INSOLVENCY LAWS IN INDIA

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Insolvency

Insolvency can be defined as when an individual or a corporation, or any other organization is unable to meet its financial obligations or paying debts as and when they are due. It simply refers to a situation where one is not able to discharge liabilities or satisfy creditors, in short, when liabilities exceed assets.

The entity that is in the state of insolvency is referred to as 'insolvent'.

Specific rights are endowed on the creditors which they can opt to exercise against the insolvent company or individual. There is provision where unsettled debts may be paid off by liquidating assets of the defaulting insolvent.

Common Reasons Responsible For Insolvency

There are numerous factors that lead to occurrence of Insolvency, but the most recurrent factors are:

#1. Erroneous Strategies: The main driver of insolvency is usually wrong strategies & erroneous investment decisions.

#2. Exorbitant Cost Structure: Another major culprit is the cost structure being too high, hence, the companies are unable to sustain for long.

#3. Inadequate Liquidity: Quite a few companies & organizations are hit by insufficient liquidity, which may arise due to causes like global crises, etc.

#4. Delayed Response: Many of the insolvencies can be traced back to the tardy and slow response by the management to the early signs of crises

#5. Value Chain Dependency: If there is a dependency on others then it can have a knock-on effect on the insolvent.

#6. Managerial Discord: Quite a few insolvencies occur due to conflicts in the inner circle of the management.

#7. Friction Between Workforce & Management: A well known fact is that many a problem, including insolvency, are triggered due to conflicts between workforce & management.

#8. Industry Facing Crisis: It happens at times that the individual business is not at fault, yet faces insolvency, due to the entire sector being adversely impacted.

#9. Economic Upheaval: This is not a very common reason of insolvency but at unusual times, like the recession, many organizations suffer insolvency.

Primarily poor management and financial constraints are the main reasons behind insolvency, and this is much more prevalent in smaller companies. It is quite obvious that the larger the company, the higher the chance of survival and of getting remedial help and chances of repaying the creditors.

Journey of Insolvency Laws In India Till IBC, 2016

According to the Constitution of India 'Bankruptcy & Insolvency' finds place as Entry 9 in List III of the Concurrent List, (Article 246 –Seventh Schedule to the Constitution) and mandates that both Center as well as the State Governments can make laws relating to this subject.

On the one hand, article 19 (1)(g) of the Constitution of India grants the liberty to practice any profession or to carry on any occupation, trade or business to the citizens of India, yet on the other, there are restrictions on closure of any industrial undertaking. Such regulations have been put in place to protect the public interest and prevent unemployment.

The insolvency laws have had a topsy-turvy ride, with multiple overlapping laws and adjudicating forums making it a tedious, time-taking process. The enforcement of Insolvency and Bankruptcy Code, 2016, (IBC) has tried to streamline the process in a time bound fashion.

Schemes Prior To The Enactment IBC, 2016

Insolvency or winding up is essentially a complex process, that takes into account all aspects of recovery, revival, reconstruction or winding up, and therefore, there is a need to see it in a holistic manner.

Prior to the enforcement of IBC, there were multitudinous laws occupying this space, but none of them were able to provide quick and satisfactory result. Absence of a separate unified Insolvency Code covering all the aspects, resulted in the process turn into a complicated, time consuming and ineffective tool.

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

The Sick Industrial Companies (Special provisions) Act, 1985 defined the concept of the 'sick company' as an entity who was faced with a complete net worth erosion. The Act stated that such a company should have existed for at least five years and the losses accumulated by it exceeded or equalled the net worth of any financial year.

Under SICA these quasi-judicial bodies existed- the Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction as defined under Section 3(b) and 3(a) of The Sick Industrial Companies (Special provisions) Act, 1985.

In spite of regulations being in place, SICA failed mainly due to its faulty approach; the balance sheet strategy to detect a sick unit rather than the prospective cash flow approach! It was a fallacious method because it takes quite some time for the net worth to diminish, and, secondly, the grave liquidity issues were never taken into consideration.

