

INSOLVENCY AND BANKRUPTCY CODE: EMERGENCE AND CHALLENGES IN INDIA

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Abstract : In India debt recovery has always been a challenge between the debtors and the creditors, till date there were many laws prevalent for mitigating the debt recovery problem, like the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) the Companies Act, 1956, Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 with various adjudicating authorities which ultimately culminated into a chaotic situation for the creditors and the debtors. Thus, finally Ministry of Finance constituted the Bankruptcy Law Reforms Committee to replace existing insolvency laws with one single consolidated and comprehensive law i.e. The Insolvency and Bankruptcy Code, 2016, that can facilitate easy and time bound closure of business. This paper has summarised the structure of the Code which includes the new concept of Financial Creditors and Operational Creditors the introduction of the Fast Track Resolution Process, other agencies to eradicate the insolvency deficiencies in an orderly and timely resolution process. The objective of the paper is to forecast on the merits of the Code and critically analyse the challenges of introducing and implementing bankruptcy reforms. The judiciary has played an important role in analysing the role of the Insolvency and the Bankruptcy Code. The paper thus highlights the areas in the Code where a strong legislation is required to expose and correct any issues before becoming a major problem for or between the debtors and the creditors.

Index Terms – Financial Creditors and Operational Creditors the introduction of the Fast Track Resolution Process, National Company Law Tribunal, criticisms

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I. INTRODUCTION:

This paper makes a critical analysis of Insolvency and Bankruptcy Code, 2016 (IBC in short) by highlighting the key parts of the Code and assess its likely impact on the Indian debt market and focuses on the working of the new Code. How effective will it be in promoting the efficient and timely resolution of insolvent entities and whether the Code suffers any drawbacks. The topics dealt with in this paper is the emergence of the Code, analysis of the Code and the demerits of the Code which needs to be amended.

I.1 EMERGING PATTERN OF INSOLVENCY AND BANKRUPTCY CODE:

In India it is found that debt recovery has always been a challenge with creditors and debtors disputing over their rights and obligations in legal wrangles under various provisions of the applicable laws making the process time consuming and costly, making India appear low on the list of countries with ease of doing business and resolving insolvency.¹ There were many laws concerning insolvency and statistical data showed this gave rise to thousands of pending issues relating to overlapping of jurisdictions of various laws governing insolvency resolution and courts dealing with recovery of money, for example, records show that it takes on an average 4 years to wind up a company in India and the reason behind this is inefficient and inadequate appropriate legal and institutional machinery to deal with debt defaults as per global standards, this in turn causes undue strain on the Indian credit system. In India the laws that deal with insolvency are Contracts Act or through special laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) the Companies Act, 1956, Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920, these laws for the recovery of the creditors have neither been able to aid recovery for the lenders nor aided in restructuring of firms. The laws which dealt with individual insolvency like the, Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 are almost a century old and this has hampered the confidence of the lenders which decreases the debt access for the borrowers.² All these laws dealt with insolvency and bankruptcy of companies, limited liability partnerships, partnerships firms, individuals and other legal entities in India. The jurisdiction to deal with these laws at various stages of the dispute were dealt by the High Courts, District Courts, the Company Law Board, the Board for Industrial and Financial Reconstruction (BIFR) and the Debt Recovery Tribunals (DRTs), have jurisdiction at various stages, giving rise to the potential of systemic delays and complexities in the process. The present legal framework does not aid lenders in effective and timely recovery of defaulted assets and causes undue strain on the Indian credit system.³ Thus due to this debt recovery structure in India the credit market opens more for the secured creditors and thus the corporate bond market is yet to be developed in India.

I.2. EMERGENCE OF INSOLVENCY AND BANKRUPTCY CODE:

Considering the abovementioned reasons, in the year 1981, the Sick Industrial Companies Act, 1985 came to the fore in regard to the Tiwari Committee (Department of Company Affairs).

Thereafter, in the year 1991, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 came to the fore, regards being had to the Narasimham Committee- I (Reserve Bank of India).

Similarly, in the year 1998, there had been the advent of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which was witnessed as regards being had to the Narasimham Committee -II(Reserve Bank of India).

In the year 1999, there was the enactment of the Companies (Amendment) Act, 2002, as Justice Eradi Committee (Government of India) proposed the repeal of the Sick Industrial Companies Act, 1985.

Later, in the year 2001, in the N. L Mitra Committee (Reserve Bank of India) proposed for a comprehensive bankruptcy code. In the year 2005, in Irani Committee (Reserve Bank of India) proposed the amendments to the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and bring into effect the Enforcement of Securities Interest and Recovery of Debts Bill, 2011 and

Dr J J Irani committee handed over its report to Government of India. Key recommendations of the committee were time bound proceedings, applicability and accessibilities, moratorium and suspension of proceedings, operating agencies, appointment of Administrators and their duties, Creditor's committee and liquidators, increased role of professionals, insolvency practitioners, cross border insolvency etc.

