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COMPARATIVE STUDY OF CIRP UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 WITH OTHER CORPORATE INSOLVENCY LAWS

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Introduction

Anation's economy grows with the increase in the business. Business is the key regulator of the economic development of a nation as it generates various economic activities without which the economy would be small and weak. Banks also play a pivotal role in the development of the economy byproviding loans to the business enterprises for their investment in various projects. Non Performing Assets (NPAs) pose threat to the investment and are recorded on the Balance sheet of the bank or any other financial institution after a prolonged period of non repayment of the loan by the borrower over a period of 90 days and hence, they place financial burden on the lenders. This affects the lender's cash flow by creating problem of scarcity of funds with the banks. Eventually banks are not in a position to provide credit or they provide credit at an escalated rate by increasing interest rates and this contracts money circulation in the economy. Also the deposit interest rates by the banks are decreased to recover the losses from the depositors. The confidence of borrowers lowers down and hence poses impediment in investment. Ultimately this results in slowdown of national economy. From the year 2008 the NPAs of Banks grew at an alarmingly steep rate. Hence, it became very important to resolve and prevent NPAs.

Businesses are driven by the entrepreneurs and they need conducive business environment of free entry and exit. The Indian economy allowed free entry and free competition but it did not allow free exit and so, there existed several zombie entities in the economic system. The creditors are providers of credit to the entrepreneurs for establishing and running a business.

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The cases from the forums yielded hardly 10-20% of the value of assets and the position of unsecured creditors was dismal. The unsecured creditors could not get anything out of the earlier processes. The position of the creditors was pathetic as they had no surety of getting back their dues and also were not heard in the liquidation and winding up process. The defaulting companies and their erring promoters continued to be the owners and retained control over the assets and management of the company in the liquidation and winding up proceedings. Even after defaulting the erring promoters used to regain control over the company at an exceptionally discounted price through back door entry. The rest of the stakeholders were the worst sufferers (such as, the employees and the workmen, etc) because they got nothing in these processes.

There were multiple over lapping laws in India dealing with Insolvency[1]and Bankruptcy [2] of Companies. Eventually, District Courts, High Courts, Board for Industrial and Financial Reconstruction (BIFR) and Debt Recovery Tribunals (DRTs) had jurisdiction at various stages and this gave rise to complexity and undue delay in the process. This Legal and ` framework did not aid lenders and investors in timely and effective recovery of their defaulted Assets and Investment and caused undue strain in the Indian Credit and Economic System. ***The value of the assets got eroded and nothing could be fetched due to the pending cases in these forums such as, BIFR, DRTs, District Courts, Lok Adalats, High Courts, AAIFR, DRATs, etc***. In some cases it is also experienced that thevalue of the assets was NIL because the cases ran over a decade.

The myriad and overlapping insolvency and liquidation laws, different foras, rising rate of NPAs, dismal condition of debtors, exit barriers for entrepreneurs[3], poor EoDB index ranking of India, erosion of the value of assets, poor circulation of money in the economy, etc were the main reasons which proved that there was a pressing need of a single consolidated piece of effective and efficient legislation for the insolvency and bankruptcy matters. Many committees such as- Tandon Committee (1974), Tiwari Committee (1981), First Narasimham Committee (1991), Narasimham Committee II (1998), Eradi Committee (1999), N.L. Mitra Committee (2001) and J J Irani Committee

[3]Bankruptcy is a situation when the court of law declares the entity as Insolvent and passes orders for resolution.

