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**AN ANALYSIS OF INSOLVENCY & BANKRUPTCY CODE, 2016**- Kajal Kanojia<sup>1</sup>**ABSTRACT**

The Insolvency and Bankruptcy Code, 2016, is an Indian bankruptcy law that aims to unify the existing framework by establishing an unified insolvency and bankruptcy law. Sick Industrial Companies Act of 1985 (SICA), Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002, Recovery of Debt Due to Banks and Financial Institutions Act of 1993, and Companies Act of 2013 are among them. As a result, several cases remained unresolved for years. The Insolvency and Bankruptcy Code unifies all of these rules, allowing for a more robust process to resurrect a corporation in the event of insolvency. This code ensures that the company is properly rehabilitated and restructured. The purpose of this research study is to examine the history, challenges, provisions in Insolvency and Bankruptcy Code and applicability of this code. Additionally, the paper also presents the corporate insolvency resolution process.

Keywords: Insolvency and Bankruptcy Code, Corporate Insolvency Resolution Process, Indian Bankruptcy Law, SARFAESI Act, SICA, Companies Act.

**INTRODUCTION**

The Insolvency and Bankruptcy Code establishes a centralised framework for dealing with corporate insolvency in India. By separating the business and judicial parts of the insolvency and bankruptcy process, it aims to increase efficiency in the insolvency and bankruptcy law system. The Insolvency and Bankruptcy Board of India (IBBI) was established on October 1, 2016, to

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<sup>1</sup> Student at New Law College Bharati Vidyapeeth Deemed University, Pune

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govern and execute various insolvency and bankruptcy cases submitted by financial and operational creditors, including Indian banks, home buyers, and others. The Code establishes a new institutional framework, which includes a regulator, insolvency specialists, information utilities, and adjudicatory mechanisms, to assist the official insolvency resolution process and liquidation within a set timeframe.<sup>2</sup>

One of the Code's important aspects is that it permits creditors to analyse a debtor's sustainability as a business decision and agree on a strategy for its resurrection or quick liquidation. The Code establishes a new institutional structure, which includes a regulator, insolvency specialists, information utilities, and adjudicatory mechanisms, to enable a formal and time-bound insolvency resolution and liquidation procedure.<sup>3</sup>

## HISTORY

In India, before the IBC, there was a single statute that addressed all facets of a company in a financial crisis. Instead, there were several statutes, each of which pertained to a specific legal process, company type, or creditor group<sup>4</sup>. Many overlapping legislation in India dealt with insolvency and bankruptcy issues, including-

**The Sick Industrial Companies Act of 1985 ("SICA")**, solely dealt with the rescue and rehabilitation of industrial<sup>5</sup> companies,

**Companies Act of 1956** dealt with the liquidation and winding up of all sorts of corporate entities,

Debt recovery laws like the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002<sup>6</sup> ("SARFAESI")** and the **Recovery of Debt Due**

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<sup>2</sup> Vig, S., 2019. *Insolvency Reforms in India: Policy and Economic Implications*. [online] Cibg.org.au. Available at: <[https://cibg.org.au/pdf\\_1204\\_48e311c8c20093b4fdc20e499a6816c1.html](https://cibg.org.au/pdf_1204_48e311c8c20093b4fdc20e499a6816c1.html)>.

<sup>3</sup> Mondaq.com. 2016. *The Insolvency And Bankruptcy Code, 2016 - Key Highlights - Insolvency/Bankruptcy/Re-structuring - India*. [online] Available at: <<https://www.mondaq.com/india/insolvencybankruptcy/492318/the-insolvency-and-bankruptcy-code-2016--key-highlights>>.

<sup>4</sup> Mondaq.com. 2017. *Insolvency And Bankruptcy Code - Insolvency/Bankruptcy/Re-structuring - India*. [online] Available at: <<https://www.mondaq.com/india/insolvencybankruptcy/627706/insolvency-and-bankruptcy-code>>.

