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IBC: THE FASTEST EVOLVING LAW IN RECENT TIMES

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Since its inception in May 2016, The Insolvency and Bankruptcy Act, 2016 has been going through concatenation of changes and amendments, whether judicial or legislative.A numberof landmark judgements of SC and NCLAT have come up shapingthe way for IBC, andsurprisingly we have seen so far fouramendmentsto the Principal Code in a short span of three years, something which is quite uncommon for most of the laws prevailing in our country. Numerous changes in the Rules and Regulations in order to facilitate a smooth operation and harmonization with related laws have also been made by IBBI, the regulatory body ofIBC.

The sincerity with which the government has been working to formulate an efficient and timely resolution framework for the stressed assets shows the will and intent of the government to make the economy and the banking structure less burdened with ageing credit andboost the recovery speed which has been sluggish for over decades.It's noticeable that the government brought*"three of the Amendments in the Principal Code by the way of Ordinance and then replaced them by Amendment Acts"*. Prior to commencement of the Code, the conditions of the insolvent entities werealleviated instead of ameliorated. Due to applicability of different judicial and legal frameworks overlapping each other's functions, the entire process of insolvency resolution was extremely complicated resulting years and years of delay, some even taking decades to resolve and by that time the companies were rendered valueless with absolute no takers in the market. The average time of resolution with erstwhile laws was around 4.3 years.[1]Also this whole complicated territory kept the foreign investors sceptical about the recovery of their investments in case their business ventures doesn't work profitably, resulting in the ranking of India at 142 out of 189 economies in the world in ease of Doing Business 2015 report.[2]

We will be discussing in detail that how this law got its shape from the scratch and after getting a way ahead it's been racing like a pro:

Journey leading to the formulation of IBC

A comprehensive and unified structure under a consolidated legal framework to deal with matters of Insolvency and Bankruptcy was long overdue, after almost 14 years of deliberations since first proposal of comprehensive bankruptcy code by LN Mitra Committee (RBI) in 2001, the Bankruptcy Law & Reforms Committee (BLRC) was

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[1]https://data.worldbank.org/indicator/IC.ISV.DURS?locations=IN
[2]https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf

formed by Ministry of Finance in August 2014, the BLRC submitted its Interim Report in February 2015 and Final report in November 2015 enumerating *Rationale & Design* and *Draft Insolvency & Bankruptcy Code* which lead to the creation of Insolvency and Bankruptcy Code, 2016. After getting passed through both the houses of parliament, itreceived President's Assenton 28th May 2016.

Progress since Implementation

Upon launching, the Code was lauded by every section of the Industry, few quoted it to be "*the boldest attempt to fix the system*", one industrialist even called it as *"the biggest reform story in India's capitalist history"*. The corporate India welcomed this Act and was looking towards it with positive eyes till the time promoters of companies under insolvency found loopholes in the Code and started bidding for their own bankrupt companies substantially discounted rates, which let them regain control of their own companies while lenders had to bear the losses. In order to plug this loophole along with solving other procedural hurdles, the government brought several amendments in the Code and the Regulations:

1st Amendment to the Code:

The first amendment to the code came in effect from November 23, 2017. It extended the application of the Code to the Personal Guarantors of the CD who were earlier immune from any liability under the Code. The Amendment also modified the definition of Resolution Applicant; previously it was defined in the Code as "*any person who submits a resolution plan to the RP*". Afteramendment a Resolution Applicant meant "*a person, who individually or jointly with any other person, submits a resolution plan to the RP pursuant to the invitation made under Section 25(2)(h)*". Therefore, the RP was made obligated to review and examine the resolution plan submitted by only such persons who have been expressly invited by the resolution professional to submit a resolution plan; it removed a big ambiguity prevailing in the minds of professionals.

Before the amendment came, it was becoming a practice by the promoters of the corporate debtors to get back door entry and gain control of their distressed entities using associate, holding companies and group companies. Section 29A was specifically inserted in the Code to clear the criteria of person who are ineligible to submit the resolution plan, this debarred all the defaulters and their associate companies or group companies to be a resolution applicant.

