THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) 2020: A BOON FOR CORPORATIONS

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INTRODUCTION

This pandemic has brought changes in everyone's life from a migrant worker to any MP sitting in the parliament.25th March 2020 is the day when the nationwide lockdown was announced and has certainly disrupted several business operations. It has affected all kinds of businesses either small or large. Many companies are financially stressed and dragged into the corporate insolvency resolution process. "The central government has amended the principal act of the Insolvency and Bankruptcy Code, 2016 to shield businesses from corporate devastation after seeing the loss of business and distress caused by the 2020 pandemic and nation-wide lockdown."

The central government had introduced the Insolvency and Bankruptcy Code, 2016 to refurbish the structure for the insolvency proceedings in India. The code was designed to amalgamate the laws relating to insolvency proceedings in India to promote the entrepreneurship and balancing of every stakeholder in the company. The government has made time to time amendments in the act to remove the intricacies from the corporate and to streamline the insolvency process under the code.

Due to tremendous changes in the corporate sector, the central government amended the insolvency code twice in the same year. "Before the implementation of the IBC on December 1, 2016, India had a complex insolvency management system regulated by a few convoluted laws such as the Companies Act of 1956, the Sick Industrial Companies Act of 1985, and others, none of which offered a fully amicable solution in and of themselves." Furthermore, reforms also simplified and expedited the insolvency procedure. Insolvency is characterized as a financial situation in which the debtor is unable to repay his or her creditors. The filing of insolvency, or bankruptcy, is a legal position.

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HISTORICAL OF INSOLVENCY AND BANKRUPTCY IN INDIA

The origin of Insolvency Law in India

The insolvency rule in India is focused on English rules. The insolvency rule was first implemented in India in the three presidency towns of Madras, Bombay, and Calcutta, where British corporations conducted business. "The Government of India Act, 1800, the Indian Insolvency Act, 1848, and the Presidency-towns Insolvency Act, 1909 ruled insolvency proceedings in India in the past." These laws regulated the insolvency of a partnership, an entity, or a corporate body back then. These regulatory frameworks only apply to presidency cities, leaving non-presidential towns unaffected. This bill was passed by the British government to make doing business simpler. Till the early 1900s insolvency laws were only applicable to presidency towns of Madras, Bombay, and Calcutta. But later in the year 1920, Provincial Insolvency Act was passed replacing the same act of 1907. Now, according to the new laws, the non-presidency towns are also subject to enjoy the privileges given to presidency towns. After this move, many small scales businesses have grown in the country relying on the new laws to support them in the crisis.

The Law Commission of India in 1964 tried to remove the ambiguities from both the laws by combining them. Nevertheless, due to many unusual things that happened and those laws never came into combination. "The Presidency towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 is still active in India and is relevant law to resolve any insolvency dispute."

THE COMPANIES ACT, 1956: FIRST LAW FOR CORPORATE INSOLVENCY

India got complete independence from the British in 1947. "The Indian constitution enacted in 1950 has defined the terms 'insolvency' and 'bankruptcy' in the concurrent list." But the power of regulation and incorporation is enshrined in the union list. The Companies Act was passed in 1956 with the power listed in both lists. The act contains all laws relating to the operation and establishment of businesses in India. Even though the Corporations Act does not describe "insolvency" or "bankruptcy," it does outline the failure to meet debts. The Companies Act, however, was the only fair legislation in India for dealing with corporate insolvency.

Later over time, the High Courts have set up adjudging authorities to resolve matters under this law. A person (the creditor) can petition the court for winding up a company with unpaid dues above the threshold. Liquidation is a process for winding up a company by an Official Liquidator (OL) appointed by the High Court. The Official Liquidator (OL) was the only authority to collect assets in a company, manage the sales and distribution in a company according to the priority specified in the acts. The companies act, 1956 comprised of some provisions which a company or its creditors could seek to reconstruct. Although, these provisions are general and don't have insolvency or bankruptcy in specific.

"According to the MCA, in 2013, there existed more than 14 lakh companies registered under the companies act, of which only about 9.5 lakh were active. In contrast, an average of not more than 6,500 cases of winding up enrolled with the High Court between 2008 and 2010." Every year around 250-300 cases get registered and around 300-600 disposed of in a year. This sums up that the implementation of the Companies Act methods to deal with corporate insolvency. It also suggests the inability of High Courts to deal with the burden of cases. Some shreds of evidence show that the winding-up process takes around seven to eight years to complete some worse cases, took 25 to 28 years.

In 2003, the central government had introduced the Companies Act (Amendment) 2003, which proposes significant changes in the Companies Act, 1956. However, implementation never happened due to legal challenges faced by the act. Then in 2013, a new amendment in the Companies Act, 1956 was made. Most of the amendments were similar to the previous amendments proposed in 2003. Alike, the former act new act had plenty of implementation issues too. Therefore, it never gets implemented.

THE EVOLUTION OF INSOLVENCY AND BANKRUPTCY LAW IN INDIA

(A) Bankruptcy Law Reform Committee (BLRC), 2014

The Ministry of Finance in 2014 constituted a committee to bring the reforms in insolvency and bankruptcy. It was a significant effort to enhance bankruptcy laws headed by Dr. T.K Vishwanathan as the committee was Bankruptcy Law Reform Committee (BLRC)[1]. The BLRC formed to advocate the Indian Bankruptcy Code, which will apply to all individuals and corporate and would succeed the existing structure of bankruptcy in India. "Finally, in

[1] The Bankruptcy Law Reform Committee (BLRC), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

November 2015, the committee submitted its report accompanying a comprehensive draft of the Insolvency and Bankruptcy Code (IBC)." In 2016 May, the proposed draft with amendments enacted in the Parliament. That signifies that now India formally has insolvency and bankruptcy laws that would outmode any other existing laws for debtors and creditors. It soon gets notified in the official gazette of India.