<sup>5</sup> Bhandari Law Firm. 2020. *Know The Insolvency And Bankruptcy Code, 2016 - Bhandari Law Firm*. [online] Available at: <<https://bhandarilawfirm.com/know-the-insolvency-and-bankruptcy-code-2016>>.

<sup>6</sup> Tandi, V., 2020. *Process of Filing Application under Insolvency & Bankruptcy Code, 2016*. [online] TaxGuru. Available at: <<https://taxguru.in/corporate-law/process-filing-application-insolvency-bankruptcy-code-2016.html>>.

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to Banks and Financial Institutions Act of 1993 ("RDDBFI Act") established ways for banks and financial institutions to enforce security and recover debt.<sup>7</sup>

The Bankruptcy Law Reform Committee drafted and introduced the Insolvency and Bankruptcy Law bill in response to ineffective implementation, conflict in one of these laws, and the time-consuming procedure under the aforementioned laws.<sup>8</sup>

## CONSTITUTIONAL FRAMEWORK

The Insolvency and Bankruptcy code (IBC) of 2016 was enacted to modernise the existing insolvency regime, which was fragmented, prone to delays, and resulting in low creditor recoveries.<sup>9</sup> The Code has brought together several insolvency legislation (such as the SARFAESI Act of 2002 and the Companies Act of 2013) under one umbrella. This bill proposes to unify existing legislation and expand the scope and depth of debt financing in India.<sup>10</sup> The constitutional legitimacy of different provisions of the Code has been challenged in several High Courts and the Supreme Court since the implementation of this new regime.

In *Sree Metaliks Ltd. v. Union of India*<sup>11</sup>, the validity of section 7 was questioned on the grounds that it does not give the corporate debtor an opportunity to be heard before an application to commence an insolvency resolution process against it is accepted. The petitioner stated that because the Code's provisions are silent on the corporate debtor's right to be heard, the right to be heard should be read into the provision. While the Code is silent on the corporate debtor's right to a hearing, the Court relied on section 424 of the Companies Act, 2013, to declare that even though the Code is silent on the corporate debtor's right to a hearing, "where a statute is silent on the proper of hearing and it doesn't in express terms, oust the principles of natural justice"<sup>12</sup>the

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<sup>7</sup> Bhandari Law Firm. 2020. *Know The Insolvency And Bankruptcy Code, 2016 - Bhandari Law Firm*. [online] Available at: <<https://bhandarilawfirm.com/know-the-insolvency-and-bankruptcy-code-2016>>.

<sup>8</sup> Centrik. n.d. *What is Insolvency Bankruptcy code (IBC)*. [online] Available at: <<https://www.centrik.in/what-is-ibc/>>.

<sup>9</sup> 2015. *The report of the BankruptcyLawReforms CommitteeVolume I: Rationale and Design*. [online] Available at: <[https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf)>.

<sup>10</sup> Vig, S., 2019. *Insolvency Reforms in India: Policy and Economic Implications*. [online] Cibg.org.au. Available at: <[https://cibg.org.au/pdf\\_1204\\_48e311c8c20093b4fdc20e499a6816c1.html](https://cibg.org.au/pdf_1204_48e311c8c20093b4fdc20e499a6816c1.html)>.

<sup>11</sup> Indiankanoon.org. 2017. *Sree Metaliks Limited And Another vs Union Of India And Anr on 7 April, 2017*. [online] Available at: <<https://indiankanoon.org/doc/164560992/>>.

<sup>12</sup> Legalshala.com. 2020. *Insolvency and Bankruptcy Code of India*. [online] Available at: <<https://legalshala.com/post/328>>.

