

**Issue 49**

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# *Ensouth*

**The E-magazine brought to you by**

**N South**

**Advocates**

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### **Managing Partner's message**

Welcome to another issue of Ensouth! All of it is focused on new developments in the legal field.

Perhaps the biggest recent development is India's attempt to resolve the bad debt problem. Two of our three columns this time are about bad debts.

First in **Joint Lender Devastation**, we examine the latest bankruptcy related ordinance and ask ourselves if its sensible to supersede India's institutional structure and transfer commercial decisions into the hands of the super regulator.

Next, in **What's the NDTV Inside story**, we evaluate the allegations against this TV channel and test if the facts disclosed add up to the allegations made.

Finally, moving on to the topical, in **Rivers with Rights of Humans**, we ask ourselves if India's environmental challenges are addressable without evoking divine intervention.

Happy reading!

**Ranjeev C Dubey**  
(Managing Partner)

## **Print Media**

### **Comment-1**

#### **Fine Print: The Joint Lender Devastation**

**Why the latest ordinance on bad loans may end up making things worse than they already are**

**Ranjeev C. Dubey**

When the entire banking industry of a country as large as ours is paralysed to a point where it becomes necessary to empower RBI, the banking regulator, "to issue directions to any banking company (ies) to initiate an insolvency resolution process under the Insolvency and Bankruptcy Code, 2016", can we agree that further proof of a complete institutional breakdown is unnecessary. How did we ever get to this point?

Allow me my oversimplification for a just cause. Back till Indira Gandhi became quite the flavour of the new socialist deal in the 1970s, India accepted the idea that commercial considerations must drive lending decisions. This changed with bank nationalization which ushered in the age of priority sector lending and the monkey circus her minister Janardhan Poojari called 'loan melas'. Nationalisation inevitably converted lender decisions into 'political decisions' which, if you know your Indian English, means that to get a credit line, you had to arrange a pay-off. Since pay-offs aren't sensitive to commercial common sense, as many good projects got funding as bad. The bad debts mounted but that apart, even if a project was good, how do you finance a payoff? In the crudest scheme, borrowers over invoiced the project cost, siphoned out money and round tripped the cash into the hands of the lender. If they didn't build enough of a hedge into their loan requirement, they ended up under-financing their project. Sickness was implicit in this mega bank scam.

It took 40 years for the probity backlash to strike back and much of the credit goes to our judiciary. While that was playing out during UPA- 2, two consequences followed. First, every debtor became a crook till otherwise proven. Court encouraged criminal persecutions became the remedy of choice for this complex problem. Second, since it takes two to tango, bankers began to be viewed with grave suspicion. Only those with really big you-know-whats' participated in decisions that lend money to anyone. Kafkaesque compliance requirements proliferated like maggots on dead flesh. The larger collateral damage was that a debtor who wanted to settle his outstanding found he had no one to talk to. How was a banker to ever write off part of a debt to settle an outstanding without being accused of corruption? The decimation of the 'system' in the 'banking' was complete.

If you are not one of those who hate Vijay Mallya simply for his flamboyant lifestyle, you will see how he is the perfect case study of the impact of institutional breakdown. What led to his fall? For those who have not read my column '**Sky High Crucifixion**', it comes down to four factors: (a) Mallya decided to take on a competitor airline which

was clearly owned by politicians just because he was in the liquor business and thought he knew how to manage government in a sector that lives from day to day at the mercy of the government. (b) His taking to the skies pronounced a death sentence on Air India forcing that government undertaking to sell tickets at a loss subsidized by tax payers' money bringing the whole aviation sector to its knees, (c) all of Mallya's attempts to bail out Kingfisher were thwarted by the aviation minister who announced successive ad hoc changes-by-the-week 'policies' which supported the competition and prevented Mallya from getting foreign investment. Needless to state, the policies were reversed immediately after Kingfisher went bust. Ask Vistara. (d) Banks rejected all of Mallya's settlement offers because no one wanted to carry the can for the decision, putting the Supreme Court in the unenviable position of becoming Mallya's principal prosecutor. The point is that businesses generally fail for complex reasons and many hands are sullied in the saga. Only village idiots and new age gurus tell you it's all very simple. The bigger reality is that Mallya remains in the dock because no institution exists to fairly evaluate and act on what he has successively proposed.

