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Transfer of Assets of Personal Guarantor: A Recipe for Disaster?

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Introduction

The Insolvency and Bankruptcy Code (Amendment) Act, 2026 has introduced Section 28A into Insolvency and Bankruptcy Code (**Code**), 2016.

This section envisages an asset-transfer framework to pool the assets of the personal or corporate guarantors into the corporate insolvency resolution process (**CIRP**) of the corporate debtor (**CD**). However, when examined specifically with respect to transfer of assets of a personal guarantor (**PG**), the framework potentially disadvantages and undermines valuable rights of not just the weaker secured creditors but also of these guarantors themselves.

While confining itself solely to PGs of CD, the purpose of this article is three-fold: *first*, to understand the functioning of Section 28A; *second*, to delineate the three core 'issues' which have compromised the efficacy of this framework; and *third*, to suggest possible reforms to tackle the said issues.

Section 28A's Asset Transfer Framework

In 2019, the Parliament made the Adjudicating Authority for PGs common with that of the CD to whom they had stood guarantee. In ***Lalit Kumar Jain v. Union of India & Ors., (2021) ibclaw.in 61 SC***, the Supreme Court (**SC**) affirmed that a common forum would not just allow proper appreciation of the nature of the assets available, either during CIRP or later, but also facilitate the CoC of the CD in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from PGs.

Over the years, a popular practise among secured creditors of the CD was to enforce their security against the PG's assets under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (**SARFAESI**) Act, 2002. This is because prior toSection 28A, a guarantor's assets could not be dragged into the CD's CIRP and had to be pursued separately through SARFAESI proceeding or through the personal guarantor's insolvency resolution process (**PGIRP**) under Chapter III of Part III of the Code.

With its introduction, Section 28A now allows assets provided as a security for CD's borrowing to be dealt in the CIRP itself subject to 'approval' of the CoC of the CD. In case the PG himself is undergoing PGIRP or bankruptcy proceedings and the creditor has forfeited or surrendered his right in relation to the asset, an additional approval by a majority of more than two-thirds in value of creditors is a pre-requisite.

A peculiar aspect of Section 28A is that it requires the CD's secured creditor to have taken 'possession' of PG's assets, before or during CD's CIRP, in order for asset-transfer to work. Obviously, this is not possible during PGIRP because it is the RP of PG, not the creditor, who takes possession. Albeit farfetched, a creditor can get possession of PG's assets under Section 128 of the Code which proportionally distributes assets across all creditors, upon passing of a bankruptcy order under Section 126. But this would mean that a repayment plan route for the creditors must fail first.

Notwithstanding, the commonest route available for possession by guarantor's creditor is under Section 13(4), read with Section 14, of the SARFAESI Act. This means initiating a SARFAESI recovery under Section 13 should ideally be the first step for a creditor seeking to benefit from this asset-transfer framework.

First Issue: Multiple charges over a common asset

Now, consider a case with multiple creditors of a CD secured by assets of the PG. Say there are multiple charges over the same assets of the guarantor(s) in favour of the different creditors.

Suppose some of these creditors choose to initiate SARFAESI proceedings before the Debt Recovery Tribunal (**DRT**) with the purpose of recovery. Financially, this will be a sounder choice because a SARFAESI proceeding will guarantee the creditor(s) a better recovery than a transfer of assets to CIRP that drains and shrinks their recovery prospects from the PG. In fact, recovery under CIRP will inevitably be lesser owing to hairline cuts, costs associated with CIRP and payment to operational creditors. For example, it an extremely standard practise among creditor banks, in case they choose to not proceed under Section 95 of the Code, to issue notice under Section 13(2) of SARFAESI Act and initiate recovery proceedings under Section 19 of the Recovery of Debts and Bankruptcy Act before a DRT.

Now, if one creditor decides to transfer the asset over which he holds security interest into CD's resolution, he can, through the RP, move an application under Section 28A of the Code, after having taken possession under Section 13(4) of SARFAESI Act. Having not surrendered his rights in relation to the asset, the two-thirds approval under third proviso to Section 28A will also not be required. The real problem, however, arises if multiple creditors hold charge on this same asset and some might want to enforce the same through the SARFAESI proceedings.

At this juncture, the creditor wanting transfer can cunningly initiate a Section 95 proceeding against the PG, because of which an interim moratorium under Section 96 of the Code will stall all pending SARFAESI recoveries by all other creditors against the PG's assets. In ***Sanjay Dhingra v. IDBI Bank Ltd. and Ors., (2024) ibclaw.in 563 HC***, the Delhi High Court held that once the interim moratorium has come into play on account of PGIRP, the creditor bank cannot proceed any further in the proceedings under the SARFAESI Act with respect to the property of the PG even if it has taken possession of the property prior to commencement of IBC proceedings.

Consequently, all creditor(s) with a charge on this asset will be compelled to pursue their recoveries through the Code now that their asset has been absorbed into the CIRP and their recoveries depend on a prospective resolution plan. The lack of adequate safeguards for secured creditors of a CD who are disinclined to transfer obliterates the very purpose of the asset-transfer framework envisioned as an efficient resolution and recovery mechanism for CD's creditors.