Later, Raghuram Ranjan Committee (Planning Commission) in the year 2008 proposed certain steps which could result in the improvement of the credit infrastructure of the country. Lastly, the Financial Sector Reforms Commission (Ministry of Finance),

¹ Gayatri Athare Mohapatra, *Summarising the Insolvency and Bankruptcy Code, 2016* INDIALAW, (August 2, 2016,13:18) <http://www.indialaw.in/blog/blog/commercialcorporate/summarising-insolvency-bankruptcy-code-2016/>.

² Mrs. Hetal Chitroda, Mrs. Jaya Ankur Singhania, *The Insolvency And Bankruptcy Code, 2016*, (February,20, 2018,14:59) http://jsa.cs.com/image/the_Insolvency_and_Bankruptcy_Code.pdf

³ RAKESH WADHWA, FCS, *INSOLVENCY AND BANKRUPTCY CODE,2016*, 9*TJFCP* 56, (2016)

in the year 2013, came up with the draft of the Indian Financial Code which in fact provided for a corporate-resolution-mechanism for resolving financial problems of the distressed firms.⁴

Thus, a plan was executed to replace existing insolvency laws with one single consolidated and comprehensive law that can facilitate easy and time bound closure of business. The Insolvency Law Reform began in the late year 2014 when the Ministry of Finance constituted the Bankruptcy Law Reforms Committee and thereafter in the year 2015 the proposal was much debated against and later referred to a Joint Parliamentary Committee, then on 11th May 2016 the Rajya Sabha passed the major Economic Reform Bill moved by the Government i.e. the Insolvency and Bankruptcy Code, 2016. The Lok Sabha however had already passed the Bill on 5th May 2016. The Code received the President's assent on 28th May, 2016, and the provisions of the Code came into effect only from 1st December, 2016 with the intention not only to ensure fair negotiations between Debtor and Creditor by removing the asymmetry of debt and default information but also to expedite & simplify the process of Insolvency and Bankruptcy proceedings in India.

II. CONCEPTUAL ANALYSIS:

The Insolvency and Bankruptcy Code, 2016, has been enacted at a very critical time for the Indian economy when the domestic banking industry was already struggling to cope with a welter of bad loans and eagerly looking for a legal framework to manage stressed situations in a time bound and efficacious manner.⁵

The interpretation of The Insolvency and Bankruptcy Code, 2016, is made clear first for a clear understanding of the Code.

There is no specific definition of the terms insolvency under The Insolvency and Bankruptcy Code, 2016, but it is important to get a clear definition of the two terms as, Insolvency and Bankruptcy cannot be said to have the same meaning.

- **Insolvency:**

The term insolvency denotes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. But, it is however, frequently used in the more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of the business. The condition of a person who is unable to pay his debts in full.

A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them

- **Bankruptcy:**

Bankruptcy is not exactly the same as insolvency. Bankruptcy is formed from the Latin words 'bancus' means a bench or table & 'ruptus' means broken. Technically, Bankruptcy occurs when a court has determined insolvency, and given legal orders for it to be resolved.

Part III of The Insolvency and Bankruptcy Code, 2016, under S. 79 sub section (4) of the Code, Bankruptcy means the state of being bankrupt.

Under The Insolvency and Bankruptcy Code, 2016,⁶ Bankrupt means –

- a. a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126.
- b. each of the partners of the firm where a bankruptcy order under section 126 has been made against a firm.
- c. any person adjudged as an undischarged insolvent.

Under the Insolvency Bankruptcy Code, Bankruptcy Debt, in relation to a bankrupt⁷ means-

- a. any debt owed by him as on the bankruptcy commencement date;
- b. any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and
- c. any interest which is a part of the debt under section 171;

Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Thus, bankruptcy can be said to be a legal process by which insolvent debtor seeks relief.

The Insolvency and Bankruptcy Code, 2016, is aimed at addressing the concerns of both domestic and foreign creditors by creating a level playing field, and ensuring greater certainty around the bankruptcy process expecting to encourage cross border financing and unsecured lending to local borrowers, thereby reducing the pressure on credit institutions in India. In order to understand the Code it is important to know, the objectives of the Insolvency and Bankruptcy Code, 2016. Some of the objectives of The Insolvency and Bankruptcy Code, 2016 can be summarised in the following points:

- A. To give a clear, speedy and coherent process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.

⁴ RAKESH WADHWA, FCS, INSOLVENCY AND BANKRUPTCY CODE, 2016, 9*TJFCP* 56, (2016)

⁵ Shishir Mehta, Kumar Saurabh Singh et.al., *The Insolvency And Bankruptcy Code, 2016-New Road And New Challenges*, MONDAQ, (May 26, 2016, 14:02)

<http://www.mondaq.com/india/x/495202/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+New+Road+And+New+Challenges>

⁶ S. 79 (3)

⁷ S. 79 (5)

- B. To establish an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.
- C. To consolidate all existing insolvency related laws and amend multiple legislations including the Companies Act.
- D. To create a new institutional framework, consisting of Insolvency and bankruptcy Board, Insolvency Professional Agencies, Insolvency Professional, information utility and adjudication authorities thus offering a uniform and comprehensive legislation. However, till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and function of the Board. Insolvency Professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. The Information Utilities would collect, collate and authenticate and disseminate financial information to such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.
- E. The Insolvency and Bankruptcy Code, 2016, separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.
- F. To resolve the disputes relating to insolvency in a strict time bound manner i.e. within 180 days.
- G. To put forth an overarching framework to aid sick companies either to wind up their business or to revive the same and for the investors to exist.

