A Critical Analysis of Corporate Recovery and Insolvency of India 2017

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Abstract

India adopted regime for the personal insolvencies and bankruptcies, part of the comprehensive new Insolvency, Bankruptcy Code. The Code was drafted and the enacted in very short amount of time, personal insolvency and the bankruptcy provisions received considerably less attention, during the lawmaking process than provisions that relate to the corporate debtors. Therefore many fundamental question about the purpose and they likely impact of these provisions remain largely unaddressed. The Code’s provisions for the individual debtors have not yet gone into force, The regulatory agency charged with the implementing and it has recently constituted. an advisory committee, which has drafted and some proposed regulations and rules will presumably advise the agency on the potential reforms. The advisory group’s project on review of counsel will inevitably more public discussion on debate about the purpose and the function of personal insolvency and bankruptcy law in India.

Key Words: Insolvencies, bankruptcies, lawmaking, corporate, debtors.
1. Introduction

Insolvency is referred to the inability to any legal person to discharge all the debts and they become due. It is the state or condition to have more debts (liabilities) than the total assets which may available to pay them. Even if assets were mortgaged or sold. Insolvency takes place in certain things happens. In some of which may comprise of: mismanagement of cash, inflation in the cash expenses, or reduction of cash flow. The detection of the insolvency is important; as the creditors are empowered and entitled to exercise the specific rights against insolvent and individual or organization. For example, the liquidating assets of insolvent party may be used to pay outstanding debts. Prior to the process with liquidation process, it is common for the insolvent entity to meet the creditor in order to attempt the arrange an alternative payment method. In context of the companies laws, the word “insolvency” has been used or defined in India. Sec.433 (e) of the Companies Act, 1956 deals with the company, which is “unable to pay its debts”, and as it result of which constitutes a ground for winding up of the company. Inability to pay its debts that would be a situation in which, a company’s entire capital is lost in the heavy losses and no accounts are found and filed and no business is carried out for 1 year.

Section 271(1)(a) of 2013 Act relates to the winding up by the Tribunal on account of lack of ability to pay the debts, has now been omitted by the Section 255 of the Code. The same is now dealt with the Insolvency and Bankruptcy Code, 2016 by Sections 7 to 9 of the Code, being initiation by corporate insolvency resolution process of financial and operational creditors. An application to the adjudicating authority (National Company Law Tribunal) for initiation of the corporate insolvency resolution process can be made only with there “default” in payment of debt by corporate person. In this regard, it is to be noted by the term “default” has been defined has in the Code to mean non-repayment of the debt, whether the whole or in a part, which has become due and payable by the corporate person. This would suggest that, now under the Insolvency and Bankruptcy Code, 2016, insolvency is resolution proceeding can be triggered even against the financially solvent of the company which has made the default in payment of its debts, since the same would fall within the ambit of “default” under Code.

2. Aim

To find out the provisions relating to interest of the creditors the way and means to reduce and improve the viability and competitiveness of the business and rights of the business.

3. Hypothesis

HO: liquidation is not one reason for the recovery and insolvency.
HA: liquidation is one main reason for the recovery and insolvency.

4. SOURCES OF STUDY:
SECONDARY SOURCES:
The Secondary Sources includes Books related to rule of law, Journal, Articles, Websites and Blogs are also been referred.

Research Problem
Does the legislative framework in your jurisdiction allows for informal work-outs and of these used adequate of credit in the company.

Research Question
Does the legislative framework in india better than u.s?

