EDITORIAL NOTE

A CASE FOR TRIBUNAL DISCRETION IN STRENGTHENING THE PREVALENCE OF THE SCHEME OF ARRANGEMENT IN INDIAN DEBT RESTRUCTURING

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While the Scheme of Arrangement ('SoA') has been widely accepted as a critical debt restructuring tool across the world, this mechanism has rarely been used in the Indian context. Often at crossroads with India's regime under the Insolvency and Bankruptcy Code, 2016 ('IBC'), tribunals have regularly taken a stance preferring insolvency proceedings under §7 of the IBC over ongoing proceedings under §230 of the Companies Act, 2013 ('CA') relating to the SoA. In addition to the low success rate of the corporate insolvency resolution process ('CIRP') regime, this phenomenon becomes increasingly relevant considering the jurisprudential precipice that Indian insolvency law finds itself at regarding minimum creditor entitlements vis-à-vis CIRP, and the extent of tribunal discretion in accepting §7 applications as seen in the recent Vidarbha Judgment. While there has been notable discourse identifying the need for India to leverage the benefits of SoA as a debt restructuring mechanism, this note examines the various jurisprudential developments which have and are taking place within the SoA and insolvency paradigms to identify a potential opportunity to induct §230 as a prominent debt-restructuring mechanism. Instead of advocating for the SoA over the insolvency regime, this note presents a model to potentially harmonise two regimes for a more effective and revival-oriented debt-restructuring paradigm in India.

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I. INTRODUCTION

In the recent case of *Grand Developers (P) Ltd.* v. *Nitin Batra*, the National Company Law Tribunal ('NCLT') observed that a scheme of arrangement ('SoA') under §230 of the Companies Act, 2013 ('CA') is an independent process and does not bar the admission of an application under §7 of the Insolvency and Bankruptcy Code, 2016 ('IBC').[1] The note is set against the backdrop of the aforesaid judgment. While what may be considered a convenient stance by the NCLT, it also reflects a limited understanding of what these two processes entail. A deeper analysis of the same reveals a structurally flawed model that operates to the detriment of the stakeholders involved.

This brief note begins by examining the initiation of Corporate Insolvency Resolution Proceedings ('CIRP proceedings') under §7 of the IBC, emphasising the rights of minority creditors and the procedural thresholds associated with the process. Furthermore, the authors provide an insight into the pro-revival intent behind an SoA. This is followed by a deeper analysis of the practical ramifications of the simultaneous initiation of both CIRP proceedings and an SoA, highlighting the implications of the current IBC-leaning regime. This sets the stage for revisiting the judgment passed by the Supreme Court in *Vidarbha Industries Power Ltd.* v. *Axis Bank* ('Vidarbha'), permitting the exercise of judicial discretion in the admission of CIRP applications. This note does not advocate for stakeholders and authorities to prioritise the SoA over IBC proceedings as a general rule. Alternatively, the authors examine the state of India's insolvency paradigm from a legal and practical perspective, analyse the nature of the §230 mechanism, and identify a potential opportunity to induct the SoA paradigm as a more prominent debt restructuring mechanism through the NCLT's discretion model under §7.[2]

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[1] Grand Developers (P) Ltd. v. Nitin Batra, 2024 SCC OnLine NCLAT 646, ¶16 ('Grand Developers').

[2] The Insolvency and Bankruptcy Code, 2016, §7.

II. SOA PARADIGM AND ITS RECEPTION IN INDIA

An entity can accomplish debt restructuring in several ways, one of them being through an SoA under §230 of the CA.[3] The SoA paradigm within the 2013 Act largely borrows from the preceding Companies Act, 1956 ('1956 Act'),[4] the greater contours of which have been discussed within the following parts of this note. There has been a widescale jurisprudential recognition of the potential benefits that the SoA paradigm offers over the current insolvency regime.[5] *Firstly*, the initiation of CIRP proceedings has an adverse impact on a corporate debtor's ('CD') reputation thereby impacting its asset value.[6] The SoA paradigm alternatively presents a mechanism which relatively protects market perception while facilitating debt restructuring. *Secondly*, as most CIRP proceedings have statistically failed and culminated in liquidation,[7] an SoA presents the opportunity to revive the CD, unlike the present CIRP regime. *Thirdly*, an SoA presents the debtor-in-possession approach offered to entities where a corporate debtor continues to maintain control of the concerned entity and its assets,[8] as opposed to the creditor-driven process seen in CIRP proceedings.[9] This approach facilitates debtor-led restructuring

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3 The Companies Act, 2013, §230.

