

Insolvency and Bankruptcy Code- A Paradigm Shift

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ABSTRACT

Insolvency and Bankruptcy Code (IBC) came into force due to some basic and primary reasons: - rushing of Non-Performing Assets/loans (NPA) and highly leveraged companies' issues or it can be said indebted companies arising issues. Presence of various actions taken by the administrative agencies when it acts like a court and multiplicities of laws have contributed in providing no longer use of debt recovery's entire process. The broken laws or legislations do not help any moneylender to reshuffling of the defaulted assets which creates problems for the credit system entirely. To overcome such issues which were rising and the debate occurring around credit system delivery a ray of hope was brought by the Insolvency and Bankruptcy Code, 2016 in India. For the debt recovery law, it brought the paradigm shift and also restricted many old law-making in history books. With the introduction of the Insolvency and Bankruptcy Code, the creditors were safeguarded in a timely bounded manner. As the code came in role it promised to be the game changer as it focus on the issues of resolving credit ecosystem, creditors and debtors issue and correctly identifying the stakeholder, dealing with NPA's, settlement of credit disputes, lowering the suspicions of creditors and guaranteeing proper working of companies rather than shutting down due to debts proper working of code and benefiting through it requires proper implementations of provisions specially for adjudicatory powers. These challenges need to be overcome for proper functioning. Tackling the hurdles such as logic, legal and procedural leads to a bright future.

Key Words: Non-Performing Assets/loans (NPA), Creditors, Credit system.

INTRODUCTION

India is considered to be a developing country from a long period of time. But economically it hasn't been developed till date. For economic development of a country any country's legal domain plays an essential role. If a country's legal domain is sturdily constructed and executed in a proper manner then certainly the country will be economically stronger and globally enriched. Whereas, India is falling down in terms of corporate economy

development in world global trends. It has been a global issue as the need of an hour to improvise the business regaining laws and insolvency. Even at global level numerous jurisdictions are showing diligence towards law governing creditor operating authorities and business rescue to uplift financial stability, economic development and even to put a stop or avert dropping of jobs with refinement in the handpicked jurisdictions to strengthen well organized insolvency and business regain policies. The Insolvency and Bankruptcy Code, 2016 brought about a paradigm shift in the retrieval of stressed assets by establishing a new idea in place of “Debtors in possession” replacing it with “creditor in control.”

Over the period of time financial, corporate, sale of goods and service tax these things had become ancient, as a result of which it had retarded the expansion and evolution of the corporate and financial system. But after 2014 India had observed noticeable development in corporate sector with regard to lawful, procedures and formalistic application. Insolvency and Bankruptcy Code had furnished with integrated procedure for settling corporate insolvency in India. It seeks to persuade efficiency inside insolvency and bankruptcy law authorities by distinguishing commercial and judicial characteristics of insolvency and bankruptcy procedure.¹ Insolvency and Bankruptcy Code is based on firstly a regulatory body i.e. Insolvency and Bankruptcy Board of India secondly on a unified adjudicatory authority i.e. National Company Law Tribunal thirdly, on insolvency expertise and lastly on information utilities. IBC had reconstructed the ancient technique of dues resolutions for becoming well organized and productive. The code had consolidated legal infrastructure concerning to liquidation, replenishment and improving the shortcoming commercial bodies. IBC had signified the divergence from ancient perspective of debtor in ownership to newer outlook of creditors in ownership.²

INSOLVENCY & BANKRUPTCY

Insolvency and Bankruptcy are like two sides of a same coin, concept comprehension of these two is vital as well as crucial as this two are identical but yet having diverse meaning. Frequently people assume Insolvency and Bankruptcy as a same thing but although they are

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¹Ankeeta Gupta, Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India, 2018, Vol. 36, No.2.<https://rauli.cbs.dk/index.php/cjas/article/view/5650/6293>

²Deepak Jain, The Insolvency and Bankruptcy Code, 2016 – An Analysis and Op-portunities for Professionals under the Code, 2017, p. 39.

different. Insolvency it is stated as a financial state i.e. it is when one is not able to pay off the debts within the time period whereas Bankruptcy is stated as a legal affair which set out motive of settling matters of Insolvency.

- **INSOLVENCY**

Insolvency is the state or situation of an individual or company from where they are not able or they lack the power (i.e. liability of a person exceeds its asset) of repayment of the debts. Insolvency prompts an individual to announce them bankrupt lawfully in such condition the flow of the money is constantly decreasing. In technical terms insolvency is state where a person's financial state value of entire asset exceeds its liability. If the dues of loan are not repaid then, asset of such individual can be sold in sale. And the reasons for insolvency are bad dues, lack of proper management and finance.

