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SUBMISSION OF RESOLUTION PLAN UNDER THE CURRENT INSOLVENCY REGIME OF INDIA: AN ANALYSIS OF SECTION 29 OF THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2018

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ABSTRACT

For economic success of a country, its banking, commercial and investment market plays a very important role. In a genuine course of business, it may happen that the investment turns out to be bad. Under such circumstances Insolvency and Bankruptcy Code, 2016 plays an important role in preventing the plague of Non- Performing Assets in the market and providing an effective resolution process. Insolvency in general terms is default in repayment of the loans. Timely loan repayment is an important factor for banking and commercial efficiency. The Bankruptcy and Insolvency Code, 2016 provides a comprehensive resolution process within 180 days (270 if extended) and also provides for liquidation if resolution fails. The important aspect is that it focuses on resolution rather than liquidation. Even though the Code is comprehensive one, certain people still find out the loopholes and use it for their benefit during the corporate insolvency resolution process. The Amendment Act of 2018 tries to plug these loopholes and modify the code according to the requirements. This Paper critically analyses the Amendments made in the code with respect to the Resolution Applicant. The amendment Act has changed the definition of 'Resolution Applicant' and has made the process of selecting resolution applicant more in control of the Insolvency Resolution Professional. Amendment Act inserts 29A as a new section whichbars range of people from taking part in resolution process. The main objective for the introduction of Section 29A was to discourage non serious applicants and pave way for an effective resolution process. The paper discusses the possible effects of these changes and how it might affect the Insolvency laws of India which is still in its nascent stage.

PROBLEM OF NON-PERFORMING ASSETS IN INDIA

Insolvency, under common parlance refers to a situation wherein a firm defaults in repayment of its monetary obligations towards the creditors. In other words, it refers to a firm's inability to pay back its outstanding debts. The phrase 'inability to pay debts' is sought to be determined by a simple question, *whether the company is commercially insolvent and unable to meet its liabilities as and when they accrue,*[1] as opined by the High Court of Andhra Pradesh. When such a situation arises, a creditor can receive the payment by adoption of certain processes. He has two options to choose from, one being the recovery of outstanding amount and the other being the resolution process. Resolution strives to keep the firm on track by the use of Insolvency and Bankruptcy Code, 2016**.** India faces a significant

[1] Reliance Infocomm Ltd v. Sheetal Industries Pvt. Ltd, (2008) 142 CompCas. 170 (AP).

problem of stressed assets in the commercial sector. With 9.9 percent ratio, India is ranked 5th amongst all the countries with highest Non-Performing Assets (NPA). The asset quality recognition in 2015 conducted by the Reserve Bank of India created havoc on banks profit and loss accounts, many banks reported full financial year losses. The lenders suffered huge dip in the profit market and therefore had a larger impact on the national economy. The banking companies which were creditors in most of the cases are facing cash crunch to fund other projects and therefore charged high interest rates to maintain the profit margin. Both the banking and corporate companies has stressed balance sheets, hampering the investment led development process. Under such circumstances the Insolvency and Bankruptcy code, 2016 (hereinafter referred as IBC) is much needed law as previous reorganization and debt recovery laws are not adequate enough to solve the problem. The IBC is a landmark reform acknowledging the fact that business might fail and failure is not fraud.

THE INSOLVENCY CODE OF 2016

The IBC strives for the resolution rather than recovery by the way of liquidation making it better from other statutory resolution processes. The soul of IBC is that it provides forum to Creditors to resolve issues and to maximize the value of asset by the collective wisdom of the creditors in the form of Committee of Creditors (hereinafter referred as CoC). The CoC acts in unison which does not involve the debtor.[2] Such principle based approach has yielded a positive outcome in the credit environment of the Country. Under the Code, the term ‘resolution applicant’ meant any person who submits a resolution plan to the resolution professional[3] and ‘resolution plan’ means a plan proposed by any person for insolvency resolution of the Corporate Debtor (hereinafter as CD) as a going concern in accordance with Part II.[4] Section 11 of the Code, barred certain persons from submitting applications for initiation of the resolution procedure. These included:

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) 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

(d) a corporate debtor in respect of whom a liquidation order has been made[5].