5. Review of Literature
The insolvency a practical legal and book for manager this deals with early insolvencies and recent changes in insolvency law(Eales 1996). ‘principles of international insolvency’ this book deals with the insolvency law is the root of commercial and financial law because it obliges the law to choose. There is not enough money to go round so the law must choose who to pay (Wood 1995). ‘Commencement of insolvency proceedings’ this book deals with the current insolvency legislation is the result of long and cumbersome evolution(Faber et al. 2016). ‘ corporate default and recovery rates 1920- 2006’ this book deals with default rates, recovery of default and credit loss rate(Hamilton 2001). ‘insolvency a practical legal and book for managers’ this deals with the twentieth century insolvency and recent ideas not adopted and other relevant sources of law (Mevorach 2009). ‘international insolvency principles’ this deals with insolvency law is the root of commercial and financial law to protect the creditors or debtors. The twin competing policies of insolvency law(OECD 2017). ‘insolvency in brief’ this paper tells about a company insolvent if it does not have enough assets to cover its debts(Akbar 2011). ‘insolvency and business recovery procedures’ this paper talks about the directors and shareholders of the company and forms of corporate insolvency (Hussain & Wihlborg 1999). ‘recovery and reconstruction’ this deals with companies advise on business operation and now to avoid running into difficulties(Schwab et al. 1998). ‘understanding insolvency’ this paper deals with loss of market where companies have not recognized the need to change in a shrinking or changing marketplace(Joint commission on the emergency in education et al. 1934). ‘business recovery and insolvency’ this deals with the economic cycle companies business and individuals will invariably faces(Joint commission on the emergency in education et al. 1934; Hindman 2001). ‘a practical cross
border insight into corporate recovery’ this deals with the mortgage is a security interest in property or an asset owned by a borrower made to a leader (Mangkusubroto 2007). ‘insolvency and business recovery procedures’ this book deals with a liquidation may be solvent or insolvent (Mangkusubroto 2007; Manzocchi 1999). ‘a study on insolvency law in india including corporate insolvency’ this paper deals with insolvency when an individual corporation or other organization cannot meet its financial obligations (Onishi & Kobayashi n.d.). ‘restructure and insolvency in india’ this book deals with the forms of security and formats of insolvency (Dine 1998). ‘corporate recovery and insolvency’ this book deals with the organized to be client focused not product focused takes place quality and advice before growth (OECD 2017). ‘evolution of insolvency bankruptcy code 2016’ this deals the indian economy in the term phase during this period banks especially public sector banks extensively to corporates (OECD 2017; Akbar 2011). ‘corporate insolvency resolution process under the bankruptcy’ this deals with corporate insolvency regime has following function to identify the signs of insolvency at earliest (Hamilton 2001) ‘corporate financial distress and bankruptcy’ this book deals corporate distress including the legal process of corporate bankruptcy reorganization (Dammann n.d.). ‘insolvency resolution process liquidation and opportunities’ this book deals with the government of india on 28th may 2017 (Dammann n.d.; Bork 2017).

6. Methodology

The data is collected mainly through Secondary sources such as articles, journals, and books relating to corporate recovery and insolvency and it is doctoral in nature

7. Limitations

Although the researcher has reached its aims, there are few unavoidable limitations like the time limit and there was no access to certain materials online.

8. Meaning of Insolvency, Bankruptcy and Code

The present time in India, a noteworthy rising economy, is attempting to the resuscitate and manage its high and development rate, it is basic that financing requirements with any shape be evacuated and an ideal nature be made for the cultivating business and rivalry. In this specific circumstance, a well working and precise the corporate bankruptcy and system comprising of very much characterized standards, methods and courses of events and the effective establishments, it is basic for empowering the advancement of vigorous
household credit markets. Anyway in India at the present absences of a solitary, exhaustive law that tends to all parts of bankruptcy of the undertaking. On a fundamental level the Companies Act of 1956. It contains the fundamental lawful arrangements, which is managing the corporate indebtedness. In all actuality however three laws, two auxiliary laws and one extraordinary arrangement to address different components of it.

there is an alternate foundations and offices characterized under the every law and arrangements with inescapable clashes of the purview between them. The present framework does not address the premiums of unsecured loan bosses, (for example, investors), outside leasers or foundations other than banks, (for example, Non-Banking Finance Companies or NBFCs). Organizations underpins indebtedness process, for example, committed insolvency seats in the councils, official vendors, credit registry and credit departments, have not accomplished the limit and ability to help differing set of the leaders.

The discontinuity of the legitimate structure and the excessive deferrals in the authorization, make motivating forces for the lease looking for by the different members in the bankruptcy procedure. The results of the present framework concerning the time taken to determine the corporate bankruptcies, the expenses related with the procedures and additionally leasers' recuperations, have been to a great degree poor and falling a long ways behind for those of different economies, bringing about the supported and the reactions of the general system in the course of the most recent few decades.

9. Meaning of Insolvency, Bankruptcy and Code

The significance of indebtedness and chapter 11 isn't same bankruptcy implies the circumstance where a substance can't raise enough money to meet its commitments. Chapter 11 implies it happens when a court has decided indebtedness and has given legitimate requests for resolutions. Code implies it happens uniform indebtedness enactment including all organizations is association and people.