4 Umakanth Varottil, *The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects*, Vol. 15(3), ECFR, 604 (2018).

5 Indian Institute of Corporate Affairs, *Strengthening Informal Restructuring for Firms*, January 21, 2021, available at https://iica.nic.in/images/Policy-CIB.pdf (Last visited on January 14, 2025).

6 Ravishekhar Pandey & Amarpal Singh Dua, *Receipt of Demand Notice under IBC: Whether Price Sensitive Information?*, IndiaCorpLaw, September 9, 2023, available at https://indiacorplaw.in/2023/09/receipt-of-demand-notice-under-ibc-whether-price-sensitive-information.html (Last visited on January 14, 2025); Shilpi Cable Technologies Ltd., In re, 2023 SCC OnLine SEBI 943, Securities and Exchange Board of India, ¶29.9.

7 For statistical details on past failure of CIRP process, *see infra* Part III on "Initiation of CIRP under §7 IBC".

8 Tracey Evans Chan, *Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience*, Vol. 18(1), Int. Insolv. Rev., 52 (2009).

9 The Supreme Court has affirmed the creditor-leaning nature of the IBC, *see* Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, ¶¶10,16 ('Innoventive Industries').

well before the insolvency stage and uninterrupted utilisation of existing management's knowledge and expertise concerning the entity's business and financial affairs.[10] Lastly, the SoA paradigm also affords substantial flexibility in the debt restructuring process, potentially facilitating complex and hybrid rescue mechanisms.[11] Indian courts have also identified a more significant social benefit that a revival, potentially facilitated through an SoA, has over a liquidation or an asset sale.[12]

The benefits associated with the SoA paradigm thereby highlight the pro-revival approach of this mechanism, along with the value preservation afforded by this paradigm vis-à-vis stressed entities. While several other jurisdictions have adopted SoA as a prominent tool of debt restructuring,[13] this mechanism has been used sparingly in the Indian context.[14] Scholars have identified the existing cramdown provisions, absence of moratorium under §230, and roadblocks in regulatory approval as reasons behind the limited adoption of SoA in India.[15]

A. UNDERSTANDING THE EVOLUTION OF SOA

As a result of conscious efforts to augment the law surrounding SoA encapsulated within the 1956 Act, the CA was passed

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[10] Dr Hamiisi J. Nsubuga, *The Debtor-in-Possession Model in the EU Insolvency and Restructuring Framework — A Domino Effect?*, J. Bus. Law, 3 (2022).

[11] Bankruptcy Law Reforms Committee, *Interim Report*, 9 (February 10, 2015).

[12] Madhu Fabrics Ltd. v. Regional Director, 2012 SCC OnLine Guj 3630, ¶5.

[13] Neeti Shikha, *Takeover through Scheme of Arrangement: A Changing Trend in UK*, Vol. 38(1), Vikalpa, 87 (2013); Lauren Tang et al., *The Art of Pre-Pack — Edition 2*, Singapore, Global Restructuring Review, March 4, 2022, available at https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-2/article/singapore#:~:text=restructuring%20and%20insolvency.-,Scheme%20of%20arrangement,not%20agree%20to%20the%20scheme (Last visited on January 14, 2025); Jennifer Payne, Schemes of Arrangement: Theory, Structure and Operation, 178-9 (Cambridge University Press, 1st edn., 2014); Chan, *supra* note 8, 37.

[14] Varottil, *supra* note 4, 587.

[15] Indian Institute of Corporate Affairs, *Strengthening Informal Restructuring for Firms*, available at https://iica.nic.in/images/Policy-CIB.pdf (Last visited on January 14, 2025).

in 2013 with provisions concerning SoA, namely §230 taking effect in 2016.[16] While discourse surrounding SoA is substantively similar within both the 1956 and 2013 statutes, there are a few key changes incorporated in the latter.

