

JOURNEY OF INSOLVENCY LAWS IN INDIA WITH SPECIAL REFERENCE TO IBC, 2016 AND IT'S CRITICAL ANALYSIS

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ABSTRACT

Before 2016, there has been no comprehensive code for handling the insolvencies and bankruptcies in India, drafting new piece of legislation called The Insolvency and Bankruptcy Code, 2016 was claimed as landmark piece of legislation protecting interest of various stakeholders and to make available process of resolution which unlike provided in previous laws shall be a cumbersome-less and speedy process.

This Research work shall provide an analysis of new era laws of insolvencies based on journey covered by such laws in three years since parliament passed this code in year 2016 along with evolution and historical trends of rules and regulations dealing with such issue prior to this code and how such rules and different laws took the present shape.

No doubt an urgent and unified code was of utmost need to present sinking economy to improve credit market, but this code subjects to many limitations due to mismanagement and inappropriate implementation. Although Constant improvements and updates to code in form of amendments, drawing up of rules and through precedents follows but it still contains many loopholes, attracts constitutionality challenges and difficulties and most severely a halt faced by this code in pandemic due to suspension of proceedings and threshold is of great concern.

This Research shall be concluded by proposing various suggestions and recommendations to ascertain how the effectiveness and future prospects of the reformed insolvency law in India could be attained which must be taken into account for urgent reforms in the present code.

INTRODUCTION

A dialogue in the novel '*The sun also rises*', one of the masterpieces of Earnest Hemingway goes like this: 'How did you go bankrupt?' Bill asked. 'Two ways,' Mike said, 'Gradually and then suddenly. This conversation between two characters marks the classical design how most of the bankruptcies takes place. The Insolvency reforms in India is no different which ran for years and suddenly configured into Insolvency and Bankruptcy Code, 2016.

An essential feature of the market economy is the birth and death of firms. While some firms will be economically viable: they will generate more cash than is required to pay the liabilities incurred to run the enterprise, some firms will fail.¹ Business failures is common in all parts of world economy so is in India thus making them vulnerable to risk of Insolvency leading into adverse implication upon various stakeholders including the shareholders, creditors, employees, suppliers and customers.

The framed Insolvency and Bankruptcy Code,2016 is considered as landmark piece of legislation which is enacted with promises of providing institutionalised creditor-in-control making Shift from Debtors-in-control status and intents to develop complete Procedure for reorganisation and insolvency resolution of corporate entities, partnership companies and individuals within a defined time frame for determining the value of such persons' properties, encouraging business-friendliness, easy credit availability and balancing all stakeholders' interests. Parliament adopted the code in May 2016 and took effect in December 2016. The object from time immemorial, capital and debt markets have been the foundation of the Indian economy which provides platform for all kinds of Corporations to establish their business in India. Along with such fancies truth also lies that bad loans have emerged as the proverbial millstone around the neck of the Indian financial system. Despite a plethora of laws by virtue of Indian Contract Act, The Recovery of debts due to Banks and Financial Institution Act 1993, The Securitizations and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), recovery remained a cumbersome, protracted affair. Despite being a fundamental requirement for any well-functioning economy, India had always lacked an efficient bankruptcy system. While many government-appointed committees had recommended changes to the old regime, those recommendations were never implemented despite the gravity of the problem and its cost

to the economy. The Insolvency and Bankruptcy Code, 2016 (Code) is being hailed as one of India's biggest structural reforms in the economic sphere. The Code will have a far-reaching impact on corporate governance (for both banks and borrowers) and the availability of credit in India and Such new stringent laws proposes to take care of the existing defaulters in a time bound manner.

This Research paper proposes to bring out the complete evolution of laws and rules to deal with insolvencies and how it developed and took the present shape. Present code has come up with certain aim and objectives, this research paper shall critically analyse the journey of present code since its inception and conclude with suggestions which present law urgently needs to take up to exclude the loopholes in the execution of present code in true spirit.

The Code and its applicability

The **Insolvency and bankruptcy Code, 2016 (IBC)** is the newly framed Indian insolvency and bankruptcy laws which came into force to simplify the existing framework through the formation of a single insolvency and liquidation or bankruptcy code. As per **World Bank's Doing Business Report, 2020** with the reorganization procedure available (through the Insolvency and Bankruptcy Code, 2016), companies have effective tools to restore financial viability, and creditors have access to better tools to successfully negotiate and have greater chances to revert the money loaned at the end of insolvency proceedings.

The Code applies to companies, limited liability partnerships, partnership firms, other corporate persons, and individuals, and any other body specified by the Government.

Objectives of Code

The objectives and aims of Code could be traced through its preamble which is adhered as following:

An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of

*Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.*ⁱⁱ

This code has been framed by *The Bankruptcy Law Reforms Committee*ⁱⁱⁱ with the following goals and objectives as expected to resolve from the introduction of the current Insolvency and Bankruptcy Code:

1. Low Solving Time.
2. Low recuperation loss.
3. Higher debt funding levels across a wide range of debt instruments and specifically stated that the new Code 's efficiency and implementation would be based on measurements of the above results.

