authority" under Section 32A of the IBC, courts are likely to define which government entities would be considered investigating authorities in the near future. Furthermore, while Section 32A attempts to provide adequate safeguards to ensure that this section is not used as a loophole by Persons in Default, it remains to be seen how effectively an investigating authority can pursue recovery against such Persons in Default when the subject matter of the wrongdoings, namely the corporate assets, becomes unavailable for attachment.

(b) Corporate debtor

From the perspective of the corporate debtor, continuing to face more regulatory action once the CIRP is completed would be useless for a business whose financial health has already deteriorated significantly and is sought to be revived by CIRP. This amendment strikes the appropriate balance; while it does not absolve the promoter or the previous management of liability, it assures that the new management has a clean slate.

(c) Investor

From the perspective of an investor, Section 32A is a relief because the IBC promises a clean slate for a corporate debtor firm that has successfully completed CIRP. Ring-fencing a corporate debtor from further action after the NCLT approves a resolution plan appears to be a step in the right direction for protecting the interests of the corporate debtor and the resolution applicant, as well as bolstering the IBC as an effective bankruptcy resolution procedure. As courts hammer out the complexities of Section 32A as the legislative framework unfolds, a balance must be struck between the interests of the many stakeholders in the corporate debtor to ensure that no one party's interests are harmed.

In the case of *Binani Industries Limited v Bank of Baroda*[3], the National Company Law Appellate Tribunal ("NCLAT") stated that the IBC's first goal is "resolution," the second is "maximization of asset value," and the third is "promoting entrepreneurship, availability of credit, and balancing the interests," in that order. The Supreme Court stated in Swiss Ribbons[4] that the preamble of the Code does not mention liquidation in any way, and that it should be considered a last resort remedy.

It further indicates that liquidation should only be considered in circumstances where there is no resolution plan or the ones submitted do not satisfy a minimum needed standard. IBBI (Liquidation Process) Regulations, 2016 Regulations 32 and 32A further support this stance. The sale of the corporate debtor as a going concern is contemplated by Regulation 32(e). Regulation 32A places a premium on such a transaction over alternative options. The 2019 modification[5] includes Regulation 32A, endorsing the IBC's attitude and purpose of maximizing value by preserving the debtor's business as a going concern, unless practicality prevents so.

The question therefore becomes what are the permissible limitations to which law can be sculpted in order to achieve its goal. It cannot, without a doubt, violate the Constitution's principles. It cannot, in the same way, be in violation of a natural justice principle. What about legal concepts that have a strong foundation in both common and statute law but don't reach the higher bar set by the aforementioned principles? The notion of separate corporate personality, which will be discussed in more detail in the following part, is an irrefutable tenet of modern company law, with a solid foundation in Indian case law and the Companies Act of 2013. To protect fundamental rights and, in some situations, obligations that attach to a firm, courts have set strict limits on dismissing corporate personhood.

Section 32A of the Insolvency and Bankruptcy Code (Amendment) Act of 2020 was added to the Code. The section discusses the corporate debtor's culpability for earlier violations. The

[3] *Binani Industries Limited v Bank of Baroda* 2018 SCC OnLine NCLAT 521
[4] *Swiss Ribbons v Union of India* 2019 SCC OnLine SC 73
[5] Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations 2019

Section has been scrutinized by the courts, most notably in the matter of Bhushan Power Steel[6], where its applicability to a specific resolution applicant was challenged. Although the legitimacy of the Section has not yet been challenged in a court of law, critics have expressed reservations about its broad scope.[7]

The Section begins with a non-obstante clause that gives it authority over any provision of the Code or any other legislation. This clause is in addition to Section 238 of the Code, which states that it will have precedence over any other legislation in effect. The Section continues by stating that any obligation stemming from an offence committed by the corporate debtor ceases as soon as the resolution plan is authorized. A qualifier has been introduced to limit the number of corporate debtors who can file a claim under the Section to those who see a change in management as a result of the resolution plan. Simply said, if the person in charge of the company's operations, or those who conspired or abetted in the commission of the violation, are no longer in control or management of the debtor, the corporate debtor will be relieved of duty upon acceptance of the resolution plan.

