Indian Institute of Insolvency Professionals of ICAI (IIIPI)
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CASE UPDATES

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1. **Essar Steel India Ltd, Gujarat HC:** Filing of application under section 7 of the IBC itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the debtor company - RBI is authorised to direct any banking company to initiate insolvency resolution process – Adjudicating authority (NCLT) cannot be considered as mere rubberstamp authority at the hands of RBI or any other institution - Banking Company is entitled to initiate insolvency proceedings without the directions of the RBI u/s 35AA of Banking Regulation Act.
2. **Essar Steel India Ltd, NCLT-Ahmedabad:** The order of admission of an Application for initiation of Corporate Insolvency Resolution Process is a judicial order which should be according to the provisions of the Code, principles of natural justice, and taking the consequences of the order into consideration - The Code enjoins upon this Authority (NCLT) to declare Moratorium; to make public announcement of initiation of Corporate Insolvency Resolution Process; and to appoint Interim Resolution Professional on the date of commencement of Insolvency Resolution Process as Rule and the exception is differing the appointment of Interim Resolution Professional to some other date that depend upon the facts of the case.
3. **Schweitzer Systemtek India Private Limited, NCLT-Mumbai:** Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor - The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor.

HIGH COURT OF GUJARAT
Essar Steel India Limited & 1....Petitioner(s)
Vs.
Reserve Bank of India & 3....Respondent(s)
Special Civil Application No. 12434 of 2017
Date of order : 17/07/2017

Section 35 (AA) and (AB) of the Banking Regulations Act, 1949 read with Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 and Article 14, 19 and 226 of the Constitution of India – Power of Reserve Bank of India to give Directions

The petitioner Essar Steel India Limited has invoked jurisdiction of the Court under Article 14, 19(1)(g) and 226 of the Constitution of India in the matter of the provisions of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by challenging the Decision of the Reserve Bank of India (in short 'RBI') vide their Press Release dated 13.06.2017 directing banks to initiate proceedings against 12 Companies including the Petitioner under the Provisions of IBC and the decision of Consortium of Lenders to initiate Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 and failure of the Consortium of Banks led By State Bank of India (in short 'SBI') to implement the package of debt restructuring approved by the Board of Directors of the Petitioner – Company.

The Gujarat High Court held as under:

Filing of insolvency proceedings would be a decision of the concerned person, who is entitled to file such application and, therefore, to that extent, it cannot be said either respondent No. 2 (SBI) or 3 (SCB) can be restrained from filing such application in accordance with law.

It is undisputed fact that filing of such application itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the company, which is requested to be taken into insolvency by any such person. Therefore, the adjudicating authority being NCLT herein, which is constituted in place of the Company Court, needs to decide on its own based upon factual details that whether the insolvency petition is required to be entertained as such or not.

For the purpose, adjudicating authority, certainly requires to extend hearing and reasonable opportunity to the company to explain that why such an application should not be entertained. In other words, filing of an application may not result into mechanical admission of application as seen and posed by RBI in impugned press release. It would be a decision based on judicial discretion by the adjudicating authority to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it.

Then, remains the only issue that whether RBI is empowered to publish press release dated 13.6.2017 or not. So far as directions to the Bank to initiate insolvency proceedings against companies, which are in debt to certain level or extent, the amended provisions of the Banking Regulation Act, 1949 in the form of Sections 35(AA) and (AB), certainly makes it clear that, now, RBI has such powers to issue certain directions to certain Banks and banking companies so as to see that there is proper recovery of public money or for any other such purpose. Therefore, the issuance of press release alone, cannot be quashed and set-aside.

The issue that remains is now limited to the scrutiny that whether such press release is in accordance with law and whether it results into infringing any fundamental right of anybody, more particularly, present petitioner and whether it is arbitrary, discriminatory and without applying proper provisions of concerned law.

The bare reading of Section 35(AA) makes it clear that the RBI is authorised to issue directions to initiate insolvency resolution process in respect of a default, and explanation makes it clear that the default has the same meaning as assigned to it in Clause (12) of Section 3 of the Insolvency and Bankruptcy Code, which means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor as the case may be. Therefore, when it is undisputed fact that the petitioner company has not paid its debt to the tune of more than Rs.32,000 Crores at the end of 31.3.2017 and when total debt is more than Rs.45,000 Crores, it is clear and obvious that RBI is authorised to direct any banking company to initiate insolvency resolution process.