The Companies (Second Amendment) Act 2002

Through this Act amendments were brought about to replace the adjudicating authorities BIFR and AAIFR with NCLT and the NCLAT. To deal with revival, Section 424A and 424L were introduced in the Indian Companies Act, 1956, however they were never enforced.

Sick Industrial Companies (Special provisions) Repeal Act of 2003

The appellate authority and the Board established under The Sick Industrial Companies (Special provisions) Act, 1985, i.e. the BIFR and the AAIFR were dissolved by the sick Industrial Companies (Special provisions) Repeal Act of 2003. However, SICA repeal Act was never notified, due to delay in the constitution of the NCLT.

The Recovery of Debts due to Banks and Financial Institutions Act, 1993("RDDBFI Act")

Under this Act, the establishment of the specialized Tribunals, called the Debt Recovery Tribunals (DRTs) and Debt Recovery Appellate Tribunals (DRATs) were suggested by Tiwari Committee constituted with the objective of solving the problem of recovery by the Banks and the Financial Institutions. The DRTs and DRATs would assist in recovering money from borrowers that they owe to the banks and financial institutions. Going by a rough estimate, there were more than fifteen lakh cases by banks & financial institutions pending, with an estimated

amount of 5,650 crores due and thus, going waste. Thus, unlocking of public money of such great proportions and its proper utilization is essential towards the development of the country.

The provisions of this Act do not apply to those Banks and Financial Institutions where the amount due is less than ten lakh rupees, and it covers all debt whether secured or unsecured, assigned or payable under any decree or order. Under section 19 (19) of the RDDBFI Act, 1993, the Tribunals have the power to issue Recovery Certificate against the company registered under the Companies Act, 1956, to the recovery officers specially designated under this Act. RCs issued by the Tribunals have the same weightage as a decree of the Civil Court.

The different modes of recovery as governed by Section 25 of the Act include:

Attachment and sale of the movable and immovable property

Arrest of the defendant

Appointing a receiver for managing the properties of the defendant

An aggrieved party can appeal to DRAT against any order passed by a DRT within 30 days from the judgement. However, the appeal shall not be entertained by DRAT in case the judgement by DRT has been passed with the consent of both the parties.

In case of Axis Bank Vs. SBS Organic Pvt. Ltd. & Others[1] the Apex Court opined that the appeal in DRAT would be taken into consideration only on the condition that the borrower deposits 50% of the amount in terms of the order passed by DRT or 50% of the sum due from the borrowers as asserted by the secured creditor, whichever is less. Exercising it discretion, the DRAT may reduce the amount to 25%.

The SARFAESI Act, 2002

Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) was formulated with the aim to authorize the financial houses to evaluate the asset quality in different ways. Otherwise stated, it can be aptly said that this act was framed to identify and resolve the problem of Non-Performing Assets (NPAs) through multiple mechanisms.

ARC, the first asset reconstruction company, was established under this act.

The SARFAESI Act lays out provisions in details for the establishment and operation of Asset Securitization Companies as well as Reconstruction Companies. The scope of capital requirements, funding and activities have all been detailed in the Act. The Reserve Bank of India All the institutions established under the SARFAESI Act are regulated by the Reserve Bank of India (RBI).

The main objectives of the SARFAESI Act under Insolvency Law In India are as follows:

[1] SLP (C) No. 13861/2015

- The Act specifies in detail the procedures for NPAs' transfer to the asset reconstruction companies with the objective of asset reconstruction.
- The Act enumerates the legal framework for scanning activities in India.
- The Act bestows on the financial institutions power to take custody of the immovable property, which is hypothecated or charged, for debt recovery.
- The Act imposes security interest without any intervention from the court.

Three significant tools to recover Non-Performing Assets (NPAs) that are sanctioned by the SARFAESI Act are:

I. Securitization
II. Asset reconstruction
III. Security Enforcement without court's intervention

With the introduction of Insolvency and Bankruptcy Code, 2016, the overlapping provisions contained in SARFAESI Act have been done away with.