To me, the main damage the Kingfisher saga did to the country was to designate the CBI as the official witch hunter for everyone who had anything at all to do with any loan that went bad. Once we got past that point, the demonisation of the commercially defeated inevitably reached its logical culmination with the Insolvency and Bankruptcy Act of 2016. I have recorded my objection to the attitude inherent in this new law in '**Commercially Sustainable Bankruptcy**' which I may summarize as follows: (a) If you want to 'Make in India', you cannot afford to follow the medieval practice of criminalizing a bad commercial call and throwing the debtor in jail. (b) The coercive nature of India's compliance regime forces promoters to defalcate funds in the dying moments of their floundering businesses in order only to satisfy the extortion demands of state officials. Businesses will dress up balance sheets before they die. (c) Entrepreneurs are rare and precious to every economy and many advanced economies will hammer revival plans down the throats of bankers and employees to secure the continuing good health of business leaders. Societies that are suspicious of businessmen will end up with none. Bankruptcy laws in advanced economies therefore exist to protect, promote and revive businesses rather than shut them down.

Instead, India has chosen to go down a road where the inevitable impact of unsustainable business losses is its takeover by insolvency professionals who are especially incentivized to break up and sell bankrupt businesses to third parties. The system is also geared up to prosecute all those who have participated in the financing of the business in any capacity whatsoever. Bankruptcy means huge write downs for lenders without exception. Is it then a surprise that bankers are simply not willing to call a spade a spade and get on with the job of restructuring a failed business? Here is the central irony: you can shout from the pulpit that you want to Make it India, but when it comes down to dust, government acts not like a commercially savvy partner of businessmen but as the local *thanedaar* out to lathi charge the stragglers. That's not the best attitude to have if the economy is what you care about.

Be that as it may, the government has reacted to the banking logjam by empowering RBI to tell the banks when and what decision to take. Let me not labour the point. I completely fail to see how a quicker and more certain death is a better solution to a bad sickness, especially when the doctor is incentivized not to prescribe any medicines. Is that *'acche din'* or the de-industrialisation of India?

This however, is not the main source of my deep disquiet with the ordinance. Since death to debtors is the primary response of the new bankruptcy law, we now have a new dispensation where the death sentence is pronounced not by those who have the most to lose by doing their deathly duty. It is performed by the regulator who supervises these lenders. At one level, this may be a perfect case of change changing nothing. If bankers are practically public servants petrified of being accused of corruption, RBI officials too are public servants petrified of being accused of corruption. Seen thus, nothing has changed.

But that's not true. At the elemental level, we must recognize that RBI is an independent regulator thus far and no further and in truth not very far at all. Only the particularly naive will believe that demonetisation was RBI's call to make. Indeed, Delhi's chattering classes have long circulated names of the small group of bureaucrats who were privy to the demonetisation decision which we know was taken without reference to the Cabinet. Do we need to ask ourselves who will decide which industrialist gets it in the neck? Not RBI for sure. In itself this may be no problem. No allegation of corruption attaches to India's widely admired CEO, or those who support his laudable attempt to drag our economy forward. Still the fact remains that the decision to revive or shut down a business will now be taken at the PMO by those manifestly not specially trained to evaluate these choices. Even more worryingly, I doubt that huge liberal democracies have advanced themselves by dispensing with institutions, discarding a plurality of decision making and marginalising regulation as a process. For all the good that is intended to be done, this is a truly scary concentration of power, the consequences of which will be apparent only long after a succession of corporate corpses have long been burnt at the stake.

### **Comment-2**

#### **Fine Print: What's the NDTV Inside story?**

**The facts disclosed simply do not add up to the crimes claimed  
Ranjeev C Dubey**

We live in a world riddled with Moral Ambiguity. Aadhar should bring transparency and probity in our society yet our Government has handed over our confidential secrets to private parties in a patently non-transparent way. The judiciary remains the last bastion of hope in a polity that is fast descending into moral bankruptcy, yet we are sweeping irrefutable evidence of corruption at the highest level

of the judiciary under the carpet. Our Government wishes to unveil a new golden age of moral rectitude, yet the most elementary principles of democratic plurality are being trampled by rampaging food faddists. To me, the greatest irony of the age of Social Media is that we are testing the limits of this moral ambiguity riding on the back of a virulent form of bipolar disorder. The shenanigans around NDTV are only the latest case in point.

