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LEGAL INADEQUACIES IN INDIAN CROSS-BORDER INSOLVENCY FRAMEWORK: A STUDY OF SECTION 234 AND 235 OF INSOLVENCY AND BANKRUPTCY CODE, 2O16

1. INTRODUCTION

The rapid development of multinational corporate entities has broadened the scope of insolvency from a domestic level to an international one. Corporations nowadays have assets, creditors, contracts and operations in multiple jurisdictions in the world and thus when such corporations become insolvent, questions arise as to the jurisdiction, recognition of foreign proceedings, treatment of overseas assets, protection of creditors who are located abroad and coordination among courts of different countries.

Section 234 and 235 of Insolvency and Bankruptcy Code, 2016 (for short **"IBC"**) of India were introduced as enabling mechanisms and not a complete and detailed legislative framework. They do not provide practical or detailed rule for the recognition of foreign proceedings or the coordination of proceedings between different insolvency courts across the globe. However, with time these provisions have been found to have their limitations. The inadequacy of Sections 234 and 235 has resulted in policymakers and scholars recommending the adoption of a framework based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997, as per Insolvency Law Committee, Report on Cross-Border Insolvency (Ministry of Corporate Affairs, Oct 2018).The paper will therefore discuss about the inadequacies and limitations with respect to cross-border insolvency laws in India.

2. LEGISLATIVE FRAMEWORK (SECTION 234 AND 235 OF IBC)

- Section 234 authorises Central Government to enter into bilateral agreements with foreign countries for enforcement of provisions of IBC meaning when India makes an insolvency agreement with any foreign country, the agreement must clearly state how the Indian laws will apply to assets or property located in that particular foreign country. The Indian Government will have the authority to set specific rules or limits on how these foreign assets or property will be handled under IBC.
- Section 235 provides that where evidence or action with respect to assets or property located outside India is required with respect to insolvency proceedings, the Resolution Professional, Liquidator or Bankruptcy Trustee can make an application to the Adjudicating Authority. If the National Company Law Tribunal (for short **"NCLT"**) is satisfied, the tribunal may issue a letter of request to a foreign court or foreign authority with which a bilateral agreement exists under Section 234.

Prima facie, these provisions appear to provide a mechanism for international co-operation but it only operates on the basis of bilateral agreements.

3. STRUCTURAL DEFICIENCIES AND OPERATIONAL LIMITATIONS IN SECTION 234 AND 235

- **Section 234:** The primary deficiency is its absolute reliance on bilateral agreements. A multinational company may have assets in 10 or more countries. The Committee noted that the use of bilateral agreements is unlikely to provide an effective solution because negotiations involving multiple countries can be time-consuming and can lead to inconsistent obligations. The Committee also noted that insolvency matters frequently involve urgent asset-preservation measures and therefore delays resulting from treaty negotiations may devalue assets prejudicing the creditors. Therefore, while the provision has been on the legislation since 2016, it has been practically dormant.
- **Section 235:** It authorizes the issuance of a letter of request to a foreign court but the success of these requests, however, is entirely dependent on the cooperation of the foreign jurisdiction. Section 235 neither obligates foreign courts to recognise Indian insolvency proceedings nor lay down any procedure for reciprocal recognition of foreign proceedings in India. As a result, cooperation continues to be based on principles of comity and

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not any legal certainty.The provision also suffers from procedural vagueness.

4. JUDICIAL PRECEDENTS

- The airline in the case of *Jet Airways (India) Limited (Offshore Regional Hub) VS State Bank of India & Anr.,* Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT) insolvency proceeding went under insolvency and had assets and creditors in both India and Netherlands. So, bankruptcy proceedings started in both a Dutch court and before NCLT. Since there was no law about recognizing and coordinating such cases, it created uncertainty regarding the validity of the two parallel proceedings. The NCLT adopted an approach to set up a way for the Indian Resolution Professional and the Dutch Bankruptcy Administrator to cooperate. 1 This arrangement enabled information sharing and coordination despite the absence of any legislative basis under Sections 234 and 235 of IBC. This case demonstrated the desperate need for a legislation that acknowledges foreign insolvency cases, helps courts of different countries coordinate and manage similar or parallel proceedings at the same time.

- The case of *State Bank of India and Ors Vs. Kingfisher Airlines,* (2017) 6 SCC 654 also brought about the question of applicability of Indian insolvency law to foreign creditors and to the assets situated outside the jurisdiction of India.

- Other than that, the Supreme Court recently in the case of *Ruchi Soya Industries Ltd. Vs Union of India,* 2021 SCC Online SC 567, addressed various issues related to the rights of the creditors across different jurisdictions alongside underlining the importance of harmonised laws for fair and equitable treatment.

5. MAJOR LEGISLATIVE GAPS

- One of the most serious problems with Sections 234 and 235 is that they do not recognize foreign insolvency proceedings. Modern cross-border insolvency framework, which most jurisdictions follow, let foreign representatives request recognition from domestic courts.This process helps them get standing, use the courts, protect assets and avoid fragmented proceedings. But Indian insolvency framework contains no such provision.

- A foreign representative cannot legally seek recognition before the NCLT. It deters investment as people who invest and lend money prefer places where there will be certain insolvency results and will be respected globally. The inadequacy in the Indian insolvency legislation therefore increases legal risks, harms foreign investment and increases transaction costs.

- International best practices presently favour treating all claimants equally, regardless of the location. However, sections 234 and 235 of India's IBC do not actually protect foreign creditors. Due to this, foreign creditors might feel uncertain about their rights and it could create perceptions of territorial bias, which can undermine confidence in India's insolvency framework.

- In contrast, the UNCITRAL Model Law clearly gives access rights to foreign representatives and makes sure there is no discrimination based on nationality or location. The absence of similar protections in the IBC reflects a significant legislative deficiency.

6. CONCLUSION

Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 mark the initial attempt to acknowledge the cross-border insolvency issues. However, it is insufficient for a complete and comprehensive framework. The Insolvency Law Committee acknowledged the shortcomings and suggested adopting the UNCITRAL Model Law on Cross-Border Insolvency from 1997 along with suitable modifications. The Model Law is built on four key principles which are access, recognition, relief and cooperation.

Foreign representatives can use domestic courts and there are ways to acknowledge foreign proceedings and give the needed relief along with encouragement of cooperation between courts and insolvency administrators. Moreover, it does not force countries to unify their laws but helps coordinate things without interfering with national control. Over fifty places have adopted legislation based on the Model Law, solidifying its standing as the international standard in cross-border insolvencies. Adoption of such framework would clearly balance the issues with Sections 234 and 235 by adding predictability, setting things up more reliably and fostering essential cooperative infrastructure.