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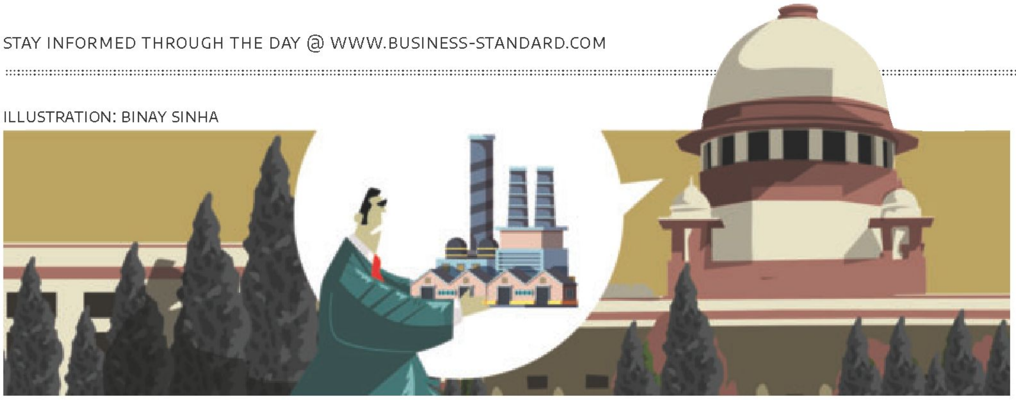

The finality of business transactions

Though legally sound, the SC judgment in Bhushan Power is akin to a capital sentence for the company and the IBC

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On May 2, the Supreme Court disposed of an appeal filed five years earlier concerning the resolution of Bhushan Power and Steel (BPS) under the Insolvency and Bankruptcy Code, 2016 (IBC). It delivered a detailed, fact-intensive judgment marked by clinical precision. The judgment exposes a series of illegalities and lapses — some deliberate and collusive — including those that occurred after the appeal was admitted, during the approval and implementation of the company's resolution plan.

The judgment documents serious failings on the part of the resolution professional (RP), the successful resolution applicant (RA), the committee of creditors (CoC), the National Company Law Tribunal (NCLT), and the National Company Law Appellate Tribunal (NCLAT). It refrains from issuing any preventive, remedial, or penal directions against any of them, leaving it to the law to catch up with the wrongdoers in due course.

In view of the irregularities that tainted the resolution process, the Court ordered the liquidation of BPS, which had been successfully rescued under the IBC in 2019 with the approval of relevant market participants and layers of state agencies. The order, legally sound but economically hollow, effectively amounts to a capital sentence for the company and the IBC, and poses a setback to legitimate business and the wider economy.

Let bygones be bygones, and let the parties fend for themselves. Public policy, however, must reflect on the implications of this episode and draw appropriate lessons. The corporate insolvency resolution process for BPS began on July 26, 2017. Under the oversight of the RP and the NCLT, market participants submitted the resolution plan for approval on February 14, 2019, roughly six quarters later. From that point onwards, the adjudication machinery (NCLT, NCLAT, and the Supreme Court) took six years to first approve, and then to overturn the plan.

This raises two fundamental concerns. The first is the timely delivery by public agencies. Every commercial transaction has money as the underlying, and money has time value. A transaction viable today may be rendered unviable tomorrow in the changed market scenario. Therefore, a transaction needs to be formalised and consummated expeditiously before it goes out of money. This is why economic laws like the IBC prescribe strict timelines for undertaking and completing transactions.

The second is the finality of commercial transactions. Once a resolution plan is approved and implemented, the passage of time only adds complexity and cost. Undoing such a plan years later entails enormous economic and institutional consequences. No prudent resolution applicant will invest in a transaction if there is a lingering risk that some authority might unravel it years or even decades later. This concern is even more acute in cases of liquidation, which, by its very nature, is irreversible. Although the judgment pertains to an insolvency matter, its ramifications extend far beyond the IBC. It signals that any commercial transaction — no matter how long it has been implemented or how many layers of state approval it has received — remains vulnerable to being overturned ex post. This deepens the sense of uncertainty for businesses and unsettles the foundation of a rules-based economic system.

There are two corresponding structural asymmetries. The first is the asymmetry of timelines. Commercial transactions require multiple parties to act with urgency and coordination. The IBC mirrors this logic, assigning the CoC and RA the role of decision-makers, while entrusting a hierarchy of adjudicating authorities (NCLT, NCLAT, and the Supreme Court) with approval functions, and the RP as the *sutradhar*. Market laws prescribe strict timelines for participants, and courts have held these to be mandatory. However, where timelines exist for adjudicating authorities, courts have treated them as directory, citing the maxim *actus curiae neminem gravabit* — the act of the court shall prejudice no one.

As a result, market participants must act swiftly and bear full accountability for any delay, facing both legal sanctions and market consequences. In contrast, adjudicating authorities operate without binding timelines and face no consequences for delays. Each tier in the adjudication hierarchy proceeds at its own pace, allowing delays to compound. Even when market participants discharge their responsibilities, transactions cannot materialise until the adjudication process concludes. It is imperative that the Court not only demand time discipline from others but also hold itself to the same standard.

Second is the asymmetry of decision-making structure. Market actors are required to make decisions in one go, bearing full responsibility for the outcome. In contrast, the adjudicatory structure operates in tiers, where each level can revisit and revise the decisions made by the one below, even years after approval or implementation, without bearing any responsibility for the consequences. Each authority can afford to be wrong. If market players must act decisively and face consequences, state institutions should be held to similar standards. If business decisions are irreversible, state approvals must also be irreversible.

The interests of business and the economy demand certainty in commercial transactions. These transactions should, at most, require the approval of a single designated authority. Once granted, such approval must be final. A system of deemed approval, akin to that under the Competition Act for mergers & acquisitions, or under the financial service providers' rules for resolution applicants, should be institutionalised wherever authorities fail to act within stipulated timelines.

If irregularities are discovered post-facto, those responsible must face swift and stringent civil, regulatory, or criminal consequences. However, the underlying transaction must remain undisturbed. This principle of punishing the wrongdoer without unsettling the transaction is firmly embedded in securities jurisprudence. Trades executed on stock exchanges are never reversed, nor are public issues unwound, even if grave irregularities are discovered post-facto. While public issues once required state approval, that gatekeeping was dismantled in the early 1990s. In its place, the regulatory framework has been significantly strengthened, ensuring accountability without compromising transactional certainty.

It is time the law, policy, and institutions recognised the finality of commercial transactions, which should form the bedrock of all economic regulatory frameworks. The legal architecture should enable rigorous oversight to prevent and deter misconduct and hold wrongdoers accountable. However, such oversight must be disentangled from the validity of commercial transactions once they have been lawfully approved or deemed approved. The way forward lies in instituting a streamlined, single-tier approval mechanism, entrusted to a professionally competent authority, and backed by institutional accountability.

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