

SOLVING THE BAD LOAN CRISIS IN THE UNCONVENTIONAL WAY: IS REVERSE PIERCING THE CORPORATE VEIL A SOLUTION?

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India being a country with a large number of closely held companies, the chances of fund diversion, siphoning, and financial mismanagement are high, since the control of companies largely lies in the hands of a few individuals. The bad loan crisis, especially, has plagued the Indian economy, with the willful defaulters causing a wreckage of the Indian banking sector. Several steps have been taken to address this mounting concern, including the enactment of the Insolvency and Bankruptcy Code 2016, and amendments to the Banking Regulation Act 1949. However, we believe and propose through this paper that these efforts need to be effectively supplemented with the application of the doctrine of reverse piercing the corporate veil. The doctrine involves imposition of liability of the controllers of the corporation to the corporation itself, thereby leaving little room for the controller to misuse the corporate façade for wrongful purposes. Application of this doctrine certainly causes disruption in the present set up of debt recovery, i.e., priority of claims, but it can be tackled with adequate change of the distribution waterfall, as explained in detail in this paper. Lastly, the elusive aspect of ‘control’ which arises while determining the application of the doctrine also finds analysis with detailed elucidation. The recommendations are made keeping in mind the present legal framework surrounding the insolvency resolution process and keeping in mind the larger public interest involved in recovering the economy from the persisting crisis.

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I. INTRODUCTION

A recent report by the RBI declared the Gross Non-Performing Assets ('GNPA') ratio of Scheduled Commercial Banks ('SCBs') at a staggering 10.8%.¹ Various methods such as the Corporate Debt Restructuring ('CDR'), Strategic Debt Restructuring ('SDR'), Scheme for Sustainable Structuring of Stressed Assets ('S4A'), Joint Lenders' Forum ('JLF'), and those under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFAESI Act') and the Recovery of Debts Due from Banks and Financial Institutions Act, 1993 ('RDDBFI Act') have been adopted to tackle this burgeoning problem. The landmark Insolvency and Bankruptcy Code 2016 ('Code') was enacted to maximise the value of assets in insolvency proceedings.² In a recent move,³ an amendment was made to the powers given to the RBI and it was authorised to proceed against large defaulters in the country with proceedings under the Code. The main purpose of the ordinance so passed, was to ensure effective usage of the Code for "*resolution of stressed assets and (to) give a big boost to the government's efforts to cut down NPAs in the banking sector.*"⁴

These efforts, as underlined in the Code to tackle the bad loan crisis in the country, can be complemented with the application of the doctrine of reverse piercing of the corporate veil. Reverse piercing the corporate veil entails the imposition of the 'controller's' liability onto the 'controlled' corporation.⁵ Under the traditional method of corporate veil piercing, the Courts pierce the veil to cut through the legal fiction and hold the person in control of the corporation liable for illegal actions undertaken at the behest of an artificial legal person.⁶ On the other hand, reverse piercing the corporate veil, involves imposition of the individual liability of the controller of the corporation on the corporation itself.⁷ The concept of reverse piercing can be divided into several branches, *i.e.*, inside reverse piercing, outside reverse piercing & triangular reverse piercing, with each having different usages and implications. Having several advantages and disadvantages, the principle of reverse piercing draws a tangent to the sacrosanct doctrine of limited liability.

¹ Reserve Bank of India, *Financial Stability Report December 2018*, December 31, 2018, available at <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/6CHAPTER2DEC181D8E9C7915894C8291E39D4D4E1EBA3E.pdf> (Last visited on October 10, 2019).

² The Insolvency and Bankruptcy Code, 2016, Preamble (Maximisation of value of assets).

³ The Banking Regulation (Amendment) Act, 2017.

⁴ Press Trust of India, *President Approves Ordinance giving RBI Greater Power to Tackle Bad Loans*, May 05, 2017, available at <https://thewire.in/banking/president-mukherjee-approves-ordinance-giving-rbi-greater-power-tackle-bad-loans> (Last visited on October 10, 2019).

⁵ Kathryn Hesse, *Preserving Entity Shielding: How Corporations Should Respond to Reverse Piercing of the Corporate Veil*, 14 J. OF BUS. & SEC. L. 69 (2013).

⁶ Jennifer Payne, *Lifting the Corporate Veil: A Reassessment of the Fraud Exception*, 56 THE CAMBRIDGE LAW JOURNAL 284 (1997).

⁷ Hesse, *supra* note 5.

Although several of the provisions and cases which we explore in this article may relate more to corporations, we believe that the same would equally apply to wealthy businessmen and other individuals who misuse the corporate façade of the corporations they control, whether directly or indirectly. The article will further delineate various circumstances and conditions under which liability to pay a debt could be evaded as already recognised by and sought to be protected against under the Code. However, some situations still remain, which we believe ought to be recognised and perhaps contained by the application of the reverse piercing doctrine.

The article is divided into six parts. In Part II, we trace the origins of the doctrine of piercing and reverse piercing the corporate veil, its development and acceptance by courts across the United States, the United Kingdom, and India. In Part III, we discuss the application of the doctrine across the three jurisdictions. In Part IV, we deliberate upon the possible solutions to resolve the conflicts arising in the distribution of assets during reverse piercing claims. Finally, in Part V, we examine the requirement of ‘control’ for making a claim for reverse piercing of the corporate veil. Part VI includes some concluding remarks from us.

II. CORPORATE VEIL PIERCING AND REVERSE PIERCING: ORIGINS AND DEVELOPMENT

As Palmer notes in his celebrated treatise on Company Law, the historic Bubble Act, 1720 was enacted by the “panic stricken”⁸ Parliament of United Kingdom to curb the increasing menace of “*speculative and fraudulent*”⁹ schemes used by companies in running their businesses. This Act swept away all forms of corporations sparing only those which were duly authorised by the Royal Charter or an Act of Parliament.¹⁰ The advancement of the industrial revolution caused a rapid increase in the need to raise additional funds and understanding the predicament of the entrepreneurs, the Joint Stock Companies Act, 1844 was passed.¹¹

This was largely to prevent the use of unincorporated company¹² form of business and to encourage a healthy mode of raising capital.¹³ However, it took yet another decade for the Parliament to pass the Limited Liability Act, 1855 and sow the seeds of modern corporate law. There were several enactments between the repeal of the Bubble Act, 1720 and the Joint Stock Companies Act, 1844

⁸ GEOFFREY MORSE, *PALMER’S COMPANY LAW*, 1007, 1.101 (25th ed., 2010) (Referring to FW Maitland, *Collected Papers* (1911), 390).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² This format of business involved a large association of investors having freely transferable shares. A deed of settlement executed between the shareholders and the trustee(s) stated the capital structure and had ownership details. This can be approximated to the present-day concept of Memorandum of Association.