As rightly observed by Justice V. R. Krishna Iyer^{iv} :

“Law is a practical instrument, a working tool in a work-day world and where, the affected fraction of the community is the common official, the commercial man and ordinary folk, the wiser rule of construction follows common sense, not casuistry, context, not strictness and not subtle nuance but plain sen.”

Thus, it was foreseen that this code will address several problems that plague the current system and as it consolidates multiplicity of laws aiming to provide a time bound process for resolution of insolvency as already mentioned herein above. The Code outlines a two-stage process with the first stage being the insolvency resolution process for the purpose of revival which is placed priority so that corporates, firms and individuals obtains chance to recover their debt and revive their sinking businesses and when no restore is left the second stage being liquidation or bankruptcy process is triggered upon failure of resolution.

Definitions/Meanings

a) INSOLVENCY

Insolvency is a term for when an individual or company can no longer meet their financial obligations to lenders as debts become due.^v It is, therefore, a situation under which one has such a financial state of being that he cannot pay off debts on time. The ones facing this kind of insolvency are called Insolvent.

The person or firm can, but not necessarily, enter into bankruptcy. Once all parties accept a loss, negotiation is often in a position to resolve the situation without bankruptcy. This is indeed the situation of Incapability to pay its debts which necessarily does not always end up with Bankruptcy it is the problem arisen that Bankruptcy is designed to solve. It triggers the financial hardships and if such hardships are not resolved Bankruptcy might become the only way to stop your financial distress. It could be concluded that showing Insolvent is necessary for establishing or proceeding with Bankruptcy process but it not essential that such incapability will always be proceeded by Bankruptcy.

b) BANKRUPTCY

The word *bankruptcy* is derived from Italian *banca rotta*, literally meaning "broken bench" but more idiomatically "broken bank," since bankers traditionally dealt from wooden benches. A folk Etymology alleges that Italian bankers' benches were smashed if they defaulted on payment, but this is often dismissed as a legend.^{vi}

Bankruptcy is a legal proceeding involving a person or business that is unable to repay their outstanding debts. The bankruptcy process begins with a petition filed by the debtor, which is most common, or on behalf of creditors, which is less common. All of the debtor's assets are measured and evaluated, and the assets may be used to repay a portion of outstanding debt.^{vii} Bankrupt is not the only legal status that an insolvent person may have, and the term *bankruptcy* is therefore not a synonym for Insolvency.^{viii} Thus, Bankruptcy is the state of being Bankrupt having inability to pay its debts where through legal process issue of insolvency is resolved for which he may adjudicate for relief of his complete or part of his debts through a proper legal process. Once a person is declared as 'bankrupt', Various adjudicating authorities or qualified Professionals are accountable for liquidating Such insolvent personal property is handed over and to its

creditors. Therefore, supplying the insolvent with a fresh start. It could be therefore summarized that all insolvent entities might not be declared bankrupt as they could be fixed with period of time however all bankrupt entities are insolvent.

c) **LIQUIDATION**

Liquidation is the process a debt-laden company initiates to wind up its operations and sell its assets in order to repay said liabilities and other obligations. A company is liquidated when it is ascertained that the business is not in any state to continue. This may be due to various reasons such as insolvency (usually the main reason), unwillingness to carry on operations, etc. If the enterprise is bankrupt the liquidator sells the company's assets to repay all liabilities. The positive balance after repaying the creditors is then distributed among the company's shareholders.^{ix}

As per accounting standards, liquidation refers to the process of selling all of a company's assets to generate cash to pay off creditors, or anyone the company owes money to. The entire process of liquidation of companies are carried by Liquidators.

Thus, it could be concluded that Insolvency is the trigger which results into Bankruptcy or Liquidation. **Bankruptcy**, the next state to insolvency for an individual and partnership specified under the new era laws. Generally, failure of resolution process leads to Bankruptcy. Whereas, Liquidation involves the Liquidation of a company under the supervision of a person or "liquidator", empowered under law for such operation and for distribution of proceeds to the various creditors as per an agreed formula. Only firms can be liquidated. Defaulting individuals cannot be liquidated.

HISTORICAL EVOLUTION OF IBC

Introduction

Legal framework of resolving various insolvencies which existed in present form reflects all laws and regulations existed before inception of IBC. In this part of Research work, we will set back to the basics in different time phases to understand the problem of resolving insolvency in different eras of India and try to sought the Historical evolution of Present law by tracing different designs and approaches broadly divided in three phases prevalent to solve issues of Insolvency and Bankruptcy in India. The first Phase shall describe **Law of Debts in Ancient India** proceeded by Second Phase dealing with **Individual Bankruptcy and Insolvency**

during **British Era** and finally **Evolution of Complex of multiple of Laws in Post-Independence Era** till enactment of Present Law termed as Insolvency and Bankruptcy Code, 2016.

