

IN BRIEF

THE INSOLVENCY AND BANKRUPTCY CODE, 2016: A QUESTION OF ANSWERS



Introduction

Since its notification in 2016, the Insolvency and Bankruptcy Code, 2016 (Code) has been positioned as the crown jewel of India's economic reforms. One of its ostensible purposes was to improve India's global ranking with reference to 'ease of doing business'. Since its inception, as with any newly promulgated law, the Code has had its ups and downs in terms of judicial interpretation. Perhaps understandably so but despite the passage of almost a decade, the situation remains fluid when it comes to a few of the statutory provisions in this Code.

The Case of Kalyani Transco vs Bhushan Power Steel

Arguably, no development in this sphere has generated as much heat and dust as the 2 (two) judgements recently rendered by the Supreme Court in the case of Bhushan Steel.

By way of background, the first case, Kalyani Transco vs Bhushan Power Steel (2025 SCC Online SC 1010) (Bhushan 1), arose from the insolvency resolution process of Bhushan Power and Steel Limited (BPSL), one of the "dirty dozen" companies identified by the Reserve Bank of India in 2017, for immediate resolution under the Code. BPSL was a major steel manufacturer with admitted claims of approximately ₹4,72,045 crores from financial creditors and ₹621 crores from operational creditors.

The Apex Court held, among other things, that in the facts of the case:

There had been a violation of timelines mandatorily prescribed under the Code: A resolution plan approved beyond the statutory timelines violated the Code's basic objective of a time-bound resolution.

Non-compliance with the timelines prescribed under the Code: Successful resolution applicants must strictly comply with approved resolution plan terms. Delays in implementation frustrate the Code's time-bound resolution objective.

Commercial wisdom of the Committee of Creditors: The Court held that while the CoC's commercial wisdom is generally non-justiciable, it cannot override mandatory statutory provisions of the Code.

Failure to adhere to payout rules: The Court noted that operational creditors were paid after financial creditors, in contravention of the regulations under the Code, at the time.

JSW's appeal to the Appellate Tribunal was not sustainable: A successful resolution applicant cannot challenge the conditions of its own approved plan without meeting the grounds specified under Section 61(3) of the Code.

Conduct of the Resolution Professional: The resolution professional failed to properly verify JSW's eligibility under Section 29A of the Code, which is designed to bar ineligible persons from taking part in the process.

The Court was critical in its observations when it held that:

- The Resolution Professional "utterly failed to discharge his statutory duties".
- The CoC "failed to exercise its commercial wisdom", while approving a plan in "absolute contravention of mandatory provisions".
- JSW's conduct amounted to "misuse of process of law and fraud committed with the CoC". Ultimately, the Court quashed both the NCLT's order dated September 5, 2019, and NCLAT's order dated February 17, 2020, rejected JSW's resolution plan, and directed liquidation proceedings against BPSL.

This judgement hit the corporate world hard and set off tremors of panic in the legal world and more particularly, the insolvency ecosystem. Some of the concerns expressed were:

Impractical Deadlines:

It was felt that the Apex Court had been a bit pedantic and inflexible when it came to the question of meeting the deadlines prescribed under the Code, and that commercial realities mandated some play in the joints.

Implications for the Larger Legal Ecosystem:

If, after the investment of several thousands of crores of rupees there was no finality, on what basis would a future investor dare to cut a cheque? What exactly were the circumstances when finality could be said to have been achieved in a particular case? Did the decision to push a viable business into liquidation not mean that immense value destruction was being caused? These were only a few of the questions which the critics of this judgement pointed out.

External Oversight on Commercial Wisdom:

The CoC having overwhelmingly approved of the resolution plan, it was felt that judicial oversight would mean that there was always the possibility of an approved plan being double guessed and meddled with purely with the benefit of hindsight.

Excessive Focus on Delays:

It was felt that the Court had not considered real world problems, such as the impact of the attachment by the Enforcement Directorate and other such mitigating factors.

The critical consensus, both from a legal as well as a commercial perspective, was that with this judgement, the Supreme Court had thrown the baby out with the bath water. Given the fallout of this judgement, the Supreme Court quickly heard a batch of review petitions which had been filed against Bhushan 1.