¹³ MORSE, *supra* note 8.

and it was only after numerous experiments that the Parliament took certain bold and innovative steps in support of growing trade and commerce.¹⁴

In 1896, the House of Lords in the landmark case of *Salomon v. Salomon & Co. Ltd*¹⁵ ('Salomon') unanimously upheld the doctrine of corporate personality and the principle of limited liability. Lord Macnaghten observed that among the major reasons which induce individuals to form private companies is the desire to avoid the risk of bankruptcy and the increased opportunities of availing credit facilities.¹⁶ He noted that through limited liability, the persons running the corporation could be shielded from the "*harsh provisions of bankruptcy law.*"¹⁷

The most interesting part of His Lordship's judgment, which will become the central point of the discussion in this article, is where he very strongly stated that he did not see anything wrongful (or anything contrary to the spirit of Act of 1862) in the idea of one person, being able to appropriate the entire profits while being a predominant partner and wielding an overwhelming influence over a corporation.¹⁸

While their Lordships vehemently defended the concept of limited liability in *Salomon*, there have been numerous subsequent cases¹⁹ where the courts were forced to look behind the corporate façade and hold the ones controlling the entity responsible for the debts and liabilities of the corporation itself. The decisions in such cases outlined different instances where piercing the veil was warranted and were soon recognised by the legislatures and adequate provisions were inserted to permit the lifting of corporate veil.²⁰ India being a colony of England till mid-1947, its company law jurisprudence has been exactly in line with the English law.²¹ Indian courts, to this day, continue to apply the English cases as precedents.²²

¹⁴ PAUL L. DAVIES & SARAH WORTHINGTON, *GOWER & DAVIES PRINCIPLES OF MODERN COMPANY LAW* (9th ed., 2012).

¹⁵ *Salomon v. A. Salomon & Co. Ltd.*, (1897) A.C. 22 (HL) (United Kingdom).

¹⁶ *Id.*, ¶ 52.

¹⁷ *Id.*, ¶ 52.

¹⁸ *Id.*, ¶ 53.

¹⁹ *Gilford Motor v. Horne*, (1993) Ch 935 (United Kingdom); *See also Jones v. Lipman*, (1962) 1 WLR 832 (United Kingdom); *Adams v. Cape Industries Plc*, (1990) Ch 433 (United Kingdom); *DHN Food Distributors v. Tower Hamlets London Borough Council*, (1976) 1 WLR 852 (United Kingdom).

²⁰ The Companies Act, 2013, §§ 34, 35, 447; *See also* Companies Act, 2006 (U.K.) §§ 399, 409; Insolvency Act, 1986, (U.K.) §§ 213-216.

²¹ Justice K. G. Balakrishnan, *The Role of Foreign Precedents in a Country's Legal System*, 22(1) NATIONAL LAW SCHOOL OF INDIA REVIEW (2010).

²² *Id.*

Lord Goff in his opinion on the issue of lifting the corporate veil in *Bank of Tokyo v. Karoon*²³ stated “*but we are concerned not with economics but with law*”. Lord Goff considered the distinction between the ‘controller’ and the ‘controlled’ as “*fundamental*” and one that cannot be “*abridged*”. In comparison, precedents²⁴ from United States in piercing the corporate veil are clearly suggestive of the fact that courts, in times of need, focus more on economics and less on law. Though they predominantly continue to respect the entire idea of corporate façade, they also do not miss any chance to penalise the one who is misusing the same.²⁵

This distinction or limitation of common law systems was noted in the recent judgment of *Prest v. Petrodel*²⁶ by Lord Sumption in his masterly drafted opinion. His Lordship observed:

“Most advanced legal systems recognize corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of right, to which the International Court of Justice was referring in Case concerning Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain) (Second Phase) [1970] ICJ Rep 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations.”

As noted further, it “*illustrates the breadth*” of the application of the doctrine.

Reverse piercing the corporate veil is one such principle which distinguishes the attitude towards corporate facade across various jurisdictions.²⁷ While traditional approach to piercing the corporate veil involves imposing the liability of the corporation upon the individual or entity controlling it for misusing the corporate façade in various different ways,²⁸ reverse piercing the corporate veil involves imposing the liability of an individual or parent corporation upon the

²³ *Bank of Tokyo v. Karoon*, (1987) AC 45 (United Kingdom) ¶ 64; *See also* *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction and Dissent ICSID Case No. ARB/02/18, (Apr. 29, 2004) 20 ICSID Rev-FILJ 205, IIC 258 (2004) (The Chairman of the Tribunal, Prosper Weil, asserted that economics should prevail over formal legal structures).

²⁴ *In Re DiLoreto*, 266 Fed. App'x. 140 (3d Cir.: 2008); *See also* *In Re Schuster*, 132 B.R. 604 (Bankr. D. Minn.: 1991).

²⁵ *CF Trust Inc v. First Flight Ltd*, 266 Va. 3 (Va. 2003).

²⁶ *Prest v. Petrodel*, (2013) UKSC 34 (United Kingdom).

²⁷ *Id.*; *See also* *Dillingham v. Dillingham*, 434 S.W. 2d 459 (Texas Civ-App.: 1968); *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1568-69 (Fed.Cir.1993).

²⁸ ROBERT R. PENNINGTON, *PENNINGTON'S COMPANY LAW* (8th ed., 2006).

corporation controlled or its subsidiary, as the case may be, respectively.²⁹ As is succinctly put by the United States Bankruptcy Court,³⁰ it is a principle used by the creditors or someone in their behalf to raise claims over the assets of the entity which the defaulting debtor owns or holds interest therein.

It is true that reverse piercing has an adverse impact on the innocent shareholders of the corporation, as a corporation would consist of other non-culpable shareholders, who would be prejudiced if the corporation's assets could be attached directly, and thus, this doctrine warrants limited application.³¹ We can also see this in the case of *Scholes v. Lehmann*,³² where the court considered it rather wrong to seize the corporation's assets where there existed more than one shareholder. However, despite this impact, we believe that it is not something which can be thrown aside as being too radical an approach, cutting across the very framework of corporate law. As noted by the Hon'ble High Court of Singapore in *Koh Kim Teck v. Credit Suisse Ag*,³³ the issue of reverse piercing demanded certain serious deliberation and was not worth dismissing altogether.

Arguably, the judicial aversion towards the doctrine is more because of the adherence to the archaic principle of separation of legal entity³⁴ which we believe must be reviewed through modern lens. The theory of artificial legal person has failed to keep up with the fast modernising corporate world.³⁵ Going back to Lord Goff's observation, it is the denial to examine the economic realities which impede the courts from applying the doctrine of reverse piercing.