Bankruptcy

Bankruptcy is the point at which an individual or association can't meet remarkable or the money related obligation towards loan specialist as it winds

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2 http://dx.doi.org/10.2139/ssrn.2206296.


up due. Indebtedness can be settled by the method for changing of the reimbursement design of the advances or discounting the part thereo. It can't be settled, at that point the lawful activity may lie against ruined and its benefits will be sold to pay off the extraordinary obligations. By and large, an official chosen one/outlet selected by the Government of India, understands the benefits and designates it among loan bosses of the ruined. Bankruptcy proceedings commence with the making of a Bankruptcy Order by the Court. Immediately on making the Order the Official Receiver becomes receiver and manager of the bankrupt’s estate, pending the appointment of a trustee.

Where there are significant assets, an insolvency practitioner will usually be appointed to act as trustee, either by a meeting of creditors or by the Secretary of State for BIS. An application for a Bankruptcy Order may be made by any creditor owed more than £750 or by the individual himself. Subject to certain exemptions, once the Order is made, control of the bankrupt’s assets pass to the Official Receiver and then to the trustee. The bankrupt loses any right to his property apart from any equipment needed by him for use in his business, and basic domestic equipment such as clothes, bedding and furniture, and certain pension rights.

There are special rules regarding the bankrupt’s home. Generally speaking, if the bankrupt has equity in a house, it will need to be realised. The law though discourages a trustee from taking steps to force a sale through the Court during the first twelve months of the bankruptcy where the bankrupt is married or has young children living with him. Rules introduced in April 2004 give the trustee three years from the date of the Bankruptcy Order to sell the house or otherwise deal with the bankrupt’s interest in it. If he does not do so within that time, the property will revert to the bankrupt. Also if the value of the equity is less than £1,000 the trustee will not be able to sell it at all. There are certain restrictions of bankruptcy which usually last until the bankrupt is discharged (although his assets remain with the trustee). If the bankrupt has an income above his needs and those of his dependants, he may be required to make contributions of this “surplus” to his creditors for up to three years. Until his discharge, the trustee may also claim any property acquired by the bankrupt after the Bankruptcy Order, such as assets left to him in a Will.

**Liquidation**

Chapter 11 is the idea somewhat not quite the same as the indebtedness, which is fairly agreeable the liquidation is the point at which a man willful pronounces himself as wiped out and goes to court for announcing him as 'bankrupt', the court is considered mindful to exchange the individual property of the wiped out and the hand it out to its leaders. It gives a new rent to life to the ruined.

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6 http://dx.doi.org/10.2139/ssrn.2206296.
The Code is a uniform, complete indebtedness enactment enveloping every one of the organizations, associations and people other than budgetary firms. The Government is proposing separate structure for the liquidation determination in coming up short the banks and money related part substances. One of the principal highlights of the Code is that enables the lenders to evaluate the suitability of borrower as business choice, and afterward concur upon an arrangement for the restoration or expedient liquidation.


Corporate Insolvency

There are five categories of insolvency procedure for companies: Company Voluntary Arrangement Administration Administrative Receivership Creditors’ Voluntary Liquidation Compulsory Liquidation (winding up by the Court) Receivers may also be appointed under fixed charges (Fixed charge receiverships) on specific assets owned by a company. These are not technically insolvency appointments as such appointments may be made irrespective of the solvency of the company. There is also members’ voluntary liquidation (MVL), but this only applies to solvent companies and is instituted by the shareholders. Of the above the first three may be employed as a vehicle for business rescue, whilst either form of liquidation is a terminal process and usually marks the end of the business activities.

Rescue Procedures

When a company reaches the stage where formal insolvency procedures are necessary the primary objective for the directors and the insolvency practitioner is to realise the greatest return for the company’s creditors. Depending on the stage at which the company realises it is in trouble, the best return is almost always most likely to be achieved by keeping the company’s business operating. This enables two possibilities, either the business can continue to operate and

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8 http://dx.doi.org/10.2139/ssrn.2206296.


generate cash for the creditors or it can be sold on as a going concern. Companies with businesses that are sold on as going concerns almost always achieve a much higher realisable value than the liquidated value of its assets or its businesses and therefore, provide a greater return to creditors. Company Voluntary Arrangement (CVA) A company voluntary arrangement is a procedure which enables a company to put a proposal to its creditors, whereby they agree to accept a certain sum of money in settlement of the debts due to them.

