

INSOLVENCY AND BANKRUPTCY, CODE 2016: ISSUES AND CHALLENGES

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ABSTRACT: In this paper, an overview of the Insolvency and Bankruptcy, Code 2016 has been provided. Earlier, India was considered to be amongst those countries that take the maximum time to resolve their bankruptcy disputes. Therefore, a mechanism that can speed up the settling operation for the infirm corporates was a long term on hold of the hour. Conveying a proper redressal system is equally important as to convincing them for investments. An assessment on the functioning of IBC from its onset along with a distinct study on the challenges post implementation and suggestions that can smoothen its path in the long term has been discussed. The paper concludes that IBC has without a doubt brought a significant swift on the financial aspect of the economy. However, a room for affirmative improvement should always be there for growth. The extension of the Code in seven years is noteworthy. Precedents and judiciary will also play avital character in regulating the long term path for IBC.

KEY WORDS: economy, finance, creditor, debt, corporate, insolvency, bankruptcy,banks, liquidation, adjudicating authority, cross-border laws, companies, challenges.

INTRODUCTION:

Financial barriers are one of the most stressful obstacles that can come in the way of any business organization. Therefore, it becomes the responsibility of the Government of any country to provide such laws that can ease
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this process and make funds available to the potential industrialists. Amongst the various laws passed by the Parliament in the field of insolvency, IBC 2016 has proved to be of utmost significance. It has elevated the strata of India upto seventy- seven positions in the category of “Ease of Doing Businesses” across the world conducted by World Bank in the past seven years. The Code presents a ‘CIRP’ for all the collaborators that defines the role of three types of agencies:

- IRP
- Final RP
- The Liquidator

In case of Individual and Partnership Firms, the Adjudicating Authority is DRT has been established and in case of LLP and Companies, the Adjudicating Authority is the NCLT. The institution of the IBBI under this Code is another highlight of this law.

APPLICATION:

The parliamentary act provides for framework to the creditors in case of non- payment of funds by the debtors through a resolution process. The introduction of Operational Creditors and Financial Creditors is made in the Code. Operational Creditors are defined as the ones who provide with certain goods or services to the debtors. The Debtors here can be individuals, companies, central or state governments. On the other hand, Financial Creditors are those where a specific amount has been given to the debtors in consideration of present discounted value. In situations when a company fails to pay its debts can choose for a voluntary insolvency procedure where it can reach to the NCLT for liquidation.

MERITS OF IBC, 2016:

The current drift is in the direction of swift capitalization of liquidation, and indebtedness. It is extremely important to evaluate any law that is passed by the government in order to truly get its correct analysis. Hence, assessment of the impact of the IBC, 2016 has been stated afterwards to get a broad idea on the advantages of the law.

- The introduction of IBC 2016 is the reason behind the speedy winding up of cases in not more than a year.
- IBC is one of the reasons of India’s upgradation in the World’s Ease of doing Businesses that has attracted Companies from all over the globe into the hub for making profits and creating employment.
- Under the guidance of the NCLT whose prime objective is to make certain rapid steps in the beginning of the debt default by a firm resulting in optimal healing period.
- The IBC 2016 has declared the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 void, along amending various other laws.
- As compared to the years when IBC was not in effect to the years when IBC came into effect even though half of the period was spent suffering from the impact of the novel COVID-19, the success of the code is still evident.
- After the implementation of IBC, an unusual space has been covered that was earlier impractical. In an operating economy it is all important to make the entry and exit an easy process in the market to get the most productive advantages of the Capital.
- According to the reports of Economic Survey 2020, the Recovery rate of NPA cases under the IBC is 42.5% of the amount necessitated as contrast to 14.5% as suggested in the SARFAESI Act.
- The Eight Schedule in the IBC clearly lays that if a case is re initiated before the NCLT, knowing the fact that it has already been decided before BIFR and AAIFR, than the cases before the latter will be diminished.

The above mentioned data is the confirmation that IBC was the need of the hour and the ambition is to make India the Centre of Business ventures, a stronger investment sector and the manufacturer of jobs is achievable.

IMPACT OF COVID-19 ON THE IBC 2016:

On March 22, 2020 the Central Government imposed nationwide lockdown of 24 hours and the rest is history. The pandemic has undoubtedly affected almost all sectors of economy, the IBC is no different. The worst has been faced by the small- medium businesses and the daily wage earners. Financial aid was their biggest challenge and therefore the Government of India made certain changes to the IBC 2016 in order to prevent them from getting insolvent.