Most common forms of reverse piercing include insider reverse piercing,³⁶ outsider reverse piercing³⁷ and triangular reverse piercing.³⁸ The first form involves the claim of disregarding the corporate structure by the corporation owners themselves to either impart a benefit or satisfy liability of the corporation or *vice versa*. A classic example of the same would be the case of *Macaura v. Northern Assurance Co*,³⁹ wherein the owner claimed application of insider re-

²⁹ Nicholas B. Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, 85 ST. JOHN'S L. REV. 1147 (2011); See also Kurtis A. Kemper, *Acceptance and Application of Reverse Veil Piercing*, 2 A.L.R. 195 (2005).

³⁰ In Re Evan Zhang, Debtor, 463 B.R. 66 (S.D. Ohio).

³¹ Cascade Energy and Metals Corp. v. Jeffery G. Banks, 896 F.2d 1557 (1990) at 1577.

³² Scholes v. Lehmann, 56 F.3d 750 (7th Cir.: 1995).

³³ Koh Kim Teck v. Credit Suisse Ag, (2015) SGHC 52 (Singapore).

³⁴ Michael J. Gaertner, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WILLIAM & MARRY L. REV. 667 (1989).

³⁵ The idea of separation of ownership has been used time and again to form shell corporations for perpetration of several frauds, money laundering activities, white collar crimes and tax evasion activities through increasingly complex structures of holding. While there are laws to actively prohibit and penalise such actions, the authors believe that certain modifications need to be created to ensure that it keeps up with the modern times, to complement such existing laws.

³⁶ *Id.*

³⁷ Hesper, *supra* note 5.

³⁸ Gary J. Mennitt, *Reverse and Triangular Piercing of the Corporate Veil*, 223 N.Y.L.J. 53 (2000).

³⁹ *Macaura v. Northern Assurance Co. Ltd.*, (1925) AC 619 (HL) (United Kingdom).

verse piercing to impart the benefit of a fire insurance policy, held in his own name, onto his company for loss caused due to fire. In this case, denying the claim, Lord Wrenbury noted that even if the corporator owned all of the company's shares, it did not make him the corporation.⁴⁰ This form of reverse piercing is largely for the benefit of the corporation or the owner. The Delhi High Court in the case of *Prem Lata Bhatia v. Union of India*,⁴¹ accepted the argument of the petitioner and treated the corporation and the owner as one and same to prevent injustice caused to the licensee due to actions of the respondent.

Outsider reverse piercing involves claims against the assets of the corporation by the 'personal creditors' of the 'owners' of the corporation.⁴² This form of reverse piercing is applied when third party individuals or corporations seek access to corporate assets as redress to wrongs of the controller.⁴³ For instance, in *Shamrock Oil & Gas v. Ethridge*,⁴⁴ the District Court of Colorado had permitted a claim for outside reverse piercing where a third-party creditor held a decree against the owner of the defendant company in his individual capacity. The plaintiff had proceeded to attach an oil drilling rig, which was the company's main asset to satisfy the decree. The court's reason for allowing this claim was based on the fact that the company was merely an alter ego of the individual defendant, who had transferred his assets to the corporation and was habitually engaged in comingling his funds with that of the company. Similarly, in *Curci Investments v. James Baldwin*,⁴⁵ the California Court of Appeal held that a judgement creditor was not precluded from outside reverse piercing to make liable a Delaware Limited Liability Company ('LLC') as a judgement debtor on a judgement against a shareholder of the LLC.

Lastly, under triangular piercing, the liability of one entity is imposed on an affiliate entity via its controller.⁴⁶ The liability moves up to the dominant individual or the controller corporation and then is flowed back down onto the second affiliate.⁴⁷ The District Court of Arkansas⁴⁸ described a triangular piercing claim as one which "results from a sequential application of the traditional

⁴⁰ *Id.*, at 633.

⁴¹ *Prem Lata Bhatia v. Union of India*, 2006 SCC OnLine Del 136 : (A license was granted to the owner of the corporation by the Government of India and the said license terms prohibited the same to be used by any other person for any purpose. The licensee commenced business under the name and banner of Romika World Travel Pvt. Ltd. (wherein the licensee and her husband owned 97.93% shares) at the same premises for which the government had granted license. Considering the company and licensee to be distinct, the government brought an action seeking to revoke the license. The court however lifted the corporate veil to prevent injustice, while considering it a common practice for individuals to pursue business activities in a like manner).

⁴² *CF Trust Inc v. First Flight Ltd*, 266 Va. 3 (Va. 2003).

⁴³ Controller here could mean either an individual shareholder or a parent corporation.

⁴⁴ *Shamrock Oil & Gas v. Ethridge*, 159 F. Supp. 693 (D. Colo. 1958).

⁴⁵ *Curci Investments v. James Baldwin*, 14 Cal.App.5th 214 (2017).

⁴⁶ *Mennitt*, *supra* note 38.

⁴⁷ *Id.*

⁴⁸ *Nursing Home Consultants v. Quantum Health Services*, 926 F. Supp. 835 (E.D. Ark. 1996).

*piercing doctrine and the ‘reverse piercing’ doctrine, which...permits two related, though independent, corporate entities...corporations which hold no ownership interest in each other, to be held liable for the malfeasance of the other.’*⁴⁹ Thus, the main difference between the applications of the various forms is the type and nature of claimant entity.

III. APPLICATION OF REVERSE PIERCING IN INDIA: BORROWING INSPIRATION FROM OTHER JURISDICTIONS

As is noted by some scholars,⁴⁹ the doctrine of reverse piercing has been unknown in English jurisprudence. There is also lack of uniformity in its application across state jurisdictions in the United States.⁵⁰ Yet the nature of remedy it offers has compelled almost all courts in the US to at least deliberate upon its applicability in appropriate situations.

The earliest application of the principle can be traced back to June, 1865, by the Court of Appeals, New York, where a perfect outsider reverse piercing claim was brought in the case of *Alfred Booth v. Jeremiah Bunce*.⁵¹ In this case, the controllers of an ‘embarrassed’⁵² corporation formed a new corporation and transferred all the property from the former to the latter to begin business again. A conflict of priority of claims between the creditors of the two corporations was solved by the court considering the law concerning fraudulent conveyance,⁵³ and the doctrine of reverse piercing. The court observed that though the new corporation was a valid legal entity for its own creditors, the principle of *qui prior est tempore, potiore est jure*⁵⁴ would enable the old creditors to make their claims against the new corporation, owing to the fact that the controllers of the corporation were same and that the transfers were fraudulent.

Here, a distinction needs to be drawn between several situations. First, where the property in question belonging to the debtor is transferred immediately/sometime before the claims arose; second, the transfer takes place after the claims arose; third, the property is transferred despite a court order against the property; fourth, the property is never transferred but the transactions are so

⁴⁹ Jeff H.Y. Chan, *Should Reverse Piercing of the Corporate Veil be introduced into English Law?*, 35(6) COMP. LAW. 163 (2014).

