# Critical Analysis of Corporate Insolvency Resolution Process

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**ABSTRACT:**

Developing economy like India has always embraced the ideas of evolution in its possible sphere. At the same time stringent provision one require to watchdog the development. As in the case of insolvency and bankruptcy laws, previously there were various provisions of law for the insolvency resolution for the different entities but to consolidate all the provisions under the common legislation this Insolvency and Bankruptcy Code, 2016 was introduced.A debtor becomes insolvent when he is unable to fulfill his obligations which he had promised to his creditors or unable to pay his outstanding debts. And Bankruptcy is a condition when the adjudicatory authority declare the debtor who unable to pay his debts, an insolvent person. This entrepreneur friendly legal regime was introduced by the government to give reality to the dream of getting India to one step closure to become developed nation and to increase the ease of doing business. This law was introduced to protect and grant the relief to the innocent debtor who is not in a condition to pay his dues due to any unforeseen situations and also protect the interest of creditors who gave debt to the debtor in a hope that they will get their money back at some point of time as decided between debtor and creditor. This law provides the process of insolvency resolution of corporate body, partnership firm, individual, sole proprietorship etc. Under corporate insolvency resolution process there are three types of person are defined who can file application for the initiation of insolvency resolution process, these person are known as corporate debtor, operational creditor and financial creditor. One of the merit of this law is that it provides speedy resolution of insolvency within a span of 180 days.
**Key words-** Insolvency, Bankruptcy, Corporate, Debtor, Adjudicatory.

## I. INTRODUCTION

Insolvency and bankruptcy law in India has helped in the growth of the economy along with strengthening of the existing laws. As India is becoming the major part of the world economy and to compete with the other economies we were in a need of fully consolidated law on insolvency because previously we had different overlapping laws concerning insolvency but those laws were not adequate to resolve the problem of the growing debt over the corporate and individual. As there was a need for the insolvency law which will be at par with the standards of the other nations so that new foreign investors will attract and invest in the Indian Economy. Because India is a growing economy and everyday new business startups are evolving so we need an entrepreneur friendly framework to resolve one of the major problem of our economy i.e. non-performing assets (NPA). Insolvency and bankruptcy law with its development had repealed two acts and amend six other laws prevalent in India before the existence of new insolvency and bankruptcy code. It repealed Presidency Town Insolvency Act, 1909, and Provincial Insolvency Act, 1920, and amend Companies Act 2013, Sick Industrial Companies Act, 2013, Limited Liability Partnership Act, 2008, Securitization and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Indian Partnership Act, 1932.In the case of *M/s Innoventive Industries Ltd. v. ICICI Bank*[1]the Supreme Court for the first time explained the paradigm shift in law by virtue of the newly enacted Insolvency and Bankruptcy Code, 2016 which consolidates and amends all the laws relating to the insolvency and bankruptcy process in India. The Supreme Court remarked that by giving effect to the State law, the intended scheme of the Code would directly be hindered to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. In *PR. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.*[2] the Supreme Court has categorically held that the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) will override any enactment which is inconsistent with the provisions of the Code.

Insolvency is the condition when a person is unable to pay his debt or obligations. Insolvency can be determined by two conditions firstly, when the cash flow in the company decreases and secondly, when the books of account shows that the liabilities are more than the assets of the entity.In general, this occurs when the entity's cash flow in falls beneath its cash flow out. For individual debtors, this implies that their incomes are too low for them to pay off their debts. For companies, this implies that the money flow into the business and its assets are less than its liabilities.[3]

Bankruptcy is different from the insolvency. Bankruptcy is a legal procedure through which an insolvent debtor seeks relief.[4] It is the condition when the person voluntarily admits that he is unable to pay his debts. And the person who is unable to pay his debts appears before the court to declare himself an insolvent person. If the adjudicatory authority finds that the person appearing unable to pay his debt then the adjudicatory authority will declare him insolvent.

## II. OBJECT OF INSOLVENCY LAW

The main object of this law is to provide the help and benefit to the innocent debtor who is not able to pay his outstanding debts due to the unforeseen conditions and the another object is to fulfill the claims of the eligible creditors by distributing the assets of the debtor equally among them by the procedure established by the law.