- **BANKRUPTCY**

Bankruptcy is legalized declaration of a person's inefficacy to recompense otherwise it is a condition where the court of law of competent jurisdiction had the authority to officially announce an individual or the company insolvent. Whenever an individual files for bankruptcy then that person is under obligatory duty to repay the dues by assistance of the government. There are two types of bankruptcy firstly reorganization bankruptcy in which the debtors reorganise the repayment idea and second form is liquidation bankruptcy in which the debtor put his assets on sale or auction for the purpose of recompense.

HISTORICAL BACKGROUND

In India, multitudinous laws were enacted in regards to assign egalitarianism to the creditors, straight forwardly and clear-cut well timed and thus for vice versa too for debtors. In situations where one is not able to pay off the debts like the company, enterprises or organisation. There are laws governing all jurisdictions with three types of lawful policy for creditor and debtors.

- The groups of creditors apply imposition or foreclosure of debt.
- Corporate debtor's liquidation and handling out left over's to creditors.
- Improvement of business as ongoing disturbance.

Point one denote procedure of debt recovery's extent and the second and third bullet point enclosed by extend of procedures of corporate insolvency. Recovery of debt due by group of creditors or individual creditor using a tool which is referred as debt enforcement by imposing pledge against loan. Whereas, with the procedure of corporate insolvency is a collaborative process which handle adverse situation of company and even affects shareholder's right. India has a very complex legal structure and even it is multidimensional including an association of communal debt enforcement and insolvency laws.

India had uncertain differences of owing mixed statutes for resolving insolvency and bankruptcy cases. Over decades the Presidency Insolvency Act of 1909 and Provincial Insolvency Act 1920 had tackled the insolvency and bankruptcy business affairs. Eventually these enactments were removed and restore by statutes. Rules relating to bankruptcy and insolvency for financial firms and companies were established in Sick Industrial Companies Act 1985, Recovery of Debt Due to Bank and Financial Institutions Act, 1993(RDDDBFI), Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 and Companies Act 2013.³ Earlier the court of law was held accountable as individual person or independent company insolvency and bankruptcy was handling according to the following amendments of Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act 1920. Even the Reserve Bank of India had timely launch numerous statutes for decreasing the occurrence of lapses of debts as a result of which NPAs purpose was of registering the loan amount. And these measures comprise of Corporate Debt Restructuring scheme a Joint Lenders Forum with calculated dues organize properly and sustainable assembling of stressed assets. In Sick Industrial Companies Act 1985 (SICA) is termed as one of the vital statutes as it was appropriate for bankruptcy and insolvent company where as the other statutes were simply supplementary derivatives.

Sick Industrial Companies Act 1985 (SICA) was outcome of Mr. T. Tiwari committee composed by RBI, which had recommended the robust mechanism which was needed to restore the sick industry company. Whose jurisdiction comprise of industrial companies which were accommodated in first schedule of Industries Act 1951 and government-oriented company. It was the obligatory duty of communicating the detail of sickness to Board of

³ Pramod Rao, Critique of the Insolvency & Bankruptcy Code, NLS Business Law Review, 2016, vol.2.p.2. https://www.insolindia.com/uploads_insol/resources/files/critique-of-ibc-by-pramod-rao-1040.pdf(accessed on 29 September 2020)

Industrial and Financial Reconstructions was placed on sick companies' director. Recovery of Debt Due to Bank and Financial Institutions Act, 1993(RDDBFI) was established as the sector of banking require some exclusive laws concerning about loan due to financial institutes. The sector of banking formulates the chief support of corporate economy and therefore it cannot be presumed to work in absence of sufficient money.⁴ The purpose to formulate the act of 1993 (RDDBFI) was speedy reclamation of the loans due to the bank, the entire Act of 1993 was absolutely Code within itself except to the extent of retaking of dues by financial organization are concerned.

While surveying what are needs of fresh enactment it was perceived that the aim of the earlier act of 1985 and 1993 was to improve the sick companies and resolve the loan due to bank and other organizations but not various improvement were done and during the entire procedure a shielding was formed so that the creditor fall short to notice their dues from debtor.⁵ Therefore, this lead a path for NPAs to begin non-productive which subsequently degrade the balance sheets of bank.

NECESSITY OF INSOLVENCY & BANKRUPTCY CODE

As there was not a single law in India which would appropriately deal with insolvency and Bankruptcy as earlier the individual and companies liquidation were dealt by numerous laws such as Presidency Towns Insolvency Act 1909, Provincial Insolvency Act 1920, Sick Industrial Companies Act, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, Recovery of Debts due to bank and financial Institutions Act ad Companies Act of 2013.⁶

This conduct guide to a crisscrossing jurisdiction of divergent authorities such as Board of Company law, Board for Industrial and Financial; Reconstruction (BIFR), Debt Recovery Tribunal and court of competent jurisdiction like HC, SC as well. Thus, this crisscrossing jurisdiction and abundance of statutes had made the procedure of insolvency resolution unmanageable in India. The survey conducted by World Bank Data states that it would take on average 4.3-year duration to fetch up any company in India. And it is effortless to begin a

⁴G.S. Dubey, An Introduction to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – A Study'. Chartered Accountant Practice Journal, 2013, p.692.