SARFAESI Act Amendments have been made in 2016 because of "Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016".

The Amending Act introduced new definitions to SARFAESI, broadened the scope of secured creditors, debts and conferred on RBI new powers in relation to framing of policies.

Further the Act lays out that requisite of categorization of secured debt as non-performing asset shall not be applicable to a borrower who has gathered funds through issue of debt securities however, the provisions for enforcement of security interest shall apply to such borrower.

A major modification introduced is that the removal of earlier prerequisite for ARC to hold fund not exceeding 15% of total financial assets acquired or to be acquired by company.

In lieu of the previous rule that stated for sponsor not to be a holding company of ARC, it has been replaced with a sponsor, fit and proper in accordance with the guidelines of RBI. RBI's approval for appointment of director/managing director/chief executive manager of ARC is mandatory to take.

Documents given by banks to ARC for the purpose of securitization are exempt from stamp duty. Also, all rights and interest regarding the unpaid portion which was held earlier by bank, will be bestowed on ARC now.

Proviso added to section 13(2): in case of having raised funds through debt securities, a buyer need not classify NPA. Upon default, he can enforce under this section.

Changes brought about in provisions of Section 13(8): previously the borrower could pay the dues till sale or transfer but now it has to be paid till the date of auction/publication of notice. The time duration for the borrower to pay the debts has been brought down substantially.

DM/CMM is mandated to pass order for taking possession of the secured assets within 30 days. If need be, he shall extend the period by another 30 days by recording reasons for it.

Audit and inspection of an ARC may be carried out by the RBI from time to time.

Corporate Debt Restructuring (CDR) Scheme

Many a time it happens that despite putting in best of efforts and having most honest intentions, corporates and companies find their financial planning going haywire. It may occur due to circumstances beyond their control or other internal factors impacting adversely. In such circumstances the need of the hour is to extend timely support through restructuring, and revive the company in order to safeguard the creditors money and the investment of other stakeholders.

Taking a cue from other countries like Korea, UK, Thailand, etc. India evolved an institutional mechanism for corporate debt restructuring & thus CDR Scheme came into being. Detailed guidelines were issued in 2001 and since then, has been revised from time to time, vide official circulars to strengthen the CDR mechanism.

It was a voluntary, non-statutory system of CDR Mechanism and was limited only to the financial institutions and banks. In 2018 RBI has scrapped CDR and similar restructuring schemes like SDR, after the enforcement of Insolvency and Bankruptcy Code, 2016, which is now considered the main tool to deal with such defaulters.

Companies Act, 2013

A company is an entity born out of a legal process and understandably, its death or end also has to be through legal recourse. Opting for insolvency and liquidation simply indicates that the company has outlived its purpose, which can be due to one of the many factors, and is therefore, being dissolved, either voluntarily or forcefully.

Amendments in the Companies Act, 2013 Prior to the introduction of the Insolvency and Bankruptcy Code, 2016 (the 'Code'), the winding up of a company took place solely under the Companies Act, 1956. The Act permitted the companies to wind up voluntarily and was in effect a less time-consuming process and attracted least interference from the courts.

But now with the Insolvency and Bankruptcy Code, 2016, coming into force the scenario has changed immensely. Section 255 of the Code notified with effect from November 15, 2016, in accordance with Schedule XI of the Code, results in the Companies Act, 2013 being amended. The aforesaid Schedule now defines the term "winding up" by introducing a new Section 2(94A) to the Act as "winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016."

Hence, now certain winding up proceedings are governed by the provisions of 2013 Act, whereas others, under the Code. Other noteworthy modifications introduced by the Code covers deletion of provisions of 'voluntary winding up' and winding up on the ground of 'inability

to pay debts' from the Act. These relevant proceedings now fall in the purview of the Code and hence, shall be dealt under the Code.

