INSOLVENCY AND BANKRUPTCY CODE: A CHANGING EPITOME

Anveksha Padhye
Student
Indore Institute of Law, India
Email anveksha23@gmail.com

ABSTRACT

Insolvency and Bankruptcy Code, 2016 code is considered as a very important step towards limiting the risk of the credits. Insolvency and Bankruptcy Code not only are having objectives of debt recovery but have motive of revival of the companies. This research paper would analyze the need of this code after all this laws which has been present. The aim of the researcher is to focuses on the powers of this code and how does this code will help to all the creditors including secured and unsecured creditors. Various issues which have been faced by the creditors of the companies are covered under this research paper. This research paper gives an overview on all previous insolvency and bankruptcy laws and main focuses on Insolvency and Bankruptcy Code, 2016.

Keywords: Insolvency, Bankruptcy, Liquidation

INTRODUCTION

Insolvency and Bankruptcy has created a big problem to the economy of the country now days. Failure to paying loans and closure of business is a critical situation especially for the developing nation, where there is a strict need of financial stability, industrialization, eligible startups, etc. Insolvency and Bankruptcy Code, 2016 is one of those few codes or bills which are passed without any political stubbornness and Government was able to secure votes to ensure safe passage that clearly shows the importance of this code. For establishing any business or expansion of any established business, availability of credit in the market is a prime factor. Due to Insolvency and Bankruptcy, creditors are becoming unconfident and an access of debt for borrowers is quite difficult.

To understand the insolvency laws, we should have a clear vision regarding the meaning of insolvency and the difference present between insolvency and bankruptcy. Insolvency and Bankruptcy are not synonyms though the Bankruptcy means a person to being insolvent. Insolvency in the layman language is inability to pay a debt or the lack of financial resources and in the concise legal definition insolvency means insufficiency to pay all enforceable debt. Insolvency is when an individual, corporation or other organization cannot meet its financial obligations for paying debt as they are due. On the other hand, Bankruptcy is a legal process intended to insure equality among the creditors of a corporation declared to be insolvent or in plain English it is a legal process to resolve insolvency. Bankruptcy is not having a same meaning as insolvency, technically Bankruptcy occurs when a court has determined that this particular individual or firm is insolvent. Insolvency term can be used for individuals or organizations, individual’s insolvency is known as Bankruptcy and organizations or corporation’s insolvency is known as Corporate Insolvency. Untreated insolvency will lead to Bankruptcy for non-corporate and Liquidation of corporate.

Form the above, we could state that insolvency is a beginning and bankruptcy is a conclusion. A bankrupt will be conclusively insolvent but all the insolvencies would not necessarily leads to
bankruptcy or liquidations. Insolvency situations have two options one is recovery or resolution and liquidation.

**RESEARCH QUESTIONS**

The researcher examine following questions on the objectives which are mentioned above in the abstract:-

1. What is the need of the new code where laws are presents for insolvency?
2. What are the objectives of this code?
3. Are the previous legislation stop workings or being on work parallel with this code?

**RESEARCH METHODOLOGY**

Sources of data which are used in research work are both primary and secondary i.e., namely books, articles, reports, statutes, cases and online websites.

**BRIEF HISTORY OF THE CODE**

The evolution of this code has been passed through different phases and various committees had been formed on the insolvencies laws. All the Governments which had in power, insolvency is been a matter of grave concern for all of them. Behind each legislation on insolvency, committee had formed to critically analyze and for their recommendations.

1. Tiwari Committee has formed in 1981, to give recommendations on SICA and in 1985 SICA enacted.
2. Later in 90’s, for RDDBFI in 1991 Narsimhan Committee has formed and in 1992, Act came into force.
3. In 1998 again Narsimhan Committee has established to give recommendations on SARFAESI and in 2002, this act came into force.
4. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on 21st December, 2015 and referred to the Joint committee on insolvency and Bankruptcy Code, 2016.
5. The Committee has presented its recommendations and a modified Bill based on its suggestions. This bill had passed in Lok Sabha on 5th May, 2016 and was passed under Rajya Sabha on 11th May, 2016. This Bill received President Assent on 28th May, 2016 and notified in the official gazette on the same day day.