Second Issue: Transfer without a PGIRP

In practise, guarantor's personal properties and lease holdings serve as surety for creditor's loan to the CD. Despite the centrality of these assets to CD's successful resolution, judicial interpretations have qualified the transferability of such assets into the CIRP. Relying ***on State Bank of India v. V. Ramakrishnan & Anr., (2018) ibclaw.in 29 SC***, the NCLAT observed in ***Nitin Chandrakant Naik v. Sanidhya Industries LLP, (2021) ibclaw.in 404 NCLAT***, that no resolution plan can directly consume the property of the PG without recourse to appropriate proceedings, which is under Chapter III of Part III of the Code.

Oddly enough, the contents of Section 28A suggest that even without initiating an PGIRP proceeding under Part III of the Code, the dominant secured creditor(s) of CD can initiate a transfer of the charged or mortgaged asset of the PG and absorb it into the CIRP pool. In fact, Section 28A(2) provides that *"the transfer of an asset referred to in sub-section (1) under a resolution plan shall vest in the transferee all rights in, or in relation to the asset, as if the transfer had been made by the owner of such asset."* This overarching provision effectively grants ownership rights over a mortgaged property of the PG.

The SC, in ***Narandas Karsondas v. S.A. Kamtam and Anr, (1976)*** had held that mortgagee's rights are limited, and ownership of a property can be claimed only though judicial intervention. Under Section 67 of the Transfer of Property Act, the only right a mortgagee gets is a right to file a suit for foreclosure. Without a PGIRP and the consequent absence of a moratorium under Section 96, the guarantor assets' now face the dual brunt of both SARFAESI proceedings and loss through CIRP absorption.

Thus, the language of Section 28A undermines the due process of law as explained in *Nitin Chandrakant Naik*. It critically disadvantages a guarantor who could be compelled to pursue simultaneous proceedings over assets he has virtually lost control.

Third Issue: Loss of subrogation rights and post-CIRP recoveries

In ***Maharashtra State Electricity Board Bombay v. Official Liquidator High Court Ernakulam Anr., (2017) ibclaw.in 19 SC***, the SC unequivocally held that surety is not absolved of his liability even if principal borrower secures a discharge in bankruptcy or liquidation ('discharge by operation of law'). In *Lalit Kumar Jain,* the SC reiterated that approval of a resolution plan does not *ipso facto* discharge the PG of the CD of his liabilities under the contract of guarantee, which is a different agreement altogether. Thus, unless the approved resolution plan extinguishes the debt, secured financial creditors are open to take recourse against the guarantor under Part III of the Code or the SARFAESI Act to ensure full satisfaction of their claims.

This leads to a strange outcome. Consider the case where assets of PG were pooled into CIRP and a resolution plan was subsequently passed. Now, a completely new and disconnected proceeding under any law to compel further recovery from the guarantor having no resources to pay sits uneasy with basic fairness principle.

An added complication is decision in ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors., (2019) ibclaw.in 07 SC***, where the Apex Court approved a resolution plan which had a conspicuous anomaly: it gave financial creditors right to extract remaining dues from the PG by invoking the guarantee while simultaneously divesting the PG of right of subrogation against the CD under Section 140 of the Contract Act.

This ambiguity was exploited subsequently in ***Vikas Aggarwal v. Asian Colour Coated Ispat Ltd. and Ors., (2024) ibclaw.in 127 NCLAT*** which held that the PG's doctrine of subrogation extinguishes in context of CIRP proceedings.

Given the long line of decisions which have consistently attached finality to a resolution plan, it stands to reason that guarantor's paralysis from moving against the principal debtor after losing his assets to CIRP is the most critical pitfall which Section 28A's asset-transfer framework fails to consider.

The Way Forward

Where efficiency in resolution comes at the cost of basic procedural fairness, such a framework is bound to fail. A transfer of assets initiated at behest of a powerful secured creditor not just not just tramples the rights of minor creditors but also leaves the guarantor virtually powerless in exercise of his contractual and substantive rights. Below are some proposed reforms to this framework:

For the first issue, I suggest that a CoC 'approval' to transfer a particular asset of the PG must only take effect when 100% of creditors of the PG (who are also CoC members) with a charge on that asset agree to the transfer. This is irrespective of whether an overall 66% voting threshold has been attained. This way, a PGIRP or SARFAESI proceeding is allowed to continue without coercing minor creditors to pursue recoveries through CIRP.

For the second issue, a limited right of audience to the guarantor must be granted, akin to a reply from CD at Section 7 stage, when the RP moves a Section 28A preferred by any creditor. This should allow PGs to disclose any other proceedings, basic valuation disclosures and proposed distribution of proceeds through alternate recovery channels and enable affected creditors to file focused objections.

For the final issue, by adding a proviso in Section 30, legislature must mandate resolution plans to not extinguish any future claim that might arise against the resolution applicant through PG's right of subrogation, if any proceeding is initiated against the PG by any secured creditor of the CD.

Conclusion

An undeniable positive feature of the asset-transfer framework under Section 28A is that it promises a consolidated process which could offer a larger, cleaner asset pool, making bids more attractive and potentially increasing recoveries. For a system often trammelled with delays and haircuts, the pooling of assets holds immense value. Yet, in several places, the framework falters while preserving rights of smaller creditors and PGs of the principal debtor. An overhaul in this framework must be imminent and the only way to ensure its efficient working.

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