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identical can and may be read into it.” As a result, the Court determined that the Adjudicating Authority must provide the corporate debtor with a reasonable opportunity to be heard.<sup>13</sup>

## INSTITUTIONAL FRAMEWORK

The Code recommends the establishment of a number of new institutions, also called as four pillars of this code. They are specialized in the insolvency resolution process<sup>14</sup>. The Code stands on four pillars:

**The Adjudicating Authority (National Company Law Tribunal and Debt Recovery Tribunal)**-The NCLT is responsible for adjudicating all corporate insolvency procedures brought under the Code<sup>15</sup>. The NCLT will act as a single point of contact for all areas of corporate insolvency resolution. A stay against an action brought before the NCLT can be granted by no other court or body. Appeals to the NCLAT must be made in response to an NCLT order. All appeals against the NCLAT's decision must be filed with the Supreme Court of India. If debt resolution or restructuring is not possible, the NCLT may order the corporate entity to be dissolved.<sup>16</sup>

**The Insolvency and Bankruptcy Board of India (IBBI)**- The IBC has established the IBBI, a regulatory and supervisory agency entrusted with effectively educating the sector, implementing, and executing the Code. The Board will oversee all aspects of insolvency and bankruptcy, including establishing eligibility requirements for insolvency intermediaries, regulating entry, registration, and exit of insolvency intermediaries, developing model bylaws for professional insolvency agencies, and establishing regulatory standards for insolvency professionals.<sup>17</sup>

**Information Utilities (IUs)**-The IBC anticipated the establishment of IUs tasked with collecting, collating, and disseminating information from businesses and creditors. Financial

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<sup>13</sup> id

<sup>14</sup> Alam, G., Pradhan, A. and Raza, A., 2020. *The Insolvency and Bankruptcy Code, 2016 Interpreted-Constructed by the Supreme Court of India*. [online] researchgate.net. Available at: <[https://www.researchgate.net/publication/344467403\\_The\\_Insolvency\\_and\\_Bankruptcy\\_Code\\_2016\\_Interpreted-Constructed\\_by\\_the\\_Supreme\\_Court\\_of\\_India](https://www.researchgate.net/publication/344467403_The_Insolvency_and_Bankruptcy_Code_2016_Interpreted-Constructed_by_the_Supreme_Court_of_India)>.

<sup>15</sup> Pib.gov.in. 2017. *Insolvency and Bankruptcy Board of India notifies Information Utilities Regulations*. [online] Available at: <<https://pib.gov.in/PressReleasePage.aspx?PRID=1486389>>.

<sup>16</sup> Gupta, A., n.d. *View of Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India*. [online] Rauli.cbs.dk. Available at: <<https://rauli.cbs.dk/index.php/cjas/article/view/5650/6293>>.

<sup>17</sup> Edelweissfin.com. 2017. *Effective Implementation of Insolvency and Bankruptcy Code*. [online] Available at: <<https://www.edelweissfin.com/wp-content/uploads/2020/03/ARC-Report.pdf>>.

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information regarding non-corporate borrowers is now only available from the income-tax department and is not available to the general public, even under the 2005 Right to Information Act.<sup>18</sup> The general framework for the establishment, governance, and fundamental services of IUs, including accepting information submissions, storing, and publishing such information, is legislated in Chapter V of the Code, Sections 209 to 216.<sup>19</sup>

**Insolvency Professionals (IPs)**-The Code establishes a cadre of professional insolvency practitioners, known as insolvency professionals, who are responsible for managing various areas of insolvency resolution. Insolvency Professional Agencies (IPAs), which are professional entities that regulate the practise of IPs, are also established by the Code. Individual practitioners must register with the IPAs, which are responsible for regulating and developing the IP profession.<sup>20</sup>

## APPLICABILITY

In regards to their insolvency, liquidation, voluntary liquidation, or bankruptcy, as the case may be, the provisions of the Insolvency and Bankruptcy Code, 2016 apply to the following (Section 2 of Insolvency and Bankruptcy Code, 2016).<sup>21</sup>

(a) Companies incorporated under Companies Act<sup>22</sup>.

(b) Companies governed under special Act (so far as of Insolvency and Bankruptcy Code, 2016 is consistent with those special Acts i.e. provisions of Special Act will prevail over of Insolvency and Bankruptcy Code, 2016)<sup>23</sup>.

(c) Limited Liability Partnership (LLP)<sup>24</sup>.

(d) Other body corporate as may be notified by Central Government<sup>25</sup>.