Subsequently after the notification of Section 255 of the Code, the Ministry of Corporate Affairs (MCA), through its Notification dated December 07, 2016, has notified the provisions of Chapter XX of the Act with effect from December 15, 2016. These provisions address winding up of companies on any ground 'other than inability to pay debts', enlisted under Section 271(a) to (e) of the Act.

The circumstances under which a company may be wound up by the Tribunal:

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for the immediately preceding five consecutive financial years; or

(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

The most important amendment in lieu of the Code was that a Creditor was barred from putting up a petition for winding up under the provisions of the Act of 2013. The first right to initiate the process by way of making an application of insolvency is given by the IBC, and which they should avail. In case the insolvency falls flat, then they can go ahead with the option of liquidation.

If a corporate debtor, whose assets exceed his liabilities, could seek to wind up by simply passing a special resolution by the company, then it is very likely that the NCLT set aside the petition and instead direct such a company to file an application for corporate insolvency resolution proceedings under section 10 of the Code.

When it comes to voluntary liquidation, one should apply under the Act, only if one wants continuous supervision by NCLT of the proceedings, which naturally will be cumbersome. Thus, it is clear that one should volunteer liquidation under the Code, where not only the intervention by NCLT is minimal but also it shall be a faster mode to reach to a conclusion!

All winding up proceeding that were pending before the High Courts on December15, 2016, on grounds other than inability to pay debts, and the notice of which were still to be served on the

respondents, shall be transferred to NCLT and dealt with under the provisions of the Companies Act, 2013.

In addition, all winding up proceeding that were pending before the High Courts till April 1, 2017, shall also be addressed in accordance with the Act of 2013 by the High Courts.

In the case of West Hills Reality (Pvt.) Ltd. vs. Neel Kamal Realtors Tower (Pvt.) Ltd[2], Bombay High Court on December 26, 2016, clarified that every winding up petition Section 433, clause (e), which is pending and which has not been served on the respondents, shall be transferred to NCLT.

Insolvency and Bankruptcy Code, 2016, (IBC) The

Compulsions Behind Framing IBC, 2016

Winston Churchill observed "to be perfect is to change often", the same can be claimed about all changes and amendments that are introduced at improving the mechanisms, the regulations, the Acts.

Globalization has ushered in a regime where the economy has opened up for international players, it undoubtedly helps in growth of the economy and the nation but at the same time needs that all regulations be in place. The insolvency and bankruptcy laws of India was not only archaic but also ineffective. To begin with, there were numerous Acts that governed insolvency and bankruptcy, all in bits and pieces. One would cater to one section of debtors, the other to the creditors, but none of them yielded satisfactory results.

In the pre-independence era, there was Presidency Towns Insolvency Act, 1909, which catered only to Chennai, Kolkata and Mumbai; then there was the Provincial Insolvency Act, 1920, that was applicable on rest of the country. The biggest drawback of these two Acts was that they had within their ambit individuals and partnerships but corporations were left out.

Post-independence, insolvency and bankruptcy got a place under Article 246 of the Constitution. Lot many Acts were introduced to deal with it like SICA Act, 1985, SARFAESI Act, 2002, RDDBFI Act, 1993, Companies Act, 1956 & 2013, various RBI-framed restructuring schemes, and many more! Instead of bringing out satisfactory results, these multi judicial forums ensued mayhem; there was confusion, no clarity or certainty, and above all, the various adjudicatory authorities compounded to the incertitude!

Framing Of IBC, 2016- A New Dawn!

The need for a more comprehensive legislation was acutely felt by all stakeholders from a long time. The pile of Non-Performing Assets (NPAs) estimated to be more than 10.25 lakh crores, was a weighty challenge for both public and private sector banks in India. This resulted in slowing down of all projects and eventually the progress of the nation.

The government took cognizance of all factors and realized the need to frame an effective insolvency and bankruptcy law that would be creditor driven, time-bound, with the ability of

[2] MH/2758/2016

effective restructuring of assets. It was also aware of the battered image India carried in the global fraternity & its pathetic standing in 'Ease of Doing Business' ranking.