One of the foremost changes introduced in §230 has been the express recognition of debt restructuring as a purpose of the SoA. Various sub-provisions within §230 discussing creditor assent requirements,[17] objection thresholds,[18] and the overall express inclusion of creditors as stakeholders within an SoA highlight the conscious effort towards the legislative clarity of schemes concerning debt restructuring.

Another significant change under §230 has been the omission of the provision allowing an adjudicatory authority to grant discretionary limited stays on suits or proceedings such as insolvency proceedings under §7 of the IBC concerning the corporate debtor.[19]

B. DISCRETIONARY MORATORIUM: ABSENCE & AMBIGUITY

Under the 1956 Act, a limited stay was available whereby the adjudicating authority reviewing an SoA could discretionarily stay the commencement or continuation of any suit or proceeding against the company, pending disposal of the scheme application.[20] The primary purpose behind such a discretionary moratorium, albeit used very carefully, was to prevent interference with the negotiation and implementation of the SoA.[21]

Considering the significance of this provision within the 1956 Act's SoA jurisprudence, the absence of a discretionary stay

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[16] MINISTRY OF CORPORATE AFFAIRS, Enforcement Notification, S.O.3677 (E) (Notified on December 7, 2016).

[17] The Companies Act, 2013, §§230(1)(a), 230(2)(c), 230(3), 230(6).

[18] *Id*., §230(4).

[19] The Companies Act, 1956, §391(6).

[20] *Id*.

[21] Payne, *supra* note 13, 216.

provision has been a significant change in the law.[22] It is notable that this absence has been termed as 'inexplicable' by scholars,[23] primarily due to the lack of legislative debate, discourse, and clarity on the absence of limited stay of proceedings within §230 of the 2013 Act.[24]

While a provision allowing for a limited stay on proceedings is absent under §230, scholars have pointed towards instances where the adjudicatory authorities have granted a limited stay in order to prevent enforcement actions while an SoA is being agreed upon.[25] The National Company Law Tribunal ('NCLAT'), as highlighted further below, has clarified its stance that the existence of an SoA does not impact the acceptance of an insolvency application under the IBC.[26] However, while hearing a writ petition, a two-judge bench of the Bombay High Court restricted, albeit not indefinitely, the NCLT from hearing and passing any final orders under a §7 petition to allow for voting on an SoA, its subsequent declaration, and filing in lieu of an SoA being under consideration.[27]

Thus, while the concept of limited stays present in the 1956 Act is nowhere to be found in the black letter of the 2013 Act, it is necessary to take note of judicial stances having a near-similar impact as that of a limited moratorium effectuated in lieu of an SoA under §230.

III. INITIATION OF CIRP UNDER §7 IBC

A financial creditor or an operational creditor may apply for the initiation of CIRP proceedings under §7 and §9 of the IBC, respectively.[28] An application under §7 may be initiated by a financial creditor, either himself or jointly with other financial creditors, for the initiation of CIRP proceedings against the CD in situations where

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[22] The Companies Act, 2013; The Companies Act, 1956.

[23] Varottil, *supra note* 4, 605; The Companies Act, 1956, §391(6).

[24] *Id*.

[25] José Garrido & Anjum Rosha, *Strengthening Private Debt Resolution Frameworks* in India's Financial System (International Monetary Fund, 2023).

[26] Grand Developers, *supra* note 1, ¶16.

[27] Supreme Infrastructure India Ltd. v. SBI, MANU/MHOR/10301/2024, ¶6(iv).

