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REVITALIZING INDIA'S CORPORATE INSOLVENCY FRAMEWORK – ROLE OF INSOLVENCY AND BANKRUPTCY CODE & NATIONAL COMPANY LAW TRIBUNAL REFORMS



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1. INTRODUCTION

1.1 The Insolvency and Bankruptcy Code (for short 'IBC') was adopted to offer a unified framework with expedited restructuring and insolvency resolution in India, with the goal of ultimately maximizing the value of the Corporate Debtor (for short 'CD') undergoing the resolution process.

1.2 The objective of the Code has been reiterated in *Umesh Saraf -v/s- Tech India Engineers Pvt. Ltd. 2020 SCC OnLine NCLAT 677*, enunciating that IBC aims at bringing the corporate debtor to its feet and not just a money recovery legislation. IBC puts significant discipline on the commercial sector through the establishment of a specific exit mechanism and stipulation of a maximum remodeling period. Effective management of corporate insolvency can also enhance the effectiveness and competitiveness of the corporate sector.

2 Key Developments in the Framework:

2.1 Section 29A brought into effect via IBC (Amendment) Act, 2018 excluded certain categories of individuals inter alia defaulting promoters from submitting resolution plans, and acquiring the assets of Section 29A brought into effect via IBC (Amendment) Act, 2018 excluded certain categories of individuals inter alia defaulting promoters from submitting resolution plans, and acquiring the assets of the CD at subsidized rates. In *Swiss Ribbons Pvt. Ltd. -v/s- Union of India(2019) 4 SCC 17*, the Court opined that erstwhile promoters of corporations have no vested right to apply for a resolution process, by validating the provision of Section 29A.

2.2 IBC made the approval by the committee of creditors (for short 'COC') imperative for a resolution plan, further limiting the scope of judicial review on the said decision of COC, as enumerated by the Court in *Committee of Creditors of Essar Steel India Limited -v/s- Satish Kumar Gupta and Ors.(2020) 8 SCC 531*.

2.3 Recognition of homebuyers as financial creditors under IBC by the Court in *Chitra Sharma -v/s- Union of India (2018) 18 SCC 575* followed by an amendment w.e.f. 6th June 2018 rendering initial deposits by allottees as 'financial debt' under IBC. Thereafter the legal standing of the amendment was contested before the Apex Court by real estate developers wherein the Court in *Pioneer Urban Land and Infrastructure Limited -v/s Union of India(2019) 8 SCC 416*, upheld the constitutionality of the same by ruling that the sums collected from homebuyers under a contract are comparable to raising finance and would, therefore, fall under the ambit of "financial debt" as defined by Section 5(8) of the Code.

2.4 In the year 2018, IBC was amended to include Section 12A, which allowed creditors to withdraw their insolvency applications as long as they received the backing of 90% of the voting share of COC; provided such withdrawal request is submitted before the point at which the expression of interest is issued in the filing of resolution plans under Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

2.5 In November 2019, the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (for short 'FSP Rules') was notified by the central government. A propos to the FSP Rules, Financial Service Providers (except banks) and NBFCs having a total asset size of more than 500 crores, including housing finance companies, would be subject to insolvency mechanisms highlighted in the IBC and the FSP Rules. In the event of a financial default, the appropriate regulator, i.e. the RBI, may initiate a resolution process for the Financial Service Providers.

2.6 The Insolvency and Bankruptcy Code (Amendment) Act, 2021 enabled pre-pack insolvency for one category of corporate debtors under the IBC – micro, small and medium enterprises. MCA has devised plans to launch pre-packaged resolution process in lieu of this amendment. The simplified method of ‘Pre-pack’ insolvency involves a pre-defined arrangement wherein the sale of whole or part of the entity’s business is negotiated with a buyer, prior to the initiation of the insolvency proceedings.

3 Recent Adaptations by NCLT

3.1 In order to combat the setbacks in the framework of the Code the NCLT and the NCLAT is attempting to streamline the proceedings

3.2 On dated 3rd April 2023 the NCLT has released a Circular, vide which the Petitioners in Insolvency proceedings have been requested to produce the record of Information Utility (NeSL certificate) for effective hearing of their case and in compliance of the Regulation 20(1A) of Insolvency and Bankruptcy Board of India (Information Utilities) Regulation, 2016

3.3 In *Manmohan Gupta -v/s- MDS Digital Media Pvt. Ltd. & Anr. Company Appeal AT (Ins.) No. 202 of 2023*, the NCLAT comprising of Justice Ashok Bhushan and Shri Barun Mitra opined that at the admission stage of the petition, the adjudicating authority is not required to provide any feedback regarding the accuracy of the debt amount. Instead, the Resolution Professional shall determine the correctness of the debt

4 Prospective Reforms under consideration

Significant changes were suggested in the MCA's recent discussion paper on insolvency to address a number of persistent problems with the IBC's operation. The proposed changes include redesigning the fast-track corporate insolvency resolution process, pre-packaged resolution, crossborder insolvency, clean slate mechanism.

4.1 MCA has proposed to strengthen the "clean slate" principle as elucidated in *Ghanashyam Mishra & Sons (P) Ltd. -v/s- Edelweiss Asset Reconstruction Co. Ltd. (2021) 9 SCC 657*. Legislative recognition and adaptation of this concept may result in positive change and fewer legal disputes.

4.2 In *Vidarbha Industries Power Limited -v/s- Axis Bank Limited, (2022) 8 SCC 352*, the Court vested discretionary powers upon the NCLT to take into consideration external factors while adjudicating Section 7 petitions, which unsettled the well-established principle of sufficiency of twin factor (debt and default) while admitting Section 7 petitions. To tackle this judgement, MCA has proposed to restore the previous position, and deem it mandatory for NCLT to accept petitions under Section 7 upon the satisfaction of the twin condition.

4.3 MCA has noted that personal guarantors may misuse Section 96 of IBC which bars initiation or continuance of legal actions in respect of debts, once an insolvency application is being preferred by the said individual. Accordingly, it is recommended by the MCA that Section 96 ought to be made inapplicable to such guarantors.

4.4 It has also been proposed that new amendments may be inserted in Part III of the Code which contemplates distinct resolution process, in order to tackle fraudulent transactions by insolvent individuals, similarly as corporate debtors.

4.5 In *State Tax Officer -v/s- Rainbow Papers Ltd. 2022 SCC OnLine SC 1162*, the Court granted statutory creditors having charge over the assets of the CD, similar status as secured creditor; resultantly the government authorities would be at par with secured creditors, which was against the intent of IBC as well as violative of Section 53 of the Code. In order to tackle this inconsistency, MCA has lodged that the definition of ‘security interest’ to only cover consensual transactions between parties, as contradictory to an interest created vide mere operation of a statute.

4.6 The role of the creditors ought to be extended to empower them to manage and uphold the working of the liquidator. It is additionally recommended by MCA, that the COC ought to be engaged to replace the liquidator at any time with majority vote of 66%.

5 Conclusion

5.1 With these trends in play, it can only be anticipated that stringency in the jurisdictional structure in the near future will add to the efficacy that the Regulation aims at. The concerns of delay may be better curtailed with dedicated benches at the NCLT. The pre-pack alternative to the CIRP is also coming to limelight and ADR has been hailed for its burden limitation in recent years

5.2 The ambit of IBC was well exemplified when the applicability was extended to Financial Service providers and more so as the Rules were structured and adept to avoid irregularities such that for such circumstances the resolution plan was to incorporate a declaration of the successful engagement of the business furthermore, the inclusion of these NBFCs to increase the economic efficiency of these institutions.