⁵S.S. Srivastava and R.A. Yadav, Management and Monitoring of Industrial Sickness,1986.

⁶Abhishk, Insolvency and Bankruptcy Code.<http://www.legalserviceindia.com/legal/article-2821-insolvency-and-bankruptcy-code-smart-notes-with-procedure-and-judgments-.html>(accessed on 30/09/20)

business rather than to leave it. And the contemporary Insolvency and Bankruptcy Code 2016 seeks to cut it to one year. In 2014 in accordance to World Bank Data India was on 130th rank and after the implementation of the IBC India ranked 70th.

The fresh Insolvency & Bankruptcy Code seeks to assist the creditors and banks from recuperate their debts from the bankrupt companies in prompt and well-mannered way.

INSOLVENCY & BANKRUPTCY CODE, 2016

Designated, code intend at conducting the paradigm shift in India's Insolvency and bankruptcy legislation. In order to analyse or determine the favourable outcome of the laws a discussion is required on features, constitutionality, and objectives of statute / enactment.

IBC 2016 is bankruptcy law of India which seeks to strengthen the existing framework by formulating a sole law for insolvency and bankruptcy. The code of 2016 is regarded as most vital and essential improvement in the history of Indian economy. The code was enacted for reconstructing insolvency resolving of corporate individual, company and many others in a fixed time period for expansion of value of assets of these people. IBC settle the claims including insolvent individual or company and this was the deliberate intention to address the complex loan difficulties which were damaging the banking system. The IBC in these few years had pay off in a grater action from protecting the corporate from backsliding on their debts. The code procedures had altered the debtor-creditor relationship as by these numerous cases had been resolved. IBC foresee categorize of CIRP- Corporate Insolvency Resolution Process by Corporate Debtor, Financial Creditor and Operational creditor.

Insolvency and Bankruptcy Code 2016 is bankruptcy law of India which seek to integrate current structure by formulating sole law for insolvency and bankruptcy. IBC was initiated which amidst numerous refinements incorporated by the government which concentrate on Ease of Doing Business in India i.e. entry, ambit, extent, speed and exit of doing business. In year of 2015's December in Lok Sabha the IBC 2015 was introduced and it was cleared by the Lok Sabha on 5th May 2016 while Rajya Sabha gave it green signal on 11 May 2016. IBC got consent by the President on 28 May 2016. Numerous statues of the IBC became effective on 5th and 19 of August 2016 and the code had been modified several till June 2020. IBC is a sole solution to resolve insolvency which earlier was long time-consuming procedure as well as economically feasible process. Insolvency and Bankruptcy Code was established to

integrate all existing law regarding insolvency and to untangle the procedure of insolvency resolutions.

The entire code is applicable to company registered under Companies Act 1956 and Limited Liability Partnership. Under IBC a financial/operational creditor can commence corporate insolvency procedure against debtor whenever the corporate debtor enacts failure in repayment of the dues. Thus, a financial creditor is not regarded with respect duly, and then he could begin insolvency legal action against corporate debtor. The code set down firm time frame for every procedure of resolution. For productively considering issue of stakeholders, the code had split the creditor into two types firstly Financial Creditors and Operational Creditors.

IBC consist of 255 sections 11 schedules and the code is separated into four major portions mainly Preliminary, Insolvency Resolution and Liquidation of Corporate Persons, Insolvency Resolution and Liquidation of Individuals and Partnership Firms and Regulation of Insolvency professionals, agencies and information utilities. According to the details given by the National Company Law Tribunal (NCLT) cases approx. 19770 are unresolved with NCLT branches which consist of approx. 10000 cases under IBC, 2016.

- Constitutional Law Provisions

The suprema lex of our country, Constitution of India particularizes the methodology in which bankruptcy and insolvency proceeding should be tackled. Insolvency & Bankruptcy laws have been registered in concurrent list given in VII schedule entry 9, Article 246 of Constitution of India. Here the change in law, rules and regulation are handled or operated by both central and state government this power is assigned to them. Thus, India being a federal state division of powers in central and state government exists.

