



CORPORATE INSOLVENCY IN INDIA

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Abstract:-

Insolvency in India is not a new thing to talk about. It is something which omnipresent in almost all the circles of the society. Be it a local business or be it an international philanthorapist like VIJAYAMallya, eberyone has seen insolvency in some way or the other.

Insolvency can be simply termed as a state of being insolvent or a state of being in a situation where one is unable to pay debts owed by him. A person turns insolvent primarily due to lack of money and to ensure that the person dosent run away with the money, the Government of India introduced the Insolvency and Bankruptcy Code of India in the year 2016.

With the coming of this Act, India was able to curtail and control problems arousing out of insolvency both in the Corporate as well as the personal level. Because India is growing into a Business hub, it is very important for the government to check and ensure the corporate insolvency that might cause problem to the Indian economy in the later stahes. This paper lays stress and talks about the Corporate Insolvency in India in a very descriptive yet lucid manner.

INTRODUCTION

The Corporate insolvency is dealt under the Companies Act of 1956. Besides the Companies Act the other relevant legislations are – the ‘Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) this is currently incorporated into the current amended Companies Act, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act). The related legislations are ‘The Transfer of Property Act, 1882, and ‘The Securities and Exchange Board of India Act 1992. The Companies Act has since seen as many an amendment. Some of the major amendments to the Act were made through Companies (amendment) Act of 1988 on the recommendations of Sachar Committee and then again in 1998, 2000 and finally in 2002 through the Companies (Second Amendment) Act of 2002 as a consequence of Eradi Committee Report.

This Eradi committee was set up by the Government of India in 1999 and was headed by Justice Eradi – a retired judge from the Supreme Court of India.

In the process of liberalization, deregulation and adopting market economy, India is experiencing a massive growth of retail loans to individuals, housing loans and credit card users. On account of phenomenal rise in retail lending it will be necessary in the near future to give a re-look at the personal insolvency laws to ensure that any insolvency proceedings against individuals are also expeditiously decided.

Causes of Insolvency in India

The research shows that India has about 11% of bad debt records out of the total lending and it is increasing day by day. Mr Vijay Mallya is one such example. The time



taken to resolve a case of insolvency is very high as compared to many other countries of the world. Due to this issue, India ranks 130th in ease of doing business in the world. More than 50% of bad debts are that of Corporates who have taken such loans from nationalised banks. The recovery from such defaulters is generally next to impossible because of a number of reasons like overlapping jurisdictions etc. Hence, these cases continue for years and years but the recovery remains zero. Previously there were about twelve laws which dealt with insolvency. Basis on those twelve laws, it took more than four years to wind up a corporation in our country.

Due to lack of required institutional and legal setup, the defaulters started considering India as a safe haven for such activities which clearly depicted incompetence on the part of our country when compared to global standards. Although India had numerous acts in place to punish the defaulters like the 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) and so on has failed miserably to recover to the outstanding dues from the defaulters. The aforesaid laws had many loopholes which kept the defaulters fear free and safe. If there is no fear of law, this scenario is likely to happen.

The Government decided to replace the existing insolvency laws with new stringent laws which would take care of the existing defaulters in a time bound manner and also set an example for the people of the country

who considered this activity of willful defaulting as a gag. On 11th May, 2016, the Insolvency and Bankruptcy Code, 2016 was passed by both the houses and received the assent of the President on 28th of May, 2016.

- The Insolvency and Bankruptcy Code, 2016 (IBC) deals with:
 - a) Insolvency Resolution and Liquidation of Corporate Entities
 - b) Bankruptcy of individuals and partnership firms.

AMENDMENT TO THE INDIAN PARTNERSHIP ACT, 1932

Section 41(a) of Indian Partnership Act provides for Compulsory dissolution which reads as under:

A firm is dissolved

- By the adjudication of all the partners or of all the partners but one as insolvent.
- Part III of the IBC (Section 78-187) deals with Insolvency Resolution and Bankruptcy for Individuals and Partnerships Firms and accordingly Section 41 has been omitted by virtue of Section 245 R/w First Schedule of IBC. 19

AMENDMENT TO THE LLP ACT, 2008

- Section 64(c) of LLP Act 2008 which provided for inability to pay debt as a Circumstance in which LLP may be wound up by Tribunal has been omitted by virtue of Section 254 R/w Tenth Schedule of IBC.
- The definition of Corporate persons as provided under Section 3(7) of IBC includes a LLP, as defined in the LLP Act.
 - Ground inability to pay debt no longer subsists and a creditor (financial and



operational) can initiate insolvency proceedings against a LLP only before NCLT under IBC.