Bankruptcy Law Reform Committee, headed by former law secretary Mr. T.K. Viswanathan, took into account all factors and framed an Insolvency and bankruptcy law that introduced the concept of 'creditor in control' instead of what was earlier termed as 'debtor in possession'. It is designed with the aim to rationalize the corporate insolvency resolution process, one which would prevent value depletion in case of corporate distress.

Salient Features of Insolvency and Bankruptcy Code, 2016

The Code offers a uniform and comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms).

'One' law for Insolvency- 2 laws repealed & 11 amended
Trigger Amount- Minimum one lakh default
Objective- Maximization of value of assets
Adjudicating Authorities- NCLT and NCLAT
Time-line- 180 days to maximum 270 days
Types of Creditors eligible- Operational and Financial, Secured and Unsecured
No Deadlock- If not resolved in prescribed time, assets to be sold
No Asset Stripping- Creditors indirectly take charge through IPs

Decoding the Code!

The Code is uniform and extends all over India and is applicable on:

1. Any company incorporated under the Companies Act, 2013, or any previous Act.
2. Any company covered under any special Act.
3. LLPs incorporated under Limited Liability Partnership Act, 2008.
4. Partnership Firms, registered or not, under Partnership Act, 1932.
5. Any individual.

Insolvency Resolution Process (IRP) For Corporates: Corporates

IRP can be initiated by-

- A financial creditor (individually or jointly) under Section 7 of IBC, 2016
- An operational creditor under Section 9 of the IBC, 2016 The corporate debtor itself under Section 10 of the IBC, 2016.

Financial Creditor (Section 7): Those entities which provide credit facilities, extend loan or financial assistance fall into this category.

- Financial Creditor can himself or jointly with other creditors, file in NCLT against the corporate debtor and initiate insolvency.

- While filing the application, the proof of default and the suggested name of the insolvency professional shall be submitted.

Operational Creditor (Section 9):

- A Notice shall be served by the operational creditor to the corporate debtor, granting him 10 days and requesting to pay the dues.
- If the result is not positive, nor does the corporate debtor intimate about any ongoing arbitration or dispute, then the operational creditor can file the application and initiate IRP.

Corporate Debtor (Section 10): Under the provisions of the Code, even a corporate debtor, who has defaulted on payment of dues, can file the application of Insolvency Resolution Process.

- They need to submit Books of Accounts and other relevant financial documents.
- Section 10 (3) (b) of the Code mandates that the corporate debtor shall also file the name of proposed resolution professional, with the application.

Once the IRP is initiated-

- NCLT shall take up the application within 14 days of filing it.
- It may reject the application if no default by the corporate debtor.
- If any pending issues regarding the proposed resolution professional then also it can be rejected.

Time period mandated for the completion of Insolvency Resolution Process:

a) The adjudicating authority shall accept or reject the application of IRP.
b) In case of rejection, the applicant shall have to remove the errors pointed out by the authority, within 7 days.
c) If accepted, the process of corporate IRP shall begin from the said date.
d) Within 14 days of the commencement of the IRP the resolution professional shall be appointed, whose tenure shall not exceed 30 days.
e) Section 12 of the IBC states that the insolvency resolution process shall be completed within 180 days of applying in the NCLT.

Procedure of Insolvency

Step #1. Public Announcement (Section 13):

Along with the appointment of resolution professional, NCLT shall make public announcement to attract submission of claims by creditors.

Step #2. Moratorium (Section 14):

The Moratorium may be granted by NCLT under the provisions of Section 14 of IBC up to 180 days and all recovery proceedings against the corporate debtor shall be stayed.

Step #3. Formation of Creditors' Committee & Revival Plan (Section 21):

The appointed insolvency professional shall form a creditors committee as per the rules under Section 21 (2) of the Code. Any resolution plan shall be viable only if 75% creditors approve of it.