While there have been concerns voiced about the Section's requirements, the discussion has not included the shredding of the corporate veil. The Section, it is argued, lifts the corporate veil in order to overlook the corporate debtor's culpability, the permissibility of which has not been adequately analyzed. This not only goes against recognized company law standards, but it also ignores corporate personality and liabilities without sufficient cause. The IBC was designed, after all, to promote economic efficiency and expediency, but does achieving that goal allow for the overruling of fundamental principles of company law?

However, since raising the corporate veil is a well-known notion that was developed as an equitable remedy, why should Section 32A be objected to on this basis, given that it promotes

---

[6] *JSW Steel* (n 1)

[7] Nausher Kohli, 'Section 32A of the IBC - An amendment with far reaching consequences' (*Bar and Bench*, 8 April 2020) <https://www.barandbench.com/columns/policy-columns/section-32a-of-the-ibc-an-amendment-with-far-reaching-consequences> accessed 10 August 2021; Sikha Bansal, 'Ablution by Resolution' (*Vinod Kothari Consultants*, 12 December 2019) <https://vinodkothari.com/2019/12/ablution-by-resolution/> accessed 10 August 2021

economic efficiency? There are two parts to the answer. First, by raising the corporate veil for reasons not found in modern company law theory, Section 32A dilutes the notion of corporate criminal culpability and, as a result, goes against the principles of independent corporate personality.

INDEPENDENT CORPORATE PERSONALITY

The case of Salomon v. Salomon Co Ltd.,[8] which is frequently mentioned in discussions regarding a corporation's independent personality, can be traced back to the roots of independent corporate personality. It not only established the foundations of contemporary English company law, but it also had a significant impact on commercial law and its foundations around the world.[9] The House of Lords, on the other hand, only codified what had been done before the dawn of time.[10] The origins can be traced back to the junction of law and economics, where numerous theories have been advanced to defend the existence of autonomous corporate personhood.[11] The most notable benefit, and the main view, is that a separate corporate personality protects its stakeholders from unbounded responsibility while still allowing for proportionate earnings. The veil of incorporation also gave a corporation nearly the same rights and powers as a person,[12] with the extra benefit of eternal existence and succession.[13] In Indian law and jurisprudence, the autonomous corporate form has been acknowledged,[14] as well as the statute.[15]

ATTENUATION OF INDEPENDENT CORPORATE PERSONALITY

As contemporary company law evolved, and Salomon strengthened the ruse of separate corporate personalities, the need for exceptions to the veil of incorporation principle arose to

[8] *Salomon v Salomon & Co* Ltd [1897] AC 22
[9] Christopher Stanley, 'Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law' (1988) 19 Cambrian Law Review 97, 97
[10] Robert W Hillman, 'Limited Liability in Historical Perspective' (1997) 54 Wash & Lee L Rev 615, 616
[11] William W Bratton and Joseph A McCahery, 'An Inquiry into the Efficiency of the Limited Liability Company: of Theory of the Firm and Regulatory Competition' (1997) Faculty Scholarship at Penn Law 904
[12] Ross Grantham and Charles Rickett, *Corporate Personality in the 20th Century* (Hart Publishing 1998)
[13] Denis Keenan and Sarah Richer, *Business Law* (Longman Publications 1987)
[14] *Life Insurance Corporation of India v Escorts Ltd & Ors* (1986) 1 SCC 264
[15] Companies Act 2013, s 9

protect shareholders from abusing it. Currently, courts have the authority to deviate from the concept in specific circumstances by 'piercing' or 'lifting' the corporate veil. When the court discovers instances of fraud or illegality,[16] or when it is in the public interest to lift the veil, this idea may be utilized.[17] The corporate entity is not rendered non-existent by lifting the veil, but it does imply that the corporate personality is not given full effect.[18] This frequently results in the culprit, as well as the business vehicle, being held accountable. By lifting the metaphorical curtain and peering behind the corporate facade, this person is proven accountable. In Indian law, this principle is generally acknowledged.[19] The Companies Act of 2013 makes directors and management staff liable under specific circumstances, which is an example of statutory disrespect for corporate personhood.