LIQUIDATION FOR CORPORATES

In case the default is for an amount over and above Rs. 1 lakhs, the creditor has the authority to initiate insolvency process as per the new Code. The Code recommends two autonomous stages:

Resolution Process for Insolvency:

1. Under this stage, the financial creditors make an assessment of whether the debtor's business is worthy of continuing or not. The creditors come up with options for restructuring the business model to avoid any further losses.
2. Liquidation:

In the event the abovementioned Insolvency Resolution Process fails, the creditors make a unanimous decision to wind down and sell the debtor's assets in order to recover their dues.

LIQUIDATION

The liquidation process commences only if:

1. The Committee fails to submit the resolution plan with the provided time frame to the NCLT.
(Ex. Hindustan Motors ltd.)
2. The Resolution Plan is rejected because of non-adherence to the Code.
3. The Creditor's Committee takes a decision for liquidating the assets by a majority vote.
4. The resolution plan is flouted by the debtor.

VOLUNTARY LIQUIDATION BY CORPORATE PERSON

The Insolvency and Bankruptcy Code also provides a section wherein the corporate person can take a decision of liquidating itself if it has not committed any default and has the capacity to pay its creditors through liquidation of its assets. In order to proceed with such a liquidation process, it is mandatory for majority of the directors of the said corporate to give a declaration stating that such activity is not taking place in order to defraud any person. Such a resolution shall be approved by the creditors of the company who are signifying at least two thirds value of debts of the company. The commencement of voluntary liquidation takes place on approval received by the creditors. Even in case of voluntary liquidation, provisions of liquidation process apply. On the assets being totally liquidated, NCLT passes an order for dissolution of the corporate.

BANKRUPTCY AND INSOLVENCY RESOLUTION IN CASE OF INDIVIDUAL AND PARTNERSHIP FIRMS

In case of individuals and partnerships, the Code does not provide any specific time frame within which a resolution decision has to be structured. The reason behind this leniency is that individual businesses are of diverse types and there are no set rules for functioning of their activities. Also, it is a fact that corporate person is an artificial legal entity, hence can be liquidated. But an individual is a real person, there is no way the term liquidation will fit him, he has to be declared a bankrupt. The Code applies to all those individuals and partnerships that make a default above Rs. 1000.

**Cited Case*****Smart Timing Steel Limited V/s National Steel and Agro Industries Limited³***

The issue before the Hon'ble NCLAT was whether filing of a "copy of certificate from the "financial institution" maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the "Corporate Debtor" as prescribed under clause (c) of sub-section (3) of Section 9 of the I&B Code 2016 is mandatory or directory.

The said Appeal was filed by the Appellant, who was an operational creditor who has filed a petition against the Respondent for initiating the Corporate Insolvency Process which was rejected by the Adjudicating Authority (NCLT), Mumbai, who had held that *“On perusal of Section 9 of Insolvency and Bankruptcy Code, it is evident, that it is mandatory to file copy of Certificate from the Financial Institutions reflecting non-payment of the operational debt incurred, for the operational Creditor has failed to annex copy of the said Certificate as required u/s 9(3) of the Code, this petition is liable to be rejected.”*

The Hon'ble NCLAT, while rejecting the appeal filed by Operational Creditor held that it is clear that the word “shall” used in sub-section (3) of the Section 9 I&B Code’ is mandatory, including clause 3 therein. The Hon'ble Tribunal while deciding observed that one of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When

the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such a case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside the words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute.

CONCLUSION
India currently ranks 136 out of 189 countries in the World Bank’s index on the ease of resolving insolvencies. India’s weak insolvency regime, its significant inefficiencies and systematic abuse are some of the reasons for the distressed state of credit markets in India today. The Code promises to bring about far-reaching reforms with a thrust on creditor driven insolvency resolution. It aims at early identification of financial failure and 270evitalize the asset value of insolvent firm.

The unified regime envisages a structured and time-bound process for insolvency resolution and liquidation, which should significantly improve debt recovery rates and 270evitalize the ailing Indian corporate bond markets.