ORDINANCE AND AMENDMENT OF IBC, 2016 AND BARS ON SUBMISSION OF RESOLUTION PLAN

However, almost a year later, in 2017, The Insolvency and Bankruptcy Code (Amendment) Ordinance was promulgated on November 23 with intent to bar a few specific categories of persons from submitting plan for resolution. It was done keeping in mind that if they were allowed to

[2] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, *Resolution: The Soul of IBC, Insolvency Resolution Process* (September 21, 2018, 11:24 AM), http://www.ibbi.gov.in/news_letter_Oct-Dec17.pdf.

[3] The Insolvency and Bankruptcy Code, 31 The Gazette of India § 5(25) (2016).

[4] *Ibid*, § 5(26).

[5] *Ibid*, § 11.

submit the plans and take control of the company, it would prove to be dangerous. The ineligibility under the Amendment Act is four-fold. The *first* line is the individual ineligibility which bars a person from submitting a resolution plan. *Second*, it bars 'connected persons' associated with the individual applicant from initiating the resolution process. *Third* level of prohibition falls on 'related parties' and *fourth* it disallows 'persons acting jointly or in concert'. Pursuant to this, The Insolvency and Bankruptcy Code (Amendment) Bill, 2017 was initiated in the Parliament to consolidate and enact the changes as provided under the ordinance and also to incorporate certain other changes to the Ordinance. It was passed by the Lok Sabha, the Rajya Sabha, received the mandatory assent of the President and was finally enacted as The Insolvency and Bankruptcy Code (Amendment) Act, 2018 in January, 2018 but deemed to have come into force on November 23, 2017[6] The bar against the group of persons prohibited to submit plans, as mentioned under the Ordinance was slightly diminished. Also, the Amendment brought relief to Scheduled Banks, Alternative Investment Funds and Asset Reconstruction Companies by excluding them from under the head of "connected persons."[7]

WHO CAN BE A RESOLUTION APPLICANT UNDER THE CURRENT INSOLVENCY REGIME OF INDIA?

The Act amended the definition of 'resolution applicant' under Section 5(25) of the Code which now reads, *"resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25*. The reason why this becomes significant is because in the prior Code, Section 5(25), when interpreted simply, implied that any person was at liberty to submit the resolution plan to the resolution professional. The loophole in this Section was that upon a plain reading this section, it reflected that the resolution professional was under the obligation to invite lenders, future investors and other persons to put forth their resolution plans. This dichotomous interpretation of Section 5(25) was debatable. On one hand, it implied that only those persons could submit resolution plans who were specifically invited by the professional under section 25(2)(h) and on the other hand, since, section5(25) lacked any reference to be read along with Section 25(2) (h) of the code, any person could freely submit the plan. The Amendment has shut all lines of speculation in this context. Now, only those persons, who receive an application by the professional can submit resolution plan. The Section also allows both, individual and joint resolution plans to be submitted.

After Amendment the definition of 'resolution plan' has incorporated the words 'resolution applicant' in place of 'any person', which provides more clarity as regards the interpretation of the provision. As far as the eligibility of a future resolution applicant is concerned, the same is laid down by the Insolvency Resolution Professional. Further, it becomes applicable once the Committee of Creditors decides in

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[6]The Insolvency and Bankruptcy Code (Amendment) Act, 8 The Gazette of India § 1(2) (2018).
[7]*Ibid*, § 29A (j).

approval of the same[8]. For formulation of a proper resolution plan, first, the resolution professional prepares something known as an "information memorandum." [9] An information memorandum can be construed to be a repository of all the important information, available in both a physical as well as an electronic form, which is prepared by the resolution professional under the guidelines, as provided by the Insolvency and Bankruptcy Board of India (hereinafter IBBI). When an applicant, by virtue of an undertaking, agrees to comply with the existing statutes and other regulations with respect to confidentiality maintenance and insider trading, it is then that this information memorandum is shared by the professional based upon which the applicant is supposed to come up with a Resolution Plan. The laws which are supposed to be complied with, include,

1. Section 195 of the Companies Act, 2013 which prohibits insider trading with respect to securities and bars communication or publication, in any manner whatsoever, of *non-public price sensitive information to any person*. According to the Explanation under Section 195, 'price sensitive information' is information, the publication of which will affect the price of securities of the concerned Company.
2. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