In the recent case of Balwant Rai Saluja v. Air India,[20] the Indian legal position on piercing the corporate veil was clarified, relying on the English judgement of Prest v Petrodel. The decision took a strong stance on piercing the corporate veil, arguing that the principle should be used sparingly and only in cases where it is proven that the corporate form was merely a ruse used to avoid culpability. The decision also referred to the six essential principles that regulate the piercing of the veil, citing the English case of Ben Hashem v Ali Shayif.[21] The concepts discussed the presence of improprieties involving the corporate structure and concealing liabilities, the ownership of the corporate in the hands of wrongdoers, and the firm serving as a front for fraudulent conduct.

The preceding ideas demonstrate that corporate personality can be neglected only in certain circumstances. It's worth noting that the process can't be carried out solely to serve "the interests of justice" if certain other requirements aren't followed. This appears to elevate the

[16] *Delhi Development Authority v Skipper Construction* [2000] 10 SCC 130
[17] *Kapila Hingorani v State of Bihar* [2003] III LLJ 31
[18] Cheng-Han Tan and others, 'Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives' (2019) 16 Berkeley Bus LJ 140, 140
[19] *Life Insurance Corporation of India v Escorts Ltd & Ors* (1986) 1 SCC 264; *State of UP v Renusagar Power Co* 1988 AIR 1737; *Delhi Development Authority v Skipper Constructions Co (P) Ltd* (1996) 4 SCC 622
[20] *Balwant Rai Saluja v Air India* [2013] 2 AC 415
[21] *Ben Hashem v Ali Shayif* 2008 EWHC 2380 (Fam)

process of ignoring the corporate personality to a lofty position. Lifting the veil can be used to prevent fraud or misconduct, tax evasion, welfare law circumventing, the use of a corporation for illicit reasons, or, as noted above, in circumstances where the corporate structure is really a façade.[22] It would not be unreasonable to conclude that the corporate veil is raised so that the true perpetrator is subjected to the law's punishment, rather than escaping punishment by hiding behind a corporate mask.

At the risk of oversimplification, it can be said that the corporate form was created to cover and protect shareholders from excessive liability and that lifting this veil in certain unusual circumstances is important to avoid the autonomous corporate form from being abused. Returning to Section 32A of the IBC, there are a few points of departure to consider. In terms of the liability, it aims to discharge, the Section is explicit. The corporate debtor must bear the brunt of the responsibility. The fact that the debtor's duty is forgiven if the management changes suggest that the management is held accountable, even if this is not the case. This technique removes the corporate curtain, allowing you to see beyond the corporate character and pinning responsibility on the people in charge. The purpose of ignoring the corporate personality is to release the debtor from obligation while they undergo a control and management overhaul. The method's premise is that the new management should not bear the brunt of the previous mistakes.[23] The corporate curtain has been lifted, and this can be revealed without raising substantial issues.

The jurisprudence surrounding the lifting of the corporate veil is centered on the possibility of misconduct by those in charge who are hidden behind the veil. As previously stated, the idea provides an equitable remedy against someone who used the fact of incorporation as a ruse to commit unjust activities. Section 32A aims to accomplish something very different. It aims to exonerate the debtor of any responsibility by separating management and the corporate debtor. To shield the corporation and its shareholders from the misdeeds of a responsible few, the corporate veil is lifted and the perpetrator is penalized instead of the company. In this case,

[22] *Delhi Development Authority* (n 16)

[23] Arjun Gupta and others, 'Ghosts of the Past: Another Shot in the Arm for Acquisition under IBC' (*Nishith Desai Associates*, 8 May 2020) <https://www.nishith.tv/ma-hotline-ghosts-of-the-past-another-shot-in-the-arm-for-acquisition-under-ibc/> accessed 15 August 2021

the corporate debtor must be found guilty of some violation before being absolved by a resolution plan's passage. The principle's development took place in an entirely different context and for a completely different goal.

