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RECENT AMENDMENTS IN INSOLVENCY AND BANKRUPTCY CODE AND A COMPARISON WITH OTHER LEGAL ASPECTS

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I. ABSTRACT

This paper conducts a detailed study on well-emerging issues pertinent to the debt recovery and insolvency matters in Insolvency and Bankruptcy Code, 2016. It attempts to compare it with other Indian legislation that is relating to the issues of insolvency and resolution procedures. The author discusses the Insolvency and Bankruptcy Code, its backgrounds, applicability, features, objectives, etc. In this article, the author is further examining the recent amendment in the Insolvency and Bankruptcy Code and providing a detailed study, and proffers her opinion about the same. The role of laws, enactments, provisions, and their inefficiency during implementation are also pointed after having a detailed study. The paper highlights the overview of the bankruptcy code, and it's a connection with other Indian laws in recovery procedures. The details about the amendments are also well explained. The author will finally conclude the article by providing her observation and suggestion.

Keywords:- Recovery, Amendments, financing, Reconstruction

II. INTRODUCTION

The introduction of Insolvency and bankruptcy code was established in 2015, and was passed in May 2016 by both the house of parliament. Thus it formed as 'Insolvency bankruptcy code,2016'. This was the most significant economic reform for focusing and resolving the creditors' problems regarding the issues arising out of Insolvency.To provide an easy exit in cases of bankruptcy of individuals and companies, the code has significant value for all

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stakeholders, including various Government Regulators.³ The issues relating to financial failures and insolvencies can be settled in this legal position.

The matters relating to debt, defaults, Insolvency, etc. were dealt with many other agencies before enacting this code. Those agencies' insolvency resolution resulted in a higher cost, more expensive, delays, more complexities, etc. Those are sorted out after the This code will fasten up the lengthy winding up proceedings and its provisions have the overriding effect over the other laws. The 'Board for Industrial and Financial Reconstruction (BIFR)', one of the Insolvency Regulators, has been a phantasm for sick industrial companies.⁴ The insolvency and bankruptcy code expedited the pending cases and period for resolving also were fixed, i.e. within 180 days and a further period of 90 days.

III. APPLICABILITY OF THE CODE

The code mainly concentrates on the parts such as liquidation, bankruptcy or voluntary liquidation, Insolvency of these entities:-

1. Any company incorporated under the companies Act, 2013, or any previous laws.
2. Any other company governed by any particular act for the time being in force
3. Any Limited Liability Partnership under the LLP Act 2008
4. Any other body being incorporated under any other law specified by the Central government.
5. Individuals and Partnership firms.

The minimum amount of the default is Rs. 1 Lakh then only this code can be applied.

IV. KEY FEATURES AND THE OBJECTIVES OF THIS CODE:

The code helps a distressed person to show a revival path and also helps to find solutions. The key features are:-

- Dedicated Adjudicating & Appellant Authority, i.e. (DRT, NCLT and Insolvency and Bankruptcy Board of India)
- Time-Bound Process: The insolvency and bankruptcy code expedited the pending cases and the period for resolving also was fixed, i.e. within 180 days and a further period of 90 days.

³ Insolvency and Bankruptcy Code, 2016, (Nov 27, 2019 - 01:20:40 PM)

⁴Id note 3

- Preserving Value of Business
- The professionalization of Insolvency Management: The professionals should be a licensed professional and are regulated.
- All Creditors empowered to trigger Insolvency: All secured and unsecured creditors, all domestic and foreign creditors; nevertheless, any discrimination can go for insolvency application.
- Enforcement of Personal Guarantees

Key objectives of the code are:-

1. To amend the laws relating to insolvency resolution.
2. To fix periods (i.e., 180 days).
3. To maximize the value of assets.
4. To promote entrepreneurship
5. To increase the availability of credit.
6. To establish an Insolvency and Bankruptcy Board of India
7. To develop higher levels of debt financing

V. CERTAIN LAWS RELATING TO RECOVERY OF DEBT AND REVIVAL OF BORROWERS:

There was much legislation established relating to the recovery of the debt in India over the decades. It provides many options for the creditors to recover their debts. Those laws and legislation are mentioned below:-

Civil Procedural Code

With jurisdictional Civil Court, a creditor claims a money recovery by filing a suit. That should be against the defaulting debtor under the Civil Procedure Code, 1908 (CPC) with jurisdictional Civil Court. But it may take a lot of time to obtain a degree through this route. This happens because of the high backlog of cases and the slow adjudication process. So it can be said that continuing with this procedure is a little bit slower comparatively. Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA') lead the way for the establishment of an economic reconstruction board called 'the Board of Industrial & Financial

Reconstruction (BIFR)'. An Act to make, in the public interest, special provisions to secure the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial, and other measures which need to be taken concerning such companies and the expeditious enforcement of the efforts so determined and for matters connected in addition to that or incidental to that.⁵

A necessary SICA provision was establishing two quasi-judicial bodies—the Board for Industrial and Financial Reconstruction (BIFR), and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR)⁶. BIFR was set up as an apex board to spearhead handling the industrial sickness issue, including reviving and rehabilitating potentially sick units and liquidating non-viable companies.⁷

However, rather than helping lenders recover their duties, Sick Industrial Companies (Special Provisions) Act principally is inclined to help revive sick companies. For any action against the defaulting company for any reason, SICA provides a moratorium. There will be no time restriction is given. However, BIFR may decide to stand on its own feet is practicable for a sick industrial company or not. Reference to BIFR thus became a safe harbor for defaulting companies to delay debt recovery. While the failed promoters retained substantial management powers that at times lead to further irreparable loss to the lender's interest.