Therefore, a resolution applicant must fulfill all criteria set out by the Insolvency Resolution Professional (hereinafter IRP) and must not be disqualified under Section 29A of the Insolvency and Bankruptcy Code (Amendment) Act, 2018. He has the burden to strive for the protection of Intellectual Property Rights under the proprietorship of the CD, to which he has gained access.[10] He must also refrain from disclosure of any 'relevant information', inclusive of financial structures and situations, disputes etc. which is necessary for formulation of the resolution plan, belonging to the corporate debtor to a third party. A resolution applicant then comes up with a plan which he is then liable to submit to the resolution professional. Once this plan stands strong on the grounds laid under Section 29(2) of the Code such as providing for an efficient resolution process as specified by the IBBI, prime focus on repayment of all the outstanding debts of the CD, containing cogent solutions for the management of affairs of the CD, strictly complying with all the laws in force, adhering to the IBBI guidelines etc., the IRP submits the same to the COC for its approval. An applicant can be present for the meeting in which the plan submitted by him/her is under consideration. However, a right to vote in that meeting arises only if the applicant belongs to the category of financial creditors for the CD. The approval of the plan by the COC is done based on its feasibility, existing liabilities of the debtor, applicability to the situation in hand and the solutions for an effective resolution provided therein. Based on the provision, it can be said, that the rules are strict enough to distinguish honest applicants from mere hoaxes. Even though no other criterion has been set out under the Code, yet depending upon each case, the applicants are required

[8] The Insolvency and Bankruptcy Code (Amendment) Act, 8 The Gazette of India §25(2)(h) (2018).
[9] The Insolvency and Bankruptcy Code, 31 The Gazette of India § 5(10) (2016).
[10] *Ibid*, § 29(2)(b).

to fulfill certain requirements in order to be eligible to submit a resolution plan. In the recent case of invitation of applicants for submission of plans for the CIRP of *Jaypee Infratech*[11] the IRP invited Expressions of Interest (EOI) by Body Corporates and Investment Companies having minimum net worth and minimum assets under management of Rs. 1000 crores respectively. It was said that the prospective applicant must competency required for the execution of real estate projects, have a sound financial system, have an investing capacity of over Rs. 2000 crores and be able to complete the already over-delayed flat construction. The Code has provisions for rejection of the plan by the Adjudicating Authority once the same is approved by the COC. However, there is nothing to show the course to be adopted if the COC rejects the plan. The matter came up before NCLT Ahmedabad recently. The Authority was of the view that once a plan is rejected by the COC, the NCLT cannot interfere with the finding. This was ruled in the matter concerning CIRP of Steel Konnect[12]. First its Director submitted the plan, which was rejected by the COC citing reasons of ineligibility under Section 29A of the Amendment Act. Later, the plan of an Asset Reconstruction Company (ARC) was also rejected based on the ground that it was non it conformation with the information memorandum.

It is well observed that the criteria have been set forth with a view to eliminate applicants who lack seriousness and without financial and legal soundness.

SECTION 29A- THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2018

Section 29A of the Amendment Act bars ten categories of people from participating in the resolution and liquidation process. A critical aspect of this section is the extent of such disbarment. Such extensive Coverage are sourced from several laws including Banking Regulation Act, 1949, SEBI Act, 1992, Indian Penal code etc. The extensive coverage might go against the principles of IBC by reducing the chances of resolution of companies. The provision quotes thatany person or person acting in Concert (PAC) will not be allowed to submit resolution plan if such person does not meet the condition under Section 29A. The meaning of PAC[13] according to Substantial acquisition of shares &Takeover regulations, 2011 is "*a person who have common objective of controlling the company by acquisition of shares or voting rights. Common purpose maybe pursuant to some agreement or understanding which maybe formal, informal, direct or indirect*". This inclusion of PAC has widened the scope of non-eligible people and will have negative consequence on private equity investors, strategic investors and entities that might be

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[11] *Jaypee Infra insolvency: IRP floats EoI for resolution plan*, Deccan Chronicle(September 21, 2018, 8:43AM),https://www.deccanchronicle.com/business/companies/271017/jaypee-infra-insolvency-irp-floats-eoi-for-resolution-plans.html.

[12] M Allirajan, *Can't Adjudicate on Rejection of Resolution Plan*, The Times of India (September 21, 2018, 3:30PM), https://timesofindia.indiatimes.com/business/india-business/cant-adjudicate-on-rejection-of-resolution-plan-nclt/articleshow/62666604.cms.