Thus, the main objective of the code is to consolidate all the laws relating to insolvency and provide a clear and time bound relief to the creditors through proper adjudications, by adjudicating the same.

II.1 DETAIL ANALYSIS OF THE CODE

Certain terms have to be looked into before creating any idea in mind about the Code. Thus, a detailed analysis of the Code is required.

II.1.1. The Insolvency and Bankruptcy Code, 2016, provides two categories of creditors:

- i. The Financial Creditors and
- ii. Operational Creditors.

Part II of The Insolvency and Bankruptcy Code, 2016, under S. 5 sub section (7) of the Code, Financial Creditors is defined as any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

In the case of *Nikhil Mehta & Sons (HUF) & Others v AMR Infrastructure Limited*⁸ in the present case the Appellants had signed a memorandum of understanding with the respondent company on the ground that the appellants would purchase properties from the respondent and the respondent company would pay an assured interest on the sum already paid by the appellant till the handing over of the possession. But, after paying the assured return for sometime the respondent defaulted on its returns. The Appellants henceforth filed an application under S.7 of the Insolvency and Bankruptcy Code. The question raised before the National Company Law Tribunal was whether the appellants were financial creditors and whether there was any financial debt. The National Company Law Tribunal in its judgement came to the conclusion that financial debt would be a debt along with interest that was disbursed against time value of money. The National Company Law Tribunal observed that "The Key feature as postulated by section 5(8) under the Insolvency and Bankruptcy Code, is its consideration for time value for money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single series of payments in the future. It may also be a sum of money invested today to be repaid over a period of time in a single or a series of instalments to be paid in the future." Thus, there was no financial debt and the appellants cannot be termed as financial creditors.

On an appeal made before The National Company Law Appellate Tribunal it observed that this transaction was of a nature that was a ale which had the commercial effect of borrowing and the appellants had disbursed the amount against the time consideration money, hence the amount invested was not a mere sale transaction but would indeed come under the meaning of Financial Debt under S.5(8) of the Insolvency and Bankruptcy Code.

Similarly, in the case Tribunal held of *Anil Mahindro and Another v Earth Iconic Infrastructure (P) Ltd*⁹ based on its own pronouncement in the Nikhil Mehta Appeal Judgment, the National Company Law Appellate that in the present case also, the Appellants were playing the role of investors, the money given by them to the Respondents was in the nature of a loan, satisfying the condition of amount "disbursed against the consideration for time value of money" and, the committed returns were in the nature of "interest". Thus, there was a debt under section 5(8) of the IBC and the Appellants were Financial Creditors under section 5(8) of the IBC.

⁸ [2017] 137 CLA 163 (NCLT)

⁹ Company Appeal (AT) (Insolvency) No. 74 of 2017 (August 2, 2017)

In the case of *Innoventive Industries Ltd. v. ICICI Bank Anr.*,¹⁰ it was observed that ICICI Bank was the Financial Creditor who filed an application under s.7 with the National Company Law Tribunal for initiation of CIRP against Innoventive who defaulted in repayment of facilities availed from the ICICI Bank to the tune of Rs.101.92 crores. After many appeals the Supreme Court came to the decision that debt is due to the financial creditors and the Innoventive cannot take the plea of suspension of debt on any other law as IBC has a wide non obstante clause and any right of the corporate debtor under any other law cannot come in the way of the Insolvency and Bankruptcy Code.

Part II of The Insolvency and Bankruptcy Code, 2016, under S. 5 sub section (21) of the Code, Operational Creditors, means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

S. 5 sub section (21) of the Insolvency and Bankruptcy Code, 2016, operational debt means a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of the dues arising under any law for the time being in force and payable to the Central Government, any State Government or to any Local Authority.

In the case of *M/s. Essar Projects India Ltd. v. M/s. MCL Global Steel Pvt.Ltd.*¹¹ the operational creditor M/s. Essar Projects India Ltd. has filed a petition against the operational debtor, M/s. MCL Global Steel Pvt.Ltd. who defaulted in payment of a sum of Rs.9,10,60,788 under section 8 and 9 of the Insolvency and the Bankruptcy Code r/w Rule 6 of the Insolvency and Bankruptcy (Application to adjudicating authorities) Rules, 2016 for initiation of corporate insolvency resolution process and the same was granted by the National Company Law Tribunal under s.13 of the Insolvency and the Bankruptcy Code.

This classification of creditors is made to give proper and time bound relief to all types of creditors for the recovery of debts from the debtors.

II.1.2. The Insolvency and Bankruptcy Code, 2016 deals separately for corporate insolvency in Part II of the Code and in Part III of the Code it is dealt with Individual and Partnership Bankruptcy.

II.1.3. The Code proposes two independent stages of insolvency resolution process for corporate debtors

i. Insolvency Resolution process during which the financial creditors assess whether debtor's business is viable to be continued and the option for its rescue and revival.

ii. Liquidation is followed, if the Insolvency Resolution process fails or financial creditors decides to wind up and distribute the assets of the debtor.