[1]AIR 2017 SC 4084
[2]( 2012 ) 11 SCC 1
[3]See https://www.greenwaybankruptcy.com/articles/the-difference-between-insolvency-and-bankruptcy/
[4] See http://www.mbcindia.com/image/18%20.pdf

In the case of YenamullaMalludora vs P.Seetharatna[5], Supreme Court of India observed, The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors. It is however not every debtor who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the Court commences when certain acts take place which are known as acts of insolvency and which give a right to his creditor to apply to the Court for his adjudication as an investment.

## III. HISTORICAL DEVELOPMENT OF THE INSOLVENCY AND BANKRUPTCY

Insolvency laws were originates from the English laws. According to the section 23 and 24, Government of India Act, 1800, the Supreme Court was having the jurisdiction for dealing the cases related to the insolvency. After that Indian Insolvency Act, 1848, came into force, but the provisions of the act were not helpful to meet the requirements of the growing economy. After that the Presidency Town Insolvency Act, 1909, came into force and along with that another legislation named, Provincial Insolvency Act, 1920 was enacted. Both these legislations were helpful to resolve theindividual insolvency and insolvency related to the sole proprietorship, and partnership even their formal content was same but there is a difference in the jurisdiction. Presidency Town Insolvency Act, 1909 applied only on the presidency towns like madras, Bombay, Kolkata etc. but Provincial Insolvency act applied on other towns. After that Companies Act, 1956 came into force to resolve and reorganization of insolvent corporate entity through the procedure of 'winding up[6]'. Part VII of section 42 to 56 of the companies act 1956 makes provisions deals with mode of winding up cases in which the company may be wound up the court.[7]After that Sick Industrial Companies Act, 1985 was enacted which introduced the provisions for restructuring and reorganization of the corporate entity.

Constitution of India give powers to the legislatures to make laws on the subject of 'Insolvency And Bankruptcy' under entry 9 list III.

To make the strict regulations related to the insolvency various committees were set up by the government to give their recommendations. In the Budget speech of the 2014-2015, the government of India announced to develop a framework for the insolvency resolution and reorganization of corporate and individual entity. And for the development of framework a committee was established which was headed by Shri T.K. Viswanathan.

[5]AIR 1966 SC 918
[6]Section2(94A) of the Companies Act, 2013
[7]Mevorach, I., 2009. Insolvency Goals in Legal Systems. In Insolvency within Multinational Enterprise Groups. pp. 105–126

## IV. RECOMMENDATIONS GIVEN BY THE COMMITTEE[8]

The committee proposes to establish the code which govern corporate and individual insolvency. It also proposes that whole insolvency process will be govern by the board named as, 'Insolvency and Bankruptcy Board of India' which will keep the vigil over the insolvency resolution process. Committee proposes to establish the position of 'Insolvency Resolution Professional' which will help and play a important part in the resolution process of insolvency. Insolvency Resolution Professional will took over the management to himself from the hands of owner of the company and manage all the operations of the company till the resolution of the process of insolvency completes. Insolvency Resolution Professional is registered under insolvency resolution agency as its member. Insolvency resolution professional and insolvency resolution agency are governed under rules and regulations made by the Board. Process of insolvency resolution will be adjudicated by the two authorities, for corporates, under National Company law Tribunal (NCLT) and National Company law Appellate Tribunal (NCLAT) and for individual the process will be adjudicated by the Debt Recovery Tribunal (DRT) and Debt Recovery Appellate Tribunal(DRAT). It also proposes to establish the committee of creditors (COC), it consists of the creditors to whom the debtor owes their debt. Committee of creditors (COC) will held meetings to take decisions regarding the insolvency resolution and this meeting will be convene by the interim resolution professional or resolution professional. Every creditor will have to vote, as they have the voting share in proportion to their claims against the debtor. A resolution plan will be made by the applicant along with the resolution professional for the resolution of the insolvency. This resolution plan will be submitted to the committee of creditors, if they pass the resolution plan then it will send for the approval before the NCLT.