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<sup>18</sup> Laws, I., 2020. *Information Utility – The Untapped Pillar of IBC, 2016 : By Adv. Harish Malik & Adv. Arpit Kumar Mishra - IBC Laws*. [online] Ibclaw.in. Available at: <<https://ibclaw.in/information-utility-the-untapped-pillar-of-ibc-2016-by-adv-harish-malik-adv-arpit-kumar-mishra/#:~:text=There%20are%20four%20pillars%20housin>>.

<sup>19</sup> Mca.gov.in. 2016. *THE INSOLVENCY AND BANKRUPTCY CODE, 2016*. [online] Available at: <<https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>>.

<sup>20</sup> Kare, C., n.d. [online] Ibclaw.in. Available at: <<https://ibclaw.in/wp-content/uploads/2019/09/Corporate-Viaticum-and-Where-We-Stand-in-the-World-An-Analysis-May18.pdf>>.

<sup>21</sup> Icmαι.in. n.d. *INSOLVENCY AND BANKRUPTCY CODE, 2016*. [online] Available at: <<https://icmai.in/upload/Students/Supplementary/IBC-2016.pdf>>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

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(e) Partnership firms and individuals<sup>26</sup>.

## CHALLENGES

### Time limit

The Code's strict timescales are a positive step since they provide stability, limit the possibility for any dilatory methods, and ensure asset prices remain stable, allowing creditors' debts to be paid. Various critics, however, see these stringent timeframes as a burden rather than a benefit. The law specifies that the entire process, which includes listing claims, resolving disputes with operational creditors, inviting bids, deliberating on them, accepting a final bid from potential buyers for the company, and final reorganisation, resolution, and liquidation, must be completed within 180 days, which can be extended by 90 days<sup>27</sup>. This appears to be unjust because many companies do not have enough time to thoroughly analyse essential financial data and react within the specified time frame with an effective representation.<sup>28</sup>

### Responsibility of the Insolvency Professional

After insolvency proceedings have been initiated and a moratorium on all contracts and legal processes has been enforced, the insolvency professional is responsible for running the company<sup>29</sup>. The Code is silent on the insolvency professional's qualifications and the requisite competence of the person selected as a caretaker to oversee the entire firm. While the professional is solely responsible for administrative responsibilities, it is impossible to ignore the potential that the corporate debtor may suffer irreparable damage.<sup>30</sup>

### Silence on Third-party Contract

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<sup>26</sup> Ibid

<sup>27</sup> Gupta, A., n.d. *View of Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India*. [online] Rauli.cbs.dk. Available at: <<https://rauli.cbs.dk/index.php/cjas/article/view/5650/6293>>.

<sup>28</sup> Rajoria, K., 2018. *NSOLVENCY AND BANKRUPTCY CODE OF INDIA: THE PAST, THE PRESENT AND THE FUTURE*. [online] researchgate. Available at: <[https://www.researchgate.net/publication/323999366\\_INSOLVENCY\\_AND\\_BANKRUPTCY\\_CODE\\_OF\\_INDIA\\_THE\\_PAST\\_THE\\_PRESENT\\_AND\\_THE\\_FUTURE/link/5c6f9065299bf1268d1ba555/download](https://www.researchgate.net/publication/323999366_INSOLVENCY_AND_BANKRUPTCY_CODE_OF_INDIA_THE_PAST_THE_PRESENT_AND_THE_FUTURE/link/5c6f9065299bf1268d1ba555/download)>.

<sup>29</sup> Gupta, A., n.d. *View of Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India*. [online] Rauli.cbs.dk. Available at: <<https://rauli.cbs.dk/index.php/cjas/article/view/5650/6293>>.

<sup>30</sup> Ibid.

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Surprisingly, the Code remains silent on the effects of potential third-party contracts between the creditors' committee and any outside party that was unable to bid at the auction either voluntarily or due to a missed deadline<sup>31</sup>. There is no provision in the legislation prohibiting the committee of creditors from accepting a profitable offer that ensures the company's survival as a going concern and provides higher returns to the creditors. The Code does not prohibit creditors from engaging with such a third party, either collectively or individually.<sup>32</sup>

## INSOLVENCY RESOLUTION PROCESS

Who is authorized to file an application insolvency and bankruptcy code?