However, to initiate an insolvency process for corporate debtors, the default should be at least INR 100,000 (which limit may be increased up to INR 10,000,000 by the Government).

II.1.4. The order of priority in payment of debts is maintained under this Code.--- "Waterfall Mechanism" is the order of priority in which the proceeds from the sale of liquidation assets are distributed. The order of priority under the Insolvency and the Bankruptcy Code¹² is as follows:

a. The insolvency resolution process cost and the liquidation costs paid in full.

b. The following debts which shall rank equally between and among the following:

i. workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

ii. debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

c. wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

d. financial debts owed to unsecured creditors;

e. the following dues shall rank equally between and among the following:—

i. any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

f. any remaining debts and dues;

g. preference shareholders, if any and

h. Equity shareholders or the partners as the case may be.

II.2. ADJUDICATING AUTHORITIES OF THE CODE:

The adjudicating Authorities for resolution of insolvency disputes was complex and overlapping, thus The insolvency and bankruptcy Code in order to reduce the burden on the Courts under Part II Chapter VI of the Code it provided for National Company Law Tribunal (NCLT) which would be working as the adjudicating authority for insolvency resolution and liquidation of Companies,

¹⁰ CIVIL APPEAL NOs. 8337-8338 OF 2017

¹¹ C.P. NO.20/1 & BP/NCLT/MAH/2017

¹² The Insolvency and Bankruptcy Code, 2016, No 31 Act of Parliament (India) section 53.

Limited Liability Partnerships (LLPs), any entity with limited liability under any law and bankruptcy of personal guarantors thereof. An appeal can be preferred from orders of NCLT to National Company Law Appellate Tribunal (NCLAT) within 30 days (15 days' extension if there is sufficient ground) and the Orders of NCLAT are appealable on a question of law to the Supreme Court within 45 days.¹³ The Code has proposed for new institutions as redressal mechanisms to carry out the provisions of the Insolvency and Bankruptcy Code, 2016:

II.2. i. Insolvency Professionals (IPs)-

Section 3 (19) of IBC, 2016: insolvency professional means a person enrolled¹⁴ with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207. These professionals has powers and duties so as to effectively drive the insolvency and liquidation process with it's assistance towards creditors.

II.2. ii. Insolvency Professional Agencies (IPAs) –

Section 3 (20) of IBC, 2016: insolvency professional agency means any person registered with the Board¹⁵ as an insolvency professional agency .The Code has entrusted on these agencies to accept registration, examine and certify the insolvency professionals. These agencies must be registered with and certified by the Insolvency and Bankruptcy Board of India.

II.2. iii. Information Utilities (IUs)-

Section 3 (21) of IBC, 2016: Information Utilities means a person who is registered with the Board¹⁶. The purpose of this intermediary is to remove information dependency on the debtors for critical information that is required to resolve insolvency. This information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings.

II.2. iv. Insolvency and Bankruptcy Board of India (IBBI)-

Section 3 (1) of IBC, 2016: Board means the Insolvency and Bankruptcy Board of India established under sub-section (1) of Section 188 .This Board shall consist of experienced professional from all fields specially, law, finance, economics, accountancy etc. And must act as a regulatory Body over the above mentioned professionals agencies and information utilities. Under the Board's supervision these agencies will develop professional standards, codes of ethic and this Board will develop a competitive industry for insolvency professionals. The Board is also responsible for making guidelines and regulations on matters relating to insolvency and bankruptcy which finds place only in this Code and not in any other law till date enacted for the protection of the creditors.

II.2. v. Fresh Start Process

This is a new concept introduced in India. The Code deals with fresh start process¹⁷ for specified concerns even to small debtors in a time bound manner only subject to certain conditions and helps to start a new life with the help of the Debt Recovery Tribunal through Resolution Professional.

II.2. vi. Fast Track Insolvency Resolution Process

The Code has provided for a fast track insolvency resolution process in respect of corporate debtors, the qualification for which is to be notified by the Government. The process shall be completed within 90 days (which may be extendable by maximum 45 days). Provisions of insolvency process apply to fast track insolvency. This will be an enabler for start-ups and small and medium enterprises to complete the resolution process quickly and move on.

This Code had introduced the new concept of Financial Crditors and Operational Creditors and has even introduced the Fast Track Resolution Process, other agencies to eradicate the insolvency deficiencies in an orderly and timely resolution process.

¹³ Gayatri Athare Mohapatra, *Summarising the Insolvency and Bankruptcy Code, 2016* INDIALAW, (August 2, 2016,13:18) <http://www.indialaw.in/blog/blog/commercialcorporate/summarising-insolvency-bankruptcy-code-2016/>.

¹⁴ The Insolvency and Bankruptcy Code,2016 , No 31 Act of Parliament (India)

¹⁵ The Insolvency and Bankruptcy Code,2016 , No 31 Act of Parliament (India) section 201

¹⁶ The Insolvency and Bankruptcy Code,2016 , No 31 Act of Parliament (India) section 210

¹⁷ The Insolvency and Bankruptcy Code,2016 , No 31 Act of Parliament (India) section s 80-93

Insolvency and liquidation of companies, firms and individuals with the aim to revitalise the ailing Indian corporate bond markets and significantly improve debt recovery rates was one of the major aim of the Code.