## V. INSOLVENCY LAWS IN OTHER COUNTRIES

### United States of America

The United States has incorporated insolvency regimes which focuses to protect the insolvent company or individual from the creditors, and balance their respective interests. In history of United States largest bankruptcy occurred on15, September , 2008, when Lehman Brothers Holdings Inc. filed for Chapter 11 protection with more than USD$639 billion in assets.

In U.S person seeking relief under the Bankruptcy Code may file a petition for relief under a number of different chapters of the Code, depending on circumstances. Title 11 which contains nine chapters, six of which contains provisions for filing a petition whereas the other three chapters provide rules to govern those petitions. The bankruptcy code of United States of the covers bankruptcy laws under chapter 7 of title 11 which provides

[8]See https://dea.gov.in/sites/default/files/BLRCReportVol1_04112015

process of liquidation.Chapter 7 seems to be the most common form of bankruptcy in the United States. Law framed un U.S code are meant assist the debtor.

**United Kingdom**

Companies which are unable to pay their debts are dilated with insolvency law in United Kingdom. While UK bankruptcy law encompasses the rules for natural persons, and the term insolvency is generally used for companies which are formed under the Companies Act 2006. "Insolvency" means being unable to pay debts. After the Cork Report of 1982, the new policies of United Kingdom insolvency law has been to attempted to rescue a company that is in difficulty, and ensure that minimize losses and fairly distribute the burdens between the employees, community, creditors and other stakeholders that result from enterprise failure. If a company cannot be revived after due aid, it is "liquidated", which means, the assets of particular company are sold off to repay creditors consistent to their priority.

The Insolvency Act 1986 primarily governs cases relating to Individual Voluntary Arrangements and personal bankruptcy and passes all administrative orders relating to company insolvency.

**Australia**

Insolvency provisions in Australia tries to maintain an reasonable balance between the competing interests of , creditors, debtors and the wider community when debtors are unable to meet their financial obligations. The legislative provisions majorly focuses on:-

- an fair and orderly procedure to handle the affairs of insolvent companies;
- to regulate a "paripassu" equal distribution of the assets amongst creditors;
- to confirm that the claims against the insolvent company are resolved with the minimum of expenses and delay;
- to rehabilitate financially distressed companies and businesses where viable;and
- providing for the examination of insolvent individual or company and their representatives, and to find out reasons for their failure.

**Canada**

There are various legislations by which matters relating to bankruptcy and insolvency in Canada are governed:-

- Bankruptcy and Insolvency Act.
- Companies' Creditors Arrangement Act.
- Winding-up and Restructuring Act.

- Bankruptcy and Insolvency General rules .
- Orderly Payment of Debts Regulations .

## VI. INITIATION OF THE PROCESS OF CORPORATE INSOLVENCY RESOLUTION

**STAGE-1**

Process of insolvency resolution starts with filing of the application before the adjudicatory authority i.e. National Company law Tribunal.

Person who can file the application for the insolvency resolution process?

Financial creditor

Operational creditor

And Corporate debtor,

Financial creditor is the person to whom the financial debt is owed by the debtor and includes a person to whom this financial debt is legally assigned. Operational creditor is the person to whom the operational debt is owed and includes a person to whom operational debt is legally assigned. And the corporate debtor is the person who owes the debt to any person.

**Time period for the completion of insolvency resolution process**

The insolvency resolution process commence from the day when the application is accepted for the insolvency resolution and ends when NCLT approves the resolution plan put forward by the committee of creditors. It takes about 180 days to complete the resolution process of insolvency but the time period can be extend for more 90 days. For this extension committee of creditors need to pass the resolution with 75% majority and after that the NCLT approves the decision taken by committee of creditors. When the application is put forward by the financial creditors, operational creditors, and corporate debtor they need to give the proof of debt to the NCLT.

**Documents required to be submitted by the financial creditor**

Financial creditor has to submit the record of debt registered with the information utility or such other documents or evidence of default. Financial creditor also has to submit the name of the insolvency resolution professional along with other information mentioned by the board.

