

SC judgment: A turning point for IBC compliance norms?



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The Supreme Court has set aside the resolution plan of JSW for the revival of Bhushan Power and Steel. The order has created a furore amongst banks, financial institutions, lawyers, and insolvency professionals, Ramakant Rai, partner, and Ravin Kapur, counsel, Trilegal, write



Courtesy: Freepik

The Supreme Court has set aside the resolution plan of JSW for the revival of Bhushan Power and Steel. The order has created a furore amongst banks, financial institutions, lawyers, and insolvency professionals. The Supreme Court has noted serious non-compliances or deviations by the Resolution Professional (RP), Committee of Creditors (CoC), and the successful resolution applicant. These non-compliances are discussed in brief below, and thereafter, we have discussed the wider implications of this order.

Non-compliance by RP

The Supreme Court has highlighted the failure of the RP to continue with the process despite the lapse of timelines provided in the Insolvency and Bankruptcy Code (IBC). Further, it has also highlighted a failure on the part of the RP to conduct a Section 29A check (i.e., disqualification of JSW on account of default concerning any other group/affiliated company of JSW).

While JSW may or may not have been disqualified under Section 29A, these lapses on the part of the RP appear to be of a serious nature, specifically the one concerning Section 29A, as Section 29A is one of the most important qualification criteria for bidders under the IBC.

Contradictory stance by CoC

The SC also highlighted concerns with regard to the conduct of the CoC and the contradictory stance adopted by it in the context of demand for interest on account of the delay in the implementation of the plan. According to the Supreme Court order, it appears that the CoC was seeking interest payment from JSW initially for the delay in the implementation of the plan, and this contention was subsequently dropped by the CoC.

While we are not in a position to comment on the specific facts, we would like to submit that such pressure tactics as demand for interest on account of delayed implementation are often used, as it is a useful tool to ensure timely resolution in IBC cases.

Delay in implementation of plan by JSW

The Supreme Court also highlighted various delays in the implementation of the resolution plan by JSW. While the resolution plan should be strictly followed, it is submitted that a resolution plan, which has been implemented pending challenges to the resolution plan (such as JSW's plan for Bhushan Power & Steel) may carry risk for the successful applicant, and, therefore, the successful applicant may be hesitant in making payment.

Wider impact of the Supreme Court order

One key impact of the Supreme Court order is that there are several other resolution plans which have been implemented and are subject to final orders from NCLAT and the Supreme Court. After the implementation of the resolution plan of JSW following the NCLT's order in 2021, many plans that involved protracted battles from promoters were implemented, keeping in mind the principle of timely resolution and following the precedent of JSW–Bhushan Power & Steel.

The stakeholders in such cases derived comfort from the precedent in this case, as the Supreme Court had allowed implementation of the plan despite ongoing challenges from the promoter and other parties involved in this matter. The JSW–Bhushan Power & Steel matter, in a way, paved the way for implementation of plans despite the pendency of appeals against the resolution plan.

Stakeholders involved in all such plans, which were implemented despite pending challenges, would now be concerned, as the risk of setting aside such plans has theoretically increased significantly after the JSW–Bhushan order.

The final order by the Supreme Court setting aside JSW's resolution plan would also likely result in a scenario where resolution applicants would not be inclined to implement a plan pending final/Supreme Court orders if there is a pending challenge to the resolution plan. Such an approach would result in extending the timelines required for implementation of plans, as it would be impractical to expect timely final judicial decisions on litigation matters, specifically considering the overburdened judiciary.

Delays in the implementation of resolution plans under the IBC have raised concerns about the timely resolution of stressed assets. Such delays may erode stakeholder confidence in the IBC's effectiveness, potentially impacting the ease of doing business in India. To address this, it is essential to consider measures that ensure the timely implementation of resolution plans, even in the face of

pending legal challenges. Alternatively, mechanisms that expedite final decisions on challenges to resolution plans could be beneficial. Implementing such measures would reinforce the IBC's role in facilitating efficient corporate resolutions, thereby contributing to a more robust economic environment.

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