A short trail of logical inferences might be used to summarize the argument. When the corporate personality was merely a facade, the corporate veil was typically lifted. While this weakened the corporate identity, it was considered an essential measure to avoid injustice. When a rule of equity with tight limitations is stretched to satisfy economic goals, it reduces the factum of a legal personality to a simple artifice that may be molded to meet current policy requirements. Furthermore, as the following section will explain, rights are linked to responsibilities and are at the heart of our legal system. Because criminal conduct is a breach of a duty owed to another, removing criminal culpability raises problems about the rights granted to corporations in the first place.

DISGORGEMENT U/S 32A OF IBC BY SEBI: A COUP DE GRACE OF INSOLVENCY RESOLUTION?

On June 16, 2020, the Securities and Exchange Board of India (SEBI) published a report titled "Report on Measures for Strengthening the Board's Enforcement Mechanism and Incidental Issues." The definitional uncertainty under section 32A has been identified by the Report as a substantial impediment to SEBI's enforcement actions. The recent dispute over jurisdiction between SEBI and the Insolvency and Bankruptcy Code, 2016 (“IBC”) has come to the fore. The Insolvency and Bankruptcy Code (Amendment) Act 2020, which added section 32A, was ostensibly an attempt to address the disagreement. If the adjudicating authority has approved the resolution plan under section 31, the non-obstante provision of section 32A protects the corporate debtor from prosecution for offences committed before the start of the corporate insolvency resolution procedure (CIRP). It also protects the corporate debtor's assets from regulators' punitive proceedings for an offence committed prior to the start of the CIRP.

SUGGESTION OF THE SEBI COMMITTEE

A violation of any provision of the Act is defined as an "offence" under Section 24 of the Act. In *Standard Chartered Bank v Directorate of Enforcement*,[24] the Supreme Court clarified the term of "offence," according to the Report. The Supreme Court ruled that the term "offence" had a broader definition than just a criminal offence. The recognition of a precedent like this expands the scope of section 32A.

According to a recent SEBI report, the protection provided by section 32A of the IBC would thus cover a breach of securities laws committed by the corporate debtor. Even after the moratorium period under section 14 of the IBC has expired, it would render securities law penalties useless. As a result, the Report proposes that an exemption be added to section 32A to allow for disgorgement or reimbursement under securities legislation. The purported attempt to align the IBC with SEBI's duty as a capital markets regulator, on the other hand, could have unexpected implications.

Cognovit Judgement

Several cases have been decided on the jurisdictional dispute between the IBC and the SEBI. The National Company Law Tribunal ("NCLT") held in *Sobha Limited v Pancard Clubs Limited*[25] that the non-obstante clause under section 238 of the IBC would not override the Act's provisions. The decision was made based on the differences in the subject matter covered by the two statutes. While the IBC oversees the interaction between a corporate debtor and creditors for the purpose of reviving ailing business units, SEBI is in charge of assuring investor protection in the securities market.