**Documents required to be submitted by the operational creditor**

Operational creditor has to give the demand notice or copy of the invoice demanding payment to the corporate debtor.In *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.*[9]the Supreme Court settled the legal proposition under the Insolvency and Bankruptcy Code, 2016 to hold that:Section 9(3)(c) of the Code is directory and not mandatory in nature.

Demand notice under the Code can be issued by the Lawyer on behalf of the operational creditor. In this context the Court made reference to the requisite elements necessary to trigger the Code under Section 9(1): occurrence of a default; delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt. The Court held that only when these conditions are met an application may be filed under Section 9(2) of the Code in the prescribed manner, accompanied with prescribed fee. Under Section 9(3), along with the application, certain other information is also to be furnished. If there is a dispute between the operational creditor and debtor then the debtor has to give the notice of dispute. And if there is no notice of dispute given by the corporate debtor to the operational creditor then operational creditor has to submit the affidavit in that regard. Another thing need to be submitted is the copy of certificate from the financial institution maintaining accounts of the operational creditor stating that there no payment of unpaid operational debt by the corporate debtor. And the copy of the report from the information utility stating that no operational debt is paid by the corporate debtor. If the operational creditor has any proof showing that there is no payment of unpaid operational debt then he can also submit that proof before the NCLT.[10]

**Documents needs to be submitted by the corporate debtor**

Corporate debtor has to submit the details of the books of accounts and other documents showing his financial condition or such other documents as specified by the board. Another thing is that shareholders of the corporate debtor has to pass resolution and the resolution should be adopted by the majority of three fourth of the partners of the corporate debtor, approving the application filed by the corporate debtor. And corporate debtor has to give the name of the insolvency resolution professional to the NCLT.

**STAGE 2**

Application for the insolvency resolution can only be filed when the default is above one lakh rupees. After filing the application, adjudicatory authority either accepts the application or reject the application.

[9](2018) 2 SCC 674
[10]See https://www.indiafilings.com/learn/corporate-insolvency-resolution-process/

Adjudicatory authority gives the intimation about the application filed within 14 days of filing, after examining the application and other documents submitted. If the adjudicatory authority finds the application valid then it will the approve the application otherwise reject the application.

After accepting the application the adjudicatory authority appoints the interim resolution professional. Interim resolution professional shall be appointed for the period of 30 days. Interim resolution professional take the management of the company in his own hands from the debtor and helps in running the operations of the company. There are some duties and functions of the interim resolution professional. Management of the affairs of the company shall vest in the resolution professional. Powers of the Board of Directors and partners stands suspended and transferred to the interim resolution professional. All the managers and offices shall report to the interim resolution professional provide him with all the record of corporate debtor when he require. All the financial institution maintaining the records of corporate debtor need to furnish the records with interim resolution professional. In doing all these, they need to ensure that due process in compliance of the law is followed and hence, it is important that they have adequate knowledge of the law, sufficient experience in commercial and financial matters and integrity in their functioning.[11]

The duties of the interim resolution professional is to collect the information regarding the financial conditions, operations and assets of the corporate debtor and submit that information to the insolvency and bankruptcy board of India. He also needs to collect the claims of creditors against the debtor. Interim resolution professional has to monitor the assets of the corporate debtor andmanage the operations of the corporate debtor until the resolution professional is not appointed by committee of creditors. Interim resolution professional has to submit all the information collected to the information utility.[12]

After the application for the insolvency resolution is made so adjudicatory authority issues a moratorium.[13] Moratorium is a kind of stay proceeding. By issuing the moratorium, adjudicatory authority restricts or prohibit the alienation, transfer, or disposing of by the corporate debtor of any of his property or assets. It also restricts initiation of suit or continuation of suit or proceedings, and execution of decree, or order given by any court, tribunal etc. It also restricts any action to foreclose, recover of any property or enforce any security interest created in favor of corporate debtor in regards to the Securitization And Restructuring Of Financial Assets And Enforcement Of Security Interest Act, 2002. In *Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj&Ors*.[14] In this case, the National Company Law Appellate Tribunal was primarily concerned with the issue whether the order of moratorium will cover a criminal proceeding under Section 138 of NI Act, which provides punishment of