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(2004) were formed time to time by the Government and the[4] Reserve Bank of India to study and tackle the issue of sick and insolvent companies, swelling NPAs, bring about reforms in insolvency laws etc. Throughout the world, insolvency procedures have aided entrepreneurs inclosing down unviable businesses and starting up new ones or rethinking of re-engineering/restructuring of the existing distressed businesses. Therefore, it is unambiguously clear that there was a dire need of an effective economic and legislative reform for the financial progress of India. ***As per the report of World Bank, 2016***

Insolvency Resolution process in India took 4.3 years on an average, while comparatively it took 1 year in United Kingdom, 1.5 years in United States of America, 2 years in South Africa, 2.7 years in Pakistan and 4 years in Brazil. India's overall ranking in 2016 was 130th in the World Bank's Index on the Ease of Doing Business (EoDB) and 136th on the Ease of Resolving Insolvencies.

Therefore, the much awaited landmark legislation Insolvency and Bankruptcy Code, 2016 (Act No. 31 of 2016, hereinafter referred to as "IBC" or "Code") received the Presidential Assent on 28th May 2016 with creditor in saddle approach to provide a unified framework for the resolution of insolvency and bankruptcy matters in a time bound manner, for promoting entrepreneurship and availability of credit and for improving the ease of doing business and facilitating more investments which will lead to higher economic growth. The Bill regarding the Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on 21st Dec, 2015. The Bill was then referred to a Joint Parliamentary Committee (consisting of 30 members) of both the houses for examination. This new code proposes to undertake a better procedure of restructuring and reorganizing the debts of the firms, to speed up the liquidation procedure of a failing business, efficient recovery of creditor's investment, to balance the interests of all the stakeholders including changes in the order of priority of payment of Government dues and to establish Insolvency and Bankruptcy Fund.

It has been fully implemented from 1st Dec, 2016 since,[5] most of the provisions governing Corporate Insolvency Resolution Process (CIRP), Insolvency Professionals (IPs), Insolvency Professional Agencies and Liquidation processes came into force. It has been enacted when

[4] Insolvency is a financial condition wherein any entity is unable to pay its debt obligations.
[5] World Bank group Flagship Report, "Doing Business 2016 – Measuring Regulatory Quality and Efficiency" *World Bank*.

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the Indian economy was in the midst of soaring NPAs, falling GDP, credit perspective in the country, when the domestic banking industry was struggling to cope with a welter of bad loans and last but not the least the Mallya Saga. This law has reconceptualized the Insolvency Resolution framework in the country.

Consequently in 2018 India's rank jumped 30 places to 100th out of 190 economies on the ease of doing business index and 103rd in the index on the ease of resolving Insolvencies.[4]This historical leap is credited to the Code as the time, cost, outcome and recovery rate for the Corporate Insolvency and the legal framework of the Insolvency has strengthened. ***IBC has made the international economic front of India emphaticallypowerful. The International Monetary Fund (IMF) states that the Real GDP Growth of India (in its 2020 Datamapper) has grown by 1.9% and classified India as an Emerging Market and Developing Economy***. ***In the World Bank's Report 2020, India stands at 52nd position in the ease of resolving insolvency index and 63rd position in the EoDB ranking.It has proven to be a major economic reform next to a uniform taxation system called Goods and Service Tax (GST).***

This insolvency code is a one stop solution in terms of a single codified legislation that has brought multiple laws dealing with insolvency in India under single umbrella. IBC is an exhaustive and comprehensive legislation which[6] provides a single authority[7], i.e. National Company Law Tribunal (NCLT), having jurisdiction over corporate insolvency and bankruptcy proceedings, establishes a new institutional framework consisting of insolvency professionals, and information utilities. There are four institutions set up under the Code, 2016 and are Insolvency and Bankruptcy Board of India (IBBI)Insolvency Professional Agents (IPAs)[8], Information Utilities and Adjudicating Authorities

The Code is a work in progress, it has teething troubles and hence, requires constant attention and amendments. As the cases are coming up before the adjudicating authorities, the deficiencies in the Code, 2016 are coming into light and amendments have been triggered to remove those deficiencies. Some of the important amendments brought are debarring defaulting promoters from submitting resolution plan, introduction of pre-packaged

[6]World Bank group Flagship Report, "Doing Business 2020 – Comparing Business Regulation in 190 Economies".
[7]World Bank Group Flagship Report, "Doing Business 2018 - Equal opportunity for all" 4 and 23.

