JSW-BPSL saga: Let it be or let it go

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Beyond legal infirmities, Supreme Court's recent order raises systemic concerns. The finality and predictability of resolution process will be severely undermined

THE RECENT SUPREME Court judgment in the matter of JSW Steel's acquisition of Bhushan Power and Steel Limited (BPSL) has delivered a significant setback to the Insolvency and Bankruptcy Code (IBC). More than four years ago, JSW acquired BPSL through the IBC process by paying ₹19,700 crore to banks, employees, operational creditors, and statutory authorities. Yet, on appeal by the erstwhile promoters challenging the National Company Law Appellate Tribunal's (NCLAT) order, the Supreme Court overturned JSW's acquisition and directed the liquidation of BPSL. Notably, the court invoked its extraordinary powers under Article 142 of the Constitution, which empowers it to do "complete justice" between the parties.

The Supreme Court's primary reasons appear to include delays by the Resolution Professional (RP) in completing the statutorily time-bound process; alleged inadequacy of the RP's examination of JSW's eligibility under Section 29A of the IBC; failure to prosecute the erstwhile promoters for suspect transactions preceding insolvency; and the purportedly non-commercial manner in which lenders exercised their discretion. However, on a close examination of the public record, these grounds appear either legally insufficient, inaccurate, or irrelevant. Indeed, the Supreme Court's order arguably violates several well-established principles of law.

A vital legal principle repeatedly affirmed by the Supreme Court is the primacy of the commercial wisdom of the Committee of Creditors (CoC) in the IBC process. In the BPSL matter, the Enforcement Directorate had attached the company's assets for violations allegedly committed by the erstwhile promoters. While JSW sought legal remedies to lift the attachment, the CoC, recognising the value-destructive effect of the attachment, exercised its discretion to extend the implementation timeline for the resolution plan. The Supreme Court's order effectively nullified this commercial decision, relying on a technical reading that the CoC could not act as a body once the plan had received NCLT approval. However, the court appears to have overlooked that the NCLT-approved resolution plan itself expressly conferred such power on the lenders.

Furthermore, the invocation of Article 142 in this context was arguably unwarranted. The power to do "complete justice" is rarely exercised and is traditionally reserved for extraordinary circumstances—such as in environmental cases, politically sensitive disputes (e.g. the Ayodhya judgment), and mass torts (e.g. the Bhopal gas tragedy)—where legal gaps would otherwise produce manifestly unjust outcomes. In the BPSL case, Article 142 has been employed to send a viable, profitable company employing thousands into liquidation on what appear to be hyper-technical and factually debatable grounds. Paradoxically, even assuming some merit in the concerns raised, Article 142 should have been used to preserve, not destroy, the corporate debtor—to save it from corporate death, consistent with the IBC's objective of revival over liquidation.

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One of the fundamental tenets of our common law system is the principle of natural justice, which imposes a duty on courts to ensure no party is condemned unheard. A review of the orders of the lower tribunals reveals that several critical findings in the Supreme Court's judgment—such as the alleged delays in the resolution process, the supposed inadequacy of diligence regarding JSW's eligibility, and purported non-disclosures—were neither argued before the lower forums or pressed before the Supreme Court. Neither the RP and the CoC nor JSW was given notice that the Supreme Court would adjudicate these matters, thereby depriving them of an opportunity to defend their conduct. It is disconcerting that the court arrived at factually contentious and arguably erroneous conclusions without hearing all affected parties.

Beyond these legal infirmities, the apex court's order raises broader systemic concerns. If the liquidation order is implemented, lenders—predominantly public sector banks—will likely have to return over ₹19,000 crore in recoveries, potentially reclassifying the company as a non-performing asset and reinstating over ₹47,000 crore in bad loans. JSW's substantial investments in plant and machinery would need to be refunded, while thousands of employees, contractors, and counterparties could face job losses and commercial disruption.

The implications for the IBC ecosystem are grave. The finality and predictability of the resolution process will be severely undermined, discouraging prospective bidders who will price in this legal uncertainty with harder bargains and lower bids. Bank recoveries and employee claims may suffer as a result. Worse still, promoters may be emboldened to game the process through protracted litigation and procedural delays, undermining the very purpose of the IBC.

The IBC has been a notable success of the current government's reform agenda. However, its effective functioning depends not only on legislative and executive action but also on judicial restraint and vigilance in upholding its core principles. In fairness, this is exactly what the Supreme Court has consistently done vis-à-vis the IBC, especially in its initial years. However, if the judiciary fails to protect the basic architecture of the IBC, there is a real risk of reverting to the pre-IBC regime of the Sick Industrial Companies Act, where corporate distress was endemic, recoveries were minimal, and resolution lay at the mercy of defaulting promoters.

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