[28] The Insolvency and Bankruptcy Code, 2016, §§7, 9.

there exists a debt and a subsequent default thereof.[29] The object of a CIRP proceeding is to ensure the revival of the CD and the maximisation of its asset value.[30] The threshold for the initiation of CIRP proceedings by a financial creditor is set at a default of one crore.[31] However, CIRP proceedings do come with their own set of limitations, urging one to be wary of its invocation in every instance of debt recovery. It also becomes crucial to assess how the IBC has fared so far. Empirical data indicates an apparent trend of multiple CIRP proceedings leading to liquidation. As of March 2021, out of 2,653 closed cases, around forty-eight percent resulted in liquidation.[32] The commencement of liquidation was primarily the result of two situations: (1) decision by the committee of creditors ('CoC') to enter into liquidation (fifty-seven percent) and (2) no resolution plan was received (thirty-nine percent).[33] A concerning rise in companies inevitably entering into liquidation after the initiation of the CIRP process makes one wary of the possible destruction of the organisational value of the debtor through liquidation.[34]

Additionally, a resolution plan for a corporate debtor undergoing CIRP must receive the approval of sixty-six percent of the creditors constituting the CoC.[35] On gaining approval, it becomes binding on all stakeholders, including the ones who dissented from the resolution plan.[36] This, when juxtaposed with the seventy-five percent threshold under §230 CA, elicits a relatively higher consent threshold amongst creditors when sanctioning a debt restructuring scheme within §230 CA.[37]

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[29] *Id*.

[30] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, ¶28 ('Swiss Ribbons').

[31] The Insolvency and Bankruptcy Code, 2016, §4.

[32] Saket Surya, *Five Years of IBC: Corporate Insolvency Resolution Process in Numbers*, PRS Legislative Research, June 21, 2021, available at https://prsindia.org/articles-by-prs-team/five-years-of-ibc-corporate-insolvency-resolution-process-in-numbers (Last visited on January 22, 2025) ('PRS Report').

[33] *Id*.

[34] *Id*.

[35] The Insolvency and Bankruptcy Code, 2016, §30(4).

[36] *Id*., §31(1).

[37] The Companies Act, 2013, §230.

A. AMBIGUITY SURROUNDING MINIMUM ENTITLEMENTS UNDER CIRP

As mentioned above, under §30(4) of the IBC, a resolution plan only requires a sixty-six percent majority vote within the CoC for it to be approved.[38] Considering the relatively low threshold required to pass a resolution plan, the IBC provides safeguards for dissenting creditors under §30(2)(b).[39] This provision sets the minimum amount received by dissenting creditors to that in accordance with the liquidation mechanism under §53(1) in a fair and equitable manner.[40] The case law jurisprudence surrounding dissenting creditor entitlements and the 'fair and equitable' threshold have been discussed below.

The Supreme Court, in *Essar Steel India Ltd. (CoC)* v. *Satish Kumar Gupta*, highlighted that the term "may" in §30(4) implied that the CoC had the discretion to consider factors while approving a resolution.[41] This discretion, and the resolution plan resulting from it, was further deemed valid if actual payment of the requisite amount was made to a dissenting financial creditor or if such a creditor was permitted to enforce its security interest.[42] In *India Resurgence ARC (P) Ltd.* v. *Amit Metaliks Ltd.*, the Court clarified that as long as fair and equitable treatment was accorded to creditors, the commercial wisdom of the CoC in approving a resolution would reign supreme.[43] In furtherance of this, the Court also held that a distribution of amounts under the resolution plan proportionate to the creditors' respective claims in the CIRP was considered fair and equitable.[44] This effectively meant that irrespective of a creditor's security interest, its entitlement to distribution would only be

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[38] The Insolvency and Bankruptcy Code, 2016, §30(4).

[39] *Id*., §30(2)(b).

[40] *Id*., §53(1).

[41] Essar Steel India Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531, ¶83.

[42] Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., (2022) 1 SCC 401, ¶121.1.

[43] India Resurgence ARC (P) Ltd. v. Amit Metaliks Ltd., (2021) 19 SCC 672, ¶¶13, 15.

[44] *Id*., ¶15.1.

proportionate to its outstanding debt, potentially resulting in an entitlement substantially less than the value of its security.