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insolvency resolution process, etc. The Government of India, the adjudicating authorities and the Supreme Court are incessantly working on it.

1.2. RATIONALE OF THE STUDY -

Though there were numerous laws existing at that time to govern Insolvency and Bankruptcy issues such as Provincial Insolvency Act of 1907, Provincial[8] Insolvency Act, 1920, The Presidency Towns Insolvency Act, 1909, The Sick Industrial Companies (Special Provision) Act, 1985 (SICA), Securitisation and Asset Reconstruction and Enforcement of Security Interest Act, 2002 (SARFAESI Act), The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), Companies Act, 1956 and The Companies Act, 2013 but they did not yield satisfactory results. There were multiple judicial forums and adjudicatory bodies/Tribunals which resulted in lack of clarity and certainty of jurisdiction. These laws neither aided recovery for lenders nor aided restructuring of firms and the proceedings under these Acts were prolonged and seemed never ending.

STATEMENT OF THE PROBLEM -

The IBC was enacted at the time when Indian banking industry was going through a very difficult phase, was over burdened with huge piles of NPAs and there was bad credit perspective in the country. The Financial Stability Report of June, 2016 released by Reserve Bank of India (RBI) confirms the fact that not all was well in the health of Indian banks.

OBJECTIVES OF THE STUDY -

The research study is aimed at the following:

1. To compare the basic concepts of Corporate Insolvency and Bankruptcy as provided under the earlier laws with the Insolvency and Bankruptcy Code, 2016.

2. To analyze the need behind the codification of the Insolvency and Bankruptcy Code, 2016.

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[8]According to Section 3 (20) of the IBC, 2016, "Insolvency Professional Agency" means any person registered with the Board under Section 201 as an Insolvency Professional Agency. These IPAs will admit Insolvency professionals (IPs) and act as a disciplinary body for all IPs registered with them

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3. To study the laws relating to Corporate Insolvency and Bankruptcy process as provided in the Insolvency and Bankruptcy Code, 2016 and check the implementation of the time bound process as provided in the Insolvency and Bankruptcy Code, 2016.

RESEARCH QUESTIONS

7 Is the Insolvency and Bankruptcy Code, 2016 able to consolidate multiple laws and adjudication authorities dealing with the Corporate Insolvency and Bankruptcy process?

8 Does the Code, 2016 facilitate time bound Insolvency resolution process?

9 Has this Code, 2016 really benefitted the Investors, Creditors and Corporate Debtors and restored their faith in the Insolvency and Bankruptcy process?

10 What are the problems in the implementation of the Code, 2016?

The terms 'Insolvency' and 'Bankruptcy' are not synonymous. Insolvency simply means the inability to pay debts and Bankruptcy is the outcome of insolvency. When liabilities of an entity surpasses its assets then the situation is termed as Insolvency and Bankruptcy is a situation when the Court of lawdeclares the entity as insolvent and passes orders for resolution. Corporate Insolvency is a situation in which the company is unable to repay its debts. The earlier multiple over lapping laws in India dealing with Insolvency and Bankruptcy of Companies, Limited Liability Partnerships, Partnership Firms, Individuals and other legal entities and their respective judicial bodies were inefficient and ineffective and failed to yield desired results.After the implementation of the IBC India jumped to 63rd position in the 2019 World Bank's Ease of Doing Business index from 77th position in 2018 and India saw the biggest jump to 52nd rank on the index of ease of resolving insolvencies from 108th position in 2018. This legislation is seen as a significant catalyst for improving debtor behavior. Under this Code a third party insolvency practitioner (called as the "Resolution Professional") takes control of the CD and formulates a restructuring plan within the strict time period which the Creditors have to approve. The OCs, the FCs or the CD, themselves may initiate insolvency of the CD in the event of default by the corporate debtor. The Code inter-alia envisages new institutional framework which consists of IPs, IPAs, IUs and IBBI. The establishment of these institutions provide for expeditious and systematic tracking procedure of insolvent companies.