⁵⁰ Jurisdictions like Georgia and California do not accept the doctrine; *See Acree v. McMahan*, 585 S.E. 2d 873 (Ga. 2003); *Postal Interest Press v. Kasawa Corp.*, 162 Cal.App.4th. 1510 (Cal. Ct. App. 2008).

⁵¹ *Alfred Booth v. Jeremiah Bunce*, 33 N.Y. 139 (N.Y. 1865).

⁵² Equivalent to insolvent.

⁵³ The transfer of assets from one corporation to another was considered to be fraudulent, and with the intent to hinder, delay and defraud the creditors of the former corporation.

⁵⁴ Meaning, he who is earlier in time is stronger in law.

structured that debtors in all cases would be shielded from liability; and fifth, absence of perpetration of fraud or crime.

Over the course of time, the courts in the United States have given judgments which make it clear that the remedies of fraudulent conveyance laws and reverse piercing are mutually exclusive.⁵⁵ Reverse piercing, in any way, being an equitable doctrine would be applicable when the law is insufficient to deal with the situation but equity and justice warrant so.⁵⁶

In India, thus, §52,⁵⁷ §53⁵⁸ and §53A⁵⁹ of Transfer of Property Act, 1882, and §49⁶⁰ of the Insolvency and Bankruptcy Code, 2016, would act as the perfect remedy for the first three situations as outlined hereinabove. Further, §329⁶¹ and §334⁶² of the Companies Act, 2013, as amended by the Insolvency and Bankruptcy Code, 2016, also render transfers carried out within a period of one year (or two years, in case of a related party) ('relevant period') before the presentation of a winding up petition under the Code or while the winding up proceedings are pending, as void.⁶³ Further, §45⁶⁴ of the Insolvency and Bankruptcy Code, 2016, helps avoid undervalued transfers being made during the relevant period.⁶⁵ §47 of the Code⁶⁶ further empower the creditors of the corporate debtor to claim avoidance of such undervalued transfers.

For the fourth or fifth situations, as given hereinabove, we believe that the concept of reverse piercing would be an appropriate remedy. For this, various factors⁶⁷ can be looked into to determine the application of the principle,⁶⁸ though not as a strait-jacket formula, but as a guide for looking into similar situations. First, where there is a total failure to observe any corporate formalities by

⁵⁵ Commissioner of Environmental Protection v. State Five Industrial Park Inc, 304 Conn. 128 (Conn. 2012), ("...corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law...challenging his or her transfer of assets to the corporation as fraudulent conveyance or illegal conversion... these remedies may obviate the need for the more drastic remedy of corporate disregard...").

⁵⁶ *Id.*

⁵⁷ The Transfer of Property Act 1882, §52.

⁵⁸ *Id.*, §53.

⁵⁹ *Id.*, §53A.

⁶⁰ The Insolvency and Bankruptcy Code 2016, §§49, 69, 66.

⁶¹ The Companies Act, 2013, §329.

⁶² *Id.*, §334.

⁶³ The Insolvency and Bankruptcy Code 2016, §43(4).

⁶⁴ *Id.*, §45.

⁶⁵ *Id.*, §46.

⁶⁶ *Id.*, §47.

⁶⁷ These factors have been collated from a number of cases. See *In re Mass*, 178 B.R. 626 (Bankr. N.D. Pa 1994); *In Re Schuster*, 132 B.R. 604 (Bankr. D. Minn.: 1991).

⁶⁸ Several scholars opine that application of the test for traditional corporate veil piercing to reverse piercing as well would be the best way to determine application of the doctrine. See Gregor Crespi, *The Reverse Piercing Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990-91); See also *CF Trust Inc v. First Flight Ltd*, 266 Va. 3 (Va. 2003) ("...The rationale for traditional piercing operates with equal force in support of reverse piercing...").

the debtor; second, where there are no directors' or shareholders' meetings and no dividends are paid; third, the absence of corporate records; fourth, where at all times the proceeds of business are used as if they are the assets of individual debtor themselves; fifth, where there is continuous intermingling of funds between the debtor and the corporation; sixth, where the property owned by the corporation is always used by the debtor for their personal benefit and enjoyment or *vice versa*; and seventh, where the debtor is a dominant shareholder in the corporation and has the power to take/influence decisions. In other words, the control test should be made applicable.

However, it is pertinent to note that control and ownership are not *sine qua non inter se* for the application of reverse piercing. At times it may so happen that despite absence of any real shareholding the individual handles the corporation from behind the scene. Courts term this as equitable ownership.⁶⁹ This concept has been recently incorporated in the Companies Act, 2013 in India by the Companies (Amendment) Act, 2018 in §90 and is known as the concept of “significant beneficial owners”, which has been discussed later in this article. Thus, the above factors make the court look into the economic realities rather than the “form”. That said, we submit that a court should be careful not to find fraud or malpractice unless it is distinctly pleaded and the onus is on to the claiming parties to prove the presence of the elements outlined above. It is also to be noted that a court is careful not to find fraud or malpractice unless it is distinctly pleaded and the onus is on to the claiming parties to prove the presence of the elements outlined above.⁷⁰

In *CF Trust Inc v. First Flight Ltd*,⁷¹ it was noted that the US courts in previous cases have denied a claim for reverse piercing, not because they rejected the concept *per se* but due to sheer absence of sufficient facts for sustenance of such claim. In the case of *In Re DiLoreto*,⁷² the court went on to reverse pierce the veils of various corporations and offshore entities for the assets to be included in the bankruptcy estate. It was noted that the defaulter had over several years put into place a complex web of entities and assets owned (on paper) by various family members and other entities, which however, remained under his complete

⁶⁹ See *In Re Easton*, 647 N.Y.S.2d 909 (N.Y. 1995), (held that an equitable owner could satisfy the domination requirement and legal ownership was not a compulsory pre-requisite). But, there is a split with respect to this position amongst different jurisdictions in the United States. For example, California and Illinois require ownership as a precondition for veil piercing. See, *Trossman v. Philipsborn*, 373 Ill.App.3d 1020 (Ill.App.Ct. 2007).

⁷⁰ Generally, the burden of proof is on the party claiming a particular default to exist. The court, though having all encompassing powers, is under no obligation to dig deep into a particular transaction over and above the default claim made by the claimant. For instance, a parallel can be drawn from the amendment of charge related provisions under the Criminal Procedure Code, 1972. While, the court has wide powers to amend the charge framed before the pronouncement of the judgment, it is under no obligation to do so. Moreover, while framing the charges, the court ought to confine itself to the documents presented before it under §173 of the Code of 1972.

⁷¹ *CF Trust Inc v. First Flight Ltd*, 266 Va. 3 (Va. 2003).