[13] SEBI (Substantial Acquisition of shares and Takeovers) Regulations, F. No.LAD-NRO/GN/2011-12/24/30181 Securities and Exchange Board of India, § 2(q) (2011).

associated with them. It is recommended that the definition of PAC should be specifically provided in IBC having narrow scope for the purpose of resolution. The following section analyses the various categories of persons barred from submitting a resolution plan under for initiation of the *Corporate Insolvency Resolution Process*[14] (hereinafter CIRP). It also takes into account the Ordinance promulgated on June 6th, 2018 and the changes made therein.

1. 29A(a): Undischarged Insolvent
   This sub-section simply excludes an entity or person who is bankrupt and is itself going through insolvency process. By the virtue of 29A (j), connected person to such entity and aforementioned PAC can also not participate in the process leaving only third parties who are not connected to the entity anyway.

2. 29A (b): Wilful defaulters.
   They barred by RBI from accessing bank credits and wide range of activities in the capital market by the SEBI. It is very apparent here that the legislators want to streamline the resolution process by removing such bidders. The message is very clear that those who are insolvent or who have defrauded the government/institutions and have caused losses to the banks cannot become in any way beneficiary of some other asset. The legislators want healthy competition between the parties and such step will not only streamline the process but also will bring credibility and transparency in it. It also has a political aspect and message to those who have duped financial institutions.
   The problem comes when this sub-section is read with 29 A (j) i.e. connected person, which might restrict some genuine bidders and therefore the resolution process will face some practical challenges.

3. 29A (c): Any person with a loan that has been NPA for more than one year.

   The intention of the government here is to stop bidding by the companies whose accounts are themselves Non-performing. It also encompasses and makes non-eligible promoters and management of the companies whose accounts are classified NPA for more than one year. Initially the government allowed any person to submit resolution plan but with the implementation of insolvency code government faced moral hazards of promoters buying back their firms with steep haircuts which was contrary to the moral interests of market, business ethics and creditors interests. The Act of buying back firm with steep haircuts is known as "phoenixing". A famous case is of *Synergy Dooray*, where promoters with the help of synergy casting, a related company bought back the company with 94% haircut which was later challenged by Edelweiss on the ground of constitution of committee of creditors. [15]
   In practical sense this sub-section poses a big challenge as NPA in business may arise due to genuine reasons. The stringent conditions may shut the doors for genuine

[14] The Insolvency and Bankruptcy Code, 31 The Gazette of India §§ 6-32(2016).

[15] Synergy Dooray Automotive ltd v. Edelweiss Asset reconstruction company, No. CA 123/2017, CP(IB) No. 01/HDB/2017, at pg. 19-20 (NCLT Hdb. Aug. 2, 2017).

bidders. Again when read along with section 29A (j) i.e. connected person, any person connected to such tainted company or promoter will also become ineligible. This sub-section also creates uncertainty for the stressed asset market investors who have invested in defaulting firms or NPA. Credit Suisse report of 2017[16] states that more than fifty percent of stressed assets are with firms whose ICR is less than 1 i.e. they do not have means to pay the interests on the loans and NPA will remain for more than one year. It is to be understood that business arrangements are very complicated. While the intention of the government is good, it has overlooked the practical challenges and restricted large numbers of genuine bidders by blanket cover of ineligibility, which may eventually harm the creditors by lower competition and lower resources. An important relatable case is of Essar steel where bidder like *Numetal* [17] was disqualified as one of the shareholders of Numetal was Rewant Ruia, the son of Essar steel's co-founder Ravi Ruia. A second bidder *ArcelorMittal's* bid was rejected because it held stakes in defaulting companies like Uttam Galva steels. Both of the bidders approached NCLT for relief.

An exception to this rule of NPA is if the person pays all the dues with interest within 30 days. For the cases in which the resolution has already begun, the legislation language provides conflict and ambiguities. How 30 days can be given paying dues during 180 (270 if extended) days of corporate insolvency process. This may involve unnecessary delay and litigation. The timeline of process will be at risk. Second issue here is if promoter or company is paying by the deal of cash on table to lenders, why they should be disqualified, when it is serving both the purpose of creditors and price discovery. Certain relief has been provided by the June 6th, 2018 ordinance which was promulgated by the President. According to the ordinance, a proviso has been inserted under 29A (c) which exempts purely financial entities not related to the corporate debtor, from disbarment under this sub-section. A relief is also provided to the stressed assets investors. The Explanation to this sub-section provides where a resolution applicant is holding NPA by the virtue of acquiring it prior to the resolution plan, will be provided with grace time of three years from the date of approval of the resolution plan. This will act as a cooling period for such resolution applicants to de-stress such assets.