III. CHALLENGES IN THE INSOLVENCY AND BANKRUPTCY CODE:

The purpose of the Insolvency and Bankruptcy Code, 2016 is found to be, the promotion of the honouring of the obligations of a debtor in financial difficulties and, where possible, the renewal of solvency, applying the principles and solutions as specified in the Code. The Insolvency and Bankruptcy Code, 2016 was enacted with the intention of improving the ease of doing business in India. As discussed above in this paper Insolvency and Bankruptcy Code, 2016 passed the process of recovery of money by operational and financial creditors in a timely manner, within a period of 180 days. It provides for only one forum for all insolvency and bankruptcy claims by all creditors and debtors to avoid confusion. In reality, however, in spite of all its merits as discussed above in this paper, this Insolvency and Bankruptcy Code, 2016 has enough loopholes or drawbacks, which is discussed below:

The most important feature of the Code which seems to be beneficial for all, can be said to be acting as a bane for the parties.

III.1. The National Company Law Tribunal:

The National Company Law Tribunal is already overburdened with a huge number cases by replacing the existing the Company Law Board, the Board of Industrial and Financial Reconstruction (BIFR) and its appellate authority and the newly amended Competition Appellate Tribunal. Therefore, to adjudicate matters relating to the Insolvency and Bankruptcy Code will be more burdensome for the Tribunal and time consuming.

The National Company Law Tribunal currently has 11 benches with 16 judicial members and 6 technical members among them. Therefore given its limited capacity the Tribunal will fail to hear and dispose of cases in a timely manner from the start. This could mean the inability of the National Company Law Tribunal to adhere to the 180 days timeline specified as the duration under the Code. The National Company Law Tribunal will deal with the cases under the Code based on the existing case laws. This will get changed only when the Insolvency and Bankruptcy Code gets perfected as a law and its institutional infrastructure reaches its capacity allowing National Company Law Tribunal to focus on upholding the design and objective of the Insolvency and Bankruptcy Code over all priors that exists.

A report states that the total number of insolvency and bankruptcy cases pending would be around 25,000 and the National Company Law Tribunal even with an increased number of judicial members of up to 50 would take approximately 7 years to adjudicate upon 25,000 pending cases, assuming all of them to be moved to National Company Law Tribunal. Furthermore the National Company Law Tribunals are also required to adjudicate compromises and mergers and oppression mismanagement cases. Thus, unless there are dedicated benches to hear insolvency cases and the number of benches are significantly increased with well equipped professionals expertise in each field of matters before the National Company Law Tribunal, and the transition is better managed, effective and expeditious disposal may be a distant dream.¹⁸

III.1.i. SHORTAGE OF NATIONAL COMPANY LAW TRIBUNAL BENCHES:

The National Company Law Tribunal which was constituted on June 1, 2016, has been positioned as the single adjudicating authority for corporate default cases. Report says- ' 5,000 cases move to NCLT, the judicial bench strength is ramped up to 50 in three years and a judge can handle 60 cases at any given point in time, it will take more than seven years to clear the current backlog'¹⁹ according to the report the National Company Law Tribunal will require at least 69 benches to handle current case load, whereas at present the National Company Law Tribunal has 11 benches with 22 members. A report states that the total number of insolvency and bankruptcy cases which would be pending would be around 25,000 and the National Company Law Tribunal even with an increased number of judicial members of up to 50 would take approximately 7 years to adjudicate upon 25,000 pending cases, assuming all of them moved to National Company Law Tribunal. 'The reports, prepared by policy researchers Devendra Damle and Prasanth Regy of the National Institute of Public Finance and Policy, New Delhi, added that in order to dispose of the pending cases with the NCLT in the next five years, it would need 80 benches.' The report added that even if there were 24 benches, which is the government's plan according to this report in the *Hindu*, the National Company Law Tribunal would have a backlog of 106,600 cases in the next five years.²⁰ Furthermore the National Company Law Tribunals are required to adjudicate compromises and mergers and

¹⁸ HSA Advocates, *Insolvency and Bankruptcy Code, 2016, India*, hsalegal.com (March 10, 2018, 16:09)

https://www.hsalegal.com/wp-content/uploads/2017/04/Insolvency-and-Bankruptcy-Code-2016_066217.pdf

¹⁹ K. R. Srivats, *Insolvency law: Limit case load at NCLT, says report*, THE HINDU, January, 17, 2017 at 22

²⁰ Shreeja Sen, *NCLT needs 69 benches to handle current case load: report*, livemint.com, (April, 6, 2017, 11:05)

<https://www.livemint.com/Companies/SsqYQbOsh3hABpkx21KCaK/NCLT-needs-69-benches-to-handle-current-case-load-report.html>

oppression mismanagement cases, recently with the present amendment made it also has to manage all the matters of the Competition Appellate Tribunal as now there will be no existence of Competition Appellate Tribunal and matters will directly move to the National Company Law Tribunal. Unless there are dedicated benches to hear insolvency cases, the number of benches are significantly increased and are well equipped, and the transition is better managed, effective and expeditious disposal may be a distant dream.