When RBI has categorically confirmed that their decision is based upon the advise received from their Internal Advisory Committee, and more particularly, when decision is to the effect that the companies which have outstanding debt with more than 60% non-performing accounts for more than a year beyond Rs.5,000 Crores, the concerned Bank should initiate insolvency proceeding at the earliest. It cannot be said that there is classification of companies in any nature whatsoever. So far as identifying disclosure in paragraphs 3 and 4 of press release dated 13.6.2017 as classification is concerned, in fact there is no classification because in paragraph 4 also, it is stated that for rest of the companies against whom advise is issued for initiating insolvency resolution proceedings at the earliest, wherein petitioner No.1 includes the concerned Banks, which finalised a resolution plan within six months and if resolution plan is not agreed upon by companies within six months, then in those cases also, Banks are required to file insolvency proceedings. Therefore, practically, there is no classification, but only time schedule is given that companies whose debt is more than Rs.5,000 Crores, which is totaling 25% of current gross NPA of the country, insolvency proceedings need to be initiated at the earliest and in rest of the companies, if resolution plan could not be finalised within six months, then, insolvency proceedings should be initiated. Therefore, there is no direction that insolvency proceeding is to be initiated only against particular company(ies) and not to be initiated against any particular company(ies). It goes without saying that any action is to be started with someone and may not lie against all at the time. It also goes without saying, as already recorded herein above that for filing any such proceeding, none of the financial company or Bank requires either the permission or direction from RBI for other agency or authority because it is their independent and absolute right to initiate any such proceeding/s. Therefore also, when respondents No.2 and 3 can initiate insolvency proceedings irrespective of any such directions, either by RBI or by any other authority, it cannot be said that direction by RBI or filing of petition by respondents No.2 and 3 is unwarranted or arbitrary. However, as already discussed herein above, filing of petition is different from admitting or allowing the petition and to that extent, this Court has issued notice to ascertain, affirm and reconfirm the position that it would be solely at the discretion of the adjudicating authority either to admit the petition and to proceed further in accordance with law or to refuse to admit the petition. It is also clear that such decision of the adjudicating authority, would be a judicial determination and, therefore, such authority has to deal with the rival submissions and factual details on the subject before taking any decision. Thereby, such adjudicating authority cannot be considered as mere rubberstamp authority at the hands of RBI or any other institution. In view of above facts, the petition needs to be disposed of with certain observations when petitioner is not entitled to any relief/s as prayed in this petition.

When petitioner has not challenged the provision of Insolvency and Bankruptcy Code, I have not to deal with such issue at this stage except to dispose of this petition, more particularly, when there is no scope of granting interim relief in favour of the present petitioner. Refusal of interim relief is obvious because petitioner company is in debt of more than Rs.45,000 Crores for couple of years, its NPA was more than Rs.32,000 Crores in last year and more than Rs.31,000 Crores in previous year. It is also clear that when total debt is more than Rs.45,000 Crores, there is no option, but to leave the issue at the discretion of the lenders to take appropriate steps in accordance with law, thereby, without interference of this Court under the constitutional mandate. However, at the cost of repetition, it is made clear that factual details and on-going process of restructuring plan and other details would be taken care of by NCLT before taking any decision on merits.

Conclusion:-

(A) The Respondent No. 1 RBI has to be careful while issuing press releases; it must be in consonance with the Constitutional Mandates, based upon sound principles of Law, but in any case should not be in the form of advise, guidelines or directions to judicial or quasi-judicial authorities in any manner what so ever.

(B) Since the press release is referring the earlier press release dated May 22, 2017, and since in such press release there is reference of S4A - Scheme for Sustainable Structuring of Stressed Assets, which is also introduced on the same day i.e. 13.6.2017; it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination. It is quite clear and obvious that Court has to see that there is no arbitrariness or discrimination by State or its authorities.

(C) It cannot be held that directions under reference is in nature of classification or such classification is irrational, unjust, arbitrary or discriminatory; but it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination..

(D) It cannot be held that Banking Company is not entitled to initiate insolvency proceedings without the directions of the RBI u/s 35AA of BRA.

(E) It cannot be held that directives of RBI under reference by impugned press release is binding upon SCB and therefore SCB is bound to consider the restructuring proposal by the petitioner, wherein petitioner has offered to start payment of dues only after 25 years and that too only with 1% interest.

(F) Only because SCB has corresponded to SBI for its proposal with reference to JLF activities, it cannot be held that SCB could not have initiated insolvency proceedings but it has done it only because of RBI guidelines by way of press release.

(G) Provisions of IBC may be drastic to some extent, but since it is part of statue which is yet not declared unconstitutional and therefore they are to be followed, but in consonance with Constitutional mandate by all concerned i.e.