2nd Amendment to the Code:

The second amendment to the Code, brought in effect by 6th June, 2018 by way of an Ordinance introduced comprehensive changes to the Code. Home buyers approached to the Hon'ble Supreme Court to consider their role as Financial Creditor under the Code, the Hon'ble Supreme Court in the case of Jaypee Infratech recognised them as financial creditors, subsequently the amendment also specified their role as Financial

Creditors by amending the definition of Financial Debt by "*including an amount raised by allottee of a real estate project into it*".

This amendment also reduced the voting threshold for routine decisions taken by the committee of creditors from 75% to 51%. For key decisions like appointment of RP, approval of the resolution plan and increasing the time limit for the IRP, the threshold was reduced from 75% to 66%. This was a major relief in various matters where decisions were getting stuck due to non participation of creditors in the CoC meetings.

The second amendment inserted Section 12A to facilitate withdrawal of application if an applicant wants to withdraw a case after its admission. Such withdrawal would be permissible only with the approval of the CoC with 90% votes. Furthermore, such withdrawal would only be permissible before publication of notice inviting Expressions of Interest (EoI). In other words, there can be no withdrawal once the commercial process of EoIs and bids commences. This step made the CDs approach the FCs with OTS/settlement offers in order to keep their entities afloat. It has resulted into 116 CIRP to be withdrawn till September 2019.[3]

3rd Amendment to the Code:

The third amendment to the Code came out on 6th August 2019, This amendment focused on the delays and minimum payouts to OCs in any resolution plan. This amendment specifically conferred powers in the hands of CoC to consider the manner of distribution of wealth. Section 5 was amended to insert and explanation envisaging that Resolution Plan can include provisions for Restructuring of CD, including by way of merger, amalgamation & De-Merger. The amendment stipulates that now the CIRP has to get summed up strictly in 330 days; previously it was 180 days, extendable to 270 days. The amendment further clarified that a resolution plan could distinguish between different FCs on the basis of the priority and value of their security, also the dissenting shareholders shall be given protection to the extent of the liquidation value of the assets.

This amendment was appreciated for prescription of strict CIRP timeline as delays have marred the resolutions, now the stakeholders to the CIRP would put more pressure for timely completion of the cases.

4th Amendment to the Code:

The fourth amendment to the Code has been brought on December 28th 2019.Like twoits predecessors this amendment has also been brought by the way of Ordinance showing the active involvement of government towards this Law. This amendment will remove certain ambiguities in the Code and ensure its smooth implementation. It will ensure that the management of a resolved entity will not be liable for any offences committed prior to the commencement of the CIRP. The liability will cease

[3]https://ibbi.gov.in/uploads/publication/cff2db5cfaa42ed5aad9544b04bfac8b.pdf

from the date the plan is approved by the NCLT. The Ordinance provides immunity to the CD from actions against their property, such as attachment, confiscation or liquidation of property, in such cases. The Ordinance also states that any existing license, permit, concession, or clearance, given by the govt. or local authority, will not be suspended or terminated during the moratorium.

Changes brought by Regulatory Bodies:

IBBI, being the apex regulatory body of IPs, IPAs and IUs, been at its toes since the Act has come in force, they have been constantly reviewing the law and making rules and regulations for smooth implementation of the Code. The IBBI has been quite proactive and been amending rules and regulations to remove any procedural hurdles in Insolvency process.

RBI has also been playing a supportive role in development of the Code. In February 2019, RBI allowed bidders of insolvent companies to raise external commercial borrowings (ECB) to refinance rupee debt of insolvent companies via the approval route. This decision of RBI was widely appreciated and being considered as a step which will facilitate resolution of the distressed assets speedily.

Conclusion:

It would not be an exaggeration to say that Insolvency and Bankruptcy Code, 2016 has been a game changer in the field of Insolvency and Restructuring and has yielded extraordinary success. It has made the market of stressed assets competitive, which was unattractive for decades due to lack of a proper framework and multiplicity of regulations. It has led the concept of realisation transformed into resolution. It’s been bringing behavioural change among debtors, creditors and other stakeholder, making them more proactive. In spite of all its successes, there are several challenges that need to be ironed out to make this law more effective and competent. These issues are in matters of co-ordination with other laws, tax and regulatory bottlenecks, inflexibility of creditors and non-cooperation of promoters. Government has lot of work to do on these counts, if it expects to be the law to be a silver bullet for our economy.