III.2. TIME LIMIT:

S.12 of the Insolvency and Bankruptcy Code prescribes attempts to ease the process of recovery of money by operational and financial creditors in a timely manner; and places the onus on professionals a time limit of 180 days for the corporate resolution insolvency process, failing which, the Insolvency and Bankruptcy Code, 2016 mandates the “Adjudicating Authority” to order liquidation (Section 33 (2) of the Code). Proponents of the Insolvency and Bankruptcy Code, 2016 have eulogized this feature. Negotiating under the shadow of liquidation may lead parties to not conduct a wide enough market search for the ailing corporate debtor and will likely result in going-concern fire sales (translating into creditor under-recoveries). Worse, a hard deadline will push otherwise salvageable companies into liquidation, disrupting markets and affecting jobs and livelihoods.²¹

In the case of *J.K. Jute Mills Co. Ltd. v. Surendra Trading Co.*²² an application for initiating an insolvency resolution process was filed against *J.K. Jute Mills Co. Ltd.* to the national company law tribunal directing the applicant to rectify certain technical defects in its application. Thereafter the National Company Law Tribunal passed interim direction against the sale or alienation of the debtor’s assets.

J.K. Jute Mills Co. Ltd. then filed an appeal against the interim order of the National Company Law Tribunal before the National Company Law Appellate Tribunal stating that once the National Company Law Tribunal fails to pass an order admitting or rejecting an application within 14 days of its submission under section 9 of the Insolvency and Bankruptcy Code it can no longer decide the matter and therefore, has no power to grant a stay on the sale of the assets. On the other hand the creditor argued that the timeline of 14 days under section 9 of the Insolvency and Bankruptcy Code is merely directory and not mandatory. Relying on judicial precedents on the interpretation of procedural timelines under the Civil Procedure Code, the NCLAT held that the time limit of 14-days is directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice.²³

However, the NCLAT is also of the view that 180 days period prescribed under s. 12 of the Insolvency and Bankruptcy Code for completion of insolvency resolution process is mandatory as speedy resolution is the essence of the Code and so all proceedings have to be time bound in nature.

III.3. NO PRESCRIBED TIMELIMIT FOR APPEALS:

There is no time prescribed in the Code for the disposal of the appeals made to the National Company Law Appellate Tribunal. Therefore, the long drawn process of mitigating a dispute still remains in question.

III.4. SHORTAGE OF INSOLVENCY PROFESSIONALS:

The number of Insolvency professionals may fall short when large number of small value accounts come up for resolution as till now around 260 cases so far has been approved by the National Company Law Tribunal for resolution. Moreover, the pace at which fresh cases have been filed are increasing significantly and the number is increasing every month more or less by the speedy approval of the National Company Law Tribunal. There are currently 3 insolvency professional agencies- Indian institute of insolvency professionals of (ICAI), insolvency professional agency and insolvency professional agency of Institute of Cost Accounts in India (ICSI). These agencies enroll and regulate the insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code. Sunil Pant, CEO of Indian institute of insolvency professionals of ICAI, says there is huge challenge ahead to handle small cases. “the USP of IBC is speed, thus number of IPs must be increased.” The one where the stakes are low say a debt of 15-20 lakhs the Insolvency Professionals are reluctant on that matter which must be looked into by the insolvency Board and the Insolvency Agencies must ensure that they are adhering to the regulations of the Code.²⁴

²¹ Mandar Kagade, *Flaws in the Bankruptcy Code*, Livemint.com, (May 10 2016, 1:43)

<https://www.livemint.com/Opinion/WOvAMCdlZzk0BIEfjb030M/Flaws-in-the-Bankruptcy-Code.html>

²² Company Law (AT) no. 9 of 2017

²³ Trilegal, *NCLAT rules on timeline under the Bankruptcy Code*, MONDAQ, (May 24,2017, 13:26)

<http://www.mondaq.com/india/x/596826/Insolvency+Bankruptcy/NCLAT+Rules+On+Timelines+Under+The+Bankruptcy+Code>

²⁴ Trilegal, *NCLAT rules on timeline under the Bankruptcy Code*, MONDAQ, (May 24,2017, 13:26)

<http://www.mondaq.com/india/x/596826/Insolvency+Bankruptcy/NCLAT+Rules+On+Timelines+Under+The+Bankruptcy+Code>

“These professional will have a challenging task ahead; they have very limited knowledge and experience in running the businesses (as the promoters will be forced to step back), in setting up independent management, assessing the financial viability and preparing a resolution plan or evaluating the resolution plans. Until an efficient infrastructure of insolvency professionals who are efficient managers is put in place, effective implementation of the Code would seriously be prejudiced.²⁵

III.5. CLAIM:

The minimum default for triggering insolvency proceeding under the Code is Rs. 1,00,000, only which can be too beneficial for initiating easy bankruptcy proceeding but it can turn out to be menace especially under a corporate regime, as any employee for non-payment or late payment of cash flow or any small vendor for unexpected late payment or non-payment of dues will be in a position whereby they can approach the forum for insolvency proceedings although the default in the payment may be due to disturbance in cash flow. This will automatically lead to an increased burden on the resolution professionals and the forums to mitigate the disputes within a period of 180 days which may even lead to an unexpected delay in the proceedings due to it's overburdened workload.