4. 29A (d): Person convicted with an offence punishable with imprisonment of two Years.

It is not necessary for the person to be actually imprisoned. The fact that imprisonment is of two years for the offence of which he or she is convicted is enough. Offence can be both civil and criminal. The negative aspect is that creditors may avoid bids from bidders who are under investigation and may be

[16] Aparna Iyer, *Despite falling interest rates, debt in distressed firms still very high*, Live Mint (September 21, 2018, 11:32 AM) https://www.livemint.com/Money/jtHOFpz41d24q2H952abON/Despite-falling-interest-rates-debt-in-distressed-firms-sti.html.

[17] Numetal ltd vs. Satish Kumar Gupta RP and Anr, IA No. 98 of 2018, CP (IB) No. 47/NCLT/AHM/2017, at *25-26 (NCLT Ahm. Apr. 19, 2017).

convicted anytime thereby overreaching the ambit of disbarment. A recent case[18] is where Renaissance steels has claimed in NCLT against Vedanta Steels from taking over Electro steels as the executives have been allegedfor criminal offence punishable for imprisonment of two years. This litigation has delayed the 270 days' timeline for resolution of electro steels. However, more clarity was provided through an ordinance promulgated on 6th June, 2018. According to the ordinance the disbarment will only apply to the list of offences provided under the twelfth schedule and also the will not apply two years after from the date of release of imprisonment. An exception is that the resolution applicant will be disbarred if he is punishable for seven years or more under any law for the time being in force.

5. Section 29A (e) - Disqualified to act as a director under the Companies Act, 2013.

This clause is hit by Section 164(1) of the Companies Act, 2013 which enshrines the grounds for disqualification of a Director. Following are the grounds which are mentioned under the Act:

a. If a competent Court has declared the Director to be of unsound mind.
b. If he/she is an undischarged insolvent, meaning thereby that the person is unable to clear off his outstanding debts.
c. He/she has applied for declaration of being an insolvent and the application is pending before the appropriate authority.
d. Conviction for a period which is not less than six months with respect to any offence involving moral turpitude and from the date on which such sentence ceased to have effect, a period of five years has not passed. It is also pertinent to note that the *proviso* to this sub-clause states that in a situation where the punishment for the offence involves a sentence of 7 years or more, the person shall lose the right to be a Director of any company whatsoever.
e. An order from any Court (including a Tribunal) disqualifying his candidature from appointment as a Director.
f. When payments in respect of call for shares held has not been paid by the Director and a period of 6 months has already passed from the last day on which such payment became due.
   This is applicable in those cases, wherein the holder has not already paid the full value of the shares at the time of issue.
g. Conviction under Section 188 of the Act for 'related party' transactions. A related party includes [19] a director and his relatives. A key managerial personnel and his relatives, a firm in which the director, manager or his relative is a partner, a private company having the director on its board of directors, a person whose advice is acted upon by the director etc.
h. If the person has not been issued a Director Identification Number [20](DIN) by the Central Government.

Along with this, a person who is or has been a director in a company which has failed to furnish the annual financial

[18]State Bank of India ltd. vs. Electro Steel ltd., CP (IB) No. 361/KB/2017, at *3-4 (NCLT KB. Apr.12, 2018).

[19]The Companies Act,18The Gazette of India § 2 (76) (2013).

[20]*Ibid*, §152(3), § 154.

statements for three consecutive years, not repaid back the deposits or interests arising on it etc. for a period of one year more, is not eligible for re-election for five years from the date of first default. Application of this Section under the IBC regime seeks to bar non-performing directors away from submitting a resolution plan. The loophole under Section 164 is that the Director is not given an opportunity to be heard and the appeal mechanism is not clear. Third parties, consequently get affected even though there is no default on their part.

6. Section 29A (f) –Prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets.

Cheating naïve investors is the most common crime the corporate sector witnesses. A lot of applications proposing to deal in securities are received under fake names merely to gain subscriptions. A perusal of this provision finds reference under two Statutes:

a. SEBI Act, 1992.