The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors. For example, a CVA may involve delayed or reduced payments of debt, capital restructuring or an orderly disposal of assets. The proposed arrangement requires the approval of at least 75% in value of the creditors who vote, and once approved is legally binding on the company and all its creditors, whether or not they voted in favour of it. There is limited involvement by the Court, and the scheme is under the control of an insolvency practitioner acting as Supervisor. Administration Administration is a procedure available to a company that is, or is likely to become, insolvent.

It places the company under the control of any insolvency practitioner and the protection of the Court with the following objectives. Rescuing the company as a going concern Achieving a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration. Realising property in order to make a distribution to secured or preferential creditors. While a company is in administration creditors are prevented from taking any actions against it except with the permission of the Court.

An administrator may be appointed: By an order of the Court, on application by the company, its directors, one or more creditors, or, if it is in liquidation, its liquidator Without a Court order, by direct appointment by the company, its directors or a creditor who holds security of a type which qualifies him to make an appointment.

10. Provision for Individuals Insolvency

The presidency in the towns of insolvency act 1909, the provision insolvency act 1920 are major enactment that deals with personal insolvency have parallel provisions and their substantial content is also similar but two differ in respect of each territorial jurisdiction.

11. Provision for Corporate Insolvency

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, consequences of winding up order appoint pore and duties and functions
of the official liquidator or committee of inspection voluntary winding up of a
company.

Effective Insolvency and Bankruptcy Regime

The business failure affects all the stakeholder of a corporate including in
leaders. Shareholder creditors suppliers, customers, workers and central and
state governments very adversely. The noable business are however required to
re-organized at earliest.

Function of a Corporate Insolvency Regime

The Functions of Corporate Insolvency Regime

- It is identified signs the insolvency at the earliest.
- Initiates the insolvency process quickly.
- Creates a collective platform of stakeholders to enable them to take
decisions about the future of the distressed entity
- It helps to reorganization of the viable businesses.
- The unviable businesses of liquidation at the earliest to arrest any
substantial loss in value.

Insolvency Resolution Process

The Code significant departure from the existing resolution regimen by
shifting responsibility on the creditor to initiate the insolvency resolution
process against corporate debtor. Under existing legal framework, primary onus
to initiate a resolution process lies with in the debtor, and the creditor may
pursue the separate in the action for every recovery, the security enforcement
and debt restructuring.

Insolvency Resolution Process for Companies and Limited Liability

The default is above Rs. one Lakh (may increased up to Rs.1 Core by the
Government, through notification); the creditor may be initiate insolvency
resolution process. The Code is proposes two independent stages:

1. Insolvency Resolution Process – It is during which financial creditors assess
whether the debtor’s business is viable to continue and the options for its rescue
and resurrection.

2. Liquidation – The insolvency resolution process fails or financial creditors

17 http://www.dhirassociates.com/images/INS17-Chapter-17-India.pdf
Fast Track Corporate Insolvency Resolution Process

The aim of Insolvency and Bankruptcy code is to conclude the procedure within half of the default time period, which is specified under the Code. The person or entity seeking fast relief will have been onus on the process at the set-off and that person or entity has to sets-off the Fast-track process must support the case is fit for the Fast-track. Therefore, fills the application for fast track is the process under Chapter IV (Section 55) of Insolvency and Bankruptcy. Code will have to file the application along with the proof with the existence of the default as evidence by the records available with the information utility or such other means as they may be specified by the Board to establish that corporate debtor is eligible for the fast track corporate insolvency resolution process.

Voluntary Liquidation of Corporate

The Code provides the voluntary liquidation for proceedings by the corporate person who intends to liquidate itself and not committed any default and they can pay off debts fully from the proceeds of liquidation of its assets. The law requires a declaration to that effect the from majority of the directors of the company also stating the company is not being liquidated to the defraud any person. Creditors representing two-thirds value of the company’s debts shall approve a resolution passed to this effect. Voluntary liquidation commences when the creditors as above pass such resolution. Provisions of liquidation process apply to voluntary liquidation. Once debtor is completely wound up and assets liquidated, the NCLT passes an order for its dissolution.

12. Suggestion and Conclusion

The corporate insolvency law can lay out clear and well defined provision governing the procedures at each stages, effectively and time resolution of an insolvency case will depend to a large extent on the efficacy with those provisions and rules are enforced. The propose, which I have mentioned in my earlier, will go a long way in protecting interest of the creditors in an insolvent company; nonetheless few more steps are desirable. Here are my few suggestions as to what the Indian Government should do to improve its insolvency system.

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