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An Indian perspective on Insolvency and Bankruptcy Framework

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Abstract: *Bankruptcy is one of the few systems by which corporate control can be moved to additional effective proprietors in the event of market economies. Notwithstanding, monetary business sectors are in many cases viewed as in their outset in nations that are going through progress from midway wanted to showcase economy, where securities exchanges are still in their developmental stage and liable toward remain illiquid for some time.*

An effective bankruptcy legislation is integral requirement for an economy to thrive. Insolvency laws strive to assist distressed enterprises in reorganizing and restarting their operations. If resolution is not possible, the law should provide a seamless process for liquidation and withdrawal from the market. The research paper focuses on the Insolvency and Bankruptcy Code, 2016 and its comparative Analysis with a view to examine its efficiency and to pluck the gray areas. The emergence of insolvency and bankruptcy law in Indian economic landscape has brought about a significant shift in how distressed assets are dealt within the country. With the introduction of Insolvency and bankruptcy code in 2016, a more structured and streamlined framework has been put in place for resolving insolvency cases

Keywords: Bankruptcy, proprietor, Insolvency, Liquidation

I. INTRODUCTION

The Indian bankruptcy system has gone through a memorable alteration through the approaching of the IBC 2016. When the arrangements of this Code connecting with corporate insolvency were advised, the main instances of bankruptcy began being conceded in the courts and the last requests on these cases turned into the principal openly available reports of India's new indebtedness and bankruptcy system. Insolvency systems in India as well as the whole way across the world have gone through a range of changes. An insolvency framework of a country not just affects the simplicity of working together positioning yet in addition thusly significantly affects the country.1 Bankruptcy implies the inability to reimburse obligations. It put on together toward disappointment of business association as well as distinctive individual bankruptcy, yet the Insolvency is typically indicated toward commercial or corporate bankruptcy.2 Once more, bankruptcy orobligation suggests deficiency toward recompense commitments upon the date when they develop due in the standard progression of commercial; the condition of an individual whose possessions then assets are lacking toward deliver the singular's commitments. It is the condition of having additional commitments (liabilities) than hard and fast assets which might be open to pay them, whether or not the benefits were sold or sold. Corporate bankruptcies happen on the grounds that organizations become incredibly obliged. Bankruptcy is typically grouped into two, "income indebtedness and accounting report bankruptcy".

INSOLVENCY AND BANKRUPTCY CODE

History In India, separate Insolvency and Bankruptcy Code was introduced in 2016. Earlier, matters relating to insolvency and bankruptcy were dealt with under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, Companies Act, 1956, and Sick Industrial Companies (Special Provisions) Act, 1985. The new act of 2016 was introduced with the motive to overcome the shortcomings of

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other pieces of legislation in the Insolvency procedure. In the U.S.A., the first bankruptcy law was introduced in 18001 and was repealed afterward in 1803.

Subsequently, many insolvency laws were introduced and repealed thereafter. Modern Bankruptcy law was introduced by the Bankruptcy Reform of 1978.

The flaw in this article is that the author needs to talk about the recommendations of different committees and what legislation they suggest because these are the main essence of this topic. The author talks about the Bankruptcy Law Reforms Committee Report, the last Committee made before the enactment of the IBC, even though on the recommendation of this Committee's report, the IBC came into force.

Nevertheless, before that, many committees, like the Eradi committee, JJ Irani committee, etc., played a crucial role in the evolution of insolvency laws.

The insolvency laws in India have originated from English laws. There was no law on the aspect of insolvency in India prior to the arrival of the Britishers. Sections 23 and 24 of the Government of India Act, 1800 (39 and 40 Geo III c 79)[10], which gave the Supreme Court insolvency authority, are the first known pieces of insolvency legislation. After the enactment of Statue 9 (Geo- IV c 73) in 1828[11], it can be said that this was the starting of the specific legislation for dealing with insolvency in India because, after the enactment of this statute, there were first. Foremost insolvency courts were set up in the Presidency towns, i.e., Bombay, Madras, and Calcutta, to seek relief for insolvent debtors. After taking a further step in the development of insolvency laws, another act came into force called the Indian Insolvency Act of 1848.