⁷² *In re DiLoreto*, 266 Fed. App'x. 140 (3d Cir.: 2008).

control.⁷³ Thus, it becomes clear that if the facts have warranted so, the courts in the United States have not refrained from application of the doctrine.

Further, in case of *In Re Schuster*,⁷⁴ the court went on to note that the defendant was not required to assert the perpetration of fraud or crime by the corporation. The urgency to ensure justice by looking at the bigger picture of entire business structure in the country, the courts could take liberal moves ahead. The predominant premise in the process of reaching such a decision is to look at the requirement being fulfilled by disregarding the corporate form, viz. principles of equity, public policy or any specific statutory mandate.⁷⁵

In India, conflicting opinions have been given by various courts and tribunals with respect to the application of the doctrine. While there exist rare examples of its application, some have even refrained from discussing it, as can be seen in the Securities Appellate Tribunal's order in *NEPC India Ltd. v. SEBI*,⁷⁶ where it only noted the arguments as presented by the counsel on behalf of appellants, who with an extremely unwelcome attitude towards the idea of reverse piercing, argued that the principle of reverse piercing of corporate veil as averred by the respondent was unheard of and it was never a practice to lift the corporate veil to find out anyone existing behind an individual.

Two recent examples of claims for application of reverse piercing can be noted from the cases of *SBI v. Kingfisher Airlines*⁷⁷ ('Kingfisher Airlines') and *Punjab and Sind Bank v. Skippers Builders (P) Ltd.*⁷⁸ ('Skipper Builders'). Kingfisher Airlines⁷⁹ was an interesting case of debt recovery against Mr. Vijay Mallya by a consortium of banks, where the counsels for IDBI Bank reportedly argued that Mallya's liability to Kingfisher ought to be fixed using the doctrine of

⁷³ *Id.*

⁷⁴ *In re Schuster*, 132 B.R. 604 (Bankr. D. Minn.: 1991).

⁷⁵ *Id.*

⁷⁶ Securities Appellate Tribunal, (Mumbai), *NEPC India Ltd. v. SEBI*, 2003 SCC OnLine SAT 11..

⁷⁷ Debts Recovery Tribunal, (Karnataka, Bangalore), *SBI v. Kingfisher Airlines Ltd.*, OA No. 766 of 2013, decided on January 19, 2017.

⁷⁸ Debts Recovery Appellate Tribunal, (Delhi), *Punjab and Sind Bank v. Skippers Builders (P) Ltd.*, (2016) 2 BC 124.

⁷⁹ Debts Recovery Tribunal, (Karnataka, Bangalore), *SBI v. Kingfisher Airlines Ltd.*, OA No. 766 of 2013, decided on January 19, 2017. (Defendant 1 is Kingfisher Airlines Ltd., Defendant 2 is United Breweries (Holdings) Ltd., Defendant 3 is Dr. Vijay Mallya, Defendant 4 is Kingfisher Finvest (India) Ltd.); In the case it was alleged that lakhs of shares were sold and purchased among Defendant No. 2 and 4 and another group company. The sale of shares was done without any circumstance warranting the sale and was not bona fide at all. In the order it was made clear that

"...it is necessary to lift the corporate veil of Defendant No. 4 and hold them liable for the entire OA claim jointly and severally with defendant nos. 1 and 3. It is further stated that in the light of the fact that Defendant no. 4 is a wholly owned subsidiary of Defendant no. 2 and that it is being entirely controlled by Defendant no. 2 on a day to day basis; and as defendant no. 4 does not have any independent business of substance, defendant no. 4 is also jointly and severally liable along with Defendant nos. 1 to 3...").

reverse piercing considering the fact of being the chief promoter and having controlling interest he holds in all the companies.⁸⁰

To settle the dues of Rs. 1746 crores to IDBI, it was pleaded to put all the group companies on one platform and to consider Mallya as the common denominator to impose the liability.⁸¹ Vijay Mallya's liability was sought to be fixed by reverse piercing since by resigning from all the companies he had eroded his net worth and hence affected his position as the personal guarantor, through which he had initially obtained the entire sum of money from the banks.

Similar application was also made in the *Skippers Builders* case,⁸² where a property belonging to Tej Properties Pvt. Ltd. was attached towards satisfaction of dues of Mr. Tejwant Singh, who was at the helm of the affairs of the company. Although the court in this case did not explicitly use the jargon "reverse piercing", the facts of the case evidence the application of the doctrine. Nevertheless, the absence of a binding decision by the Supreme Court of India on the application of this doctrine gives it only persuasive value before courts and tribunals, with no guarantee of its usage in subsequent cases.

IV. SOLVING THE PRIORITY OF CLAIMS MATRIX

The Insolvency and Bankruptcy Code was brought into force with the main intention of giving more power to creditors in the Indian context.⁸³ The application of the doctrine of reverse piercing would amount to providing additional power to creditors. Yet, it is understandable that a conflict of priority of claims would arise amongst the existing creditors of the corporation and the individual creditors with reverse piercing claims against it.

⁸⁰ Press Trust of India, *Banks to file objections to Heineken's Impleadment plea in Vijay Mallya case*, June 21, 2016, available at <https://economictimes.indiatimes.com/industry/cons-products/liquor/banks-to-file-objections-to-heinekens-impleadment-plea-in-vijay-mallya-case/article-show/52857899.cms>, (Last visited on October 11, 2019).

⁸¹ *Id.*

⁸² Debts Recovery Appellate Tribunal, (Delhi), *Punjab and Sind Bank v. Skippers Builders (P) Ltd.*, (2016) 2 BC 124 (The bank (appellant) had sought an attachment of property No. 23 Jor Bagh, New Delhi owned by Tej Properties Pvt. Ltd. in its debt recovery application filed under the Recovery of Debt due to Banks and Financial Institutions Act, 1993, in light of the landmark judgment of *DDA v. Skipper Constructions Co. (P) Ltd.*, (1996) 4 SCC 622. As per the landmark judgment, the Hon'ble Supreme Court had lifted the corporate veil of Skipper Constructions to find out Mr. Tejwant Singh and his family behind the various legal entities created to perpetrate the fraud as noted in the judgment. Tej Properties Pvt. Ltd. was one such entity created at that time. The claim was that since Mr. Tejwant Singh was the Certificate Debtor in all the connected recovery cases, the property currently belonging to Tej Properties could be attached towards satisfaction of dues of Mr. Tejwant Singh. The claim was allowed owing to the fact that once the corporate veil was lifted by the Hon'ble Supreme Court to find Mr. Tejwant Singh behind the companies, the reverse logic also held good).

⁸³ T.K. VISHWANATH COMMITTEE, *Report of the Bankruptcy Law Reforms Committee*, Vol. 1: Rationale and Design. November 4, 2015.