While this stance has been upheld in various cases thereafter, the Supreme Court in the recent case of *DBS Bank Ltd.* v. *Ruchi Soya Industries Ltd.* ('DBS Bank Judgment'), adopted a starkly contrasting view from that laid down in *Amit Metaliks*. The Court, while acknowledging the CoC's discretion to determine the distribution of proceeds, held that §30(2)(b) cannot be interpreted to effectively 'nullify the minimum entitlement' of a dissenting financial creditor.[45] As a result, the DBS Bank Judgment sets the value of a creditor's security interest as a threshold for the minimum value it is entitled to.[46]

This matter has been referred to a larger bench, in light of the contradictory stance of the Court. Resultantly, the jurisprudence surrounding the rights of dissenting creditors has given rise to severe ambiguity and contention within the CIRP paradigm.

IV. SIMULTANEOUS INITIATION OF §230 CA & §7 IBC PROCEEDINGS

In *Grand Developers (P) Ltd.* v. *Nitin Batra*, the NCLAT observed that the proceedings under §230 of the CA are independent in nature and do not in any manner preclude the initiation of CIRP proceedings under §7 of the IBC.[47] The practical ramifications of this judgment are of interest and must be noted. Upon the initiation of CIRP proceedings, a moratorium is imposed, and the management of the company is taken over by a resolution professional.[48] A moratorium within the meaning of §14 of the IBC suspends all legal proceedings and limits the sale of assets, thereby preventing any debt restructuring endeavours or proceedings under §230.

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[45] DBS Bank Ltd. v. Ruchi Soya Industries Ltd., (2024) 3 SCC 752, ¶28.

[46] *Id*., ¶43.

[47] Grand Developers (P) Ltd. v. Nitin Batra, 2024 SCC OnLine NCLAT 646, National Company Law Appellate Tribunal (New Delhi), ¶28.

[48] The Insolvency and Bankruptcy Code, 2016, §14.

A veil of uncertainty presently shrouds the ability of tribunals and adjudicatory bodies to exercise discretion in the admission of §7 applications. §7(5)(a) of the IBC prescribes that a CD may be admitted into CIRP upon the satisfaction of three conditions. Firstly, there must have occurred a default on an existing debt. Secondly, the application for the initiation of CIRP must be complete. Lastly, no disciplinary proceedings should be pending against the proposed resolution professional.[49] The Apex Court in *Innoventive Industries Ltd.* v. *ICICI Bank* observed that upon the NCLT's satisfaction of a debt and a corresponding default on the same, it is duty-bound to admit the CD into CIRP.[50] However, the Supreme Court offered a dramatically different opinion in Vidarbha.[51] The Court interpreted the word "may" in §7(5)(a) as giving tribunals and other adjudicating authorities the discretion to admit or reject the admission of a CD into CIRP even after the establishment of a default.[52] The court opined that the NCLT may, at its discretion, reject a CIRP application after its evaluation of all the relevant facts and circumstances, including the overall health and financial viability of the debtor.[53] One is thus faced with legal ambiguity when addressing whether the admission of applications under §7 allows for tribunal discretion or is merely a mechanical exercise contingent on the fulfilment of the conditions outlined in §7(5)(a).

The aforesaid judgment gave the courts sweeping discretion in the entire process, compelling them to consider the grounds raised by the corporate debtor against the initiation of CIRP proceedings.[54] However, due to a series of conflicting judgments on this subject, the judgment given by the court in Vidarbha is under review.[55] As the matter remains *sub judice*, it becomes imperative to assess the need for discretion, particularly in the context of adopting a tailored approach suited for the CD.

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[49] *Id*., §7(5)(a).

[50] Innoventive Industries, *supra* note 9, ¶¶28, 30.

[51] Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352.

[52] *Id*., ¶65.

[53] *Id*., ¶77.

[54] *Id*., ¶88.

[55] Maganlal Daga HUF v. Jag Mohan Daga, Civil Appeal No(s). 533/2023 (Supreme Court) (Pending).