Nevertheless, the provisions under this Act needed to be adequate to meet the consecutively dynamic conditions in the 20th century. Although this Act of 1948 was into force in Presidency towns till, the Presidency Towns Insolvency Act of 1909 was not enacted. This Act and another act called the Provincial Insolvency Act of 1909 were the two central enactments at that time that dealt with personal insolvency & also both have parallel provisions and almost akin content substantially. However, both differ in territorial jurisdiction legislation, meaning that the Presidency Towns Insolvency Act of 1909 was only applied in Presidency towns, and the Provincial Insolvency Act of 1909 applied all over India. These enactments were also applicable to sole proprietorships and partnership firms with individuals.

PURPOSE BEHIND FOR INSOLVENCY LAWS IN INDIA.

When there were no enactments or laws regarding insolvency, in case there is default by any company or organization in the repayment of the loan to a creditor, i.e., insolvent, it was not easy to distribute the money to the creditors according to their interest. Every creditor or claimant tried first to grab its interest or share in the company's assets. This battle among the company's claimants pushed it towards liquidation even though it was in an excellent position to pay off its liabilities. This would result in the needless destruction of the organization's worth and the loss of jobs.

The winner-takes-all scenario would make the business of granting credit riskier from the creditors' viewpoint. Additionally, a firm's shareholders are the remaining claimants with liability of limited nature. The business has every motive to pursue high-risk tactics as it nears collapse. The upside is theirs if the plan is successful. The creditors lose if the plan works.

Additionally, shareholders could take part in related party transactions and asset siphoning. These risks would increase if shareholders' and managers' motivations were in line. All these risks would be ex-ante priced in by creditors, who would then lend money at higher interest rates, hurting borrowers. The economy would suffer overall.

The principal purpose behind the enactment of legislation regarding insolvency and bankruptcy is-

1. To establish a proper procedure for insolvency resolution.
2. To protect the right of insolvent debtors or companies, they can seek relief from the harassment of creditors whose money they have borrowed and cannot pay back.
3. To provide a proper system for those creditors who are not feeling secure about their payment of debts to be well pleased.

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INITIATION OF PROCEEDINGS

In India, under the Insolvency and Bankruptcy Code, 2016 initiation of resolution can be taken by Creditor as well as the Debtor2 . Application for resolution process is made to the National Company Law Tribunal after giving prior 10 days' notice to the debtors, in case the resolution process is initiated by the financial creditors. The condition precedent for Debtors while filing for the resolution3 process is, that they have to file the consent of the Board of Directors. A resolution process can be initiated if the debt amount is more than 1 lakh rupees to 1 crore rupees. The Code suggests two methods: 1) Liquidation and 2) Insolvency Resolution Process. In the Liquidation process, the assets of the debtor are sold out to pay off the liabilities. The Insolvency Resolution Process offers a more rational approach by giving the option to retrieve the business. The financial creditors have the option to assess whether the business of the debtor is retrievable or not. Failure of the Resolution process provides the option of liquidation to cover the losses.

PROCEDURE In India, after filing the resolution, Adjudicating Authority4 appoints Interim Resolution Professional (IRP), to start the Corporate Insolvency Resolution Process (CIRP) and management of the corporation lies with the IRP. According to Section 18 of IBC, the responsibilities of the IRP include gathering all the information on the company's assets and liabilities, constituting the Committee of Creditors (CoC), management of finances of the company, and checking creditors' claims against the indebted company. IRP works until the Resolution Professional is appointed and with the voting of the Committee of Creditors, even IRP can become the Resolution Professional (RP). IRP's role is temporary and he deals with the matter till the Resolution Professional is appointed.

II. RESEARCH METHODOLOGY

The methodology used by the researcher in this research paper is entirely doctrinal. This research is based on the "evolution of insolvency and bankruptcy laws in India", which is purely theoretical; that is why the researcher uses doctrinal sources. This paper is a mix-up of both sources, primary sources, and secondary sources. Primary sources like the "Companies Act, (2013)" and "Insolvency and Bankruptcy Code (2016)"[7], and various other sources of the secondary nature like the book, journals, articles, etc. that had been written by the authors and the researchers. secondary sources like research papers, journals, articles, books, etc., were written by different authors and researchers.

MAJOR LEGISLATIONS GOVERNING CORPORATE INSOLVENCY

The principal legislation governing Corporate Insolvency was as follows-:

COMPANIES ACT, 1956

'Bankruptcy' and 'Insolvency' is given in Entry 9 of the Concurrent List[12] under Article 246 of the 7th Schedule of the Indian Constitution, which means that the Union and State Government both can make laws upon the subjects under this list. For exercising these powers Companies Act of 1956 had been enacted by the Union Government. This legislation deals with all the concerned things related to how the companies function, including their dissolution, and winding up process; albeit this is the good legislation by the government but the major flaw of this Act was that it did not contain any provision which deals with the expression insolvency or bankruptcy. It just dealt with the payment of debts. However, at that time, this was the only legislation deal with the insolvency of corporates but not explicitly.

