

Indian Insolvency and Bankruptcy Code, 2016 in the era of Covid-19

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Abstract

The primary alarm of insolvency and bankruptcy management is to keep possible businesses in service. An optimal administration should prevent the early closure of viable businesses and should be able to revive struggling enterprises so that investments from creditors can strengthen an individual's position. Major changes to the current system can considerably lower failure rates by reducing the number of lucrative enterprises that are liquidated. They are also linked to advantages including expanded access to low-cost borrowing, a higher credit recovery rate for creditors, and increased employee security. The corporate personality principle grants the company certain rights and liabilities. But if the liabilities on the assets of the company go beyond its income, then the company may at times even fall down. This extraordinary situation has made an impact on the insolvency regime as well. The legislature has come up with regulations to address the issues immediately in the insolvency system during this pandemic crisis. The present paper is planned to analyze the issues and problems relating to corporate insolvency declaration in India during the pandemic.

Keywords: Corporate, Insolvency, Insolvency and Bankruptcy Code, 2016, Covid-19 crisis, Bankruptcy, Liquidation.

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Introduction

The legal environment of a country always plays an important role in its economic development. If the legal environment of that country is heavy and implemented then definitely the global background of the country will be strong. One of India's most notable economic changes, the Insolvency and Bankruptcy Code, 2016, is thought to have had a considerable impact on credit

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risk management.² IBC, 2016 integrates and modifies the laws relating to the insolvency resolution process in India. The impact of the advent of the Code seems to be far-reaching to lenders, financial institutions, corporations, and also for professionals, giving them scope to act as resolution professionals. Bankruptcy legislation attempts to provide a rescue option for struggling businesses, speed up the winding up of insolvent ones, and give investors a simpler way out.³ The Insolvency and Bankruptcy Code, 2016 brought a drastic change in the Indian insolvency regime. It was indeed a major structural reform in the Indian insolvency regime wherein there was the consolidation of all the insolvency laws in a new form with a new infrastructural setup different from the previously existing structure in India which was in a scattered form. The corporate insolvency resolution process under the IBC, which works without the intervention of the court and in a time-bound manner, makes it unique from the earlier position.⁴

Process for Resolving Corporate Insolvency

Financial creditors evaluate the debtor's company's viability to continue operating as well as the possibilities for its rescue and revival throughout the corporate insolvency resolution procedure. If a bankruptcy plan is unsuccessful or financial creditors conclude that the debtor's business cannot be operated economically and should be shut down. The process of liquidating the debtor will begin, and the liquidator will realize and distribute the debtor's assets. A process, known as "solvency resolution," involving financial bankruptcy resolution procedure, gives lenders a way to work together to address the corporate debtor's overall troubled situation. This represents a significant change from the current legal structure, where the debtor has the primary responsibility for starting the reorganization process and lenders may pursue separate proceedings for recovery, security enforcement, and debt restructuring.⁵

² Ghosh, Pradip Kumar 2018 'Evolution of Insolvency and Bankruptcy Code, 2016, Based on Judicial Interpretation and Pronouncement' *The Chartered Accountant* 66 (7): 27–31.

³ Jain, Deepak 2017 'The Insolvency and Bankruptcy Code, 2016 – An Analysis and Opportunities for Professionals under the Code' *Chartered Secretary* 47 (3): 38–42.

⁴ Goel, Shivam, *The Insolvency and Bankruptcy Code 2016: Problem and Challenges*, *Journal of Interdisciplinary Research*, V-3, I-5, ISSN 1362 2017

⁵ Sharma, Nilesch 2017 'Corporate Insolvency Resolution Process, Under the Insolvency and Bankruptcy Code, 2016 – An Analysis'. *Chartered Secretary* 46 (9): 56.

Covid-19 Pandemic and IBC:

The unanticipated pandemic crisis caused different economic problems not just in other nations but also in our own. This unprecedented situation has made an impact on the insolvency regime as well. The legislature has come up with amendments to address the issues surrounding the insolvency regime during this pandemic crisis. Measures were taken in the form of central government notifications and Amendments.⁶ According to Section 4 of the Insolvency and Bankruptcy Code, 2016, the central government increased the entrance limit from Rs one lakh to Rs one crore as the minimum amount of default to invoke the provisions of the Insolvency and Bankruptcy Code, 2016. This was done mainly with the intention of saving Micro, Small, and Medium Enterprises. However, this circular created confusion since it did not specify whether it is retrospective or prospective in effect.⁷ At this point in time, NCLT benches at Kolkata and Chennai came up with an explanation. Kolkata NCLT bench in the cases of Foseco India Limited v. Om Boseco Rail Products Limited took the view that the central government was prospective in nature since the notification does not specify anything, by applying the rule of interpretation of statutes, which a statute will be supposed to be approaching unless specified to be retrospective by suggestion.⁸ In the same way, the Chennai NCLT Bench in the case of Arrow line Organic Products Pvt. Ltd. v. Rockwell Industries Ltd. held that the announcement can only be considered as prospective in nature. Another concern is that since this is not retrospective in nature, the earlier threshold of Rs one lakh would be applicable to the pending cases. If so, what would be the position of cases pending at different stages like, if they are awaiting admission by the NCLT, if they have already sent the demand notice but have not filed the application before the NCLT?⁹