2.1. THE LEGISLATIVE INTENT BEHIND THE CONSTITUTION OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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Firstly, it is crucial to analyze the legislative history and understand the efficacy of the past Corporate Insolvency resolution framework in India. In India the legislative history has a dearth of comprehensive and cohesive single law to overcome insolvency issues so as to bring all the stakeholders under one forum. Therefore, the multitude of laws and regulations dealing with insolvency ensued in complexities and impediments in processes, overlapping of jurisdictions of different judicial forums and inordinate delays in the outcome. Insolvency and Bankruptcy is a subject matter of the concurrent list (Entry 9 of List III in the Seventh Schedule- Article 246 of the Constitution of India) in India and allows both the Central and State Governments to develop the legislative framework. This implies that both the Parliament and the State Legislatures have the power to legislate on the subject of Insolvency and Bankruptcy. But in case of repugnancy or conflict between laws made by them, the laws made by Parliament prevails unless the State seeks Presidential assent for its law, in which case that law prevails in that State only. This constitutional provision is similar as in United Sates. Insolvency laws are generally under the ambit of the State but it comes under the domain of the federal laws on the initiation of the bankruptcy process.

In pre-independence[9] time, we had the Provincial Insolvency Act of 1907, which proved to be a failure as it gave undue protection to dishonest debtors. This Act was superseded by the Provincial Insolvency Act, 1920 (applicable to the whole of India except the erstwhile presidency towns) and we also had The Presidency Towns Insolvency Act, 1909 (applicable to the erstwhile presidency towns of Calcutta, Bombay and Madras). Both these Acts were almost a century old, embraced the whole of Bankruptcy law in the era of British India and were applicable in the cases of individual insolvency (including proprietorships and partnerships). Creditors sought recovery action, either through the route of the Indian Contract Act, 1872 or through special laws enacted Post-independence, such as the Sick Industrial Companies (Special Provisions) Act, 1985, Companies Act, 1956, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. None of the laws had desired outcomes and they had neither been able to aid recovery for creditors nor aided restructuring of firms. This had hampered and lowered

[9]Insidore E. Goldberg, "Constitutional Law: State bankruptcy or insolvency laws; Statutes dealing with the voluntary assignment for the benefit of creditors and the federal bankruptcy act" 11 *Marquette Law Review* 101-104 (1927).

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down the confidence of the lenders. As a consequence, the debt access for borrowers diminished and this state is reflected in the credit markets in India. Hence, we can conclude that In India, the legal and institutional machinery was not in consonance with the international standards for dealing with debt defaults. Under these circumstances, the recovery rates attained in India are amongst the lowest in the world. When default takes place, generally, lenders recover 20% of the value of debt, on an NPV basis.

Over the period of last two decades, there has been tremendous transformation in the Indian financial system. Various financial sector reforms have been initiated to aim at promoting an effective, efficient, competitive and well-diversified financial system having a paramount objective of improving the efficiency of resources so that it furthers economic development. India is swiftly moving to the centre stage of world economy, as the policy makers have consistently made efforts to undertake substantial reforms in the laws, systems and processes to bring them in parity with international standards and give impetus to the foreign investors for investing in the Indian economy. Industrial sickness started before independence in the India and in fact this problem was inherited from British colonial rule. So, the Government took several ad-hoc measures to counter industrial sickness and maintain equilibrium in the economy. As an instance, Nationalization of Banks and other measures were big steps taken but they provided some provisional relief. Reserve Bank of India (RBI) was the principal body to monitor and manage industrial sickness.