Law of Debts in Ancient India

अि नशष म् ऋणशष म् श शष च ।

पनः पनः प्रवधत त मात षषम न कारयेत् ॥

It could be marked by above mentioned Ancient Scriptures which meant 'If a fire, a loan, or an enemy continues to exist even to a small extent, it will grow again and again; so, do not let any one of it continue to exist even to a small extent.' provided guidance in respect of the borrowing behaviour. It has been made through the Dharamashastras, the collection of important Smiriti^x that Law of debt is a very important branch of ancient Hindu Law. It has been emphasized that it is the legal as well as the moral duty of a person to pay his debts. Further, the classical Islamic Laws could also be drawn regarding Debt and Bankruptcy in Ancient India. The Quran and the Sunna describe not only how to worship and live morally as a Muslim, but they also prescribe rules for commercial life.^{xi} The Quran specifically addresses debt (*Iflas*). The Quran emphasizes the debtor's obligation to repay their debts.^{xii} Within the Hadith also there are set examples in which the Prophet tells followers to repay their debts. The Prophet narrates that "the best among you are those who repay their debts handsomely."^{xiii}

Individual Bankruptcy and Insolvency during British Era

From above it was traced that the laws of debts in India have their origin from Ancient India and took shape of insolvency laws during British Era in form of English Laws.

- The provisions that dealt with insolvency law were initially found under S.23 and 24 of the Government of India Act 1800. In 1828, a Statute was passed marking the beginning of insolvency specific legislation in India. This statute applied to Presidency towns namely Bombay, Madras and Calcutta.^{xiv}
- Then the Indian Insolvency Act 1848 was enacted that made distinction between traders and non-traders. The jurisdiction relating to insolvency was transferred to High Courts, limiting its jurisdiction to presidency towns.^{xv}

- The Presidency Towns Insolvency Act, 1909, covers the insolvency of individuals and of partnerships and associations of individuals in the three erstwhile Presidency towns of Chennai, Kolkata and Mumbai. The 1861 Indian High Courts Act led to the setting up of the High Court system in place of the Presidency towns Supreme Courts, which also has jurisdiction over insolvency related matters in the Presidency towns.^{xvi}
- The Provincial Insolvency Act 1920, is the insolvency law for individuals in areas other than the Presidency towns, deals with insolvency of individuals, including individuals as proprietors. Section 3(1) of the Provincial Insolvency Act, 1920, allows the State Government to empower subordinate courts to hear insolvency petitions, with district courts acting as the court of appeal.^{xvii}

These two legislations, The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act 1920 continued in force until recently and were repealed by the present Insolvent and Bankruptcy Code, 2016.

Evolution of complex of multiple of laws in Post-Independence Era:

From time immemorial, capital and debt markets have been the foundation of the Indian economy. They created a comfortable specialty for small industries, large corporations and even MNCs to establish their business in India. Reputed banks finance the debt market by adopting exceptionally proficient banking measures under the aegis of the Central Bank, RBI. On the premise of credit shortcoming and feasibility for acknowledgement of the debts, the assets are arranged basically into two classes Standard Assets and Non-performing Assets.^{xviii} “Standard Assets are assets in which there has been timely payment of interest and instalments. Non-performing Asset is defined as an asset whose interest or principal is overdue for a period of one hundred eighty days or more from the due date of contract between the lender and borrower”^{xix}

The data asymmetry existing among banks with regard to credit facilities, deteriorating industries and fraudulent practices engaged by the industrialists have encouraged the creation of “bad loans” or “stressed assets” or “non-performing assets” (NPA).^{xx} When the company becomes bankrupt, the banks are left with no other option but to write off the loans. Throughout the years, this heaping up of NPAs bottlenecked development of the economy. Ensuing to which, the Government passed two major statutes to recoup the debts—The Recovery of Debts

Due to Banks and Financial Institutions Act 1993 (DRT Act) and Securitization of Assets and Reconstruction of Financial Assets and Enforcement of Security Interests Act 2002 (SARFAESI Act 2002) to recover the bad loans. The passing of these two enactments enhanced the level of debt recovery process in India as enforcement of security interest created in favour of the creditor is now possible without the interference from the courts, with the drawback that this mechanism only provides relief to secured creditors.^{xxi}

As “Bankruptcy & Insolvency” is in the Con-current List in the Indian Constitution^{xxii}, both Centre and State Governments have power to legislate on this subject. Entry 43 of List I deals with incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies whereas Entry 44 of List I deals with “incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities”. Entry 32 of List II deals with “incorporation, regulation and winding up of corporations, other than those specified in List I ...”. With these powers given under the Union List, the Parliament enacted the first legislation dealing with corporate insolvency in India viz. the Companies Act 1956. However, the Act did not refer to insolvency or bankruptcy of corporates it only referred to its “inability to pay debts”.^{xxiii} The Companies (Amendment) Act 2003 proposed several changes to the provisions relating to insolvency under the Companies Act 1956. However, these could not be notified due to legal challenges.^{xxiv} In 2013, the new Companies Act was passed introducing several changes in the corporate insolvency procedure. Companies Act 2013 contains provisions for rescue and rehabilitation of all registered entities in Chapter XIX, and Liquidation in Chapter XX. However, these provisions have not been notified. The law for rescue and rehabilitation remains the Sick Industrial Companies (Special Provisions) Act (SICA), 1985, although it applies exclusively to industrial companies. Under SICA, a specialized Board of Industrial and Financial Reconstruction (BIFR) assesses the viability of the industrial company. Once it has been assessed to be unviable, BIFR refers the company to the High Court for liquidation. The SICA was repealed in 2003, but the repealing act could not be notified as the National Company Law Tribunal proposed by a 2002 amendment to the Companies Act, 1956 got entangled in litigation.^{xxv}