V. THE CURRENT STATE OF CIRP JURISPRUDENCE & OPPORTUNITIES PRESENTED TO THE SOA

The report released by the Bankruptcy Law Reforms Committee ('BLRC') in 2015 emphasized that insolvency proceedings should be initiated as the last resort.[56] This presupposes that the creditors and the CD have engaged in negotiations that have failed to ensure the entity's continuation as a going concern. The CIRP process should be the final attempt towards the resolution of conflicts and must be preceded by thorough deliberation.[57] It may be contended that the underlying objective behind §230 of the CA, which is to ensure the revival of the CD,[58] is consistent with and is in furtherance of the overarching purpose of IBC.[59]

Erosion of asset value of the CD during CIRP, as mentioned above, further reduces the prospects for better returns to the creditors.[60] An SoA may provide a viable route for preserving the valuation of these assets. Additionally, while the CIRP process purports to revive the CD,[61] empirical data indicating its eventual progression into liquidation is rather worrisome.[62]

In such circumstances, the adjudicating authorities should provide adequate flexibility to creditors to work out a plan that best serves their interests while also ensuring the continued operation of the CD as a going concern. It has been noted by the BLRC that there may exist other viable mechanisms through which a defaulting CD can be granted protection. In its view, alternative mechanisms could potentially lessen societal costs associated with liquidation, which

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[56] Bankruptcy Law Reforms Committee, *Volume I: Rationale and Design*, 79 (November 4, 2015) ('BLRC Report').

[57] *Id*.

[58] Harish Sharma v. C&C Constructions Ltd., 2023 SCC OnLine NCLAT 1793, National Company Law Appellate Tribunal (New Delhi) ¶12.

[59] Swiss Ribbons, *supra* note 30.

[60] For deterioration in asset value of the creditor during CIRP, *see supra* Part II on "SoA Paradigm and its Reception in India".

[61] Swiss Ribbons, *supra* note 30, ¶28.

[62] PRS Report, *supra* note 32.

often entails the destruction of the organisational value of the CD.[63] The significantly low success rate of the CIRP process in India might be further exacerbated by the recent complications in the jurisprudence regarding the entitlements owed to various financial creditors who are part of the CoC.[64] As discussed earlier, the DBS Judgment has brought to question the rights of dissenting creditors vis-à-vis the minimum threshold of compensation to which they would be entitled. In addition to the fact that recognising the value of a creditor's security interest as the minimum entitlement would significantly impact the potential entitlements of other creditors involved in the CIRP process, the general ambiguity currently surrounding the CIRP paradigm affects the approval of resolution plans by CoCs. A consequence of the DBS Judgment could mean a higher number of the CIRP processes failing, and thereby entering the liquidation stage. This not only goes against the cost of creditor interests resulting from a near complete erosion of asset value but also challenges the pro-revival approach that the IBC has been trying to imbue since its inception.[65]

The current IBC jurisprudence thus presents significant problems for various stakeholders involved in the 'revival' of an entity. However, this roadblock within the insolvency paradigm also offers an opportunity to bring alternative debt resolution mechanisms within the discourse surrounding the revival of stressed entities in India, notably SoA under §230. As discussed above, the pro-revival objectives of the SoA paradigm overlap with that of IBC while potentially offering speed, flexibility, and low costs to the entity and other stakeholders.

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[63] BLRC Report, *supra* note 57, 13.

[64] For complications in jurisprudence regarding entitlements owed due to financial creditors, *see supra* Part III.A on "Ambiguity Surrounding Minimum Entitlements under CIRP".

[65] Ministry of Corporate Affairs, *Restructuring and Liquidation*, available at https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/restructuring-and-liquidation.html (Last visited on January 14, 2025); Mayur Shetty, *Over 94% Value Erosion Found in 165 IBC Liquidation Cases*, The Times of India, February 20, 2023, available at https://timesofindia.indiatimes.com/india/over-94-value-erosion-found-in-165-ibc-liquidation-case/articleshow/98072144.cms (Last visited on January 14, 2025).

The SoA paradigm has been accepted as the preferred route for debt restructuring in several jurisdictions, but has sparingly been used for the same in India.[66] Further, courts and tribunals have recently taken a very strong stance towards preferring insolvency proceedings over SoA under CA.[67] However, the current state of jurisprudence presents a crucial opportunity to lay down the foundations for a greater presence of SoA as a means of debt restructuring in India.