(1) Not to act upon it mechanically and that all provisions may not be treated mandatory but it could be treated directive only based upon facts, circumstances and evidence available before the authority (judgment dated 1.5.2017 in Company Appeal (AT) No.09 of 2017 between J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Company by the National Company Law Tribunal);

(2) Without being guided by any advice or directions in any form or nature viz: impugned press release. There is reason to say so because RBI has tried to do so and changed its document when called upon to explain their stand; and

(3) Thereby it is obvious that adjudicating authority may though proceed in accordance with Law, there should not be undue pressure on it by administration and period of pendency of present petition can certainly be considered as reasonable ground to count the time limit from the date of receipt of writ of this order.

(H) So far factual details of Petitioner Company with reference to its activities and exercise of restructuring through JLF is concerned, it would be appropriate not to enter into any determination on such point since that would be the subject matter before the Adjudicating Authority under IBC (i.e. NCLT) and therefore it is left open for it to consider it for its determination in accordance with Law, to avoid any prejudice to either party by discussion and determination on any such issue at this stage by this Court, where core issue is whether there is reasonable classification by the RBI and not that whether insolvency proceedings should be admitted or continued or not.

(I) For the same reason, issue of suppression of material facts or false statement is not much material at this stage because to decide that information or fact if at all suppressed or false is whether material or not would require same exercise and that may prejudice either side. Moreover, petition can be disposed of even without determining such issue and therefore no determination is required on such issue.

(J) Pursuant to decision in **Ionic Metalliks v. Union of India, reported in 2015 (2) GLH 156**, no writ can be issued against SCB and therefore petition stands dismissed against Respondent No. 3/SCB. Factual details between the Petitioner and SCB has been avoided to be discussed further because this Court has not to decide the validity or proprietary of action by SCB against the petitioner when petition by SCB against petitioner is pending before the NCLT and therefore discussion and determination on factual issues may prejudice either side.

Bench	**National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad**
Financial Creditor	State Bank of India / Standard Chartered Bank
Corporate Debtor	Essar Steels Ltd. / Essar Steels India Ltd.
Amount in Default	45000 Cr.
Date of Order	02-08-2017
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 and 9 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Financial Creditor
Facts of the Case	State Bank of India (SBI) and Standard Chartered Bank (SCB) initiated Corporate Insolvency Resolution Process (CIRP) under section 7 of the IBC against the respondent corporate debtor/Essar. The case of the ESSAR is that: • The operations of the ESSAR are very complex involving large number of stakeholders including suppliers, creditors, employees, promoters, customers, Government exchequer over and above the financial creditors. • ESSAR is on the path of improvement to carry on the operations at 80% capacity. • Debt Resolution Process was undertaken and there were discussions between the Lenders and ESSAR till 13th June, 2017 on the day on which Reserve Bank of India (RBI) issued a Press Release. • that the directions given by RBI to SBI triggered the reference before National Company Law Tribunal. According to ESSAR, Resolution Process has two risks. First, the process of formulation of Debt Resolution Process will have to be reinitiated and further time will be lost due to fresh start. The second one is potential risk to the operations and value of the Company under the hands of IRP.