**NEED OF UNIFORM INSOLVENCY LAW**

In a globe, India stands way back in the legal mechanism for dealing with debt recovery and has not been in a line. As per the Ease of Doing of Business Report of the World Bank, it takes an average of four to five years in resolution of insolvency in India. Insolvency of any individual or any firm affects not only creditors but it also affects unpaid employees as well. Insolvency spread lack of confidence among the credit market and which ultimately hinders the development of the country. As we discussed earlier that there are many legislations since independence has been present which deals with the insolvency and bankruptcy. There are some laws which have been dealing with an individual insolvency and some which have been dealing with firm and other corporation’s insolvency. There is no uniform law on insolvency has been enacted yet. All legislations on insolvency having a different procedure for debt recovery and provisions of one act are overlapping to another acts provisions. It’s been a difficult task for the creditors that in which act, they should have to be apply. To remove this ambiguity, there is a strict need of uniform law which should have deals with all types of insolvency and bankruptcy.
INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 is enacted with the aim to consolidate all laws on insolvency and give strong legislation on all previous laws which contains various resolutions in single legislation. All provisions of this code have an overriding effect on previous legislations. Single chain system has introduced in this code, which helps in fast resolution process of liquidation.

Backbones of the Code

This Code has 5 pillars on which it stands, there as follows:-

1. **Insolvency and Bankruptcy Board of India:** - This is regulatory body, which is established to regulate or govern the provisions of the code. This body will oversee the activities of Insolvency Professionals agencies, Insolvency Professional and Information Utilities. The body having a separate legal entity and perpetual succession, it can sue and be sued in its own name.

2. **Insolvency Professionals agencies:** - There are three insolvency professional agencies such as Indian Institute of Insolvency Professionals of ICAI, ICSI Insolvency Professionals Agency, Insolvency Professional Agency of Institute of Cost Accountants of India, which are governed by Insolvency and Bankruptcy Board of India (Insolvency Professionals agencies) Regulations, 2016.

3. **Insolvency Professionals:** - The Code provides insolvency professionals as an intermediaries between the creditors and the management of a company. The main role of IP’s as to manage and control the financial decisions and assets of an enterprise. The IP’s play an efficient part in the resolution process and shall have various powers to take important decisions of an enterprise.

4. **Information Utilities:** - The creditors shall have right to information about their debtors. The code has ideated information utilities which provide authentic financial information of the debtors in centralized electronic form. This information has given to the creditors, insolvency professionals, Official liquidator and stake holders during the insolvency proceedings.

5. **Adjudicating Authority:** - The insolvency proceeding has adjudicated by two authorities under this code. Adjudicating authority for corporate insolvency is National Company Law Tribunal (NCLT) and the appellate authority is National Company Law Appellate Tribunal (NCLAT) and thereafter Supreme Court.

The Debt Recovery Tribunal (DRT) is an adjudicating authority for an individual’s insolvency and partnership firm and for the appeal there is Debt Recovery Tribunal Appellate (DRAT) and further appeals lie to the Supreme Court.

CORPORATE INSOLVENCY RESOLUTION PROCESS

The Corporate Insolvency Resolution Process is covered under Part II of this code, which distributed in 7 chapters contained from section 4 to section 77.

Under Resolution process for the corporate persons, financial creditors assess the company’s position and through insolvency professionals try for revival of a company. If a company is not in a position to revival in the eyes of creditors and the appointed insolvency professionals, following company go into the liquidation and assets of a company shall be distributed in the following financial creditors.

In the objectives, as we discussed the code stressed on the timely proceedings or we can say it follows time-bound resolution for corporate persons or individual. This process shall be completed in 180 days which can be extendable to 90 days, means in total 270 days, following process should be completed.

The comprehensive mechanism has to be followed by the insolvency resolution process for corporate persons:-

1. Filing application to NCLT
2. Adjudication of NCLT; whether application has accepted or rejected
3. Declaration of moratorium and public announcement
4. Appointment of interim insolvency professionals
5. Formation of creditors committee
6. Preparation and approval of resolution plan
7. Resolution plan applicability: revival or liquidation

**Application before National Company Law Tribunal (NCLT);** - For the insolvency resolution of corporate persons, application has to be filled before NCLT against corporate debtors.