There have been instances in the past wherein courts have stepped outside the rigid bounds of §7 to reject the admission of a CIRP application on the basis of extraneous considerations.[68] In *SBI* v. *Krishidhan Seeds (P) Ltd*., an application under §7 was kept in abeyance for a period of six months on the ground that the management of the CD was actively pursuing its revival.[69] In *Bank of Maharashtra* v. *Newtech Promotors & Developers (P) Ltd*., reliance was placed on Vidharbha to reject the initiation of CIRP proceedings since it would have an adverse impact on the rights of the concerned stakeholders.[70] The foremost objective of the IBC is to ensure the revival of the corporate debtor.[71] There is hence a strong case for tribunals and courts exercising discretion to explore the most beneficial mode of revival of the CD.

An admission of a §7 application brings any process of arriving at a fair and equitable debt restructuring scheme under §230 to a standstill. The assumption that a CIRP proceeding is more

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[66] Indian Institute of Corporate Affairs, *Strengthening Informal Restructuring for Firms*, available at https://iica.nic.in/images/Policy-CIB.pdf (Last visited on January 14, 2025).

[67] ICICI Bank Ltd. v. Supreme Infrastructure India Ltd., 2024 SCC OnLine NCLT 3100, National Company Law Tribunal (Mumbai Bench) ¶51.

[68] Ankit Parhar & Rashi Srivastava, *Decoding Section 7 of IB Code for Admitting an Application for Corporate Insolvency Resolution Process*, SCC Times, June 23, 2023, available at https://www.scconline.com/blog/post/2023/06/23/decoding-section-7-of-ib-code-for-admitting-an-application-for-corporate-insolvency-resolution-process/ (Last visited on January 22, 2025).

[69] SBI v. Krishidhan Seeds (P) Ltd., 2022 SCC OnLine NCLT 324, National Company Law Tribunal (Indore Bench, Madhya Pradesh) ¶20.

[70] Bank of Maharashtra v. Newtech Promotors & Developers (P) Ltd., 2022 SCC OnLine NCLT 326, National Company Law Tribunal (New Delhi) ¶11.

[71] Swiss Ribbons, *supra* note 30, ¶28.

beneficial both for the corporate debtor and the creditors in every scenario would be mistaken. As has been illustrated above, an SoA may prove to be the ideal way forward owing to a multitude of reasons ranging from flexibility to prevention of asset deterioration. The note is not in support of preferring the CD-driven SoA mechanism over the IBC paradigm as a rule of thumb. However, Vidarbha affords tribunals the discretion to prefer the former over the latter, if and when the opportunity presents itself. Undoing the developments in Vidarbha would effectively discard the jurisprudential opportunity of inducting the SoA mechanism as a more prominent tool for debt restructuring, particularly while CIRP framework continues to face challenges in effectively achieving debt restructuring and revival.

Subsequent to the greater inclusion of SoA as a debt restructuring mechanism in India, this development will also spearhead discourse on potential changes that may be brought to this mechanism in context to the absence of a moratorium as seen in the 1956 Act, and cross-class cramdown of creditors.

If the NCLT is satisfied that the CD is a viable entity capable of reviving itself through alternative debt recovery mechanisms, the admission of a §7 application must be kept in abeyance for a short period of time, thereby allowing for a more seamless and advantageous debt recovery and restructuring process.

VI. CONCLUSION

The SoA has played a significant role in the field of debt restructuring in various jurisdictions of the world. In spite of its pro-revival approach, we observe a limited adoption and use of this mechanism within the Indian context owing primarily to the existing friction between the SoA and IBC paradigms. While a need for the adoption of SoAs has been well-recognised, this note presents to the reader an overview of the jurisprudence within which this discourse currently exists. While the SoA paradigm has undergone some crucial changes potentially impacting its use within India, the note has identified a few key developments within Indian insolvency law. This includes the rare, but prevalent, discretionary stay on §7 proceedings

in light of the ongoing SoA process, in addition to the contention surrounding the discretion afforded to the tribunals vis-à-vis insolvency applications. Additionally, this note highlights the state of the failing CIRP paradigm in India, and further inclination towards liquidation potentially due to the recent ambiguity surrounding CIRP proceedings following the DBS Bank Judgment.