With passage of time the Corporate insolvency has attained great significance. Globalization of the economy has raised the need more. Moreover, the calls for a deeper redesign of the combined single process as discussed above under heading of Need of IBC was much of necessity for better Economic growth and existence. The present law in force on insolvency and bankruptcy in India has evolved over a period of time after the recommendations and suggestions provided by different committees constituted from time to time. Some of the relevant and recent committees which have given insolvency and bankruptcy present shape are as follows:

1. **Tiwari Committee:** In 1985 after RBI showed huge concern over blocking of huge funds and NPAs of Sick companies this committee recommended suggestions to secure the issues by the enactment of the Sick Industrial Companies (Special Provisions) Act 1985 (SICA). A Board for Industrial and Financial Reconstruction was established which later failed to fulfil the purpose in the long run.
2. **Justice V.B. Balakrishna Eradi Committee:** The Tiwari Committee was followed by the Justice V.B. Balakrishna Eradi Committee Report in 1999, setting up of a NCLT for functions and power with regard to rehabilitation and revival of sick industrial companies. It also recommended amendments to the Companies Act 1956 that were enacted but not notified. Other recommendations were adoption of UNCITRAL Model Law for Cross Border Insolvency; need to encourage voluntary winding up of companies and criteria of sickness of companies to include inability to pay debts.
3. **N L Mitra Committee:** It was set up by RBI in 2001 as the Advisory Group on Bankruptcy Laws under the chairmanship of Dr N L Mitra. one such significant proposal was the consolidation of all the scattered bankruptcy laws into a separate code. However, no steps were taken.
4. **J. J. Irani Committee:** In 2005, it was set up to review and revise primarily Company Laws to establish a transparent framework for insolvency and restructuring procedures at international level. This Committee recommended changes in the law to make the restructuring and liquidation process expeditious. The suggestions comprised direction of providing a single framework resolving insolvency of corporates through a specialized adjudicatory authority.
5. **Bankruptcy Law Reforms Committee (BLRC):** This Committee was Headed by Mr T.K. Viswanathan, the report was introduced in two parts: The first part dealt with the

rationale and design/recommendations and the second dealt with comprehensive draft Insolvency and Bankruptcy Bill covering all entities. The report suggested major changes of the existing framework. The Present Insolvency and Bankruptcy Code 2016 is the outcome of these recommendations.

Conclusion

This Code evolved over a period is jewel in the Indian statute book and is a historic law reform legislation. Apart from reforming the credit market, the Code also further takes into account new reforms in law must be progressively made to shape it in perfect suiting demands of economy. The Central Government followed up the enactment of the Code with a continuous monitoring mechanism by constituting a Standing Committee on the Code^{xxvi} to respond to the challenges arising in the operation thus providing a great platform for this code to keep moving towards achieving its stated objectives. Brilliant judges adorning the courts and tribunals, enforcement authority and various professionals are established who are charged with the duty of laying and running the foundation of new legislations enacted by Parliament overcoming the complex structure of credit market in nation.

CRITICAL ANALYSIS OF CODE

“The IBC provides India with a self-correcting marketplace for the secure and transparent disposal of distressed assets” by Aditya Mittal, President and CEO, Arcelor Mittal.

Finance Minister Sri Arun Jaitley introduced the Insolvency and Bankruptcy Code 2016 in the Lok Sabha in December 2015. This Code was introduced in the economy at a perfect timing when it was needed utmost. There were many cases that deals with liquidity and insolvency and codes and laws were not competent and accurate enough to deal with such complexities. Such laws made it more difficult for revival of the sick companies. Thus, there was a need to introduce IBC. Now it’s been more than three years of its presence in the economy, we can see a much better results but this code along with so much advantages it is subjected to limitations that occurred due to mismanagement and inappropriate usage of the Code. Although Constant improvements and updates to IBC have followed in response to the feedback received and

practical experience of processes under execution still this code and its execution comprises loopholes, its constitutionality challenges and difficulties and most severely a halt faced by this code in pandemic due to suspension of proceedings and threshold is of great concern.

To its credit, the Government has been willing to hear out suggestions. An expert committee was constituted to suggest modifications required by the IBC to fine tune it and plug-in loopholes.