[11] International Monetary Fund Orderly and Effective Insolvency procedures, 1999 – Chapter on Institutions and Participants.
[12]Section 18, Insolvency and Bankruptcy Code, 2016
[13] Section 14, Insolvency and bankruptcy Code, 2016
[14] 2018 SCC OnLine NCLAT 415

imprisonment for a term which may extend to three years or with fine which may extend to twice the amount of cheque or with both? The Respondent in the case submitted that the proceeding under Section 138 of the Negotiable Instrument Act i.e. dishonor of cheque due to insufficient funds, is covered by clause of Sub-section (1)(a) of Section 14 of I&B Code, therefore, proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority cannot proceed. NCLAT noted that as Section 138 of NI Act is a penal provision, it empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. In *Alchemist Asset Reconstrution Company Ltd. V M/S. Hotel Gaudavan Pvt. Ltd. &Ors.*[15]An arbitration proceeding cannot be started after imposition of moratorium and that that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

**STAGE-3**

After the appointment of interim resolution professional, public announcement is made by him regarding the claims against the corporate debtor. The public announcement is valid till seven days, so if any creditor have their claims against the debtor, they can submit the claims to interim resolution professional. In *M/S. Surendra Trading Company V. M/S. JuggilalKamlapat Jute Mills Company Limited And Others*[16] In this case, the question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory. The precise question was whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the adjudicating authority was a hard and fast time limit which could never be altered. The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the adjudicating authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory. However, the Supreme Court differed in its perspective and held as follows: "We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinizing

[15] 2017 SCC OnLine NCLT 15234
[16] 2017 SCC OnLine SC 1208

the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application." The public announcement also contains the name of the debtor and name of the interim insolvency resolution professional.

Interim resolution professional after collecting all the claims give notice to every creditor and made committee of creditors. Committee of creditors takes decision in the meeting by their voting share of not less than 75% in proportion of their claims against the financial creditors.Committee of creditors within seven days held the meeting and recommend the name of the insolvency resolution professional to the adjudicatory authority. Committee of creditors either resolve to appoint the interim resolution professional as resolution professional or recommend another resolution professional.

Insolvency resolution professional appointed by the committee of creditors shall prepare an information memorandum which contains all the details regarding the financial condition of the debtor. (1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan. (2) The resolution professional shall provide to the resolution applicant access to all Approval of committee of creditors for certain actions. relevant information in physical and electronic form, provided such resolution applicant undertakes— (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading; (b) to protect any intellectual property of the corporate debtor it may have access to; and (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.[17]

Resolution applicant will submit the resolution plan according to the information memorandum provided by the insolvency resolution professional. And after that insolvency professional will examine the resolution plan submitted by the resolution applicant. Then the resolution plan is put before the committee of creditors and committee of creditors can pass the resolution plan by voting share of 75% of their debt against the debtor. If the committee of creditors approves the resolution plan then it will be submitted to the adjudicatory authority which either approve or disapprove the resolution plan.

[17]Section 29, Insolvency and Bankruptcy Code, 2016

## VII. CONCLUSION

Introduction of Insolvency and Bankruptcy Code in India has helped to resolve one of the major problem of Non Performing Asset of banks which are the biggest landers which provide the financial help to the corporates. This code of insolvency provide the path to decrease the non- performing assets and helped the banks to improve their asset quality so that investment can be improved and consequence of which is economic growth. Another advantage it gave to the Indian economy is that it provides an entrepreneur friendly insolvency resolution procedure which give help to the new entrants in the field of business so that they can come out of this vicious circle of insolvency and can run their business smoothly. This code is one of the main reason for improvement of India's ranking in the World Bank's Ease of Doing Business to 100 in 2017 from 130 in previous year. Introduction of this code has also helped toward the 'Make in India' scheme by luring many foreign corporates to come in India because this code provides easy and fast process of insolvency process. Because before this code came into force the winding up process of companies took very long time but this code provides a speedy process of insolvency resolution.