The concurrent list encompasses all subject matter on which central and state government can make body of law. Supreme Court is in power to beat the pertinent clause from the regulation bill. The case of Innoventive Industrial Ltd is termed as landmark case, in this case the constitutional legality of the Code is examined at greater extend, being observed code considered central law win over other surviving laws concerning to insolvency and

bankruptcy. *Innoventive Industries Ltd v ICICI Bank and another*⁷ ICICI Bank had filed a civil suit against the Innoventive for commencing Corporate Insolvency Resolution Process (CIRP) at National Company Law Tribunal Mumbai (NCLT) as the debtor was defaulter as per IBC. Debtor's argument during the legal proceeding was that no dues were lawfully left as according to the Maharashtra Relief Undertaking, 1958 Act⁸ all the liability were eliminated for two years. However, the National Company Law Tribunal Mumbai (NCLT) stated that the provisions of the IBC will be superior to the Maharashtra Act of 1958 as the statute was formulated by the parliament will prevail than those constructed by state authority. Thus, the debtor is considered as defaulter as per IBC. SC during this case confirmed decision of Appellate Tribunal that insolvency appeal is not supposed to be justifiable, similar to the case of erstwhile management company which fasten the beginning of insolvency procedure deprived from right had furthermore it made visible the distinction among operational and financial creditor.⁹

In the case of *Macquarie Bank Ltd. v Shilpi Cable Technologies Ltd.*¹⁰ National Company Law Tribunal (NCLT) was of opinion that appeal ought to be refused because as per section 9 (3) of IBC was not in accordance with, as the Macquaire Bank had not given the certificate from financial institution as needed as per the terms and conditions. And the dues existence was having disagreement according to the Shilpi Cable as the previous legal notice was in accordance to the section 433 and 434 of the Companies Act 1956 which was creating petition responsible to be refused under section 9(5)(ii) of the IBC.¹¹ Hence, the SC agreed with the appeal and stated that demand letter as per section of 9 IBC can be provided by legal practitioner and international financial agencies and they could begin the corporate insolvency resolution mechanism.

- Objective of the code

The code furnishes with a restrictive time procedure to settle the insolvency. Whenever any fault is made in repayment then creditor had the authority above the debtor's assets and he

⁷Civil Appeal Nos. 8337-8338 of 2017.

⁸Section 239 of IBC

⁹Tushar Kaushik, Corporate Insolvency Resolution Process – A Paradigm Shift, 2018.

<https://www.lawbulls.in/readers-submission-corporate-insolvency-resolution-process-a-paradigm-shift/>

¹⁰Civil Appeal No. 15135 of 2017

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<http://www.nishithdesai.com/information/news-storage/news-details/newsid/4417/html/1.html#:~:text=The%20NCLT%20held%20that%20the.in%20its%20reply%20to%20an> (accessed on 30/09/20)

must take a conclude the insolvency in time period of 180 days. To make sure continuous settlement procedure the code grants immunity to the debtors from a firm decision claims of creditor during the course of action. IBC strengthen the statutes of contemporary framework to formulate a common forum for creditor and debtor for all insolvency cases. As per IBC 2016 the creditor as well as debtor both could commence recover litigation among each other. Insolvency & Bankruptcy Code 2016 had strengthened and revises all the existing insolvency statutes in India. The entire code of 2016 had simplified, accelerated lawsuit, safeguard the interest of creditor, restore the company, enhance entrepreneurship, to furnish the creditor with reassurance it had enhanced the credit supply, framed fresh and time bound recuperation process are accepted by banks and financial organisation and increased the value of corporate individual assets as well. Numerous advantages are granted to both creditor and debtor such as power given to creditor are as followed creditors had majority of authority, replacement of management is easy, for NPAs account restrictive time is given with fast solutions, guide the financial organisation and many more. Primacy given to debtors are no litigation charges, less time is required to solve the matter, time bound resolution forcing lenders to take a decisive action, translucent judicial process, easily bring investor and many more advantages are given to the debtor.

- Features of Code

The entire code of 2016 is constructed on four pillars as stated earlier and they are regulator i.e. Insolvency and Bankruptcy Board of India as per section 188. The entire board regulate all the lawfully affairs associated to insolvency. Second pillar is adjudicatory authority i.e. National Company Law and Appellate Tribunal under section 60. Depending upon the territorial jurisdiction the corporate individual would be adjudicated. Third pillar is Information Utilities are storehouse or archive of financial information established under IBC in order to separate irreverent information from insolvency procedure. And the fourth pillar is Insolvency professional are those who watch out the administrative functions of corporate debtor if the adjudicatory authority accepts the appeal for CIRP.¹²

CONCLUSION

¹²Section 3(19) and 207 of the Code.



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IBC 2016 had made noteworthy attempts to renovate the whole Indian credit system by modifying the ancient insolvency procedures. Code of 2016 had given special importance to creditor driven insolvency decision as well as it identify financial failure at early stage only and increase the asset value. The code had made ease of doing business. A unite authority predict a structure and restrictive time procedure for insolvency resolution and liquidation which should subsequently enhance debt recovery rate and strengthen the sick corporate bond market of India.