- Earlier, the monetary portal for registering a resolution process in IBC was Rs. One lakhs, which was then shifted to Rs. One crores through an announcement by the Finance Minister on 24th March.
- Regulation 40-C has been introduced in the IBC 2016 to keep 330 days out of the covid period through a suomotu deed taken by the Apex Court.
- Section 7, 9 and 10 of the Code has been hanged with an addition of Section 10 A in its place.

Section 7 gives the power to a financial lender to register for the beginning of the CIRP against the debtor.

Section 9 suggests the ways for submitting the application by the operational moneylender.

Section 10 talks about the procedure for commencement of such proceedings.

The said ordinance ensures the protection of the borrowers from getting bankrupt.

- A subsection of section 66 of this Act that provides for fraudulent and wrongful trading has also been added to the ordinance.

On June 5, 2020 the Ministry of Finance announced this ordinance. It was denied on September 19, 2020. The law prevents the institutions part of insolvency proceedings on hold for six months arising from September 25, 2020 that can be extended upto one year. A lot of chaos and hesitation appeared during the time of lockdown about the suspension and postponement of the intimation of the Code. The ordinance was framed to put an end to all the skepticism. Unfortunately, the directive did not go as planned and it was called off.

The changes made during the pandemic hopes for brighter results whereas interpretation by Courts and other necessary amendments will surely pave a long way for IBC.

LANDMARK JUDGMENTS IN IBC 2016:

When a Code has been in existence since the past seven years, it becomes a slightly difficult task to mark the significant and not so significant judgements. A few of judgments have been penned down below in order to get the viewpoint of the various Adjudicating Authorities from across the country. These perceptions have brought a notable swap to this Code and helped in unfolding several pending questions:

1. Macquarie Bank Ltd vs. Shilpi Cable Technologies Ltd. (Macquarie Bank vs Shilpi Cable Technologies Ltd.):

Point at issue here is whether a lawyer can produce the demand notice of an unsettled operational creditor under Section 8 or not?

Section 8 in the IBC Rules in consonance with section 30 in the Advocate's Act provides that such a plea shall be valid.

2. Innoventive Industries Ltd (Corporate Debtor) vs. ICICI Bank and Anr, 2017: (Innoventive Industries Ltd (Corporate Debtor) vs. ICICI Bank and Anr, 2017, 2017)

The Supreme Court in the above referred exposition held that - The foregoing directors in the administration of the Company are unable to continue appeal in the name of party when an Insolvency Expert is already recruited to manage its tasks.

3. K Kishan vs. M/S Vijay Nirman Company Pvt Ltd, 2018: (K Kishan vs. M/S Vijay Nirman Company Pvt Ltd, 2018, 2018) The highest appealing authority held that functioning borrowers can't operate the Code partially or fully as the replacement for debt enforcement procedures.

There may be possibility of cases happening under Section 34 where challenging the Arbitral Award had been barred by the limitation, it can be presented in the Court that the session of ninety days along with a surplus of

30 days has been expired, after which no petition has been filed under Section 34. However, there can be more number of cases where petition has been instituted in the wrong court by the petitioner.

4. JignaishShaah versus Union of India, 2019: (JignaishShaah versus Union of India, 2019)

The main matter in question here is whether the Art. 137 of the Limitation Act in reference to winding up petition was time –barred?

The Court pointed that the obstruction only exists on the day of default for the motive of filing of winding up petition.

5. Mobilox Innovations Pvt Ltd versus Kiroosa Software Pvt Ltd.: (Mobilox Innovations Pvt Ltd versus Kiroosa Software Pvt Ltd)

The question before the bench is whether the word ‘and’ in Section 8 (2) (a) can be replaced by ‘or’?

Here, the expression ‘and’ may be substituted by the term ‘or’ in order to widen the scope of the object of the Statute.

6. Koontal Construction Private Ltd versus Bharat Hotels Limited, 2020: (Koontal Construction Private Ltd versus Bharat Hotels Limited, 2020)

It was held by the Court that absence of communication as for judgement is an invalid ground for the connotation detain as it is the responsibility of the counsel to keep himself updated after the matter is retained for declaration.

