# LIQUIDATION BEFORE RESOLUTION?

- ***Richa Saraf***

***Editor's Note:*** *'Resolution before liquidation' is the maxim propagating the objective of the Code. However, can liquidation be a more feasible option than resolution? If so, in what circumstances? This article discusses certain cases in which liquidation was preferred even before trying for resolution.*

A survey by World Bank[50] pointed out that it took 10 years on an average to wind up/ liquidate a company in India as compared to 1 to 6 years in other countries. Such lengthy time-frames are detrimental to the interest of all stakeholders. The process should be time-bound, aimed at maximizing the chances of preserving value for the stakeholders as well as the economy as a whole.

**Report of the Expert Committee on Company Law**- "Restructuring and Liquidation" noted that the Insolvency law should strike a balance between rehabilitation and liquidation. It should provide an opportunity for genuine effort to explore restructuring/ rehabilitation of potentially viable businesses with consensus of stake holders reasonably arrived at. Where revival/ rehabilitation is demonstrated as not being feasible, winding up should be resorted to. Where circumstances justify, the process should allow for easy conversion of proceedings from one procedure to another.

*"Restructuring and Liquidation" noted that the Insolvency law should strike a balance between rehabilitation and liquidation. It should provide an opportunity for genuine effort to explore restructuring/ rehabilitation of potentially viable businesses with consensus of stake holders reasonably arrived at.*

Companies Act, 2013 stipulated for creditors' voluntary winding up, however, since the same has been omitted now, the only option remaining with the creditors is to move an application before NCLT under the provisions of the Insolvency and Bankruptcy Code. Liquidation procedures cannot be initiated by creditors as a first resort on payment default. The Code prescribes that a financial or operational creditor can initiate the corporate insolvency resolution process in case of failure by the corporate debtor to pay at least Rs. 1,00,000, and only in the case of failure to work out a resolution plan, the corporate debtor will be liquidated. The general motto is- "*Law should provide a reasonable opportunity for rehabilitation of a business before a decision is taken to liquidate it so that it can be restored to productivity and become competitive*".

Also, the intention of the code is that first resolution should be attended and if the resolution fails, then liquidation should be attempted. The meaning of liquidation is selling of the assets, which will mean the company is no longer in existence and if this happens many workers will also lose their job.

[50] Doing business in 2005- India Regional Profile

We have been long hearing this phrase- "Resolution before liquidation". This being the general notion, let us examine a situation where the company is already dead, there is no chance of revival. Here, there can be two scenarios, if there are cracks in a building, it can be repaired. However, if the building is already demolished, the only option is to remove the vestiges and rebuild a new structure. If we now relate the said case to insolvency proceedings, once the application for initiation of corporate insolvency process is admitted by the Tribunal, the process commences, the interim resolution professional forms a committee of creditors and the first meeting of the committee of creditors is held within 30 days' time.

The following events may lead to liquidation trigger:

- the committee of creditors cannot agree on a workable resolution plan within 180 days (which can be extended once by 90 days);
- the committee of creditors decides to liquidate the company;
- the tribunal rejects the resolution plan;
- the corporate debtor/ resolution applicant contravenes the requisites of resolution plan.

However, an important question that crops up before us is "***Can the creditors decide to liquidate the company in the very first meeting?***"

Section 33 stipulates in clear terms that where the resolution professional any time during the CIRP but before confirmation of a resolution plan, intimates to the NCLT the decision of the committee of creditors to put a company into liquidation by the requisite majority, a company may be put into the liquidation process. On perusal of Section 33(2) of the Insolvency and Bankruptcy Code, 2016, one can infer that the answer is in affirmation. Such a decision has been taken in several cases before the NCLT.

Commenting on the high level of liquidation proceedings, M.S. Sahoo, chairman of the Insolvency and Bankruptcy Board of India, stated[51]-

"Many of the 450-odd companies where insolvency proceedings have been admitted by the NCLT have been struggling for survival for years, much before the IBC was implemented late last year. Therefore, these are almost 'dead' cases where chances of insolvency resolution are very remote, and liquidation is the only natural outcome."

Going by the number of cases moving towards resolution, it seems most of the companies will not be able to achieve the resolution plan in the 180 days or the extended period of 270 days. After that the mandate of is to liquidate the company and that is what is going to happen. However, in case of highly stressed businesses, liquidations may be a valid commercial outcome to realise the assets trapped.

In *VIP Finvest Consultancy Private Limited v. Bhupen Electronics*, the committee of creditors was constrained to decide that it is prudent for the company to go for liquidation, as the company had

[51] http://www.financialexpress.com/industry/insolvency-law-more-firms-going-for-liquidation-than-resolution-over-20-face-closure/988676/

not been operational for decades and had no employee on its payroll. In the instant case, the only valuable asset remaining with the Company was its fixed assets i.e. land and building, and the committee of creditors did not firm up any resolution plan nor did it receive any from others.

Another interesting case was of *Chivas Trading Private Limited v. Abhayam Trading Limited*, wherein the corporate debtor was liquidated as there was lack of business opportunity, and the creditors felt there was no point putting good money to recover bad money. The committee of creditors made the following observations:

a) There is no business prospects with the company;

b) There is no substance in chasing the legal suits and cases for recovery;

c) There is no point in spending good money to make efforts to recover bad money, having very remote chance of recovery;

d) The assets with the company are not sufficient to repay the amounts of creditors;

e) The assets in the form of land and shares are also not easily recoverable.

The Corporate Debtor had also given its response stating that:

a) The business is not feasible and there is lack of business opportunity;

b) Any resolution plan is not possible, which could enable the company to pay the entire debts;

The Corporate Debtor also mentioned that if the creditors are willing to take substantial haircuts in their loan amounts and grant additional time to repay, the company would work on the resolution plan proposing new business activities.

Again, in the case of *Best Deal TV Pvt. Ltd*., the committee of creditors recommended liquidation since the business activities were already closed down and all employees had left the corporate debtor. In one case where a liquidation order was passed by the NCLT, Mumbai, the ex-chairman of the corporate debtor i.e. *Esskay Motors Pvt. Ltd.* contended that the resolution professional did not invite bids from interested parties, however, the committee of creditors noted that inviting bids would only prolong the process of resolution and will not yield any result as the corporate debtor was not a going concern.

The paradox that although the creditors cannot initiate the winding up proceedings against a company, they have the power to place a company in liquidation by their decision during corporate insolvency resolution process. Why not give a right to initiate winding up itself?