	• ESSAR also stated that if the Company is in the hands of IRP who is an individual person it is difficult for him to oversee such complex operations in a short period of 180 days. • Further, the funding supported by the creditors and suppliers which were available to the Company under the stewardship of Board of Directors and promoters may not be available to IRP. According to the ESSAR, promoters, lenders, employees, creditors, suppliers, customers have invested time, efforts and resources to revive the Company and implement a satisfactory Debt Resolution Plan and if at this stage the Insolvency Resolution Plan is invoked it would adversely affect the interest of the Company and all its stakeholders. • It is further stated that in view of Section 13 and 16 of the IBC, the appointment of IRP shall be made only after the admission of the petition within 14 days. • Further, there are 4500 people working in the Company and all would be affected in case of commencement of Insolvency Resolution Process. • That National Company Law Tribunal has got discretion not to admit the petition in view of language used in Section 7.
Decision of the Tribunal	There is no dispute about the proposition of law that in order to give appropriate meaning to the words "may" and "shall" used by the Legislature, the intent of the particular enactment and the attendant circumstances must be taken into consideration. This Adjudicating Authority is of the view that the order of admission of an Application for initiation of Corporate Insolvency Resolution Process is a judicial order which should be according to the provisions of the Code, principles of natural justice, and taking the consequences of the order into consideration. Therefore, there this Adjudicating Authority shall exercise its discretion in either admitting or rejecting the Insolvency Resolution Applications. It is needless to say that discretionary power has to be exercised in a judicious manner taking into consideration all the facts and circumstances of the case, the provisions of the applicable laws and the object of the Insolvency and Bankruptcy Code. This Adjudicating Authority shall look into the aspect of the occurrence of default, and, while doing so, shall take into consideration various factual and legal pleas raised by both parties in order to record its satisfaction. Therefore, the argument that the word "may" in Section 5(a) shall be read as "shall" and therefore it is mandatory on the part of the Adjudicating Authority to admit all the Insolvency Resolution Applications filed by the Financial Creditors, if they are complete, do not merit acceptance. In the case on hand, from the material placed on record by SCB and SBI, it is clear that it is established that ESSAR has committed default in repayment of financial debt to SCB and SBI. The Applications filed by the SCB and SBI are complete in all respects. As can be seen from the Written Communications of proposed Interim Resolution Professionals filed by the SCB and SBI, no disciplinary proceedings are pending against them. Whether Debt Restructuring Process or Debt Restructuring Plan is going to absolve the ESSAR, Corporate Debtor from the Insolvency Resolution Process? From the material placed on record, it is in the year 2014 that Debt Reconstructing Process commenced. For one reason or the other, the Debt Reconstructing Process has not been finalised till today or till the date of filing of the Applications. It is not a case where ESSAR owed monies to Lenders in the previous year. The Lenders are there from the beginning of the ESSAR Company. As contended by ESSAR there are several reasons that prevented it from discharging the debts. No doubt, there are no allegations of siphoning of funds, diversion of funds or fraud. But, the fact remains that except showing a little progress in the last financial year, there appears to be no scope for the ESSAR to repay its debts till 25 years or in a span of 25 years. Therefore, the Debt Restructuring Process, which is going on for the last two years, may not be a factor not to enter into Insolvency Resolution Process. It is pertinent to mention here, that even in the Corporate Insolvency Resolution Plan, Debt Restructuring Plan can be taken into consideration by the Committee of Creditors as one of the Resolution Plans, if submitted by any of the Resolution Applicants. Therefore, commencement of Insolvency Resolution Process cannot be construed as putting an end to the Debt Restructuring Process which has been commenced. The apprehension of ESSAR, that, to again start Debt Restructuring Process would consume lot of time, appears to be not acceptable for the reason that Insolvency Resolution Plan is a time bound programme. There is no scope for the stakeholders to prolong the process without taking a decision and without finalising the Resolution Plan. Therefore, on the ground that when a Debt Restructuring Process is going on there is no need to commence the Insolvency Resolution Process under the IBC does not hold the field. If Insolvency Resolution Process is commenced by appointing Interim Resolution Professional, no doubt the Board of Directors would be suspended. That does not mean the entire machinery of the Company is suspended. Even after appointment of IRP, all the employees of the Company, top to bottom, would continue to function under the control of IRP instead of the Board of Directors. Therefore, the apprehension of ESSAR that suspension of Board of Directors may cause prejudice to the interest of the Company and the stakeholders may not be correct. The Object of the IBC is to chalk out a Resolution Plan to revive the Company, but not to liquidate the Company straightway. It is needless to say that a company like ESSAR need not be liquidated and there are several other alternatives to revive the Company. If all the eligible Creditors sit together; evolve a Resolution Plan, it would help not only the Company, its stakeholders, Steel Industry, and ultimately the economy of India. In chalking out such Resolution Plan, mainly the Lenders, must sacrifice to a great extent which makes the Company to revive. If a Resolution Plan is chalked out with such objectives in mind, the Resolution Plan will certainly help the Company and it would come out of the present situation. Therefore, as opined by the Hon'ble High Court of Gujarat (in Essar Steel India Ltd. Vs. RBI & others, Special Civil application No. 12434 of 2017), taking all the material facts, and the Debt Restructuring Plan, and the objects of the 1B Code, into consideration this Adjudicating Authority is of the view that it is only the Resolution Plan that would make the ESSAR Company survive which course would safeguard the interest of all the stakeholders of the Company. Therefore, there is no need for an apprehension that Resolution Plan is going to be detrimental to the interest of the Company. The finding of this Authority, after taking into all factual aspects, the complex activities of ESSAR, the ongoing Debt Restructuring Process, is that both Applications merit admission. In view of the above discussion, this Adjudicating Authority is of the considered view that the Applications filed by the SCB and SBI are complete, there is occurrence of default in respect of financial debts, and there are no disciplinary proceedings pending against the Insolvency Resolution Professionals proposed by both the Applicants, i.e., SCB and SBI. Hence, this Adjudicating Authority is hereby admitting both the Applications filed by SCB and SBI. Whether there is no need to appoint Interim Resolution Professional on the same day on which date admission order is passed and it can be passed within 14 days of the admission of the Applications? In case of admission of an Application under Section 7 of the Code, the Corporate Insolvency Resolution Process commences.