7. GhanshyamMisra and Sons Private Limited versus. Edelweiss Asset Reconstruction Company Limited.,2021 (GhanshyamMisra and Sons Private Limited versus. Edelweiss Asset Reconstruction Company Limited.,2021):

The Supreme Court held that the adjustment in Section 31 is ‘clarificatory and declaratory’ with retrospect effect.

Also, the Court mentioned that the NCLT’s observation that EARC can take aid of substitute antidote which is provided to it by the law is prohibited. This can help the corporate debtor with a new start without previous burden.

8. LokhandwalaKataria vs. Nissus Finance and Investment: (LokhandwalaKataria vs. Nissus Finance and Investment:)

The above case was with reference of Rule 8 of the IBC (Application to Adjudicating Authority) Rules 2016 with Rule 11 of the NCLAT Rules, 2016. The Supreme Court held that NCLAT cannot make any use of structural powers mentioned in the latter.

9. Surendra Trading Company versus JugilalKamlaapat Jute Mills: (Surendra Trading Company versus JugilalKamlaapat Jute Mills)

Here, the suspicion before the Court was whether the seven day period for rectification of the default was obligatory or directory?

The Hon’ble Court held that the same under proviso in sec 7, sec 9 (5) or sect 10 (4) is a directory guideline & not compulsory.

10. Transmission Corporation vs. Equipment Conductors and Cables: (Transmission Corporation vs. Equipment Conductors and Cables)

The case of Mobilox was referred here where the Court of Justice held that the IBC did not appraised itself as some deputy forum to provide for any kind of remedy in case of dispute arose.

CHALLENGES POST IMPLEMENTATION:

The challenges do not end even after implementation, the introduction of the CIRP lead to chaos and disorder. Some crucial worries were:

- **JURISDICTION:** The jurisdiction of various subsidiaries in different tribunals is decided by the registered office of the debtor that results in absurdity of proceedings related to insolvency of group companies.

- **CROSS BORDER LAWS:** In cases where assets are located in different places around the globe especially in the occasion of big companies, lack of cross –border insolvency law becomes a big hindrance.
- **SCOPE:** Due to the narrow scope and an undefined language of the term ‘*insolvency*’, many benefits are restricted against supplies, therefore avoiding return on the time of non- payment.
- **OPPRESSION OF NCLT:** One of the major dare for IBC after its execution is the overburden of the NCLT. The cases with DRT, BIFR jointly with CLB are now in control of the authority of the NCLT.
- **LIQUIDATION OF ASSETS:** Direction for liquidation of assets under IBC states that an insolvent asset must be settled within 270 days. If no buyer of that asset is found within that specified period or in case the deciding command is not convinced with the offer than the asset must be liquidated at the minimum value evaluated by the specialist.
- **ROLE OF CREDITORS:** The committee of creditors in any company plays a crucial role in portraying its image in front of thousands of its investors. A group of financial creditors ensure an even conduct of meetings, accountability and transparency in its operations.
- **LACK OF STABILITY:** Since the Code has been established since 2016, there have been several amendments in the past seven years that has led to its lack of permanency and dynamic nature. It results in difficulty in interpretation of Insolvency and bankruptcy laws.
- **DEARTH OF PROPER INFRASTRUCTURE:** According to the reports presented by the Ministry of State for Finance and Corporate Affairs, there have been more than ten thousand pending cases before the NCLT as on September, 2019. Reasons behind this huge pile of cases can be vacant seats in the management of the tribunal, internal conflicts, poor drafting skills.
- **SCARCITY OF EXPERTS:** According to the Code, if a person desires to become an insolvency expert, he shall be a practicing lawyer for not less than 15 years, or a Charter Accountant or a Company Secretary or a Cost Accountant. Clearance of the examination conducted by IBBI is mandatory. However, there are very less number of resolution professionals registered with the board due to lack of awareness, absence of exposure and opportunities.
- **TIME – LIMIT:** The Insolvency and Bankruptcy Board controls the time period for the recovery of its debts from the creditors. The deadline has been set at every step in order to safeguard the interests of the beneficiary.