The facts, such as we know them, can be summarized as follows. On June 2<sup>nd</sup>, 2017, a shareholder of both NDTV and ICICI Bank registered an FIR against Pranoy and Radhika Roy claiming they conspired to defraud ICICI Bank of some Rs. 48 Crores. The saga began in 2008 when the Roys triggered an open offer in the wake of their decision to buy back some shares of NDTV. In July 2008, they obtained short term bridge finance of Rs. 500 Crores from India Bulls and then set to the task of finding a way to pay back India Bulls. Three months later, on 23rd October, 2008, they persuaded ICICI Bank to grant them a loan of Rs. 375 Crores against a pledge of all their shares in NDTV carrying interest at roughly 19%. On the face of it, this loan violated the Banking Regulation Act which did not allow the Roys to pledge more than 30% of their shares to ICICI Bank. Just so that we don't lose perspective, this violation carries a penalty of Rs. 1 Crore or twice the amount involved, whichever is more. No jail time is prescribed. As far as I am concerned, if ICICI Bank wants the Roy's to pledge more shares that they are allowed to, then it's for ICICI Bank to explain what they were smoking at the time.

There is a second element to this bit. RBI's Master Circular dated 28.8.1998, clause 10(vi) requires Banks to "ensure that advance against shares are NOT USED to enable the borrower to acquire or retain controlling interest in the company/companies or to facilitate or retain inter-corporate investments." As far as I am concerned, it's something the bank needs to worry about. Besides, NDTV can argue that they took the money to pay of India Bulls, not buy shares! You may think that is too slick by half, but then, welcome to the real world of M&A! It's called transaction structuring.

That takes us to Act 2. In 2009, Reliance Ventures Limited extended a "zero coupon optionally convertible loan" of Rs. 403.85 Crores to its minimally capitalized 'paper' subsidiary SRP Limited. In turn, SRP Limited extended the same courtesy to its minimally capitalized associate company VCP Limited). In turn, VSP Limited passed through the money to RRPR Holdings, the wholly owned Roy entity which held part of NDTV's equity. Now why would Reliance want to jump three hoops to give money to RRPR Holding? I don't have to tell you. A bunch of regulatory handcuffs prevented Reliance from doing directly what it did indirectly. I also don't need to tell you that if you want to do something about these allegations, you have to talk to Reliance. Wildly gesticulating and screaming conspiracy theories doesn't change the fact that it's not a NDTV problem.

Now behold Act 3. With the Reliance money secured, RRPR Holding purchased more NDTV shares from the Roys till RRPR's ownership of NDTV ballooned to 29%

while the Roy's shareholding in NDTV dropped to 32%. Through this process, the Roy's also ended up personally richer by Rs. 53.85 Crores! Seen in isolation, it is debatable if a law was broken in this piece of it. The violation if any occurred under SEBI's Takeover Regulations provided you treat the Convertibles issued to Reliance as a change in control even though the Takeover Code doesn't define it like that. On a worse case basis, should SEBI decide that a violation had occurred, the Roys will pay a penalty in an amount not exceeding Rs. One Crore. This is something for SEBI to look at, not the local *thanedaar!*

This brings us to the final and fourth act. On August 6<sup>th</sup>, 2009, ten months after the loan was taken, ICICI Bank entered into a settlement with the Roys, and accepted the reduced sum of Rs. 350 Crores in settlement of the outstanding. As confirmed by a letter of August 7<sup>th</sup>, 2009, ICICI Bank treated the debt as fully paid though RRPR Holdings still showed a pending amount of Rs. 4.4 Crores as due. On this basis, the FIR claims that ICICI Bank gave up Rs. 4.4 Crores of principal amount due with interest on top, thus taking a net haircut of Rs. 48 Crores.

No doubt, there is reason to pause. Did ICICI Bank take a genuine commercial haircut or did it get scalped? Considering that the Roy's ended up with an extra Rs. 53.85 Crores in their personal accounts, they were clearly capable of giving Rs 48 Crores to the bank. I am sure there is much to be said on both sides of this subject. I do observe though that settling a loan too cheap is something RBI would normally look at as a governance issue, not CBI, and most certainly not at the instance of a minor shareholder of ICICI Bank. It's not a crime for a Bank to take a haircut. We need more substance to sustain an allegation of fraud, though fraud it may well be. I looked hard at the FIR and found nothing more than vague allegations in highly emotive rhetoric all but drowning under ridiculous verbosity and split infinitives.

In this, the FIR is unexceptional. Desi FIRs engage in spin doctoring all the time, mainly in order to stretch the accusations beyond their natural logic and get maximum flexibility for constructing alternative narratives in the future. If someone objects to the verbiage, the cops shrug: "oh but this is an FIR and the investigation is still to come". That may well be but the same verbiage allows the cops to swoop into the homes of the accused at all hours of the day or night and arrest the poor victim without just cause. As for the rest of us, we withdraw into a shell and weakly protest that "there can be no smoke without fire". Never do we stop to ask what indeed is the precise nature of the ostensible fire that created this dramatic smoke?