According to code, for filling an application the total amount of debt shall be one lakh rupees or more, however Central government may by notification, shall specify the minimum amount of default of higher value which shall not be more than one crore rupees. [Section 4]

Following are the persons who could initiate an application against debtors in the manner which is provided by the code under section 6:-

- Financial creditors
- Operational creditors
- Corporate debtors

There are persons who are not entitled to initiate an application, or prohibited by the code which are as follows:-

- a corporate debtors already under the process of insolvency resolution
- a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application;
- a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- a corporate debtor in respect of whom a liquidation order has been made. [Section 11]

**ADJUDICATION OF NCLT: ADMISSION OR REJECTION OF APPLICATION**

The adjudicating authority (NCLT), has right to accept or reject the application within fourteen days from filling an application. Application may send for rectification of defects and shall be submitted within seven days.[Section 7 (4)&(5)]

The insolvency resolution process shall commence from the date of admission of application by the adjudicating authority. It is referred as Corporate Insolvency Resolution Date. [Section 10(5)]

**TIME LIMIT FOR COMPLETION OF INSOLVENCY RESOLUTION PROCESS**

The process shall be completed within one hundred and eighty days from Corporate Insolvency Resolution Date. The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.

If the Adjudicating Authority is being satisfied that the insolvency resolution process cannot complete within given time i.e., 180 days, they shall order for time extension to resolution professionals, however the extended time shall not exceeding ninety days.
Declaration of moratorium and public announcement

The Adjudicating Authority after admission of an application shall:

- Declare a moratorium
- Public announcement and call for submission of claims
- Appoint of interim resolution professionals. [Section 13]

Moratorium period:- after the commencement of insolvency resolution process, calm period of 180 days is declared, during which all suits and legal proceeding etc. against the Corporate Debtors are held in abeyance to give time to the entity to resolve its status.

The supply of essential goods and services to the Corporate Debtors shall not be terminated during the moratorium period. [Section 14]

Public Announcement:- Interim Resolution Professionals shall make public announcement immediately after the appointment.

The public announcement of the corporate insolvency resolution process under the order referred to in section 13 shall contain the following information, namely:

(a) name and address of the corporate debtor under the corporate insolvency resolution process
(b) name of the authority with which the corporate debtor is incorporated or registered.
(c) the last date for submission of claims
(d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims
(e) penalties for false or misleading claims [Section 15]

Appointment of interim insolvency professionals:- Interim insolvency professionals are appointed by the Adjudicating Authority within fourteen days from the commencement date. Procedure of an appointment shall be done according to Section 16 of the code.

Powers which shall be exercised by interim resolution professionals such as:

- Management of the affairs of corporate debtors
- Powers of board of directors and partners of a company shall be exercised by IRP
- the officers and managers of the corporate debtor shall report to the interim resolution professional
- the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional[Section 17]

The duties of interim resolution professionals are as follow:

- collect all information relating to the assets, finances and operations of the corporate debtor
- receive and collate all the claims submitted by creditors to him
- constitute a committee of creditors
Formation of creditors committee:- Interim resolution professionals after determine the financial positions of Corporate debtor and collation of all claims against the Corporate debtor shall constitute a committee of creditors.

Composition of committee –

a) All financial creditors
b) Related parties of corporate debtors cannot become members of COC.[Section 21(2)]

All the decisions of committee will be taken through voting, and minimum seventy five per cent of votes shall attain in the meeting of COC.

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors. All meetings of the committee of creditors shall be conducted by the resolution professional.

Preparation and approval of resolution plan

Resolution plan:- it is a proposal agreed by debtors and creditors to resolve insolvency of a company without liquidation. Section 30 and Section 31 of the code deals with the preparation of resolution plan.

Resolution professional prepares information memorandum which shall contain information regarding formulation of resolution plan.

Submission of resolution plan:- for the submission of resolution plan, it shall be approved by Committee of creditors with not less than 75% of votes. Subsequently the committee of creditors approved which resolution plan is submitted to adjudicating authority by resolution professionals.