	Section 13 of the code says that after the admission of the Application under Section 7, the Authority shall declare moratorium, cause public announcement of initiation of Corporate Insolvency Resolution Process, and call for submission of claims under Section 15 of the Code, and appoint Interim Resolution Professional in the manner laid down in Section 16. No doubt, a reading of Sections 13, 14, 15 and 16 (1) of the Code goes to show that Adjudicating Authority need not appoint the Interim Resolution Professional on the same day on which Application under Section 7, 9 or 10 is admitted. But, there is no provision which bars the Adjudicating Authority from appointing Interim Resolution Professional on the same day on which the admission order was passed and simultaneously with the admission order. In an application filed under Section 9, in case if the Operational Creditor did not give the name of the IRP, then the Adjudicating Authority, availing the 14 days' time provided under Section 16(1), can appoint the Interim Resolution Professional within 14 days from the date of admission order. Suppose in a given case there is some omission in the Written Communication or there is some difficulty in the appointment of the recommended IRP, in such Cases the Adjudicating Authority may appoint IRP even in an application under Section 7 not on the date of order of admission, but on a subsequent date, but before 14 days from the date of admission. Therefore, there must be facts and circumstances that warrant the Adjudicating Authority to defer the appointment of IRP in an application filed under Section 7 of the Code. In the case on hand, no such circumstance exists which warrant deferring the appointment of Interim Resolution Professional to some other date but not on the date of admission order. No two stages or no two separate hearings are contemplated under the Code, namely, the first stage is admission and the second stage is appointment of Interim Resolution Professional. The object of the Code is to complete the entire process in a time bound programme. When such is the object of the Code, without any compelling circumstances, there is no need to defer the appointment of Interim Resolution Professional only to give an opportunity to the Corporate Debtor to agitate the decision of this Adjudicating Authority twice in two Appeals. The Corporate Debtor is entitled to prefer an Appeal against the order of admission and also against the appointment of Interim Resolution Professional. If both the orders, namely admission order and the order appointing Interim Resolution Professional are made separate, then the Corporate Debtor will file two Appeals at two stages and thereby gain more time, which is not the object of the Code. Therefore, the Code enjoins upon this Authority to declare Moratorium; to make public announcement of initiation of Corporate Insolvency Resolution Process; and to appoint Interim Resolution Professional on the date of commencement of Insolvency Resolution Process as Rule and the exception is differing the appointment of Interim Resolution Professional to some other date that depend upon the facts of the case.

Bench	**National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai**
Corporate Debtor	M/s. Schweitzer Systemtek India Private Limited
Financial Creditor	Phoenix ARC Private Limited
Amount in Default	4.69 Cr.
Date of Order	03-07-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant
Facts of the Case	The main issue before the Tribunal was that "whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium? In the instant case the personal properties of the promoters have been given as security to the banks while taking loans.
Decision of the Tribunal	This code of 2016 has prescribed certain limitations which are inbuilt and must not be overlooked. The "Moratorium" indeed is an effective tool, sometimes being used by the corporate debtor to thwart or frustrate the recovery proceeding. The plain language of the Section 14 is that on the commencement of the Insolvency process the **'Moratorium' shall be declared for prohibiting any action to recover on enforce any security interest created by the Corporate Debtor in respect of "its" property.** Relevant section which needs in-depth examination is section 14 (1) (c) of The Code. There are recognised canons of interpretation. Language of the Statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. **Rather in this Section the language is so simple that there is no scope even to supply 'casus omissus'. I hasten to add that the doctrine of ' Noscitur a Sociis' is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted.** As a result, "its" denotes the property owned by the Corporate Debtor. **The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium.** Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that section 10(3) has specified that the Corporate Applicant shall furnish "its" Books of Accounts. This Bench has no legislative authority to expand the meaning of the term "its" even under the umbrella of 'Ejusdem generis'. The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding Debt, which is not the subject matter of this Bench. **Before I Part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned Debtor, otherwise not.** The Application under section 10 of the Code is hereby "Admitted".

Hope you find this Update helpful.
Suggestions if any, may be mailed to ipa@icai.in