Legal consultation services

SICK INDUSTRIAL COMPANIES ACT (SICA) 1985

During the period between 1956 to 1985, the Companies Act 1956 was the only Act that dealt with the insolvency of corporations. After attaining independence in 1947, the initial policies of the government of India for the development of the country's manufacturing sector required more investments. However, at that period Indian economy was among the various growing economies of the world; the government continuously made efforts to raise funds through many large development finance institutions. The objective behind setting up these financial institutions was to uplift industrial development. However, in return for these funds or credit given by these development financial institutions, shares or the seats on board of firm by the firms. By this direct authority was offered to the creditors direct authority over how these enterprises were run. The result of this was the poor distribution of economic capital.

The issue of sickness had extended throughout industrial businesses by the early 1980s. The number of sick industrial units increased from 26,758 to 119,606[13] between 1981 and 1985. So, to deal with this problem, in 1980, there was a committee called the Tiwari committee set up to give suggestions regarding dealing with this issue of industrial sickness. The result of setting up this Committee was the enactment of SICA legislation, 1985. The objective behind the enactment of this Act was to recognise the "sickness"[14] of the industries and bring them back to a proper position. The support of this Act established two new legal forums: the "Board of Industrial and Financial Reconstruction" (BIFR) and the "Appellate Authority for Industrial and Financial Reconstruction" (AAIFR).

SICA was the first Act whose primary focus was only on restructuring the companies. Albeit the realm of the enactment was only restricted to the industrial companies, which looked "sick".[15] The Firm's Board is responsible for disclosing sickness, according to the Act. The Act granted an automatic suspension of all lawsuits, claims, and processes against the firm once sickness was disclosed. This process differed from the process given under the Companies Act, where a stay was not automatically granted; instead, it was upon the High Court's discretion to do so. Additionally, despite being declared sick, SICA gave the debtor corporation autonomy over its resources and business operations.

TRANSFORMATIONAL POSITION OF INSOLVENCY LAWS IN INDIA

In the last two decades, we can see that there have been drastic reforms happening in the Indian Financial system. The government made crucial decisions in the finance sector, whose primary purpose was to encourage an effective, efficient, well-structured, and competitive financial market or system to speed up economic development with proper utilisation of resources. As we all know that India is the foremost economy around the world, so the policy and lawmakers have given their best efforts to make the laws and policies of India at the international level, which attracts investors to invest in Indian financial markets.

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We discuss how reforms take place in laws of insolvency and bankruptcy-

NARASIMHAN COMMITTEE I, 1991

In 1991, a high-level committee called Narasimha Committee was set up. The outcome of this Committee was enacting the "Recovery of Debts due to the Banks and Financial Institutions Act 1983" (RDDBFI, 1993). The Committee focused on the development of the financial institution, and banks faced many difficulties while recovering their dues amount from the borrowers by filing cases in Civil Courts. The Committee suggested the establishment of specialised tribunals that would be very easy to deal with these kinds of matters quickly. So, as per the suggestion with the enactment of the RDDBFI Act, two tribunals were set up called "Debt Recovery Tribunals (DRT) and Debt Recovery Appellate Tribunals (DRAT)". The DRTs and DRATs were designed as specialised tribunals to help banks and a specific group of financial institutions quickly recover debt from defaulters.

NARASIMHAN COMMITTEE II, 1998

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In 1998, once again Narasimhan Committee was set up for the concerns about the rising non-performing assets (NPAs) in the banking system. The "Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest" (SARFAESI, 2002) Act were passed in 2002 on the recommendation of the Committee.

The Act gave banks and other financial institutions broad authority to pursue non-performing secured loans for recovery. The SARFAESI Act offered an alternate path for recovery because the DRTs had yet to prove to be as effective in facilitating recovery as anticipated. The Act permitted banks and FIs to seize the collateral security without needing a court order. Its goal was to lower banks' and other sizable public financial institutions' rising NPA balances.