SARFAESI:

This is an Act deals with the registration and regulation of Asset Reconstruction Companies (ARCs) by the Reserve Bank of India and Facilitating securitisation of banks and financial institutions' financial assets with or without the benefit of underlying securities.⁸ Thus Promotion of seamless transferability of financial support by the ARC to acquire banks and financial institutions' financial assets through the issuance of debentures or bonds or any other security as a debenture.⁹

The Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 SARFAESI prescribes three alternative fast track methods for recovery of NPAs viz.

⁵THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985,(12th January, 1987)

⁶Adam Hayes, Sick Industrial Companies Act (SICA), Investopedia, (Jan 16, 2020)

⁷Id note 6

⁸SARFAESI ACT, 2002- Applicability, Objectives, Process, Documentation (Mar 09, 2020 - 11:23:23 AM)

⁹Id note 8

securitization, financial reconstruction assets, and enforcement of security. The SARFAESI Act provides quick resolution by allowing lenders to enforce security without reference to Court. However, this remedy is only available to Scheduled Banks and Notified NBFCs against an account that has already turned NPA. From the borrower's perspective, the major lacuna of this mechanism is that unilateral security enforcement does not provide a fair chance to the borrower to revive, which may permanently impair the business, thus adversely impacting the interest of other stakeholders, including unsecured creditors, employees, etc. One can say that while SICA was too lenient on the borrowers, with SARFAESI, the pendulum has swung too extreme in favor of lenders.

V. AFTER THE AMENDMENTS, IS IT FINALLY DONE FOR THE INSOLVENCY AND BANKRUPTCY CODE

All suit for recovering their debts are done under the special laws or contract law. There turned the need for the establishment of a consolidated law which provides a positive outcome globally. Before the advent of this code in 2016, some individual other acts or rulings were meant to deal with corporate debtors and creditors' situation.¹⁰ Some of those are SARFAESI (Securitization and reconstruction of financial assets and enforcement of security interest), RDDBFI (Recovery of debt due to banks and financial institutions) for debt recovery by banks and financial institutions), Companies Act, Presidency towns insolvency act, Provincial Insolvency.¹¹

After the changes in the market of creditors and borrowers, the need for the alteration became high, resulting in three amendments of the code.

AMENDMENT BILL, 2018

- The insolvency and bankruptcy amendment bill 2018 was introduced in Lok Sabha. The primary purpose of the bill was to make sure that the employees there are still employed.
- The voting bracket for all creditors has lowered from 75% to merely 51%.
- Anyone who has allotted under real estate project will consider as a financial creditor.
- A specific person is now not allowed to submit a resolution plan. The reason is also mentioned clearly in this Bill.

¹⁰Siddhant dubey, After round three of Amendments, is it finally done for the Insolvency and Bankruptcy Code, IBS Laws (April 8, 2020)

¹¹ Id note 10

- Homebuyers will get a deciding position.
- Insolvency resolution can be withdrawn if a total of 90% of the creditors agrees to it. This leads to the strengthening of the relationship between creditors and debtors.

AMENDMENT BILL, 2019

- advanced to operational creditor according to a resolution plan
- voting criteria for any authorized personnel appointed by the financial creditors.
- Insolvency action of the real estate business can only be put into motion if 10% debenture holding market.
- In the process of Insolvency, the primacy basis of the corporate debtor remains intact.
- The method of corporate Insolvency must be completed in a specific time frame.
- The time limit for resolution process is implemented.
- The 14 days within which the NCLT has to find the existing default is directory not mandatory. This was concurred by the supreme court in the case of M/S Surendra Trading co. Vs. Juggilal kamlapat jute mills and others.¹²

AMENDMENT BILL, 2020

- In this amendment, there added Section 32A.
- This code determined a minimum limit for a sect of financial creditors can apply for the initiation of the insolvency resolution process. This limit has been set at 1 lakh rupees, i.e. the defaulted amount must be 1 lakh rupees for in insolvency resolution to initiate.¹³
- Any corporate debtor should not be denied applying to any other corporate debtor to initiate corporate insolvency resolution.
- The permit, registration, license etc. shall not be called off during the moratorium period.

VI. CONCLUSION AND SUGGESTION

The introduction of the Insolvency and Bankruptcy code is a good step in the right direction. It boosts the lender, creditor, foreign companies' confidence and facilitates the business's growth; this leads to the country's economic development. Another prominent role of this code is

¹²M/S Surendra Trading co. Vs. Juggilal kamlapat jute mills and others.19 September, 2017, 8400 of 2017

¹³Siddhant dubey, After round three of Amendments, is it finally done for the Insolvency and Bankruptcy Code, IBS Laws (April 8, 2020)

providing superior power to the financial creditors. But there are many deficiencies in this 2016 code; delay in the resolution process is the main problem stated by many sources. The study says India takes around 4.3 years to complete the process. This rate is relatively higher than in other countries (USA-1 Year, UK-1 Year, South Afric-2 Year).

There are many significant problems and inefficiencies found out in this code. Some of them are resolved after the introduction of Amendment Bills in the years of 2018,2019,2020. But it may cause adversely also. As the changes in the market players' functioning, the government needs to change its laws or alter the rules accordingly to stand at par with the market and function globally with ease.



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