Under this Act, by virtue of Section 11, the Securities and Exchange Board of India has been given various powers including *suspend the trading of any security in a recognized stock exchange* and *restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities.*[21]These orders are recorded in writing with the prime objective of protecting the rights of the investors.

b. Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003

Chapter III of this regulation states that if the Board and the Chairman think there is a reasonable cause to believe that the transactions in securities are going on in a manner which is unfavorable for the investors or is not in consonance with the provisions of this enactment, it may give orders for investigation. In the case of BPL Ltd. v. Securities & Exchange Board of India [22] the stock prices of B.P.L witnessed a conspicuous shift. The appellant was barred from accessing the capital markets for a period of four years and also prosecuted under Section 24 of the SEBI, Act which deals with offences.

All such persons are prohibited from taking part under the CIRP for the plain reason that they have violated the regulations at some point of time and are best kept away from unfairly participating in the resolution process.

7. Section 29A (g) –Has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code.

[21]Securities and Exchange Board of India Act, 1992, 15 The Gazette of India § 11(4)(a), § 11(4) (1992).

[22] BPL Ltd. vs. Securities & Exchange Board of India32 S.C.L. 95 (2001).

By virtue of this provision, the scope of ineligibility has been widened. It restricts a promoter or any other key person of the corporate debtor from submitting a resolution plan if certain specified transactions have taken place in the debtor company and an order with respect to the same has been passed by the NCLT. A 'transaction'[23] is nothing but an agreement with the object of transfer of assets, funds, goods or services either to or from the debtor company.

a. Preferential Transactions
They are covered under Section 43 of the Code. They refer to those types of transactions which get a preferential treatment over others. A duty is cast over the IRP to file an application with the NCLT for avoidance of the same. Clause 2 of Section 43 talks about the transactions which would fall under this category. An example of the same can be transfer of a property merely on account of an existing debt owed by the debtor to a creditor or a surety. The time limit for computing the same has also been provided for. It is two years before the date of commencement of the resolution process, if made to a related party. Otherwise, for all other transactions, it is one year. However, those transactions which are carried out in the usual course of business have been excluded under this head.

b. Undervalued Transactions
Section 45(2) of the Code deals with undervalued transactions. As the name suggests, these are carried out by the debtor in exchange of a negligible or a non-significant consideration. It may also be in the form of a gift. Upon the application of the IRP, the NCLT may pass an order to transfer back the property constituting subject matter of the transaction to the corporate debtor etc. The same time limit is applicable as that in case of preferential transactions.

c. Extortionate Credit Transactions
These transactions have the sole purpose to benefit the creditors and are covered under Section 50 of the Code. In these cases, the debtor pays an excessively high amount to avail the credit facility. The NCLT, upon receipt of the application may make appropriate orders to set aside such exorbitant debts and restore original position.

d. Fraudulent Transactions
The term being self-explanatory, involves those transactions which are carried out with a fraudulent intention to dupe the creditors. They intend to keep the assets, which would otherwise be claimed, away from the creditors. The Adjudicating Authority in this case, protects the interests of those creditors.

The aforementioned transactions are termed as 'avoidance transactions'. The onus is on the IRP under Section 25(2)(j) to apply for their avoidance. They are avoided so that the existing assets of the debtor company can be fully utilized to clear its debts. The promoters or other key people associated with the company against whom the NCLT has ordered with respect to such transactions are barred to be a resolution applicant.

[23] The Insolvency and Bankruptcy Code, 31 The Gazette of India § 3(33)(2016).

For example, 'XYZ' is a firm undergoing a resolution process. The NCLT receives an application with respect to a fraudulent transaction which took place in 'XYZ' and passes an order against it. 'P', a promoter of 'XYZ' is not eligible to be a resolution applicant for another debtor company in this situation. The loophole in this provision can be posed in the form of a question: What if the NCLT passed the order before 'P' became a promoter? This loophole has been cleared vide Amendment Ordinance of June, 2018 which states that the clause shall not be applicable if the aforementioned Avoidance Transactions took place before the applicant's acquisition of the debtor company and after approval of the resolution plan. Further, it shall also not be applicable if the resolution scheme has been given a nod by any regulator of the financial sector or a competent court. Moreover, the ordinance adds another requisite which states that the applicant must not have been involved in any of the four categories of transactions.