In the U.S., three or more creditors can start In the U.S., three or more creditors can start insolvency proceedings against a company if the company owes them more than USD 12,300 (approximately Rs. 800,000/- as per the current exchange rate). However, in India the 2016 Code sets the minimum threshold as low as of Rs. 100,000/- which makes the insolvency proceeding more easily accessible.

III.6. LACK OF CONSENSUS AMONG LENDERS:

The Insolvency and Bankruptcy Code, 2016 is applicable to both corporate and non-corporate persons. According to Section 6 of the Code, where any corporate debtor commits a default, then- financial creditor, operational creditor or the corporate debtor by itself, can initiate the “corporate insolvency resolution process” in respect of such corporate debtor. According to the 2016 Code, any creditor:

Financial creditor or operational creditor, will be able to start the insolvency resolution process by giving the proof of default. If the adjudicating agency, that is, the National Company Law Tribunal or the Debt Recovery Tribunal, gives a clean clear signal, then, the entity will be taken over by the ‘Committee of Creditors’ and ‘Insolvency Professionals’. The applicant creditor will prepare a resolution plan and will submit it to the Insolvency Resolution Professional. The plan will then have to be approved by 75% of the creditors (by value) in the Committee of Creditors (operational creditors will not be the part of the committee). There is no certainty that 75% of the creditors will agree to the resolution plan. Thus, as it will not be easy to get 75% creditors on board, much likely, the resolution/revival plan will be in doldrums and there will be eventual rise of litigation. Necessarily, as the operational creditors are denied seat in the Committee of Creditors²⁶ as per the 2016 Code, thus, the NCLT while reviewing the resolution plan will have to ensure that the operational creditors are treated fairly.

The implementation of the Code is therefore dependent on the lenders acting in a timely manner and adopting a holistic approach of turnaround and revival rather than focussing merely on minimising provisioning.

III.7. BENEFIT OF FRESH START MECHANISM:

This is a new concept introduced in India. Sections 80-93 of the Code, deals with the concept of fresh start mechanism. So far as this mechanism is concerned, the fresh start is applicable to those individuals whose monthly income is below Rs.5000/- and the debt amount is not more than Rs.35, 000/-. This amount is so meagre that only individuals with such low income and debt amount will be able to take the benefit of this mechanism.²⁷

III.8. CORPORATE DEBTORS ARE NOT HEARD

The Insolvency and Bankruptcy gives immense power and rights to financial creditor in order to get back their loans but the Code doesnot provide corporate debtor any recourse to address their grievances. This creates a heavy imbalance in favour of creditors against corporate debtors. The creditors while filing an application for initiation of insolvency resolution process have to nominate an Insolvency Resolution Professional who will inturn form the committee of creditors and thereafter this committee will appoint a person as a Resolution Professional. Thus, it is evident that the Resolution professional will work for the interest of the creditors only. The revival plan which would be presented by the Resolution Professional in front of the committee will be more focussed on the

²⁵ *Id.*

²⁶ The Insolvency and Bankruptcy Code,2016 section 21

²⁷ Shivam Goel, *The Insolvency and Bankruptcy Code, 2016*, MONDAQ, (May 24,2017 10:23)

<http://www.mondaq.com/india/x/492318/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+Key+Highlights>.

demand of the creditors than that of the debtors. Thus, the principle of natural justice is found to be violated.²⁸ Whereas, it is also found that Calcutta High Court in *Sree Metaliks Limited and Another v Union of India*²⁹ and NCLAT in *M/s Innoventive Industries Limited v ICICI Bank and Another*³⁰ have observed that for an application u/s 7 of the Code, NCLT is obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document. In the former case, the Calcutta High Court observed that u/s 424 of the Companies Act, 2013 the NCLT has to follow the principles of natural justice while disposing off proceedings before it.

However, the Section 217 of the Code provides provision for filing a complaint against insolvency professional or insolvency professional agency or information utility by any person in front of the Board and thereafter the Board will examine with the aid of disciplinary committee examine a report. But this process too lengthy and tedious.

Thus, there is neither any written procedure laid down for the hearing given to the corporate debtor nor the corporate debtors themselves can raise any claims. The Code rides substantially on the unquestionable word of the creditors. Neither does the corporate debtor have an opportunity to put forth his/her case nor is there any scope of discretion provided to the adjudicating authority itself. At various stages — of admission of the insolvency proceedings, of appointing the insolvency professional, of finalising the resolution plan — the Code fails to provide any opportunity to the corporate debtor to make a representation, at the very least.

In this manner, the Code ignores rights enshrined in the Constitution. In *Maneka Gandhi v. Union of India*, 1978³¹, the Supreme Court observed that it is the duty of the authority to give reasonable opportunity to be heard, even where there is no specific provision for showing cause when a proposed action affects the rights of the individual.

In the case of *Innoventive Industries v. Union of India & Ors.*³² the national company law tribunal held that on an initiation of insolvency process by the financial creditors a corporate debtor has no right to audience at the time of admission of the insolvency application.