The recommendations of the committee that were accepted were brought in as amendments to the Code. For instance:

- Homebuyers to be treated at par with financial creditors—they can also take builders to bankruptcy code.
- Lenders to decide turnaround or liquidation by 66% vote, down from 75%— decision making easy.
- Redefines entities disqualified from bidding for bankrupt firm—widens the pool for bidders.
- Withdrawal of application admitted under IBC by approval of 90% lenders—exit opportunity to corporate debtors for better settlement outside IBC purview
- MSME promoters can bid for their enterprises, which are undergoing Corporate Insolvency Resolution (CIR) process provided they are not wilful defaulters—big relief to MSMEs.^{xxvii}

Justice A.K Sikri while addressing the gathering as special chief guest states that revival of sick companies benefits the companies but also assist in achieving high Gross Domestic Product, generate employment and eventually realistic and faster growth in the economy. Indian economy should show its interest in looking for all possible options to revive the sick companies. The significant provision of IBC, 2016 is in charge of management in a sick company. “Insolvency and Bankruptcy Code, 2016 is a game changer.”

The concerns of this Research paper after evaluating The Insolvency and Bankruptcy Code, 2016 and its journey covered completing almost more than three years of its implementation with striking hits and misses can be summarized and concluded as following:

1. The Time bound manner process of CIRP.

“Timely resolution is very important. I'd request you to ensure that the resolutions are done in time, not just for the regulatory requirement but also because it will result in better valuation going forward.”

-N. S. Vishwanathan^{xxviii}

As cleared from earlier chapters of this dissertation, the quintessence of this code lies at its timely resolution of sick companies which used to be never ending process before this code. IBC mandates that an insolvent asset must be resolved in 270 days. If an insolvent asset does not find a buyer within that period or if the committee of creditors, the decision making body on these assets, is not happy with the bids, the asset should be liquidated at the minimum value assessed by the resolution professional managing the asset.^{xxix} According to KR Jinan, Judicial member at NCLT Kolkata bench “Missing the 270-day deadline is a misnomer,” because the code does not specifically mention regarding computing the duration of 270 days that whether delay in time due any justified reasons or unforeseen circumstances shall be excluded or not from computing such duration which has been a subject matter in a number of cases before the NCLT and NCLAT.

Giving a verdict in the **Quinn Logistics India vs Mack Soft Tech** case, NCLAT held that if an application is filed by the resolution professional or committee of creditors or any aggrieved person for justified reasons, “it is always open to the adjudicating authority/appellate tribunal to ‘exclude certain period’ for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion in unforeseen circumstances.”^{xxx} Thus such delays in computing the period and lately delays in judgements creating the gaps and collapsing the speed of recoveries causes to raise fear that IBC may face same fate as DRT and SARFAESI.

The IBC is aimed at early corporate debt resolution and value maximisation of the assets of the debtor. But gaps in the IBC ecosystem and infrastructure bottlenecks have slowed the process.^{xxxi}

2. CIRP leads to sharp decline in value of enterprise.

The enterprise indulging into the insolvency regime as mentioned in the code it is observed that value of the firm reduces exponentially with time, as prolonged uncertainty about its ownership and control and general apprehension surrounding insolvency may make the possibility of resolution remote. Although the Code mandates closure of resolution process in a time-bound manner to preserve the value but it is marked and analysed in above point that timely completion of resolution process faces great challenges due to several reasons.

3. NCLT's are overburdened and understaffed.

“Delays in judgement, admission of cases and interruptions in the whole process, besides the gaps in infrastructure, have compromised the IBC mechanism,” said KP Sreejith, managing partner at India law LLP.

The NCLT was constituted under the Companies Act 2013 to adjudicate on corporate disputes under the law. But it was also given the additional task of hearing corporate insolvency cases under the Insolvency and Bankruptcy Code (IBC).^{xxxii}

With this, the NCLT had to takeover related cases pending before the high courts (approx. 5,200), Company Law Boards (approx. 4,000), Board of Industrial and Financial Reconstruction (approx. 700), and the Debt Recovery Tribunal (approx. 15,000).^{xxxiii}

The tribunal has sixteen benches, six at New Delhi (one being the principal bench) and two at Ahmedabad, one at Allahabad, one at Bengaluru, one at Chandigarh, two at Chennai, one at Cuttack, one at Guwahati, three at Hyderabad of which one is at Amaravathi, one at Jaipur, one at Kochi, two at Kolkata and five at Mumbai. Of the two new benches approved to be set up, one each in Indore and Amaravathi, the Indore bench is yet to be notified. Except the Bench at Amaravathi, all the benches have been notified as division benches.^{xxxiv} Thus, there are only 15 company tribunals presently working to carry out the entire burden as mention in preceding para along with the burden of cases of Insolvency and Bankruptcy code cases since its implementation. For such overburdened system one bench exists only in name. The NCLT bench at Kochi was constituted through an MCA notification in July 2018 with jurisdiction over Kerala

and Lakshadweep, both of which were overseen by NCLT-Chennai until then. However, almost a year later, the bench had not yet begin functioning, and Chennai continued to hear matters from these two territories despite the July 2018 notification divesting it of jurisdiction to hear their matters. The Chennai bench also oversees matters from Tamil Nadu and Puducherry.

