

SECTION 32A OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (“IBC”): NEED OF AMENDMENT

Intention: - To aware the viewers of the fact that introduction of Section 32A under IBC is *introduced to ensure that the past liabilities of the Corporate Debtor, undergoing Corporate Insolvency Resolution Process (“CIRP”), does not affect the takeover process. Also the purpose and scheme of the CIRP is to hand over the business of the Corporate Debtor to a bona fide new Resolution Applicant (“Acquirer”) without risking their money.*

DATE OF ENFORCEMENT

President accorded his assent to the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (“**Amendment Act**”) on 13th March, 2020 and Amendment Act is deemed to come into force *with effect from 28th day of December, 2019.*

CRUX of Section 32 A

- ❖ Intends to *cease the liability of the Corporate Debtor and prevent any action being taken against its property* from the date of approval of the Resolution Plan by the adjudicating authority i.e. **NCLT** for any offence committed prior to the commencement of the corporate insolvency resolution process;
- ❖ It would be conditional to change in management and control of the Corporate Debtor [*This means in case a Corporate Debtor undergoing CIRP is a MSME Unit and being taken over or acquired by its original Promoters, such exemption from liability is not applicable*];
- ❖ While continuing the liability of the promoter or personnel who were associated with the offence, on the basis of complaint or report made by the investigating authority [*In other words, defaulting Promoters of Corporate Debtor continues to become vulnerable as their liability doesn't extinguish*]

What is Section 32A?

1. The liability of a Corporate Debtor (“CD”) for an offence committed prior to the commencement of the corporate insolvency resolution process (“CIRP”) shall cease, and	2. No action shall be taken against the property of the CD in relation to an offence committed prior to the commencement of the CIRP of the CD, where such property is covered under a Resolution Plan approved by the NCLT,
<p>if the resolution plan <i>results in the change in the management or control of the CD</i> to a person who was not-</p> <ul style="list-style-type: none">• Promoter or in the Management or Control of the CD or a related party of such a person; or• a person who is believed to be abetted or conspired for the commission of the offence <p>Provided that if a prosecution had been instituted during the CIRP against such CD, it shall stand discharged from the date of approval of the Resolution Plan (by NCLT) subject to fulfilment of the above requirement.</p>	

Introduction of 32A although provides protection to the Corporate Debtor but following individuals shall continue to be held liable for any offence:-

- Designated Partner in case of LLP;
- Officer in default in case of Company [*Typically, CEO, CFO, CS of the CD*];
- Every person who was, in any manner, in charge of, or responsible to the Corporate Debtor for the conduct of its business;
- Every person associated with the Corporate Debtor in any manner and who was directly/indirectly involved in the commission of the offence as per report of the investigation authority [*This may include Non-Executive Directors appointed on the Board of CD*]

The Section appears to have been introduced as a result of the litigation and ambiguity surrounding JSW Steel Limited's resolution plan for Bhushan Power & Steel Limited. The attachment of Bhushan Power & Steel Ltd.'s (BPSL) assets by the (ED) created doubts among bankers for knocking the doors of IBC Code.

Bhushan Power & Steel Limited “Successful Resolution Applicant or RA”	JSW Steel Limited “Corporate Debtor or CD”	Directorate of Enforcement “DE”
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- ❖ Corporate Insolvency Resolution Process “CIRP” was initiated against CD by the NCLT under IBC Code;
- ❖ RA's Resolution Plan was approved by the NCLT; Later, the DE attached certain assets of the CD under Prevention of Money Laundering Act;
- ❖ The same was challenged by the RA before Appellate Tribunal, while the appeal was pending, section 32A was enacted;
- ❖ The DE contended that the above section would not apply to RA's resolution plan as the RA was the related party of the CD;
- ❖ Appellate Tribunal held that the DE attachment *was illegal and without jurisdiction*. It further held that CD's assets are immune from attachment by the DE and clarified that its decision will not come in the DE's way to proceed with investigation or to take any action in accordance with law against CD's erstwhile promoters and officers.

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