However, as noted earlier⁸⁴ and applying the equitable principle of *qui prior est tempore, potiore est jure*,⁸⁵ meaning ‘he who is earlier in time is stronger in law’, we believe that the creditors with reverse piercing claims should be either given primacy over all the rank holders in the existing hierarchy specified in §53⁸⁶ or §178,⁸⁷ or should be at least treated at par with the highest ranked creditors in the hierarchy, and the division of assets should then be made proportionately. However, §53 is applicable only if the resolution plan does not get the requisite threshold approval of seventy five percent, within the committee of creditors of the corporate debtor and consequently the company goes into liquidation. Thus, in case the creditors approve the resolution plan, the claims would be settled according to the plan as framed under Chapter X of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It is thus the prerogative of the Resolution Professional to identify all such “*specific sources*” of funds which would be used to meet the debt obligations. A perusal of §29A of the Code⁸⁸ can allow us to infer that since the Resolution Professional is duty-bound to ensure that resolution applicants do not attract any of the disqualifications mentioned therein, this duty could be extended to empower them to apply the doctrine of reverse piercing the corporate veil. Therefore, if the Resolution Professional manages to identify, *vide* application of the reverse piercing doctrine, any other additional source of fund, then the onus ought to be shifted to the competing creditors of the two entities to amicably resolve the priority of their payment or the proportion entitled to them. Practically speaking, it appears to be an extremely far-fetched situation but the involvement of the Adjudicating Authority might help resolve the conflict in light of equity, justice and good conscience. Further, considering the fact that a case for reverse piercing may not be viable or may not always succeed in a court or tribunal, in situations where they do succeed, it would warrant the involvement of the Adjudicating Authority and the application of judicial mind to ensure that it is not merely a mechanical process, but a well thought out and reasoned decision.

A point worth noting here is that under the Code, a marked shift was made from the present priority of claims⁸⁹ under the Companies Act, 2013, which we believe was done with the sole reason to protect the interests of creditors to a

⁸⁴ Alfred Booth v. Jeremiah Bunce, 33 N.Y. 139 (N.Y. 1865).

⁸⁵ *State of A.P. v. Rajah Ram Janardhana Krishna Rangarao Bahadur Varu*, 1965 SCC OnLine AP 2727 ; *Thirumagaral Mudaliar v. Muruga Pillai*, 1958 SCC OnLine Mad 21428 ; *Imperial Bank of India v. U Rai Gyaw Thu and Co. Ltd.*, (1923) SCC OnLine PC 42 : (1923) 25 Bom LR 1279; *Banarsi Prasad v. Basti Begam*, ILR (1908) 30 All 297; *V. Dakshinamurthi Mudaliar v. General and Credit Corpn. (India) Ltd.*, 1959 SCC OnLine Mad 236 ; *William Jacks and Co. (India) Ltd. v. Skipper Sales (P) Ltd.*, 1997 SCC OnLine Del 711 : 69 ; *Ramaswami Pillai v. Ramasam Naicker*, 1959 SCC OnLine Mad 151 : .

⁸⁶ The Insolvency and Bankruptcy Code 2016, §53.

⁸⁷ *Id.*, §178.

⁸⁸ *Id.*, § 29A.

⁸⁹ The Companies Act, 2013, §§ 320, 325, 326, 327.

greater extent and to improve the advancement of credit in the country.⁹⁰ Thus, giving more power through reverse piercing to creditors, would only amount to strengthening their position further, which is of paramount importance in the era of ever-piling bad loans.

In the case of *In Re Phillips*,⁹¹ the Supreme Court of Colorado allowed an outsider reverse piercing claim wherein an outsider sought to hold the corporation liable for the obligations of the debtor. Distinguishing between traditional and reverse pierce claims, the court stated that, “in traditional veil piercing, the veil shields a shareholder who is abusing the corporate fiction to perpetuate a wrong. In outside reverse piercing, however, the corporate form protects the corporation which, through acts of dominant shareholder or other corporate insider, uses the legal fiction to perpetuate a fraud or defeat a rightful claim of an outsider.”⁹² Thus, the thrust of the argument places the creditors of the individuals in a higher position while considering their “rightful claim” as against the debtor.

Also, in the case of *In re Mass*,⁹³ a reverse piercing claim was allowed by the Pennsylvania court for the existence of circumstances which warranted the application. Such circumstances were nothing but the factors, as outlined above, present in the case at hand. It also reiterated the stance that even absent allegation of fraud or misconduct by debtor-shareholder⁹⁴ a claim of reverse piercing could be sustained under Pennsylvania law, provided such application serves the larger public interest. Thus, irrespective of the fact that fraud exists in non-repayment of debt or not, a creditor of the controller could still legitimately bring a claim against the corporation and get it satisfied.

Analogously, in numerous tax recovery cases like *Shades Ridge Holding Co. v. United States*,⁹⁵ *Zahra Spiritual Trust v. United States*,⁹⁶ *Towe Antique Ford Foundation v. IRS*,⁹⁷ the courts have treated the tax recovery agency or the government as a creditor and placing their priority above all other creditors of the relevant corporation, have allowed outside reverse piercing claims towards satisfaction of the tax dues. This makes for a stronger case for the applicability of the doctrine in debt-recovery cases.

⁹⁰ TK VISHWANATH COMMITTEE, Report of the Bankruptcy Law Reforms Committee, Vol. 1: Rationale and Design. November, 4, 2015).

⁹¹ *In Re Phillips*, 139 P.3d 639 (Colo. 2006).

⁹² *Id.*

⁹³ *In Re Mass*, 178 B.R. 626 (Bankr. N.D. Pa 1994).

⁹⁴ The judgment noted that “...The Court further cannot find that there was any intentional scheme or fraud committed by the individual Debtors on any creditor of this estate. They, at all times, used the proceeds of the account in question as their own individual account to pay off their personal debts including those debts associated with the business...”. See *id.*, 5.

⁹⁵ *Shades Ridge Holding Co. v. United States*, 888 F.2d 725 (11th Cir. 1989).

⁹⁶ *Zahra Spiritual Trust v. United States*, 910 F.2d 240 (5th Cir. 1990).

⁹⁷ *Towe Antique Ford Foundation v. Internal Revenue Service*, 999 F.2d 1387 (9th Cir. 1993).

Another solution as carved out by scholars⁹⁸ is that of paying from the relevant portion of shareholding of the concerned individual controller. This prevents any impact on the property of the company, thereby not raising any priority of claims issue. However, it is argued that admission of a new shareholder, at least in a private corporation, being largely subject to the decision of other shareholders as well, affects, to certain extent, the interests of the claiming creditor.

V. EXAMINATION OF CONTROL

Another aspect which is important to examine in relation to application of the doctrine is the control exercised by the individual over the corporation against whom a reverse piercing claim has been brought with respect to dues of such individual. The judges in *Nicholas v. Nicholas*⁹⁹ held that in case of one person or very closely held corporations, it is easier to relate the actions of an individual with that of the company. Thus, in such cases, the debts of an individual can be easily claimed against the corporation.