HBN Dairies & Allied Limited floated a Collective Investment Scheme ("CIS") without seeking SEBI registration in *Bhanu Ram v HBN Dairies & Allied Limited*.[26] When SEBI became aware of the situation, it issued an order to seize HBN Dairies' assets in order to repay the investors. Investors, on the other hand, filed an application for CIRP against HBN Dairies under section 7

[24] *Standard Chartered Bank v Directorate of Enforcement* AIR [2006] SC 1301
[25] *Shobha Limited. & Sadashiv Lazman Jogalekar v Pancard Clubs Ltd* [2007] CP 593 & CP 1085 /I&BP/NCLT/MAHI2OI7
[26] *Bhanu Ram v HBN Dairies & Allied Limited* NCALT [2018]

of the IBC. Following the NCLT's approval of the application, SEBI was instructed to de-attach the properties that had previously been attached. The NCLT relied on the non-obstante clause of section 238 of the IBC to rule that the moratorium provision under section 14 of the IBC would prevail over section 28A of the Act, which allows for the recovery of corporate assets by selling them. The concerned order was maintained by the National Company Law Appellate Tribunal ("NCLAT") on appeal. SEBI has filed an appeal with the Supreme Court in the case of SEBI v. Rohit Sehgal, citing its dissatisfaction with the NCLAT's decision.

In-Depth Analysis

The NCLT appears to have taken an uneven view to the scope of the non-obstante clause under section 238 of the IBC, as seen by the case law noted above. According to Sobha Limited, section 238 of the IBC cannot overrule the Act's provisions. In Bhanu Ram, on the other hand, the NCLT took the opposite tack, stating that section 238 of the IBC would supersede section 28A of the Act. Following that, the NCLAT upheld the original decision. Both judgements, however, were made before the IBC's inclusion of section 32A. The non-obstante provision of section 32A has increased the scope of the IBC's overriding effect. Because the Recovery Officer's power of attachment of property under section 28A of the Act is in direct conflict with the recently enacted section 32A of the IBC, it's difficult to see how the jurisdiction would fall under the Act's purview.

SEBI's appeal against the NCLAT's ruling in Bhanu Ram is still pending at the Supreme Court for adjudication. SEBI has made the case that it has jurisdiction since the CIS assets are held in trust by the corporate debtor on behalf of the investors who subscribe to the programmed. Investors, it has been argued, are not lenders, and so cannot file an IBC application in the position of financial creditors. If the Supreme Court supports SEBI's reasoning, bidders will be discouraged from submitting a resolution plan. Because there is no particular legal precedence that accepts SEBI's disgorgement claims as an operational debt, the proposed modification in the Report allows for a backdoor entry to recognize such claims. In March 2019, SEBI and the Insolvency and Bankruptcy Board of India signed a Memorandum of Understanding for the

successful implementation of the IBC. In light of this, it would be advantageous to seek convergence of interests among all parties. It is critical to ensure that the Act's requirements do not create bottlenecks in IBC implementation. In the event of a conflict between the two pieces of legislation, the rule of law is supposed to ensure that they are interpreted in the same way. In the event of a conflict, the later legislation, namely the IBC, must take precedence.

As a result, any attempt to undermine the IBC's primacy must be rejected. The SEBI committee's suggested change will almost certainly have a disruptive effect on the corporate insolvency scene. At a time when the economy is already reeling from the pandemic's effects, giving SEBI such broad regulatory authority will create a trust deficit among potential investors and discourage successful IBC resolutions. As a result, authorities must work to alleviate problems for resolution applicants while still preserving the credibility of India's bankruptcy process by ensuring asset value maximization.

THE RAMIFICATIONS ON CORPORATE CRIMINAL LIABILITY

Possessing similar rights as human beings comes with it the other, inseparable side, namely, the obligation to incur the same duties.[27] Even if a common-sense approach to determining the mens rea required to commit a crime would indicate that an artificial person is not capable of possessing the same, corporations are subject to criminal responsibility. The idea isn't new, and courts have been debating whether or not artificial individuals can be held criminally liable since the sixteenth century.[28] While the origins of such liability are murky and devoid of intentional direction under common law, the law has now consolidated itself in the shape of precedent as well as a statutory duty. Agents acting on behalf of corporations may break regulatory laws, commit criminal offences, and commit strict liability violations for which the corporation may be held liable.[29]

[27] VS Khanna, 'Corporate Mens Rea: A Legal Construct in Search for a Rationale' (1996) Discussion Paper No 200 Harvard Law School

