



NEWSFLASH

A Necessary Reckoning:

The BPSL Verdict and the Imperative to Reinforce
India's Insolvency and Bankruptcy Code

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The recent Supreme Court judgment annulling JSW Steel's acquisition of Bhushan Power and Steel Ltd (BPSL) and ordering its liquidation under Article 142 of the Constitution marks a watershed moment for India's Insolvency and Bankruptcy Code (IBC). This decision, stemming from a protracted and deeply flawed insolvency process, is not merely a case-specific outcome but a profound commentary on the systemic frailties that have emerged within the IBC landscape. While the primary objective of the IBC is resolution and revival, the apex court's drastic measure underscores a critical need to address the exposed lacunae and the collective failures of stakeholders to ensure the IBC's integrity and efficacy.

The BPSL saga unfolded against a backdrop of grave irregularities and non-compliances that plagued its Corporate Insolvency Resolution Process (CIRP) from the outset. The RBI had identified BPSL as one of the "dirty dozen" accounts requiring immediate admission under the IBC, highlighting the significance of the case. However, the ensuing process was marred by failures at multiple levels, ultimately leading to the Supreme Court's intervention.





Lacunae Exposed: A System Under Strain

The Supreme Court's decision cast a harsh spotlight on several critical failings within the insolvency ecosystem:

- **Gross Non-Compliance with IBC Provisions:** The resolution plan itself and the approval process were riddled with contraventions of mandatory IBC provisions and CIRP Regulations. This included concerns about the treatment of operational creditors and the plan's structure, which allegedly diluted creditor rights. The plan approved by the Committee of Creditors (CoC) was found to be out of sync with the requirements of Section 30(2) of the IBC, read with Section 31(2), rendering it liable for rejection by the NCLT at the initial stage. Specifically, the plan failed to ensure priority in payment to operational creditors over financial creditors as mandated by Regulation 38 of the CIRP Regulations, 2016, read with Section 30(2) of the Code.
- **Failure of the Gatekeepers – The Resolution Professional (RP):** The RP, envisioned as a linchpin of the CIRP, demonstrably failed to discharge statutory duties. This included inadequate verification of the resolution applicant's eligibility under Section 29A, which bars entities like erstwhile promoters or related parties from submitting a plan. A critical lapse was the non-submission of the Compliance Certificate in the prescribed Form 'H' by JSW Steel, a matter flagged by the RP's legal counsel but not adequately addressed. The SC noted significant lapses in the RP's adherence to timelines and scrutiny of the resolution plan's compliance before CoC presentation.
- **The "Commercial Wisdom" of the Committee of Creditors (CoC) Under Scrutiny:** While the IBC grants deference to the CoC's commercial wisdom, the SC's ruling clarified this cannot be absolute or bypass legal tenets. The CoC, predominantly financial creditors, faced criticism for approving a non-compliant plan, overlooking red flags, and shifting stances during proceedings. This raised questions about whether narrow recovery percentages sometimes overshadowed the need for legally sound resolutions. The SC highlighted that the CoC's acceptance of JSW's delayed payments and support for its "ill-motivated plan" raised serious questions about the exercise of their commercial wisdom.



Lacunae Exposed: A System Under Strain

- **Adjudicatory Lapses (NCLT/NCLAT):** The National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) also faced scrutiny for not adequately addressing procedural illegalities and substantive non-compliance at earlier stages. The NCLAT was specifically criticized for exceeding its jurisdiction, such as by staying an order of the Directorate of Enforcement (ED) under the Prevention of Money Laundering Act (PMLA), a matter beyond its purview. The NCLAT also erred in entertaining an appeal by JSW to merely modify conditions of an approved resolution plan, which is not permissible under Section 61 of the IBC, and for justifying JSW's non-disclosure of a material Joint Venture Agreement relevant to Section 29A eligibility.
- **Conduct of the Resolution Applicant (JSW Steel):** JSW Steel faced severe criticism for deliberate delays in implementing the approved plan, potentially to benefit from favorable market cycles, as well as alleged misrepresentations and misuse of legal processes. The failure to disclose certain agreements that could impact Section 29A eligibility was a significant concern. The SC noted a dishonest and fraudulent attempt by JSW to misuse the court process by not making upfront payments for about two and a half years while unjustly enriching themselves.
- **Sanctity of Timelines:** The IBC's emphasis on time-bound resolution was severely undermined, with protracted delays defeating a core objective of the Code. The CIRP is mandated to conclude within 180 days, extendable by a maximum of 90 days, with no more than one extension. The significant delay of two years made the NCLT's approval of JSW's plan an error in the eyes of the law.