In this judgement reported in 2025 SCC Online 2093 (Bhushan 2), a 3-judge bench headed by Chief Justice Gavai, while upholding the Resolution Plan, recalled the earlier order of liquidation and held that:

The Commercial Wisdom of the Committee of Creditors was Supreme:

The CoC does not become *functus officio* after the plan approval and continues to exist until the plan implementation. The CoC has a vital interest in the resolution plan continuing until actual implementation and payment to the creditors. Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, clarify that meetings can be convened until the resolution plan approval under Section 31 of the Code or the liquidation order under Section 33 of the Code. Unless there is evidence of malefices or bad faith, a decision of the CoC cannot be set aside.

Extension Clauses:

The Court upheld Clause 3.1 of the resolution plan, allowing the CoC to extend the implementation timeline by a 66% majority, distinguishing it from the *Ebix Singapore*¹ and *AMTEK Auto*² cases. Extension clauses that reserve discretion to the CoC for implementation timelines do not constitute modification or renegotiation of the resolution plan terms and are permissible to address practical exigencies.

Locus Standi of Erstwhile Promoters:

The Bench accepted that the erstwhile promoters had locus standi as “persons aggrieved” under Section 62 of the Code, relying on *Glas Trust Company LLC v. Byju Raveendran*³ for broad interpretation. The logic was that the phrase “any person aggrieved” in the Code should be given purposive interpretation, and once a corporate insolvency resolution process is initiated, proceedings become collective *in rem* where all stakeholders are necessary parties.

The delay in this case could be justified:

The Court found that delays were caused by external factors including the Enforcement Directorate’s provisional attachment order, criminal proceedings, and the NCLAT’s interim stay orders. It held that delays not attributable to the resolution applicant and which were attributable to legal impediments and regulatory actions do not vitiate the resolution process.

Earnings Before Interest, Taxes, Depreciation, and Amortization (EBIDTA) Distribution:

The Court rejected claims for EBITDA distribution to creditors, holding that without a specific provision in the Request for Resolution Plan (RfRP), such claims cannot be entertained post-approval and that once a resolution plan is approved under Section 31 of the Code, claims not part of the RfRP or the resolution plan, cannot be raised as it would amount to “*hydra heads popping up*”, creating uncertainty for resolution applicants.

While normally, a review would smooth down ruffled feathers, in this case, perhaps because the Code is still a ‘work in progress’ as it were, Bhushan 2 probably raised as many questions as it answered, for instance:

CoC status:

The Bhushan 1 judgment ruled that the CoC lost its authority (became *functus officio*) after approval of the resolution plan. In contrast, the Bhushan 2 judgment determined the CoC continued to play an active role in implementation after plan approval.

Equity Infusion via CCDs:

Originally, the Court deemed JSW’s use of Compulsorily Convertible Debentures to be insufficient to satisfy its upfront equity infusion requirement. Later, the

¹ Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited, ((2022) 2 SCC 401)

² AMTEK Auto Limited through Corporation Bank vs. Dinkar T. Venkatasubramanian, ((2021) 4 SCC 457)

³ Glas Trust Company LLC vs. Byju Raveendran, (2024 SCC OnLine SC 3032)

Court ruled this compliance to be perfectly adequate.

Delays:

The Bhushan 1 judgement found the delays in implementation to be inexcusable and a clear violation. By the Bhushan 2 judgement, those same delays were seen as justified by external factors outside JSW's control.

Timelines:

In Bhushan 1, the Court held that compliance with the section's statutory timeline was mandatory, and any violation fatally undermined the process. In Bhushan 2, the subsequent judgment did not really address or enforce timelines.

Conclusion

Perhaps the most disquieting question raised by this entire episode is whether the insolvency framework displays an unconscious bias toward systemically important companies — the “too big to fail” syndrome that plagues financial regulation worldwide. Would a smaller enterprise, without Bhushan Steel's economic footprint and employment implications, have received such careful reconsideration? This question strikes at the very foundation of equal treatment under law and threatens to create a two-tiered insolvency regime.

As mentioned, given that it is, in comparative terms, still early days for the Code and this judgement will continue to be commented upon remorselessly, it is perhaps fair to say that so far what has been said about the judgement has generated more heat than light.

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