[28] *Androscoggin Water Power Co v Bethel Steam Mill Co* 64 Me 441 (1875); *State v Great Works Milling & Mfg Co* 20 Me 41 (1841)

[29] Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary' (1975) 29 Sw LJ 908*; State v Lehigh Valley* RR 90 NJL 372, 103 A 685 (Sup Ct 1917)

The Companies Act of 2013 establishes both corporate and individual criminal liability for directors. On several occasions, the Supreme Court has confirmed this.[30] While there is a heated argument about the efficiency, acceptability, and necessity of corporate criminal responsibility, it is beyond the scope of this study. This paper takes a positivist view of corporate criminal liability and makes no judgments about its efficacy. The argument is based on the idea that imposing such a liability on businesses serves a deterrent and penal function, as the hypothesis has been tested, has practically universal recognition, and has found a place in Indian law books.[31]

The recent cases of Iridium India Telecom Ltd. v Motorola Incorporated[32] and Standard Chartered v Directorate of Enforcement[33] blurred the line between corporate criminal liability and criminal liability in general, affirming that corporations can be prosecuted for crimes that require imprisonment as a penalty. The rulings have bolstered the concept of corporate criminal culpability and encouraged the employment of criminal sanctions to control corporate behavior.[34] Furthermore, because Indian company law distinguishes individual liability of directors and, in some cases, shareholders from the liability of a corporation as an independent person, it will be assumed that they serve separate and independent purposes, and that one is not dispensable even if the other's survival is guaranteed. The efficacy and purpose of imputing criminal culpability to corporations are destroyed by Section 32A of the Code. It does so by exonerating the corporation solely on the basis of a change in control during the insolvency procedure. Furthermore, reducing a criminal conviction to a mere exemplary function, it undermines the foundation of an independent corporate personality. The grounds for this stance are discussed in greater detail in the following paragraphs.

---

[30] *Standard Chartered Bank* (n 24)

[31] Henry Edgerton, 'Corporate Criminal Responsibility' (1927) 36 Yale LJ827, 833; VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harvard Law Review, 1477, 1484; Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26 Yale LJ IO5, 111; LH Leigh, The Criminal Liability of Corporations in English Law (1969) 1, 12

[32] *Iridium India Telecom Ltd v Motorola Incorporated* (2011) 1 SCC 74

[33] *Standard Chartered Bank* (n 24)

[34] V Umakanth and Mihir Naniwadekar, 'Corporate Criminal Liability and Securities Offerings: Rationalising the Iridium-Motorola Case' (2013) NLSIR (Spl Issue) 144, 167

From a jurisprudential standpoint, the imposition of criminal culpability on corporations is important. Numerous privileges are granted to corporations. "Legal rights are correlatives of legal obligations and are defined as interests which the law protects by imposing equivalent duties on others," the Supreme Court declared in the case of State of Rajasthan v. Union of India.[35] A crime, according to Lord William Blackstone, is a "violation of the public rights and obligations owing to the entire community, viewed as a community."[36] When a corporation is given a set of rights, it is also given commensurate responsibilities. Criminal acts, which are a subset of the violation of certain of these responsibilities, are punishable by society and the state. As previously said, the punishment functions as a deterrence. Absolving the firm of a breach of its obligations while continuing to bestow rights on it runs counter to the basics of the notion of rights on which our legal system is founded. Recognizing a criminally capable body corporate and then blurring the line between the corporate and its constituent pieces has the unforeseen consequence of blurring the autonomous corporate form as well.

When the rationale of Section 32A is extended to a hypothetical, the case gains even more strength. A company X has been found guilty of an offence for which it must pay a fine of Rs. 10 lakhs. Between the date of the offence and the competent court's decision of conviction, X fully overhauls its management and control. Can it then ask a competent court to overturn its conviction on the grounds that the company's control and management have completely changed since the offence was committed? X then declares insolvency, and a moratorium is imposed before the fine is due. With new management in place, the resolution plan is approved, and X is cleared of any wrongdoing and is no longer liable for the amount owed under Section 32A. The misuse of the corporate facade is now sanctioned by the letter of the law. Such fraud, which formerly required the piercing of the corporate veil and the punishment of the wrongdoers in command, now has the authority to disregard the corporate personality for the fraud's perpetration.