SARFAESI granted exceptional enforcement capabilities but only for a specific class of secured creditors, i.e., banks. In addition, if agreed upon by 60% of the value of the creditors, under the SARFAESI the precedence is given to the enforcement proceedings over the BICR procedure. With the invocation of the SARFAESI, the winding up process under the SICA or the Companies Act would be postponed.

N L MITRA ADVISORY COMMITTEE (2001)

The N L Mitra Advisory Committee looked at the specifics of contrasting court rulings regarding the criminalization of justice. A unique feature of the civil law system is tribunal justice. In India, the contest between the two systems is nothing new. The common law and civil law systems are now approaching one another, with the standard law systems adopting administrative justice and the structure of administrative authority for managing various state functions. On the other way, the civil law system incorporates the principles of the accusatory system and judicial process.

So, the advisory group's entire discussion was about how to avoid the possibilities of dualism in the system so that the whole procedure of liquidation of a company can be completed without delay. So, the group suggested two ways regarding this were following-:

1. Establish a National Tribunal with various benches under the jurisdiction of the High Court. So, it would be able to receive and deal with all petitions, regarding insolvency or bankruptcy and restructuring of the company, with an appeal file in the High Court and Special Leave Petitions in Apex Court; and
2. Each high court has a bench devoted to bankruptcy matters, enabling quick liquidation through reorganization and insolvency procedures. The only avenue of appeal is a special leave petition to the Apex Court.

Legal consultation services

The advisory body also analysed that establishing a professional body of experts who can deal with bankruptcy-related matters or proceedings shall build up the current court proceedings. This will fulfil the objective of fastening judicial proceedings.

COMMITTEE UNDER THE CHAIRMANSHIP OF JJ IRANI (2005)

On December 2, 2004, the Ministry of Corporate Affairs (MCA) a group has been established for the purposes of proffering the suggestions and recommendations on the amendments to be brought in the Companies Act, 1956 for the purposes of building a law/statute which would be compact in nature for addressing changes in the national and international environment, allow for the adoption of best practices that are widely recognized, and for the purposes of the evolution at the rapid pace, by providing enough flexibility, and making novel arrangements in response to the business models. It was a commendable endeavor to give India a current company law that would satisfy the demands of the economy in the competitive world. The committee recommendations were as follows:

1. The role of the Insolvency Tribunal in the rehabilitation and liquidation process should be generic, non-intrusive, and supervisory. Only when using a fast-track method to resolve disputes does the Tribunal need to intervene more. The Tribunal should follow well-established legal rules of procedural fairness by taking a pragmatic approach to dispute resolution.
2. The Tribunal should establish high standards and be capable of upholding the necessary degree of public expectations for accountability, fairness, and impartiality. The Tribunal's president and members should be chosen in a way that allows for a diverse range of skills in the course of its work.
3. To deal with the problems that have been presented to the Tribunal, specific knowledge will be needed. The statute shall provide a sufficient qualification standard for appointment to the Tribunal and the judges' and members' training and ongoing education.
4. The creation of rules should ensure easy access to court documents, judicial proceedings, debtor and financial information, and other public information.
5. It is essential to develop and establish standards for measuring the Tribunal's abilities, performance, and services so that an accurate assessment can be made and additional improvements can be offered.
6. The Tribunal shall have a defined scope of power and practical means for upholding its rulings. It should be equipped with the necessary authority to stop unlawful or abusive behaviour.

II. CONCLUSION

Bankruptcy Law is an important tool for a well functioning society and an ideal bankruptcy process must provide justice to all stakeholders. Distribution of claims needs to be impartial for all stakeholders including creditors,

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workmen, taxpayer and the debtor. A hasty liquidation of an enterprise with long-term economic viability, especially when liabilities exceed assets, will lead to losses for both secured creditors and unsecured creditors.

Before the coming up of the Insolvency and Bankruptcy Code of 2016, India did not have any prior separate law for the Insolvency Procedure and was governed by the Companies Act, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002, and Sick Industrial Companies Act. However, the U.S. was much ahead of time when it introduced its first Insolvency law in the year 1800. Though many changes were introduced and the law of 1800 was repealed thereafter. The Present law is also quite old even so, the provisions are extensive and include advanced concepts like that of Debtor in Possession and prescribe procedures for Municipality insolvency and Cross Border Insolvency. India has still a way to go and provided that it is a developing nation, India needs to make considerable changes in the law. It’s high time that concept of Cross Border Insolvency as is cleared from the recent cases, is included in the Insolvency Code.

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