Viewed from a distance, the same set of interconnected facts has seen NDTV repeatedly attacked over the last several years. In 2014, the Income Tax Department accused the Roys of not paying tax on the money they made on the sale of NDTV shares to RRPR. The Roys claim the Department's lawyer has stalled the proceedings for years together and doesn't allow them to be heard. SEBI has been examining the legality of a range of actions taken by NDTV for a decade now. On June 8<sup>th</sup>, 2016, it

issued a show cause notice to NDTV for violation of the Takeover Code amongst other things. This too has been hanging fire for a long time.

At the end of the day then, what are we to make of the fate of a TV channel that has frequently been critical of the Government? If you smell smoke in ICICI Bank's Rs. 48 Crore haircut, wouldn't you argue that the press cannot claim immunity from prosecution on the patently dishonest argument that it would muzzle freedom of speech? Would you have a competent investigation look at this extraordinary transaction with an open mind, or is NDTV a holy cow you can't hurt? On the other hand, considering that the essential facts we related here have been in the public domain for several years, exactly what did the CBI expect to find in the home of the Roys in the middle of the night? When the same set of facts transforms year after year into a new and fresh prosecution, are you not entitled to think that we have ourselves a witch hunt? Would you not argue that NDTV is taking heat exactly as the Rehajas did after Outlook published a story about Atal Bihari Vajpayee's foster son-in-law, and as Ram Nath Goenka did during the Emergency? Do I have a problem with pattern recognition, or am I just prejudiced?

Once again, I find myself confronted by a morally ambiguous question to which there is no simple answer. No one here smells of fresh roses in the rain. Forced to a choice, I find myself reluctantly coming down in defense of those who are clearly not squeaky clean, on the principle that whatever be their sins, they are more sinned against than sinning.

### **Comment-3**

#### **Fine Print: Rivers with legal rights of a human**

#### **Does saving India's environmental require divine intervention?**

**Ranjeev C. Dubey**

Calendar art depicts Ganga Maiya as a beautiful full bodied lady venerated by millions, yet her devotees violate her guiltlessly. Electoral promises to clean up the Ganga wins votes but nothing then prevents the same voters from misappropriating funds allocated for the job. In this environment of grotesque irony, what are we to make of the Uttarakhand High Court's judgment declaring the Ganga and Yamuna as living beings? Coming as it does at the crest of a saffron political wave, are we to understand that India is capable of cleaning up its rivers only by reaching back to a 5000 year old concept of riverine goddesses? Does modernism mean retro chic Hinduism? Do we need to call our aerospace initiative the Udan Khatola Program? Are our solar energy farms an aspect of Surya Pooja? Is Hindutva the framework within which Indian business will now seek to achieve its commercial ambitions?

To make sense of this unusual judgment [*Mohd. Salim v/s State of Uttarakhand*, W.P. 126 of 2014 Decided 20.03.2017], we need to examine what it means in law for a 'thing' to become a 'real' legal person. Consider a Hindu temple. People routinely offer

money to the deity within. The money accumulates. Priests then create trusts, open bank accounts, invest the money and so forth. Sometimes, they also open schools, colleges, charities and hospitals. Who owns all these things? Clearly, it's not the priests. In *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta* [1969 (1) SCC 555], the Supreme Court reiterated yet again that a Hindu idol is a juristic entity capable of holding property and of being taxed through its managers who are entrusted with such duties.

So far so good, but we now face a fundamental difficulty: how do we take a 2500 km long river and make a 'person' out of it? The Supreme Court has given us the necessary ideological construct to justify this piece of legal jugglery. In *Ram Jankijee Deities & Others v. State of Bihar* [1999 (5) SCC 50], the Supreme Court more or less endorsed the hardcore Hindu mind set:

*"Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. A Sayambhu or self-revealed image is a product of nature and is ... without any beginning and the worshippers simply discover its existence".*

In effect, this means that a river for instance is holy before the beginning of time and humans have merely stumbled on something self-evident. In this view of the matter, the Uttarakhand High Court didn't give us anything, it merely stated the obvious.