[35] *State of Rajasthan v Union of India* AIR (1977) SC 1361
[36] Sir William Blackstone, *Commentaries on the Laws of England* (17th edn, Clarendon Press 1830)

The word "change in control and management" is mentioned in Section 32A, however the Code does not define it. In the recent example of Arcelor Mittal,[37] the two concepts were defined separately in terms of their use in the IBC. According to the Companies Act of 2013, the term management refers to the company's de jure management, which includes the Board of Directors, "managers," and "officers."[38] "The right to appoint a majority of the directors or to influence the management or policy choices," according to the Companies Act.[39] Section 32A sets a disjunctive requirement, requiring either a change in control or a change in management, but not both. A rigorous reading of the Section would lead to the conclusion that even a change in the Company's Board of Directors after the acceptance of the resolution plan qualifies the company for protection under Section 32A. The disjunctive condition gives a controlling shareholder an easy way out by simply changing the company's management after the insolvency procedure has begun. Furthermore, shareholders are the ultimate benefactors of any financial gains made by the organization. If this Section is applied, the firm may be exonerated of a crime even if the shareholding pattern remains the same as it was at the time the infraction was committed. The different aspects of the provision's abuse raise a slew of doubts about the corporate structure's actuality. The fact that it has its own personality, rights, and liabilities distinguishes the corporation from simply being a gathering of persons. The ambiguous definitions of control and management, as well as their numerous valid interpretations, may lead to actions that jeopardise the legal corporate structure's fundamental existence.

Apart from diminishing the principle and effectiveness of corporate criminal culpability, the clause has also been criticised for its application in the recent case of Bhushan Power & Steel Limited (“BPSL”), which has been speculated to be the provision's raison d'être in the first place. JSW Steel Ltd. filed a resolution request with the BPSL CIRP. On September 5, 2019, the adjudicating body approved the resolution plan, and on October 10, 2019, the Directorate of Enforcement (“ED”) attached BPSL's assets under the anti-money laundering law. The ED's

[37] *Arcelor Mittal (India) (P) Ltd v Satish Kumar Gupta* (2019) 2 SCC 1
[38] *Ibid*
[39] Companies Act 2013, s 2(27)

claims to attach BPSL's property were rejected when Section 32A was applied to the facts of the case. The Supreme Court is now deliberating the case. The Court will have the chance to define Section 32A's application and decide on the scope of its application in this case. The present NCLAT decision in the case suggests that Section 32A has broad powers, even to the point of overriding the Prevention of Money Laundering Act, 2002. The decision appears to be contrary to previously recognised legislation.[40] One of the ramifications of this decision is that illegal acts, such as concealing proceeds of crime, assisting in tax evasion, and so on, can be carried out through the corporate structure, and a legitimate way out of liability can be found because the Code and Section 32A contain non-obstante clauses that apply to any criminal legislation enacted prior to the Amendment's passage.

DESTINATION INSIGHT

Many bidders who were previously scared off by the corporate debtor's prior criminal responsibilities have been saved thanks to the modified clause.[41] The revision is likely to improve India's ease of doing business, boosting the country's position in the World Bank's Ease of Doing Business rankings. However, the focus should be on the boundaries that may and cannot be crossed in order to achieve economic efficiency. In the aftermath of the BPSL CIRP, the Code was revised to incorporate Section 32A. BPSL's insolvency is one of the largest to date, with claims totaling Rs. 47,158 crores.[42] The government's policy incentive is completely understandable. Instead of rushing such a massive provision into law, the unique matter of BPSL should have been handled through an executive order. The Central Government has the authority to merge two corporations in the public interest under Section 237 of the Companies Act. The clause might have been used in one-time cases involving guilty corporations.