The note identifies the current state of the jurisprudence as an opportunity to induct SoA as a more prominent mechanism for debt restructuring through a focused moulding of the law surrounding insolvency in India, primarily tribunal discretion under §7. Considering the breadth and complexity of this field, Indian corporations, legislators, policy-makers, and courts cannot afford to ignore the significance of SoA as a tool. This note identifies and presents a jurisprudential opportunity for India to leverage the benefits of the SoA in consonance with the insolvency paradigm and other significant factors at play.

IN THIS ISSUE

Volume 17(3) of the NUJS Law Review, the third volume of this academic year, contains articles providing a diverse range of insights on varied subjects ranging from pertinent judicial lapses to insights on careers in nascent fields such as arbitration by leading professionals. We thank our authors who have kindly agreed to contribute to this volume.

The NUJS Law Review conducted a detailed discussion with Senior Advocate Gourab Banerji on key developments in the realm of arbitration, careers in arbitration and the newly inaugurated Arbitration Bar of India. The discussion was moderated by Ranak Banerji and Nimesh Singh, and transcribed by the members of the Review. An insightful piece from the perspective of a professional is bound to find immense respect amongst readers with a keen interest in arbitration.

Kaustav Saha in their piece titled "Rights, Remedies and Retrospectivity: The Curious Case of the Specific Relief

(Amendment) Act 2018" challenges the insistence of courts to ensure the prospective applicability of the Specific Relief (Amendment) Act, 2018. The aforesaid habit receives a flow of criticism from the author owing to its mischaracterisation of specific relief as a right. By drawing a distinction between 'rights' and 'remedies' through a doctrinal analysis, the author underscores the disparities in the judicial discourse surrounding the subject. A case in point is the decision passed by the apex court in *Katta Sujatha Reddy* v. *Siddamsetty Infra Projects (P) Ltd.* excluding contracts entered into before the enactment of the Amending Act from availing the statutory remedy under the amended framework. Through an extensive analysis, they advocate for the classification of specific performance as a remedy thereby ensuring its retrospective applicability.

Mahima Balaji in their piece titled "Property and Preservation: The role of conservation covenants under the Indian Transfer of Property Act, 1882" questions the traditional foundations of the Transfer of Property Act, 1882 ('TPA'). By advocating for the incorporation of environmental goals within the current property law framework, the paper attempts to tackle problems of contemporary relevance including habitat destruction, biodiversity loss and climate change. Through an innovative interpretation of §11 and §40 of the TPA in alignment with current environmental regulations the paper proposes a framework on par with those of progressive foreign jurisdictions.

Anay Mehrotra, in their piece titled "Environmental Obligations in Armed Conflict: Israel's Responsibilities under Human Rights Law and the Paris Agreement", examines Israel's different environmental obligations as an occupying power in Palestine. The paper looks at these obligations from the perspective of International Humanitarian Law, International Human Rights Law, and Environmental Treaties. The paper first establishes that Israel is bound by certain obligations under each of these three heads and then proceeds to conclude that it has breached such obligations against Palestine, attracting international liability.

Dipika Jain, Krithika Balu, Vrishti Shami, Feroza Mody and Tavleen Kaur Saluja in their piece titled "The Legal Labyrinth: Navigating the Human Cost of Prosecution under Criminal Law for Abortion Services in the Trial Courts of Punjab" scrutinise the incessant misinterpretation of §312 of the Indian Penal Code ('IPC') and its botched utilisation as a tool for harassment of pregnant women. The paper acquires an empirical hue by providing an expansive analysis of two hundred and sixty-two decisions of the Trial Courts in Punjab between January 2013 and August 2024. A closer reading of these cases reveals a fallacious insertion of spousal consent within the confines of §312 of the IPC. The misapplication of §312 alongside other key legislations reveals a more structurally flawed model of judicial misapplication and vindication.

Overall, this volume contains a series of articles that the editorial team found deeply engaging. We encourage our readers to appreciate the degree of legal nuance woven into each of these articles. We welcome any feedback our readers may have for us. Lastly, we extend our heartfelt thanks to our authors for making such valuable contributions to the Journal.

Truly,

Board of Editors,

The NUJS Law Review.