However, in larger private corporations or in public companies, the person with the highest shareholding or asserting the maximum influence over the decisions of a corporation is considered to be in control of the corporation. In India, no specific test exists as to the determination of control as clarified by the Securities and Exchange Board of India ('SEBI') through its notification dated 8 September, 2017,¹⁰⁰ where it clearly mentioned that no bright line test exists for such determination, and control ought to be determined on a case to case basis, making it a question of fact.

Applying the criteria as discussed above would aid in the determination of control of an individual over the corporation. For example, it becomes clear that one who actively makes his firm engage in activities for his personal benefit, or commingles his individual and corporate funds, uses corporate property for personal uses, ought to have considerable control and influence over the working of the corporation.

⁹⁸ Michael Richardson, *The Helter Skelter Application of the Reverse Piercing Doctrine*, 79 U. CIN. L. REV. 1605 (2011).

⁹⁹ Mary Anthony Nicholas v. Brian Nicholas, (1984) FLR 285 (United Kingdom).

¹⁰⁰ Press Release, SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI), September 8, 2017, available at https://www.sebi.gov.in/media/press-releases/sep-2017/acquisition-of-control-under-the-sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011_35891.html, (Last visited on October 12, 2019) (Though the press release talks of determination of acquisition of control in situations of substantial acquisitions of shares and takeovers, it also states that the definition of 'control' as under the Companies Act, 2013 (§2(27)) and under other laws are very similar and none provide for a bright line test. §2(27) of Companies Act, 2013 or Regulation 2(1)(e) provide for only an inclusive definition and do not envisage all situations of exercise of control. Further, SEBI's press release being only applicable to public listed and unlisted companies, determination of control in a private limited company also remains a question of fact but in light of the inclusive definition of control under the Companies Act, 2013).

Moreover, even if the person does not own any shares, equitable ownership,¹⁰¹ as mentioned previously, aids in identification of the control. The degree and nature of influence over the decisions of the corporation becomes relevant in the determination of control. Thus, overall, it depends on the evidence adduced showing the presence of the elements outlined above and the onus is clearly upon the entity claiming reverse piercing.

On a related note, it may also be pertinent to highlight the changes brought about under the Companies (Amendment) Act 2017, three of which we believe are relevant to our argument. The first is the amendment to the definition of an associate company,¹⁰² where the meaning of “*significant influence*” by one company over another has been amended.¹⁰³ Significant influence now constitutes control of at least twenty per cent of total “*voting power, or control of or participation in business decisions under an agreement*”, which provides a numerical threshold for examining control over associate companies, which might be helpful for courts and tribunals in examining reverse piercing claims.¹⁰⁴ The Companies Law Committee Report (2016) sheds light on the legislative intent behind the amendment, that is, to ensure compliance with corporate governance requirements under the Companies Act 2013. Yet, from another perspective, the expression “*control over or participation in business decisions*” could be construed as bringing under its purview direct or indirect agreements and arrangements between the corporate debtor and its associate companies for the purpose of examining claims of reverse piercing.

The second and most significant change in our opinion is the addition of the new §89(10), regarding the declaration of beneficial interest in any share. The provision defines beneficial interest in a share firstly, to include “direct and indirect” rights or entitlement of persons, secondly, to factor in ‘any’ rights in shares as “beneficial interests” and thirdly, to include persons who “collectively” hold beneficial interests. Although a perusal of the Companies Law Committee Report would show that the Committee seems to have recommended¹⁰⁵ this in furtherance of India’s obligation to comply with Recommendations 24 and 25 issued by the Financial Action Task Force (‘FATF’) regarding transparency and beneficial

¹⁰¹ In Re Easton, 647 N.Y.S.2d 909 (N.Y. 1995).

¹⁰² The Companies Act, 2013, § 2(6), *inserted vide* The Companies (Amendment) Act, 2017 (w.e.f. January 3, 2018).

¹⁰³ In order to qualify as an associate company.

¹⁰⁴ This is only with respect to satisfaction of claims if a reverse piercing argument arises and is subject to the seven-point guide which we have mentioned above in the article, as not all associate companies would necessarily be party to wrongdoing. Therefore, such a claim would eventually depend on the facts and evidence adduced.

¹⁰⁵ Ministry of Corporate Affairs, Report of The Companies Law Committee, 32 (February 2016), available at http://www.mca.gov.in/Ministry/pdf/Report_Companies_Law_Committee_01022016.pdf, (Last visited on October 11, 2019).

ownership of legal persons¹⁰⁶ and legal arrangements,¹⁰⁷ we believe that this provision also buttresses our argument for making claims against companies in which the corporate debtor is a beneficial shareholder. In other words, where a corporate debtor is the beneficial shareholder in a company, an argument for reverse piercing can be made by the creditors to recover debt owed by the corporate debtor, from the company in which it is a beneficial shareholder. From a broader point of view, the legislature seems to have considered protection of public money to be paramount importance. Thus theoretically, there still exists scope for making such an argument, and if courts and tribunals are willing to extend their arms in ensuring justice and speedy debt recovery, such application would arguably bolster the debt recovery process.

The third change under the amendment Act is in relation to §90.¹⁰⁸ The earlier un-amended Section dealt with investigation of beneficial ownership by the Central Government, but the amendment has revamped the scope of the provision, and we believe that this would be helpful in asserting a claim for reverse piercing. The amendment introduces a new concept of “significant beneficial owner”, as an individual who acting alone or together, or through one or more persons or trust holds beneficial interests, either directly (or together with any direct holdings) or indirectly, of not less than ten percent in shares of a company or voting rights in the shares, or has right to receive or participate in not less than ten percent of the total distributable dividend,¹⁰⁹ or the right to exercise, or the actual exercising of *significant influence*¹¹⁰ or *control*¹¹¹ over the company. There is indeed an effort towards covering all possible ways in which a person can have control over a company. Furthermore, the amended rules also prescribe comprehensive criteria for determining whether an individual would be considered as a significant beneficial owner (with respect to his/her indirect holdings) for the purposes of declaring oneself as a significant beneficial owner. The Companies (Significant Beneficial Owners) Rules specify that if a member of the reporting company is a company, the significant beneficial owner would be the individual who holds majority stake in that member or holds majority stake in the ultimate holding company of that member.¹¹²

¹⁰⁶ The Financial Action Task Force (“FATF”) Recommendations, Recommendation 24, February 2012.

¹⁰⁷ The FATF Recommendations, Recommendation 25, February 2012.

¹⁰⁸ The Companies Act, 2013, § 90, *inserted vide* The Companies (Amendment) Act, 2017 (w.e.f. January 3, 2018).