The Centre did promulgate the Companies Amendment (Ordinance) 2018 on 2 November to de-clog the NCLT by decriminalising several offences under the Companies Act, besides increasing the financial jurisdiction of the regional director from Rs 5 lakh to Rs 25 lakh, so they could handle more cases and fewer reached the NCLT. The actual impact of the ordinance on the functioning of NCLTs, however, is yet to be seen.^{xxxv}

The lack of permanent judicial members and supporting judicial infrastructure such as clerks, paralegals and stenographers has further enhanced the challenge for the system. No doubt judges are doing their best to handle such huge workload but there is limit to human capacity curbing which could result in deteriorating efficiency of well enhanced code.

4. Infrastructural challenges

“In view of the large number of cases that may be referred to National Company Law Tribunal (NCLT) in the near future, there may be a case for strengthening the NCLT infrastructure in order to ensure that it can deliver on its promise of time-bound resolution,” -The RBI noted in its ‘Report on Trend and Progress of Banking in India 2017-18’.

Another challenge is space constraint at the NCLT’s specially this problem could be encountered more in Delhi’s premises, the CGO Complex, which is also home to the NCLAT. The Premises is handling 60-matters-a-day rosters which subjects to chaos and struggle faced by litigators. Both the Delhi High Court and the Reserve Bank of India (RBI) have highlighted the need for an infrastructural upgrade for the NCLTs which seems to achieve too far for a while.

5. Too much discretion in the hands of Insolvency Resolution Professional.

“How do you expect a resolution professional not only to understand the nuances of the business, calculate the claims of various creditors, figure out the long-term viability of the company, and then devise a resolution plan that will ensure that the company continues to generate enough cash flows to not just service its debts but generate profits too?”

asks Pandey of J. Sagar Associates.^{xxxvi}

The entire management goes into hands of IRP along with powers of Directors which get suspended and all operations comes into his hands which could be more distressing and critical.

The Code has provided only 30 days’ time to the Interim RP, and during that period he is eligible to act as per powers given under section 20 of the Code. But practically within the 30 days’ time it is not possible to understand the existing status, make up mind for further action even if he appoints accountants, legal or other professionals for his assistance, they will take certain time to start and complete the work. Therefore, he may not be practically able to take effective and proper action as are necessary to keep the entity as a going concern.^{xxxvii}

6. Creditor classification under Insolvency and Bankruptcy Code, 2016.

The code classifies between the Financial Creditors and Operational Creditors along with marking difference in the Resolution and Liquidation process of same. The operational creditor where debt is in respect of goods and services unlike financial in respect of other class later is always prioritised and such unfairness is promoted by BLRC’s report itself.

The irony is that the last put unsecured operational creditors can get a presumption only after the financial creditors have filled their bellies as far as the plate has to give. In reality, the operational creditors may end up with no payment at all in many cases, since most insolvencies are deep enough.^{xxxviii} Thus, such distinction made in the newly framed code is not clearly intelligible nor does it seem to be competent within the umbrella objective of equitable treatment.

7. IBC being a law more for the Bankers.

The IBC has drawn significant criticism for being a law more for the bankers, and less for the smaller operational creditors. MSMEs, too, are not very pleased with the treatment they have been meted out under the IBC. The power sector is also fighting for its life before the Supreme Court, seeking some respite from IBC and its strict timelines.^{xxxix}

8. Personal Insolvency Ignored and Side-lined.

“The individual credit has grown in recent times where individuals account for almost 38 per cent of non-food credit and the stress on personal loans is increasing.”^{xl}

Thus, great emphasis needs to be made on personal Insolvency too which have been most ignored area of debt in recent developments of Code. Part III of this code which exclusively deals with Insolvency and Bankruptcy of Individuals and Partnership Firms had not notified with enactment of this code in 2016 whereas, certain provisions relating to the Personal Guarantors to the Corporate Debtors had been notified on 1st December 2019 by Gazette Notification dated 15th November 2019. The part relating to Fresh Start is not notified yet. Wherein A large number of households and small businesses in India which were already burdened with piled-up debt and lack of availability of proper process of getting resolved, with the situations of destructive Pandemic had made matters worse for them.

While the government is making efforts to provide liquidity and financial support in the form of subsidies, loan schemes, and direct cash transfers for the vulnerable, unless existing debts are resolved, such measures will not be sufficient to help people in a meaningful way.^{xli}

9. Deficiencies in Fresh Start Process

As described in the Dissertation that the eligibility criteria for filing an application for Fresh Start Process is mentioned in Section 80 (2) of Insolvency and Bankruptcy Code.

In such scenario as mentioned in above proviso of this Code it could be made out that if the person who fulfils the criteria mentioned here in above has no need to go for insolvency I.e application to made for fresh start process and further resolving the credit through Insolvency resolution process as he is already living at state of poverty and

seems to be virtual bankrupt and in such circumstances there is no means how a creditor would pursue to claim its debt. Further, it is important to make note of the Fresh Start Process wherein the Debtor is declared Insolvent and becomes Bankrupt ultimately. Such Process is more prevalent in the United States where personal laws are strict and in case of default there are penal provisions of imprisonment and heavy penalties and in order to escape from such liabilities they declare themselves Insolvent. Wherein in India by virtue of the new enacted Code an individual by complying with the procedure given in the Code can be adjudged insolvent and discharged of his liabilities which gets subjected to many benefits including moratorium period whereby all the legal cases and proceedings are stayed and no fresh proceedings can be initiated till the conclusion of process and ultimately if he is unable to pay the qualifying debt, he is discharged of all his liabilities including the penal provisions of law.