At one level, river or idol, all artificial persons are made equal because they are after all only ideological constructs. Indeed, the idea of a 'real person' is itself an ideological construct. In history, we have had legal systems where real 'touch and feel' human beings were not legal persons. For example, in Roman and French colonial law, a slave was never a person. This was also true in America till slavery was abolished. Conversely, even societies that pay little if any heed to religion have recognized a multitude of imaginary secular 'things' as real persons. What is a company but words on paper that exists an entry in a register in some government office somewhere? What is a Hindu joint family but an emotional construct in the minds of blood relatives? What are charitable trusts but the benevolent fantasies of the dead? Yet all these are legally real entities even though they are not real people. This brings us to the heart of the real issue. If you stop to think about it, human beings are all committed irrevocably to 'imagined realities'. The Gods, Hindu Karma, Christian Charity, Original sin, Bhakti, Nirvana ... you name it. If the Indian Evidence Act is the standard of proof required to make something real, none of these ideas can be proved to a standard that a court could accept. Indeed, if the Indian Evidence Act is the standard of proof, the concept of human rights, justice and fair play are all imagined realities. Yet, from this reality comes the judicial system, however, imperfectly it administers its own mandate. That being the state of the art, there is no special reason why a river should be less a pretty lady and more a bulk of water seeking the lowest point in the landscape to flow through.

This brings us back to the judgment of the High Court. The saga began when some persons encroached along the right bank of the Shakti canal in the Kulhal District of Dehradun and started raising a building. Neighbors complained. The administration acted but it was unclear if this land fell within Uttarakhand or was a part of Uttar Pradesh. The dispute ultimately negotiated the labyrinth of India's judicial system and came to rest in the High Court. The Court took the view that Indians have deep veneration for the Ganga and the Yamuna, which rivers have provided both physical and spiritual sustenance to all of us from time immemorial. For this reason, they must be recognized as living persons, especially in view of Articles 48A and 51A (g) of our constitution. In conclusion, the court declared the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as persons in loco parentis (meaning "in place of the parents") as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries.

The real question though is the impact of this judgment. What happens if an imagined reality becomes a real person? For a start, it invokes the power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. Thus, the court has now obliged the state to protect the rivers. Does this advance the cause of environmental protection in India?

I don't see how. It's not as if India's degraded environment had no parent till this judgment came along. The Uttarakhand Environment Protection and Pollution Control Board (UEPPCB) is a statutory Organization constituted under the section 4 of Water (Prevention and Control of Pollution) Act, 1974 to implement environmental laws and rules within the jurisdiction of Uttarakhand. It's their job to keep the rivers clean. When it comes to encroachment, the Uttarakhand Urban and Country Planning and Development Act, 1973 sends anyone encroaching on public land to jail for a year with a fine of twenty thousand. It also authorizes the authority under the Act to remove the encroachment. To put it quite bluntly, I do not see how making a new bunch of officers responsible for fixing an old problem changes anything of the nature of the problem.

This brings me to the two thoughts I have on this issue. First, I am gravely concerned with issues around materiality. I have argued in the past that Indian courts assume jurisdiction orders of magnitude beyond the powers that were conferred on them when their existence was conceived. Thus I have argued in '**Invisible Elephant in the Court Room**' that it is not for courts to expend their energy rendering judgment on the legality of bull taming, anthem standing and santa-banta joke telling. Departments already exist to protect rivers, keep waters clean, prevent encroachments, and so forth. If citizens flout the law and the government watches immobile, laws also exist to move the courts to make governments do their job. These prerogative writs are well known and frequently employed to excellent effect by the courts. In the circumstances, there is little benefit in creating new judicially imagined realities that do nothing to advance the

cause of the issue at hand. In India, this above all is true: when we confront a problem, we deny that we are poorly administered. Instead, we pretend the law is inadequate and set out to create another law which inevitably is just as ineffective no matter how effectively it is drafted. We need to recognize that it's rarely the law: it's the attitude of its enforcers. If we want to change behavior, we have to change incentives, not switch enforcers.

My second thought is a national reality we need to confront. We are a nation of grandstanders who engage in endless pulpit oratory and 'tokenism'. If we want to clean up our country, it doesn't strike us that organization, process and best practice is quite the way to go. Instead we think the best way to do it is to hand a broom to every celebrity we can find and have them mill about on a pleasant Sunday winter afternoon amidst leering bystanders fighting to get into the TV frame. It's not entirely different with the courts. Importing Hindutva into what is above all a management challenge of managing municipal and industrial waste is erudite spin unlikely to address the issue. The Pollution Board must by law clean water bodies whether they provide us spiritual sustenance or not. The Ganga is beautiful even if she isn't a full bodied goddess. Engaging in literary flourishes may excite the press, but it does not do enough to advance the debate or resolve the issue at hand.

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