¹⁰⁹ Companies (Significant Beneficial Owners) Amendment Rules, 2019 (India), Rule 2(1)(h).

¹¹⁰ This term has not been defined in the Rules or in the Section itself. However, going by Rule 2(2) which directs those words not defined, to the Act, we can refer to §2(6) of the Act, albeit in the context of an associate company.

¹¹¹ The Companies Act, 2013, § 2(27).

¹¹² Companies (Significant Beneficial Owners) Amendment Rules, 2019 (India), Explanation III to Rule 2(1)(h).

A perusal of these criteria would show that the Rules do not seem to restrict the scope of ‘beneficial interest in a share’ merely to shareholding, but also consider other forms of control through *direct and indirect through any contract, arrangement or otherwise*.¹¹³ This Section gives an inclusive and wide definition, and beneficial interest also includes those interests not specifically mentioned in §90. Such an individual significant beneficial owner is now mandated to make a declaration to the company, specifying the nature of his interest, and the company is mandated to maintain a register of such interests that have been declared by the significant beneficial owners.¹¹⁴

It may be noted here that although a juristic person like a company may declare its beneficial interest, a *significant beneficial owner* who crosses the thresholds mentioned above, must necessarily be an individual.¹¹⁵ The company is also given the power to give a notice to any person whom it knows or has reasonable cause to know to be the significant beneficial owner of the company, and also the power to apply to the Tribunal to order for restriction in the transfer of shares and the suspension of rights attached to such shares, if it does not receive satisfactory information from the persons to whom the notices were issued.¹¹⁶ Since every company must file a return of significant beneficial owners of the company with the Registrar of Companies, assistance from the Registrar in obtaining information on companies in which an individual is a significant beneficial shareholder would make it easier for creditors to make a claim for reverse piercing.

Further, this Section provides immense scope for identifying individuals who are significant beneficial shareholders and applying the doctrine of reverse piercing to make good the debt owed to creditors. This provision could also help reduce the effort that would have to be undertaken by the creditors claiming their debt, or resolution professionals who have to identify the source of funds for such repayment, an argument that was made earlier in this article. It may be issued as a caveat that although this provision is strictly applicable to ‘individuals’, and not to ‘persons’, thereby excluding from its ambit ‘corporate’ debtors, an argument for reverse piercing could nevertheless be made in the case of individuals as well, as was seen in the Kingfisher Airlines case,¹¹⁷ and the Skipper Builders case.¹¹⁸

¹¹³ The Companies Act, 2013, §§ 89(10), 90(1), *inserted vide* The Companies (Amendment) Act, 2017 (w.e.f. January 3, 2018).9, 2017).1 ry Tribunal, (Karnataka, Bnagalore), oned in the standard the page number.

¹¹⁴ Companies (Significant Beneficial Owners) Amendment Rules, 2019 (India), Rule 3.

¹¹⁵ *Id.*, Rule 2(h).

¹¹⁶ *Id.*, Rule 7. Assuming that courts and tribunals accept (in future) the doctrine of reverse piercing for the purpose of debt recovery (as argued in this article), protection against defaulting investors is available under §58 of the Companies Act, 2013. §58(1) and 58(4) allows a company to refuse the registration of shares, which reasonably can be extended to refuse the registration of transfer of shares of an investor with accounts classified as NPAs or having stressed assets.

¹¹⁷ Debts Recovery Tribunal, (Karnataka, Bangalore), *SBI v. Kingfisher Airlines Ltd.*, OA No. 766 of 2013, decided on January 19, 2017.

¹¹⁸ Debts Recovery Appellate Tribunal, (Delhi), *Punjab and Sind Bank v. Skippers Builders (P) Ltd.*, (2016) 2 BC 124.

We can see that the Ministry of Corporate Affairs ('MCA') is taking active steps to examine the real persons and individuals who are in control of organisations or who exercise significant influence over organisations, and we hope that §90 would be extended to corporations in the near future, so as to further help resolve the bad loan crisis, which is the need of the hour as compared to individual debtors. The intention of discussing this provision here is to show how the MCA has been taking steps to identify the real owner(s) and person(s) in control, and that if extended to 'corporate debtors' in the future, an argument for reverse piercing could be made to resolve the crisis.

Although the intention of the amendment may not have been to directly support the argument that the authors seek to make in this article, we believe that they nevertheless can serve a dual purpose and help resolve the bad loan crisis in the country. This however, depends on the progression of the Adjudicating Authority in their decision making and approach towards the gravity of the debt crisis in India.

VI. CONCLUSION

It is true that bad loans, owing to the scale of the debt, can easily affect the economy at large. The application of reverse piercing in reduction of bad loans not only improves the health of banks in the country but also strengthens the positions of various large, medium or small creditors who are unable to bring any claims against the defaulting debtors.

Reverse piercing the corporate veil definitely provides for a remedy over and above the present law as outlined under the Insolvency and Bankruptcy Code, 2016. With the different cases of debt payment evasion as discussed in this article, it becomes clear that the presence of fraud does not necessarily have a bearing on the application of reverse piercing doctrine. Moreover, considering the need of the hour in the present economy as well as in the interest of equity and justice, the application of the doctrine of reverse piercing, can be a solution to reduce the burden of bad loans in the country.

It is also clear that the application of the doctrine causes aberrations in the priority of debt claims vis-à-vis the creditors of the corporation and the personal creditors of individual debtor. However, the very fact that a debt exists without payment gives scope for the application of the principle. It is not our argument that a claim for reverse piercing should be readily accepted by the Adjudicating Authorities. Rather it is our argument that where the creditors make a plausible claim supported by strong evidence for reverse piercing, the Adjudicating Authorities can be more proactive, and apply this doctrine to help resolve the problem. Accepting such an argument would warrant their interference and the application of their judicial mind, and not merely mechanically approving or rejecting the resolution plans, which are approved by the Committee of Creditors.

Application of reverse piercing not only passes a strong message to all persons in this country with respect to debt clearance but also further strengthens the position of creditors, in line with the goal as envisaged by the drafters of the Code.

In the entire discussion, we have frequently advocated expansion of the reach of the insolvency resolution process, i.e., not limiting it only to the estate of the corporate debtor. The reason for this is that imposing such a limitation would dilute the objective of the insolvency process, *i.e.*, of maximisation of value for creditors. Unfortunately, the Code has put a strict prohibition on the inclusion of the assets of any Indian or foreign subsidiary of the corporate debtor as a part of the liquidation estate assets.¹¹⁹ Nevertheless, as much of this article involves policy suggestions against the existing regulatory framework, a serious consideration of the concept of reverse piercing would contribute immensely to speed up the Non-Performing Assets recovery efforts in India.

¹¹⁹ The Insolvency and Bankruptcy Code 2016, §36(4)(d).