10. Dealing with the Contingent Liabilities.

Most companies have varied pending litigations—tax, statutory dues, government dues, labour litigation and other commercial disputes. Resolution applicants have less clarity on whether and to what extent such dues will be discharged as a part of CIRP. Contingent liabilities by nature cannot be reliably estimated. Hence, it will be difficult to value the company and it requires a lot of risk analysis before presenting a resolution plan.^{xlii}

11. More companies are turning into liquidation.

The primary objective of this code with which it was enacted was revival of Distressed business so that they can survive to make profits and clear its debt contributing more to the economy and the last resort must be liquidation in rare of rare cases when revival is not all possible but According to the Quarterly Newsletter of IBBI^{xliii} the status of CIRPs as on December 31, 2019 is presented to be that out of total number of cases admitted to CIRP which are 3312, Cases closed by resolution are 190 whereas Cases closed by Liquidation amounts to be 780 which clearly embarks the failure of code.

12. The Code turning into fear of complexities and confusions.

The Code within 3 years of enactment had been amended multiple number of times along with continuous interpretations have made the procedure a bit complex and tend to confuse professionals playing major role in carrying out the various processes at

various stages of resolution or liquidation or Bankruptcy process. Although such changes have been brought for achieving the objectives of code and for betterment of economy but when such changes are not appreciated or further taken in true spirit these amendments and interpretations shall be of no use. The code when enacted must have been introduced with more caution so that correction of all such regular loopholes and incapacities could have avoided turning it to be complex and confusing.

13. Fleeing of offenders and fraudsters.

This issue has been also major drawback in implementation of present insolvency code. According to data by the External Affairs Ministry, between 2015 and 30 June 2018 Twenty-eight such Indian defaulters in financial irregularities had fled from the country. The list compiled by the Central Bureau of Investigation and Enforcement Directorate comprise names like Mallya, Nirav Modi and his brother Neeshal Modi, Choksi and Lalit Modi.

14. The IBC (Amendment) ordinance 2020: A Pandemic of Bad Drafting.

The recent IBC (Amendment) Ordinance, 2020 was promulgated on June 5, 2020 triggered on account of economic distress caused by the ongoing COVID-19 pandemic which suspends the operation of Section 7, 9, 10 of this Code for period of 6 months, extendible up to one year.

This amendment is not happily worded, and within a short span of time we have seen so many conflicting interpretations. Two Sections, viz. 10A and 66(3) have been incorporated in the Insolvency and Bankruptcy Code, 2016. The arrangement of expressions in the newly-inserted Section 10A is very poor and that creates an unwanted confusion which compels me to name it “**A Pandemic of Bad Drafting**”.^{xliv}

This newly inserted Section 10A of this code is read as

“Notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf”

Such underlines expressions could be misled by the wrongful placement.

With all such and many other short comings of code and difficulties faced while implementation of same since its inception it is also important to note and cannot be avoided that code is contributing its bit also in full indebted economy. In a matter of over 3 years, approximately 25,000 cases have been filed under the Code, of which around 3,000 cases have been admitted. A total of 221 cases have yielded resolutions, and 914 resulted in liquidation. About 2,170 cases were undergoing CIRP as on 31 March 2020.^{xlv} The government has been trying its hard pro-actively addressing and working upon the issues that come up in the implementation of the reform.

The Code is also instilling confidence among the stakeholders with respect to the financial system in general. As per the Systematic Risk Survey reported in the FSR of June 2019, about 50 per cent of the respondents felt that the prospects of the Indian banking sector are going to improve marginally in the next 1 year aided by the stabilization of the process under the Code which will also play a key role in enhancing the confidence in the domestic financial system. As the implementation of Code strengthens going forward, and framework for individual insolvency is also in place, it is expected that it would contribute immensely to government's start-up initiatives.^{xlvi} These might be assertions and expectations which reflects the glass as half full but critically it could be easily made out that as per the report in FSR mentioned above that half of the institutes still cannot put its trust on mechanism of this code and faith of improvising and stabilizing of code and economy cannot be seen at least for now due to huge economic distress the nation is facing and shall have to face in near future. No doubt the efficient and effective insolvency regime is need of hour and IBC proposed to deliver same.

It is often difficult to tangibly measure the contribution of an efficient insolvency system in national prosperity. Direct measures of the impact tend to underestimate its importance as they may fail to account for the 'enabling' and 'preventive' role played by the insolvency system. While the sustainable impact of the IBC will be known in due course, green shoots have already emerged and some significant benefits of the IBC are visible.^{xlvii} To look for more sustainable impact of code certain changes in attitude of mechanism and reforms are must. Following are certain Suggestions and point of improvements made out on analysing the code and its implementation in journey of three years made out through research work on present Dissertation to strengthen this Code.