CONCLUSION:

The above-mentioned legislation is a correctional remedy for the country’s bad debt problem. This issue not only restricts the subsequent expenditure opportunities but also weakens the lending and borrowing relations with the rest of the globe. The whole mindset behind manufacturing a framework relating to insolvency and bankruptcy is to make India an ocean of possibilities for startups and business ventures without any restrain of boundaries.

In order to make the Code a success, a lot can be done in the field of improvement. The improvement of any law depends upon several other institutions and conditions. The Public Sector Banks (PSBs) have a consequential role in determining the credible performance of the IBC.

Taking into account the number of cases that has been resolved post implementation of Insolvency and Bankruptcy, Code 2016 it can be said that growth within terms of expansion and economy has been highly exceptional. In a short stretch of time, the IBC has proved its worth and unlike in previous times when the outcome of any law could be seen in decades, this is an achievement for our modern laws and their creators. A thoughtful financial plan is considered to be an investment in peace as it reduces the chance of uncertainties or monetary disappointments. IBC is a constructional change that can bring forth substantial gains for the economy and the corporate sector.

Nevertheless, each and every aspect of IBC might not have been covered under the Code, but the precedents and other relevant case laws can further help in producing landmark judgements that can cover the other necessary requirements.

SUGGESTIONS:

Any contemporary legislation requires suggestions from general public in order to move forward. Similarly, following are some recommendations that can be helpful for the law makers in future.

1. **OBJECTIVES:** It is important to identify the common objectives between the Reserve Bank of India, the government and other public and private operated banks to increase the efficiency of the IBC. All these institutions are working in the financial sector and there are high chances of clashing of their interests. Encountering of interests can often restrict the successful administration of the Code in the long term.
2. **INFRASTRUCTURE:** A proper and full- fledged infrastructure is correspondingly necessary as to the careful drafting and right implementation of the Code. The IBC might seem to be wholly supplied with skilled personnel and adequate infrastructure today but for the next twenty to fifty years, for thousands of cases in line, it might not be enough. Therefore, suitable recruitment of qualified staff is the next step in line.
3. **MICRO- LEVEL MANAGEMENT:** A suitable redressal mechanism at ground level can minimize problems on larger levels. The way the law is applied for a default at micro level can determine its risks and accounts for further actions. Also, a strong direction at the beginning can bring a positive impact on the whole fiscal structure.
4. **INCENTIVES:** It is believed that a good incentive policy for the stakeholders can boost up their morale for further investments. A modified incentive scheme for reorganization is a mandatory step in gaining additional control over the market. Similarly, disincentive for non-participants shall reduce the number of unnecessary transactions.
5. **A DEBTOR- FRIENDLY SYSTEM:** This suggestion is inspired by Chapter 11 of the U.S. Code where a debtor is given a chance to file for bankruptcy while he is still in the possession of his assets. Once an application is filed under this chapter, an unconditioned stay is utilized which gives debtor the time to arrange matters with his shareholders.
6. **INSOLVENCY PROFESSIONALS:** In the U.K. bankruptcy Code, the debtor firm is managed under the guidance of an insolvency professional during the moratorium period. This system can replace the creditor in charge structure existing in the current IBC, Code 2016.
7. **EFFECTIVE ESTABLISHMENT OF PRE-PACKS:** The Insolvency Law Committee published a report giving a green flag on the introduction of pre packs in the IBC system. With the recent amendment in July, 2021 the use of prepacks for concluding the disputes among the anguished business owners has been added.
8. **CROSS-BORDER LAWS:** When the gates of a country are opened for global businesses, not one economy is on stake but many. Therefore, cross-border risks can hamper the present as well as future investments. In today's connected world, it has become really important to have common laws in a co-ordinated manner. Global economies need to bridge the gap between the statutory agencies and the foreign courts. Foreign judgments are however recognized in the Indian Courts.
9. **EFFECTIVENESS OF THE COURTS:** The effectiveness of the Courts should be enhanced by limiting their cases and reducing their burdens. The productive response can be derived from the commercial courts when their experience is exercised on insolvency cases.
10. **DISPOSAL OF STRESSED ASSETS:** An established disposal market for stressed assets can reduce the challenge of selling among the investors. India's stressed asset market is approximately a business of 120

billion which gives a good chance to the buyers through the IBC process or extra judicial settlements for their retail promotion. A similar approach can be adapted internationally to get the best from across the world. These are growth opportunities that should be encouraged.

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