III.9. HIGH COST OF BANKRUPTCY RESOLUTION PROCESS:

The reason for the high cost of bankruptcy resolution is mostly due to the costs of insolvency professionals which is not a unique problem in India. The U.K, also had to review its fees charged by insolvency professionals on a number of cases. Hence, they made the Insolvency (Amendment) Rules that came into effect in October 2015, wherein they provided remedy so that the bankruptcy cost can be controlled by controlling the cost of the Insolvency professionals. In India too, the cost structure needs to be addressed to strike a balance between providing sufficient incentives for the profession to develop while ensuring that these costs donot raise the cost of the bankruptcy resolution process.

III.10. UNSECURED OPERATIONAL CREDITORS

Operational Creditor as – “any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”.³³

Section 21 Of The IBC remains silent on operational creditor’s right to vote. Again section 24(4) grants voting power to the financial creditors but doesnot include operational creditors within their ambit. They, have the right to attend the meeting but donot have the right to vote. An operational creditor can be categorised under unsecured creditors. Therefore, even in the case of liquidation and asset distribution, financial creditors are prioritised over operational creditors (excluding workmen and employees, who are operational creditors but are specified to be treated equally with secured financial creditors).

III.11. NEED FOR BETTER MONITORING OF INSOLVENCY PROFESSIONALS

In order to avoid unethical practices and to ensure transparency the IBBI needs to ensure adequate mechanism to monitor the Insolvency Professionals. This would significantly entail capacity building both in terms of human resources and IT capabilities.

CONCLUSION AND SUGGESTIONS:

²⁸ Singh & Associates, *India: Insolvency And Bankruptcy Code, 2016: Has Corporate Debtor No Say?*, MONDAQ, (September, 1,2017,11:15)

<http://www.mondaq.com/india/x/625284/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code+2016+Has+Corporate+Debtor+No+Say>

²⁹ W.P. 7144 (W) OF 2017

³⁰ Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017

³¹ 1978 AIR 597, 1978 SCR (2) 621

³² W.P. (L.) No. 143 of 2017

³³ The Insolvency and Bankruptcy Code,2016 , No 31 Act of Parliament (India), Section 5(20)

From the above facts and circumstances it is evident that the Insolvency and Bankruptcy Code, 2016 proved to be a major step taken in the right direction to mitigate the problem of the creditors and the debtors as well. The main idea behind this Code is to provide relief to the corporate creditors, debtors, the individuals and the partnership firms in a time bound manner and thus this Code provides an umbrella legislation to the laws relating to insolvency, bankruptcy and insolvency resolutions. It is also found that The Insolvency and Bankruptcy Code, 2016 is the only law available to the financial and the operational creditors and to the debtors also. Earlier laws pertaining to the Debt Recovery Tribunals (DRT) and the SARFAESI were exclusively available for banks/financial institutions only but now the individual or partnership firms can also approach to DRT for declaration of insolvency and corporate Entities/ the creditors can approach the National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code for declaration of Insolvency and Liquidation. The difficulty with the Code however is this that it seems to be over ambitious. The Code although provided relief to the creditors and debtors but this paper has tried to focus on the drawbacks of the Code due to which the proper implementation of the Code is not possible. This Code must put more focus on the adjudicating authorities, the manner of disposal of their disputes, how far the remedy is available to the debtors and more points of discussion as made in this paper. The role of Judiciary has also come to the fore in highlighting the drawbacks of the Insolvency And The Bankruptcy Code.

Thus, in order to achieve the objective of the Code it is foremost important to focus on the drawbacks of the Code so that it's demerits are removed and proper remedy as required is made available.

In the newspaper report of the times business on November 17th 2017 it was published that less than a year after this new code kicked in the Government appointed a committee headed by Corporate Affairs Secretary I Srinivas to review the IBC to address concern and remove glitches.

The 14 member committee which includes the IBBI chairman MS Sahoo, representatives from RBI, department of financial services and external experts has been tasked with assessing the functioning of the new law in addition to examining issues that could impact the framework prescribed under the law that was enacted to speed up the revival and exit of firms.

The following are some suggestions for providing a more secure and strong insolvency law in India:

1. The National Company Law Tribunal must not be overburdened with large number of cases to be dealt with. The NCLT now has to deal with varied forms of cases therefore, benches must be increased to get a speedy redressal of disputes within the given time frame.
2. The period of 180 days is not always appropriate to give redressal to a dispute, thus for some cases the period of redressal must be enhanced.
3. This Code must lay stress on the relief of debtors as well, otherwise the rule of natural justice is violated.
4. Committee of Creditors must ensure the viability and feasibility of the resolution plan before approving it.
5. The Insolvency and Bankruptcy Board of India (IBBI) has to be given additional powers.
6. Fresh Start Mechanism must be made available to all categories of debtors.
7. The claim amount for triggering insolvency proceeding under the Code must be increased to reduce the burden on the Adjudicating Authorities.

Thus, after citing some suggestion, it can be said that in light of the recent challenging economic times and the financial meltdown, exposing fraudulent activity an increasing aspect a more strong Insolvency legislation is required. Hence good and strong Insolvency law will help to expose and correct any issues before becoming major problem for or between the debtors and the creditors.