Step #4. Liquidation (Sections 33-59):

A corporate debtor may face liquidity if:

- Any time during the insolvency resolution process, 75% of the creditors committee resolve to liquidate it.
- If the creditors committee fails to finalize a resolution within the stipulated 180 days.
  - The resolution plan submitted by the committee is rejected by the NCLT.

Once the liquidation order is passed a moratorium shall be imposed on the corporate debtor and its assets.

There is a 'waterfall mechanism' as to the priority of claimants specified by the Code, and the debt shall be returned accordingly.

Insolvency Professionals (Section 3 (19):

These play a key role as intermediaries and are enrolled as a member of an insolvency professional agency and in addition, registered with IBBI.

Fast Track Corporate Insolvency Resolution Process (Chapter IV, Part II)

Insolvency Resolution Process for Individuals and Unlimited Partnerships:

The provisions of the Code is applicable in all cases of minimum default amount of Rs 1000 and above.

The Code specifies two procedures for insolvency:

Automatic Fresh Start: Under this provision an eligible debtor can apply to be discharged from certain debts by the Debt Recovery Tribunal (DRT), permitting it to start afresh.

Insolvency Resolution: The debtor can present a repayment plan to the creditors, and if approved, shall be presented to the DRT. The DRT shall pass an order that will be binding on all. If rejected, then either party can apply for bankruptcy.

Case Laws

Being a newly enacted law, it was but natural that lot of ambiguity would be there which shall be eventually clarified by the Apex Court. In merely two years, there have been many cases pertaining to different sections of the Code, some of them are mentioned here.

#1. B.K. Educational Services Private Limited v. Parag Gupta and Associates[3]

The Case: The question raised was whether the Limitation Act, 1963, will apply to applications made under Section 7 or section 9 of the IBC from its commencement.

Date of Verdict: October 11, 2018

The Verdict: The Supreme Court maintained that the Limitation Act is applicable to applications filed under Sections 7 and 9 of the IBC from the inception of the Code.

#2. State Bank of India v. V. Ramakrishnan[4]

The Case: The point in contention was if Section 14 of IBC, that provides moratorium for a limited period, as mentioned in the Code, on admission of an insolvency petition, would be applicable to a personal guarantor of a corporate debtor.

Date of Verdict: August 14, 2018

The Verdict: The Apex Court opined that protection of moratorium under Section 14 is applicable only to corporate debtor and not to a personal guarantor. It further stated that Section 60(1) of the Code, which provided that the adjudicating authority in relation to the insolvency resolution and liquidation of both corporate debtors and personal guarantors shall be the NCLT.

#3. Alchemist Asset Reconstruction Company Limited v. M/s Hotel Gaudavan Private Limited & Others[5]

The Case: This case was about whether or not arbitration proceedings can be initiated after the imposition of Moratorium.

Date of Verdict: October 23, 2017

The Verdict: The Supreme Court observed that an arbitration proceeding cannot be started after imposition of moratorium. Further, it maintained that the effect of Section 14(1)(a) of the IBC is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

#4. Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited[6]

The Case: This case was all about seeking clarity on whether the time limit prescribed in the IBC 2016, for initiation of a petition, or admittance or rejection of it, was a mandatory process.

Date of Verdict: September 19, 2017

The Verdict: First of all, the Apex Court held that the mandate of sub-section (5) of section 7 and section 9 or sub-section (4) of section 10 is procedural in nature, a tool to help in speedy dispensation of justice and therefore, is directory. It further observed that the provision of removing the defects in an application within seven days is not mandatory in nature but directory. If the objections are removed after seven days, the applicant while refilling the

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[3] Appeal No.23988 of 2017.
[4] Civil Appeal No. 3595 of 2018.
[5] Civil Appeal No. 16929 of 2017.
[6] Civil Appeal No. 8400 of 2017.

application, needs to file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days.

#5. Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd[7]

The Case: This case brought to light a very pertinent question as to whether NCLT was the ultimate authority to approve or reject the plan and if it was so, then on what grounds it was done!