Approval of resolution plan:- if the Adjudicating authority satisfied that the committee of creditors has approved the following resolution plan as per the provisions of the code, the authority shall order of approval of the resolution plan and it shall be binding on-

- Corporate debtors and its employees
- Members, creditors and guarantors
- Other stakeholders involved in resolution plan [Section 31(1)]

After order of approval:-

- Moratorium order shall have to cease the effect which passed under section 14
- Resolution professionals are forward the approved resolution plan to the board for records. [Section 31 (3)]

Resolution plan applicability: revival or liquidation

Revival

If all the procedure of resolution plan has been done then it shall be applicable and revival of a company shall proceed. But if the adjudicating authority finds that the resolution plan does not satisfied the conditions referred in this code, they shall have powers to reject the approval may by order according to section 31 clause 2. The process of liquidation starts when the corporate resolution process has stop.
Liquidation

The first objective of this code is the revival but if the resolution plan fails to do so, the liquidation provisions are strike. To resolve the corporate insolvency, liquidation is considered as the last but an effective method. Chapter III of this code is contain the provisions of liquidation process and the liquidation process of corporate insolvencies has to be done with these given provisions only.

Initiation of liquidation :- Following are the reasons on which liquidation can initiate-

Resolution plan rejects:- After rejects the resolution plan under section 31, Adjudicating Authority shall have right to –

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter
(ii) issue a public announcement stating that the corporate debtor is in liquidation
(iii) Require such order to be sent to the authority with which the corporate debtor is registered.

• Non-receiving resolution plan:– According to section 33 of the code, the process of liquidation has to take place when the maximum time period of corporate insolvency resolution has over and the Adjudicating Authority has declared by order that the resolution plan does not received yet hence they shall have to reject the approved resolution plan.

• On the decision of committee of creditors:- if the resolution professional intimate the Adjudicating Authority during the corporate insolvency resolution process that the committee of creditors decide to liquidate the insolvency before the confirmation of resolution plan, Adjudicating Authority may give order of liquidation.

• Contravention by corporate debtor :- the resolution plan is being contravened by any Corporate debtor, any person may filed an application to adjudicating authority for liquidation.

Appointment of liquidator and fees to be paid

Appointment of liquidator has to be done according to section 34 of this code. According to section 34, appointment is possible in following ways:-

• Resolution professionals can appointed as official liquidator.
• On the recommendation of board, insolvency professionals can also appointed as a liquidator

Fees of the liquidator is paid according to section 34 clause 9 - The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

Powers and duties of liquidator

Section 35 of this code contains provision of the power and duties of liquidator which are as follows:-

(a) to verify claims of all the creditors;
(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
(c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;
(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) to transfer any immovable and movable property of Corporate debtor in the process of liquidation.

(g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;

(h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

(i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;

(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and

(o) to perform such other functions as may be specified by the Board

**Priority of claims**

After the completion of liquidation process, the assets will be distributed according to the provisions of this code and priority of claim will be accordance with this code.[Section 53]

- Cost and expenses of insolvency
- Workmen’s dues for the period of 24 months and secured creditors
- Wages and any unpaid dues owed to employees other than workmen, for the period of 12 months
- Dues of Central Government and State Government
- Unsecured financial creditors
- Other debts and dues
CONCLUSION

The Insolvency and Bankruptcy Code, 2016 is a biggest step which is taken by the government and finance ministry. The historic performance of insolvency laws is being spotty. After liberalization, free market and economy weak insolvency and bankruptcy laws are not going to support anyways. To see the all previous legislations flaws, it is considered as a necessary step which should have taken earlier. “The functioning of Indian Banks is not today’s problem it is our country’s legacy problem” said by Hon Finance Minister Mr. Arun Jaitley. To resolve this problem, the code has been introduced. To study this code and keep all the flaws of previous laws in mind, the main motive behind this code is the fast and furious resolution of insolvency. Insolvency is threat to the development of the country it should eradicate. I would like to conclude that this code has been a very important contribution of the government to resolve the problem of all the creditors, especially Banks and financial institutions which are highest money lenders in the country. Bank should be more powerful, but in India the positions of Banks are being deteriorating and no. of insolvency are increasing day by day. This code believes in fast track mechanism and also focuses on revival of companies. This code itself concerns with revival and reconstructions of the companies and firms. The Adjudicating Authorities which are NCLT and DRT are having numerous powers which are helpful in give fast verdicts. According our Finance Minister, DRT is going to resolve individual insolvency and partnership firm insolvency, but the mechanism of DRT has been very slow so all the procedure of DRT will be online which proofs helpful in fast mechanism. The powers of adjudicating authorities can see with the number of provisions of this code. The maximum time limit of 180 days and only one time extension clearly reflects its objective. The formation of creditors committee gives the power to creditors from the hands of debtors, itself a big change in the system.

REFERENCES