Collective Responsibility and How Things Could Have Been Managed Differently

The BPSL saga underscores that the IBC's success hinges on the integrity and diligence of all participants.

- **Lenders (CoC)** must ensure their pursuit of recovery does not lead to endorsing legally untenable plans and must critically apply their minds to ensure fairness and legal adherence.
- The **Insolvency and Bankruptcy Board of India (IBBI)** needs more robust oversight of RPs, stricter enforcement, and continuous training.
- **Resolution Applicants** must approach the IBC process with transparency and good faith, as attempts to exploit loopholes or delay implementation damage the regime's credibility.
- **Adjudicating Authorities (NCLT/NCLAT)** must be vigilant against procedural shortcuts and ensure full compliance before approving plans. Addressing understaffing and resource constraints at these tribunals is also crucial.

Several aspects could have been managed better to avoid this outcome:

- **Rigorous Due Diligence:** More thorough examination of the resolution plan's compliance, especially concerning Section 29A and fair treatment of all creditors by the RP and CoC, was essential.
- **Unwavering Adherence to Timelines:** All parties should have respected statutory timelines, with strict monitoring by NCLT/NCLAT.
- **Transparency by Resolution Applicant:** Full disclosures by JSW Steel could have preempted legal challenges.
- **Proactive Adjudication:** Earlier, decisive intervention by NCLT/NCLAT to correct deviations might have prevented escalation.
- **Accountability:** Clearer and more stringent accountability for RPs and CoC members is needed.



The Way Forward: Strengthening the IBC Framework

The BPSL judgment, though resulting in liquidation, serves as a crucial inflection point. It is a call to action for all stakeholders to uphold the IBC's spirit and letter. The path forward must involve:

- **Reinforcing Procedural Integrity:** The SC has made it clear that procedural sanctity and strict IBC compliance are non-negotiable; "commercial wisdom" cannot shield illegality.
- **Enhancing Accountability:** Mechanisms to hold RPs, CoC members, and resolution applicants accountable for misconduct or gross negligence need strengthening. The call for penal action under Section 74(3) of the IBC in the BPSL case warrants serious consideration.
- **Capacity Building for NCLT/NCLAT:** Adequate staffing and resources are vital for these tribunals to handle complex cases efficiently and ensure thorough scrutiny.
- **Balancing Speed with Due Process:** While speed is crucial, it cannot compromise fairness and legality; recalibration for robust checks and balances may be needed.
- **Re-evaluation of Section 29A Application:** The interpretation and application of Section 29A need to be consistent and transparent to prevent misuse or ambiguity.
- **Boosting Investor Confidence:** Ultimately, the aim is a robust, predictable insolvency regime that inspires investor confidence through responsible and ethical stakeholder actions.

While some criticize the judgment for potentially dissuading investors and its late timing, leading to a 'commercially perverse outcome' by unwinding an implemented restructuring, many laud it for providing necessary safeguards against abuse and highlighting structural irregularities. The judgment emphasizes stricter compliance and rebukes non-performance, offering hope for the IBC's reinstatement as a robust mechanism. An alternative outcome could have been ordering an IBBI investigation instead of complete unwinding.

The BPSL ruling is a painful but potentially transformative lesson. The focus must now shift to learning from these failures and fortifying the IBC framework to promote entrepreneurship, credit availability, and balanced stakeholder interests through fair and efficient resolutions. Failure to do so risks undermining one of India's most significant economic reforms.



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