The NCLAT in Himadri Foods Ltd. V. Credit Suisse Funds AG held that once the terms of settlement providing a repayment schedule were incorporated in the order, thereby making it an order of the court, The freedom to return granted to the financial creditor in the event of

⁶ Megha Khandelwal and Ananya Ghosh Suspension of CIRP during Covid-19: A Boon or a Bane?

⁷ Section 4 of Insolvency and Bankruptcy Code, 2016

⁸ Foseco India Limited V. Om Boseco Rail Products Limited (CP (IB) No 1735/KB/2019)

⁹ Arrow line Organic Products Pvt. Ltd. V. Rockwell Industries Ltd. IA 341/2020 in IBA 1031 / 2019.

settlement conditions breach could only be read as a request to revive CIRP in the event that the settlement's terms were broken.

When an attorney was given the proper instructions to issue the demand notice, the NCLAT ruled in *Mohit Minerals Ltd. V. Nidhi Impotrade Pvt. Ltd.* that there were no grounds to argue that the advocate's notice was not one that had been issued by an authorized party. In *Sri. D. Srinivasa Rao V. Vaishnovi Infratech Ltd.*, the NCLAT ruled that if a corporate debtor refused to accept delivery of a notice under Section 8 of the Code, the NCLT would not be justified in ruling that the corporate debtor had not received the notice because the corporate debtor would be at fault, and the NCLT would not be able to satisfy that responsibility.¹⁰

In *Shubham Jain V. Gagan Ferrotech Ltd. & Anr.*, the NCLAT determined that serving a notice under Section 8 of the Code on the corporate debtor's director would be a legal service and satisfy the Code's criteria. Additionally, it was decided that the notice must be regarded as having been properly served under Section 8 of the Code if it is returned as unclaimed.¹¹

The NCLAT ruled in *Shailendra Sharma v. Ercon composited & ors.* that an application under Section 9 of the code would not be barred by the pending of any proceedings under Order 37 of the Code of Civil Procedure, 1908 or Section 138 (Negotiable Instruments Act, 1881). In *Narendra Kumar Agarwal & Anr v. Monotrone Leasing Pvt. Ltd. & Anr.*, the NCLAT determined that a transaction involving an intercorporate deposit made for a specific period of time and subject to interest would also fall under the definition of financial debt as stated in Section 5(8) of the Code. The NCLAT noted that the time value of money, a byproduct of such a transaction, would be the interest.¹²

Covid-19 Pandemic and Insolvency and Bankruptcy Code, 2016

During COVID-19, the world has gone through a recognizable economical change. The event has affected the growth of different sectors everywhere, on the whole of the business world and

¹⁰ *Sri. D. Srinivasa Rao V. Vaishnovi Infratech Ltd.*, Company Appeal (AT) (Insolvency) No. 880 of 2020.

¹¹ *Shailendra Sharma V. Ercon Composited & ors.*, Company Appeal (AT) (Insolvency) No. 159 of 2020

¹² *Narendra Kumar Agarwal & Anr. V. Monotrone Leasing Pvt. Ltd. & Anr.*, Company Appeal (AT) (Insolvency) No. 549 of 2020

the corporate sector covering back due to the delay in procedures which in turn affected the economy at large. The Government of India also took measures regarding the restriction compulsory upon economic activity which majorly affects the corporate sector.¹³ The Indian Government under the sample of Insolvency & Bankruptcy Code 2016, suspended the commencement of the proceeding afterward concerning insolvency when default occurs against corporate debtors by making an allowance for all the factors which are undecided and unexpected.¹⁴ Hence, the amendment brings out the insolvency regulation as the Insolvency & Bankruptcy Code (Amendment) 2020 with certain new provisions taking into consideration the impact of Covid 19. Insolvency resolution procedures under the Insolvency Code have increased from Rs. 1 Lakh to 1 crore. This move is expected to benefit micro, small, and medium enterprises and is also otherwise welcome by corporate debtors given that the previous entrance of Rs. 1 lakh was reasonably near to the ground.¹⁵ Further, the amendment extended the statutory timeline from 180 days up to 270 days with regard to the completion of the corporate insolvency resolution process, which became due to the lockdown situation described in Section 12 of the Insolvency Code, pending. It further provided the exclusion of the lockdown period for any activity or task in the corporate insolvency resolution process under the preview of the code.¹⁶ The Insolvency & Bankruptcy Code (Amendment) ordinance articulated the addition of creation provisions into the Code in June 2020 by observing the impact of Covid 19 in the continuous insolvency process. Section 10, a newly inserted section, talks about the Suspension of Initiation of the corporate insolvency resolution process, it restricted financial creditors, operational creditors, and corporate debtors from filing an application to initiate the corporate insolvency resolution process regarding those corporate Debtors who were in default during the period of 6 months initiating from and including March 2020 on which the nation commencement of lockdown got announced which may be extended up to 1 year.¹⁷ The primary effects of COVID 19 which impact the proceedings ought to start after the inauguration of the lockdown but afterwards, it also has an impact on the continuing proceedings which were pending due to the