Date of Verdict: November 19, 2018

The Verdict: The Supreme Court upheld the order passed by the NCLAT which reiterated that the ultimate authority to approve or reject a plan vests with the NCLT. Even though the NCLT is not permitted to alter the terms of the plan, yet it should be understood that approval of the NCLT is not a mere requirement or formality!

In doing so, the NCLT should consider the various aspects like:

I. Whether the plan is in compliance with the requirements of Section 30(2);
II. Whether the plan is fair and equitable; and,
III. Whether the plan adheres to the object of the Code i.e. maximizes the value of assets and balances the interests of all the stakeholders?

Only if these questions are answered satisfactorily, the plan is confirmed, if not the NCLT is free deny its confirmation.

#6. Shah Bros Ispat Pvt. Ltd v. P. Mohanraj8

The Case: The point raised in this case was if the order of Moratorium will cover a criminal proceeding under Section 138 of the Negotiable Instruments Act or not!

Date of Verdict: July 31, 2018

The Verdict: The NCLAT held that Section 138 of the Negotiable Instruments Act is a penal provision which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding of any judgment, decree of money claim. It was further concluded that imposition of fine cannot be held to be a money claim or recovery against the corporate debtor nor order of imprisonment, if passed by a court of competent jurisdiction on the directors, they cannot come within the purview of Section 14 of the I&B Code, 2016. Hence, no criminal proceedings are covered under Section 14 of the I&B Code.

The Final Word: Most Successful Two Years!

Indian Perspective!

The vacuum that had existed prior to the enforcement of IBC, 2016, has vanished as the comprehensive resolution mechanism provided by it has been quite effective! This legislation

[7] Civil Appeal No. 10998 OF 2018.

despite facing teething problems has proved to be not only an effective tool but also has altered the negative image associated with NPAs.

The Finance Minister was thrilled by the results shown in the first two years as he gave out the details. 1,322 cases have been admitted by NCLT till now, another 4,452 were disposed at preadmission stage, settling a whopping amount of 2.02 trillion; and 66 saw successful adjudication leading to recovery of Rs 80,000 crores by the creditors.

It has sent a stern message of caution to all as to abstain from turning to potential debtors. The defaulters realize that they shall be barred and thrown out of management, and hence, to save themselves from this fate, most defaulters pay up during the pre-admission stage. It has changed the debtor-creditor dynamics drastically, the creditor no longer needs to chase the debtor as he has a powerful tool to tame the erring creditor.

The recovered money shall be utilized and will propel growth of the economy. More liquidity will automatically result in more jobs, better infrastructure!

International Perspective!

[8] 2018 SCC Online NCLAT 415.

The most remarkable consequence of IBC 2016, can be measured by India leapfrogging to 77th rank, in the ranking of 'Ease of Doing Business'. India has recorded a jump of 53 positions in just two years confirming that it is on the right track. In addition, these steps have earned the confidence of foreign investors, they are keen to take full advantage of it.

Road Ahead!

IBC has covered much ground in a short period, yet the way ahead is not very smooth as there are certain concerns that still needs to be tackled. Many ambiguities have already been cleared by judgements of Supreme Court and NCLAT. The regulators too are keenly aware of it and have done well to plug in the loopholes effectively through the amendments!

All said and done, the IBC has been framed with the aim of re-organization and resolution of defaulting companies and that is what it is doing! The recovery of debts is a side-effect of it and not the means of the Code!

Mr. MS Sahoo who is at the helm of the Insolvency and Bankruptcy Board of India (IBBI), asserted that feasibility and viability should be the primary motive of the CoC, not the debt recovery!

Mr. T.K. Viswanathan also very aptly stated that the Bankruptcy Code shall help the stakeholders realize their worth!

Finally, it seems the ‘trial and error’ approach regarding the legislation of Insolvency and Bankruptcy laws has ended on a very positive note!

- Surbhi Aggarwal

(Founder & CEO, School of Legal Education)
Thankyou