---

[40] *Directorate of Enforcement v Axis Bank* 2019 SCC OnLine Del 7854; *Shah Brothers Ispat Pvt Ltd v P Mohanraj* 2018 SCC OnLine NCLAT 415

[41] Pallav Gupta and Devarshi Mohan, 'IBC (Amendment) Ordinance, 2019: Providing a much-needed relief to the Prospective Investors' (*Bar and Bench*, 13 January 2020) <https://www.barandbench.com/apprentice-lawyer/ibc-amendment-ordinance-2019-providing-a-much-needed-relief-to-the-prospective-investors> accessed 21 August 2021

[42] Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy News* 20 (January to March 2020, Vol 14)

In a recent report, the government considered decriminalizing corporate offences.[43] The loss of corporate criminal culpability as a deterrent, exacerbated by the implications of Section 32A, puts the notion of independent corporate personality in jeopardy. While corporate crimes have been decriminalized, no discussion or movement has taken place to weaken the principles of corporate veil lifting. As a result, the procedure is made easier for white-collar criminals, as the threat of a financial penalty on their stock holdings has decreased significantly.

While the ease of doing business is critical in a rising economy like ours, we must not lose sight of traditionally good legal foundations. Originally, corporate law was created to protect stockholders against unlimited liability and excessive risk. Since then, a whole body of law governing business behavior has grown up around the classical foundations. This progression has been gradual, allowing stakeholders and participants to acclimatize to changes in a manageable way. Incorporated into the practice of corporate exchanges are customs and customary norms.[44]

Bringing in such a major change not only violates the conventional and customary sense of what a firm stands for, but also prevents practice from organically developing around it, crushing reasonable stakeholder expectations. Because the anti-money laundering law does not allow for abrupt absolutes of criminal culpability, the ED had to oppose the application of the Section to the case, as it did in the case of BPSL. The idea that "criminal proceeds" are somehow dissolved into the assets of the corporate debtor goes against established notions of justice and equity. Similarly, it would not be surprising if the Section leads to litigation as a result of contradictions with corporate law or other sets of legislation that apply to various fields.

CONCLUSION

[43] Ministry of Corporate Affairs, Report of Company Law Committee (14 November 2019)
[44] 'Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law' (1955) 55 Colum L Rev 1192

When making policy decisions that influence the very foundations of established legal concepts, the government must consider the ripple effect that a slight change in a system can have. The massive organization created to govern corporate behavior is still reacting and adapting to the change. The remarks of Justice Holmes could not be more aptly expressed than towards the conclusion of this discussion. While the introduction of Section 32A may appear to be a logical step toward making it easier to do business in India, the provision's success or failure, as well as the insolvency regime, will be determined by the history of corporate and commercial law, as well as the circuitous path it has taken to reach its current form. This essay was produced with the goal of igniting a discussion regarding the constitutionality of clauses that, although not crossing the line into unconstitutionality, do violate accepted legal norms. The Supreme Court has yet to decide on Section 32A's fate, and it will be interesting to watch which side wins out between the sacredness of corporate identity and the allure of financial benefit.

The argument in this paper is that the most recent amendment to the IBC has the potential to undermine the foundations of company law. The business structure and personality have evolved over time to their current state. Similarly, safeguards in the form of exceptions and limits to those exceptions have evolved over time to prevent unfairness and fraud. The courts can look past the veil of incorporation to find the actual culprits hiding behind the corporate facade because of the limited exceptions to an autonomous corporate personality. By absolving an insolvent corporate debtor of prior liability, Section 32A protects the interests of successful resolution applicants by applying the disregard of the corporate personality principle. The benefits of this section are available to a debtor who is undergoing a control and management overhaul. As a result, economic considerations trump the notion of corporate criminal culpability, and a misbehaving corporation escapes criminal liability.