SUGGESTIONS AND RECOMMENDATIONS

“For the rational study of law, the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”

- Jr. Holmes O.W. ^{xlvi}

1. **Strength NCLT’s**

To strengthen IBC government must focus on strengthening the National Company Law Tribunals by providing it with more financial and human resources so that it does not get overburdened by the rush of matters of insolvency of corporations. Removing such incompetencies and lightening its burden will ultimately improve the efficiency and effectiveness of code and delay in resolution processes.

It is feared that if the NCLT doesn’t address and tackle the procedure hangover and infrastructure woes in its early days, it could just end up being a prettier version of the CLB, BIFR and DRT.

2. **Discretion of Banks**

Banks on their own caution and discretion must be allowed to put this code in effect for better utilisation and for better outcomes Moreover other financial institutions should also be considered at par before adjudication of insolvency matters.

A column in this newspaper^{xlix} by Amitabh Kant, CEO, NITI Aayog, and Richa Roy, an attorney correctly stressed the need to improve the operation of the Insolvency and Bankruptcy Code (IBC) to effectively resolve corporate distress. It takes on significance following the decision by the Supreme Court to quash RBI's 12 February circular, which directed banks to initiate bankruptcy proceedings against defaults above a specified level.

3. **Minimise Delays**

To minimise delays, the need is to vastly enhance capacity and induct experts.¹ More and more benches— including specialist benches— have to be set up by the adjudicating authority. Further, bankers must have the leeway to take haircuts without asking government authorities to witch-hunt them.

Changes to the Banking Regulation Act (Section 35AA) are also required to dispense with the precondition that the Center must allow RBI in the case of unique defaults to issue directions. RBI should be completely allowed, if necessary, to issue instructions for banks to begin bankruptcy proceedings.

4. **Maximize the Recovery**

Sale and disbursement of properties of defaulting companies under liquidation should be made more competent and transparent through introduction of various online procedures such as e-auction and e-tender so that maximum number of dues to creditors could be repaid through fair means and such procedures will be best suited to tackle the halt brought to code by pandemic situations.

5. **Put stop to mismanagement turning companies' insolvent**

Along with strengthening code and its implementation government must also focus towards mismanagement of the financial affairs of the company by the board members which is the substantial cause for companies' finances going bust. Government must introduce a mechanism or law which would affix accountability of such members who are involved in such mismanagement and defaults and finally leads to sinking of entire empire. Such mechanism will act as a deterrent against mismanagement of companies that jeopardize the interest of the creditors and will reduce pushing it towards insolvency.

6. **Alternative to the Ordinance of 2020**

To avoid all kind of confusions created by the said ordinance and serve the objective of the preamble of same ordinance was simply to redefine and amend the definition of "Default" which would have served all purposes and objectives of ordinance avoiding all kinds of confusions.

The better way would have been to amend the definition of "Default" itself by simply adding a Proviso in Section 3(12) to the following effect: *"Provided that the defaults arising on or after 25th March, 2020 for a period of six months or such further period as may be notified by the Central Government in this behalf but not exceeding one year from the said date, shall not be considered for the purpose of calculating the 'minimum amount of default' under Section 4 of the Insolvency and Bankruptcy Code,*

2016.”^{li}

This would have taken care of all the objectives cited in the preamble of the Ordinance and there would have been no confusion at all. The whole of Part II of the IBC, 2016 which includes Sections 7, 9, 10 and 66 as well would have become inapplicable to such defaults for the intended period by amendment in such manner. Through the medium of this Article, I request the concerned authorities in the central Government to take cognizance of the point raised here to improve their future endeavours in enacting legislations. This will save the crucial time and efforts of the courts and the practitioners, mitigate the burden of the already burdened judiciary, avoid conflicting judgements and serve the cause of justice.^{lii}

7. **Miscellaneous**

- IBBI must train professionals who may take steps and research for alternative methods to resolutions plans.
- Code must put emphasis and encourage Out of court settlement.
- More clear guidelines regarding evaluation of bidding system and its deadlines.
- Code along with making shift of management of company in hands of creditors must also regulate preventive measures to protect the interest and rights of the company which does not of course means to empower Debtors.

The IBC should not revert back to the adversarial legal system where the debtors and creditors have ‘equality of arms’ and debtors with better resources are able to delay cases.^{liii}

- Some broad guidelines for equal treatment of Operational Creditors.
- It is high time for government to focus on Personal Insolvency also.
- Government must make a keen watch and introduce amendments in Passport Act which would prevent Fraudster Borrowers and defaulters fleeing and escaping from country for better functioning of present Insolvency Code.

Thus, *“Change is a necessary companion to law-making, especially when you’re creating something new such as the management of bad assets, and defaulters who believe they have built layers of immunity. People recognise the IBC is being road-tested. You can either ignore the road bumps or fix them.”*

ENDNOTES

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