(B) The Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 is modified from the complex laws already present to deal with corporate insolvency. Both, the design and the principle of the new framework stand modified from previous legislations. The IBC formed considering all the past recommendations which include apex court, High Courts, and other committees. It is an integrated insolvency resolution law that covers all existences, unlike the legislation such as the companies act, 1956 or SARFAESI 2002, or SICA 1985. It authorizes all the creditors, whether secured or unsecured, to proceed with the insolvency proceedings with complete assistance. It produces a panel for speedy recovery and resolution.

The Insolvency and Bankruptcy Code, 2016, is intended to provide all parties with a fair chance to engage in insolvency proceedings while still assessing the likelihood of a defaulting company. Previous laws like SARFAESI accord only individual recovery to secure financial credit. In SICA 1985, the restructuring proceedings were initiated only after its declaration as "sick" which is too late to recover any value. The new IBC 2016 permits an early resolution process to reduce the financial distress as appears in single default. Apart from improvement in the process, the new code introduces a plan to set up new institutions to promote the implementation of the law.

The current system aims to achieve the objectives of a fast resolution period, a faster recovery pace, and debt funding from a variety of outlets.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT), 2020

The year 2020 was the most painful in decades. Many people lost their loved ones, their jobs, and whatnot. In India, 15.5 lakh crore businesses were lost due to pandemic in the initial days of lockdown. Therefore, the Insolvency and Bankruptcy Code, 2016 get two times amended in the same year.

The first amendment came after the beginning of the nationwide lockdown in June 2020. The primary reason for the amendment is to suspend the fresh bankruptcy proceedings against any person business affected by the Covid-19 for the next six months. With the ordinance, the government has planned to save the corporate persons in this distressful situation to prevent them from insolvency proceedings.

THE AMENDMENTS BROUGHT UP IN THE ORDINANCE

The first amendment says that no person or corporation can apply any default performed by a corporate debtor arising after 25th March 2020 (after the official nationwide lockdown).

In the principal act of IBC, section 10A has been injected which says that no new applications can be filed under sections 7, 9, and 10 of IBC against any corporate debtor. “It also stated that no application shall ever be filed against any corporate debtor in the period of lockdown. Also, it is clarified that the provisions in section 10A shall not be suitable for default committed before 25.03.2020.”

The second amendment is that the Resolution professional cannot apply under fraudulent trading of default in the case concerning newly introduced section 10A.

Section 66 of the code was amended to deal with wrongful trading or fraudulent trading. It permits the resolution professionals to apply against the director of the corporate debtor if the business was carried to defraud the creditors. With this new amendment sub-section, 3 introduced in section 66 which restrain the resolution professional to file any application under section 66 of the code. This section will be monitored with section 10A.

THE INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) 2020

Owing to the national lockdown and weakening economy, the second amendment to the principal act of the Insolvency and Bankruptcy Code was made to reinforce the failure of companies. The bill was introduced to ensure that no new insolvency cases could be initiated for at least six months, beginning on March 25, 2020. Finance Minister Nirmala Sitaraman said in the Rajya Sabha that the IBC is not a loan recovery legislation and that saving lives in a pandemic is more essential than loan recovery. This code will help to provide a mechanism to resolve insolvency within the principles of fairness and equity.[2]

The new Insolvency and Bankruptcy Code (Second Amendment) 2020 attempts to stay the Corporate Insolvency Resolution Process (CIRP), mentioned in Chapter 4 of the IBC, 2016. Witnessing the covid-19 terror on the business across the world, the World Trade Organization[3] recognized two postulates for the insolvency provisions:

1. The need to deter potentially profitable businesses from going bankrupt unnecessarily, and
2. An increase in the number of businesses that cannot withstand the recession until insolvency is resolved.

The Insolvency and Bankruptcy Code (Second Amendment) 2020 has the following main features:

- No insolvency proceedings may be launched over firm conflicts.
- From March 25, 2020, no insolvency proceedings will be launched by Financial or Operational Creditors for losses occurring over a six-month period that has been extended to one year.
- This bill makes every corporate debtor's associate or director liable to apply their contributions to the company's properties whenever they perform wrongful acts under particular circumstances.
- The bill prohibits Resolution Professionals from submitting any claim for defaults to begin the currently barred Corporate Insolvency Resolution Process.

These are some expeditious amendments in the Insolvency and Bankruptcy Code 2016 in light of the Covid-19 pandemic. Moreover, the government has accepted the loss of business and assured any needful assistance to people in the corporate sector. Notably, the efforts made by the government have relieved the businesses, also helped to revive the economy of the country.

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[2] The Hindu, https://www.thehindu.com/news/national/rajya-sabha-passes-amendment-in-insolvency-and-bankruptcy-code/article32646808.ece.

[3] The World Trade Organisation, https://www.wto.org/.

CONCLUSION

There is no uncertainty in the fact that people have lost so much to this pandemic. Many Medium Small and Medium Enterprises (MSMEs) have lost their business due to huge debts or other financial losses. This move by the Government of India (GOI) is a welcome move to save corporations from losing their identity. This move has reduced the burden from the National Company Law Tribunal (NCLT), which is the principal body for matters related to insolvency. The Insolvency and Bankruptcy Code 2016, implemented to promote ease of doing business as well as to identify corporate frauds in India.

Although, one should not forget that only sections 7, 9, and 10 are temporarily suspended and do not complete the code. So they should plan their way forward to deal with business and pandemic. The covid-19 cases are expanding day by day but the business will never stop, thus corporations need to plan according to the situation to minimize the loss. The author believes that both amendments will bring stability to the Indian economy by promoting ease in doing business.