8. Section 29A (h) –Has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code.

The interpretation of the clause can be understood by an example. On the basis of the essential conditions required for a Contract of Guarantee, let 'A' company be a corporate debtor (a principal debtor), 'B' be a surety/guarantor and 'C' be the creditor. 'A' acquired financial loan from 'C' and has the obligation to pay it back. With respect to this transaction, 'B' is the guarantor for 'A'. 'C', moves an application for resolution of 'A'. So, as per the provision, 'B' cannot submit a resolution plan for any other debtor. The law has not laid down any provision for a situation in which the guarantor has already honoured the guarantee. Such a situation came up for consideration in the case of RBL Bank Ltd. v. MBL Infrastructures Ltd.[24] in 2017. The NCLT in its order, was of the view that clause (h) was inserted to prohibit those guarantors who had not honoured their guarantee and had defaulted. When in the first place, the liability on the guarantor does not accrue, it cannot be held that he/she has defaulted. It was held that the Applicant in this case was not ineligible under Section 29A (h).

The Ordinance of June '18 however, has inserted clarifying words and now reads that the guarantee in question must have been invoked by the creditor and the same must remain unpaid, either in part or in full.

9. 29A (i) -Ineligibility in foreign jurisdiction

This clause extends the ineligibility criteria to the foreign companies or Indian companies who falls under 29A(a) to (j) in foreign jurisdictions. This sub-section widens the disqualification ambit to perhaps unjustified extent. Suppose for instance company A of UK has given guarantee for company B which goes insolvent, so now A cannot bid in India. In similar manner if A is connected person to any Indian company disqualified under 29 A(a) to 29 (i), it will be disqualified from

[24]RBL Bank Ltd. v. MBL Infrastructures Ltd,CA(IB) No. 543/KB/2017, at *14 (NCLT KB. Dec. 18. 2017).

bidding. The network of ineligibility is needlessly extended which will be ultimately bad for efficiency of Insolvency Law.

10. Section 29A (j) –connected person not eligible under clauses (a) to (i)
 It has defined the term 'connected person' to include both present and future promoter, person(s) involved in management and control of the resolution applicant. It also extends to a holding company, an associate company or any other related party of the 'connected person'. And all find meaning under the Companies Act, 2013. In a relief, the provision excludes a scheduled Bank, an Alternate Investment Fund and an Asset Reconstruction Company. The Ordinance of June 2018 makes clearer the exclusions under the category of 'related party'. It excludes any financial entity which is regulated by a financial sector regulator and is related to the debtor company merely on account of 'conversion of debts or instruments' into equity shares.[25] Along with the Scheduled Bank, AIF and ARC, a foreign based entity controlled by a central bank in a foreign jurisdiction and any investment vehicle registered with a non-Indian investor has also been excluded. The exclusion also extends to such persons which shall be notified by the Government.

CONCLUSION

In a nutshell any person satisfying the above criteria or if connected to any entity satisfying the criteria will be disqualified from bidding and also cannot take part in liquidation. The intention of the legislators behind 29A is good but its consequences can be negative in nature. It is right to argue that certain promoters may deliberately rundown the company so that the assets can be purchased at lower price and therefore the exclusion seem to be right.[26] However, exclusion under such wide ambit and blanket ban on honest applicants may result in lower competition among the applicants who are seeking to resolve the company, ultimately it means lower recoveries for the creditors. In terms of small and medium scale companies, exclusion of promoter who may be the only one to revive the company as bidder will lead to forceful liquidation. Apart from this, procedural impact will be unnecessary disputes and litigation, complication of role of Insolvency Resolution Professional. Presently the Insolvency Law is in its nascent and volatile stage. The government must scrutinize its legislations, remove ambiguities, study the impact on the market and only then implement its legislations with commercial rationale rather than any other.

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[25] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 6 The Gazette of India § 22(vii)(2018).

[26] Vatsal Khullar, *Legislative Brief the insolvency and Bankruptcy Code (Amendment Bill), 2017*, **PRS LEGISLATIVE RESEARCH** (June 15, 2015, 2:40 PM)http://www.prsindia.org/uploads/media/Bankruptcy/Legislative%20Brief%20Bankruptcy%20Amendment%20Bill.pdf.