**Financial creditors-** Financial creditors, as defined in section 5(7) of the IBC 2016, are mainly creditors who lend money to promoters. Banks, home buyers, and so on are examples of promotional creditors.

In *Anil Mahindroo & Anr v Earth Iconic Infrastructure*<sup>33</sup>, it was held that, the money was given by the home buyer against the deliberation for the time of good utility of money for all grounds, they fall within the meaning of being considered as 'financial creditor' as defined under section 5(7) of the IBC Code 2016.<sup>34</sup>

**Operational creditors-** Operational creditors, as defined in section 5(20) of the IBC 2016, are creditors who deliver goods and services to the promoters rather than money or cash. For instance, there is a company "X" that manufactures vehicles, and a firm "Y" that provides machines to business "X" to make vehicles. Both firms agree that after the machines are delivered to company 'X,' that company 'X' will pay the funds to company 'Y' within 20 days. As a result, in this scenario, firm "Y" is the operational creditor and firm "X" is the debtor.<sup>35</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> casemine. n.d. *Anil Mahindroo & Anr v Earth Iconic Infrastructure*,. [online] Available at: <<https://www.casemine.com/judgement/in/59a5b314ce686e6bd34c1793>>.

<sup>34</sup> Vashistha, H. and Sharma, A., 2020. *AN ANALYSIS OF CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER INSOLVENCY BANKRUPTCY CODE, 2016* by Harsh Vashistha & Animesh Sharma – *JOURNAL FOR LAW STUDENTS AND RESEARCHERS*. [online] Jls Journal.in. Available at: <[https://www.jlsrjournal.in/analysis-of-corporate-insolvency-resolution-process-under-insolvency-bankruptcy-code-2016-by-harsh-vashistha-animesh-sharma/#\\_ftn4](https://www.jlsrjournal.in/analysis-of-corporate-insolvency-resolution-process-under-insolvency-bankruptcy-code-2016-by-harsh-vashistha-animesh-sharma/#_ftn4)>.

<sup>35</sup> Verma, A., 2020. *All you need to know about Insolvency and Bankruptcy Code - iPleaders*. [online] iPleaders. Available at: <<https://blog.ipleaders.in/all-need-know-about-insolvency-bankruptcy-code/>>.

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**Corporate debtors-** Under section 5(a) Corporate debtors are defined as promoters who take loans or money from financial creditors or take products or services from operational creditors as a debt<sup>36</sup>. They must submit a special resolution passed by the shareholders of the corporate debtor, or a resolution passed by 3/4th of the members of the corporate debtor in the event of a business, to the application under section 10 of the IBC<sup>37</sup>. It will also be required to propose the name of an interim resolution professional, who, like the other two, will be required to prove the default.<sup>38</sup>

## CONCLUSION

The Insolvency and Bankruptcy Code, 2016, is a forward-thinking piece of law aimed at improving the efficiency of insolvency and bankruptcy processes in India. The new regulation allows for early diagnosis of financial difficulty as well as a time-bound resolution mechanism. However, many details about the IBC's implementation must be worked out in the regulations, and the success of the IBC will be determined in large part by how quickly a high-quality cadre of insolvency resolution professionals emerges and whether the time-bound insolvency resolution process is followed in practice.

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<sup>36</sup> Ibid.

<sup>37</sup> Ruia, C., 2018. *Overview of Insolvency and Bankruptcy (Amendment) Ordinance, 2018*. [online] LinkedIn.com. Available at: <<https://www.linkedin.com/pulse/overview-insolvency-bankruptcy-ammendment-ordinance-2018-ruia>>.

<sup>38</sup> Parker, Abhijeet, Corporate Insolvency Resolution Process Under IBC 2016 (June 4, 2020). Available at SSRN: <https://ssrn.com/abstract=3619061> or <http://dx.doi.org/10.2139/ssrn.3619061>

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