¹³ Gurrea-Martínez, Aurelio, Insolvency Law in Times of COVID-19 (June 9, 2020). Ibero-American Institute for Law and Finance, 2020,

¹⁴ Wadhwa Rakesh, Insolvency and Bankruptcy Code 2016, The Journal of Corporate Professionals, V-46, I-09, 2016

¹⁵ Insolvency & Bankruptcy Code (Amendment) 2020

¹⁶ Section 12 of the Insolvency Code 2016

¹⁷ Section 10 A, Insolvency & Bankruptcy Code (Amendment) 2020

closure.¹⁸ The delay comes about in those cases that are getting handled by the NCLT and NCLAT because hearing of these cases is done through video conferencing. In these circumstances, a greater focus is required to pleasing to the eye the efficiency of existing out-of-court and in-court reformation mechanisms and introducing new mechanisms to safeguard worth.¹⁹

The NCLAT in a *Kalinga Allied Industries India Pvt. Ltd. V. Hindustan Coils Ltd. & Ors.* held that the NCLT cannot consider a request for consideration of a new resolution plan from a person who has not participated in the corporate insolvency resolution process, even if that person is willing to pay a higher amount than the successful resolution applicant, while the application for approval of the resolution plan is still pending before the NCLT. The NCLAT highlighted that the corporate insolvency resolution process would become an immeasurable procedure if a resolution proposal is considered after the deadline has passed.²⁰

The NCLAT in *Ranjeet Kumar V. Committee of creditors of Straight Edge Contract Pvt. Ltd.*, held that the interim resolution professional has no right to appear before the court to maintain an appeal against the decision of the committee of creditors to replace the interim resolution professional would not amount to a stakeholder and that the interim resolution professional could not argue that the Constitution of the committee of creditors was bad when the committee of creditors was constituted by the interim resolution professional himself.²¹

Prakash Shanker Mishra & Ors. V. Ashok Kriplani & Anr., the NCLAT, held that on the committee of creditors selecting a person as the interim resolution professional or to act as an authorized representative, such persons could not be substituted by persons of the NCLT's choice contrary to the wishes of the committee of creditors on the ground of volume of work to be done and interest of the Company.²²

¹⁸ Gurrea-Martínez, Aurelio, *Insolvency Law in Times of COVID-19* (June 9, 2020). Ibero-American Institute for Law and Finance, 2020,

¹⁹ Ministry Of Corporate Affairs Notification, 2020

²⁰ *Kalinga Allied Industries India Pvt. Ltd. V. Hindustan Coils Ltd. & Ors.*, Company Appeal (AT) (Insolvency) No. 518 of 2020

²¹ *Ranjeet Kumar V. Committee of Creditors of Straight Edge Contract Pvt. Ltd Company Appeal (AT) (Insolvency) No. 388 of 2020*

²² *Prakash Shanker Mishra & Ors. V. Ashok Kriplani & Anr.*, Company Appeal (AT) (Ins) No.34 of 2020

Conclusion and Suggestions

Insolvency law can serve as a tool to defend financially concerned debtors affected by COVID-19, to help them preserve the importance of the firm, and the reformation of their debts; insolvency law is not the problem but the solution, especially for large companies.²³ In cases where the pandemic situation brings in financial limitations and difficulty to proceed further with the now-accepted plan, it becomes difficult to attain the real objective as required to achieve by the code. The lower entry limit and the comprehensive ban on filing applications can adversely affect the operational creditors of the commercial defaulter.²⁴

CITE THIS ARTICLE: Dr. Monika Jain, Indian Insolvency and Bankruptcy Code, 2016 in the era of Covid-19, *Justice and Law Bulletin*, 1(2), pp. 61-67, (2022)

²³ Jared A. Ellias and George Triantis, Congress is ignoring the Best Solution for Troubled Companies: Bankruptcy, *Fortune*, 15 May 2020.

²⁴ Gurrea-Martínez, Aurelio, Insolvency Law in Times of COVID-19 (June 9, 2020). Ibero-American Institute for Law and Finance, 2020.