In 1974, a study group known as **Tandon Committee** was constituted by RBI to frame guidelines for bank credit. The committee submitted its report in 1975 and made comprehensive recommendations concerning the banking lending practices.[10]**H N Ray Committee** was constituted by RBI in 1976 to suggest measures for alleviating theproblem of industrial sickness.

Broadly insolvency reforms in India from 1981 can be encapsulated as under:

Tiwari Committee (1981)- Furthermore, in the year 1981, Tiwari Committee was appointed to probe into the legal and other difficulties faced by banks and financial institutions in dealing with industrial sickness and revival of sick units and to suggest remedial measures including special legislation. The committee submitted its report in 1983 and suggested a

[10]Report of the Committee on Industrial Sickness and Corporate Restructuring (July 1993).

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special law and exclusive quasi-judicial body to handle the cases of industrial sickness.[11] Ultimately as per the suggestion the Sick Industrial Companies Act, 1985 (SICA) was passed and keeping the views of this committee an exclusive quasi judicial body known as Board for Industrial and Financial Reconstruction (BIFR) was created and it started functioning in 1987. The object of this Act was laudable but the erring promoters factually misused it and defeated its object.

First Narasimham Committee (1991)- Next in the line, the First Narasimham Committee was established in the year 1991 under former RBI Governor Mr. M. Narasimham, for looking into all the features of the financial system and to bring banking reforms in India. The committee gave comprehensive recommendations and in follow up action the Government enacted the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI) for quicker recovery of bad debts. This Act created the forums Debt Recovery Tribunals and Debt Recovery Appellate Tribunals forexpeditiously adjudicating disputed of non-recovered dues. But there were several loopholes in the Act misused by the borrowers.

Narasimham Committee II (1998)- Consequently, in the year 1998, another committee called as Narasimham Committee II was appointed under the chairmanship of Mr. M. Narasimham to further strengthen the financial system of India. The Government enacted Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) on the recommendation of this committee. Through this Act, for the first time, secured creditors were empowered to recover their long standing dues from the non-performing assets.

Eradi committee (1999)- In 1999, the Government of India constituted a high level committee headed by Justice V. Balakrishna Eradi known as Eradi Committee to examine the existing Insolvency and Winding up laws of companies and to suggest reforms to avoid the delay in such proceedings. The committee recognized the number of matters and their duplicity and court proceedings as the most notable causes for making the proceedings of insolvency and dissolution of companies delayed and hefty. After taking reference from the international practices prevailing in some countries into consideration and remodeling it in line with the latest international practices, the committee made the following recommendations –

[11] *Available at*: https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/7930.pdf (last visited on march 06, 2024).

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4. The committee suggested that the laws of insolvency should also provide for possible revival and rehabilitation of companies besides quick disposal of assets,
5. Besides the three different agencies (namely the Company law Board, the Board for Financial and Industrial Reconstruction and the High Courts) having the jurisdiction and powers relating to the Winding up of companies, the Committee proposed the constitution of a National Company Law Tribunal which should combine the powers of the three agencies in restructuring and winding up of companies

Pursuant to the key recommendations of the committee, the Companies (Second Amendment) Act, 2002, was enacted and it provided for the constitution of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) to replace the Company Law Board (CLB) and the Board for Financial and Industrial Reconstruction (BIFR) . However, due to the litigation with respect to the constitutionality of NCLT which went on for more than 10 years, it was established under Section 408 of the Companies Act, 2013 but was constituted on 01 June, 2016.

N.L. Mitra Committee (2001) – A Standing Committee was setup by the RBI in 2001, to identify and monitor developments of international standards in various segments of financial sector and draw out a road map to align India's standards in the light of global practices. This Advisory Group on Bankruptcy laws noted that the cross-border insolvency laws in India are obsolete and there was no specific statutory process in winding up Indian companies having assets abroad. The committee proposed a comprehensive bankruptcy code which contains the provisions relating to corporate insolvency and cross-border insolvency. However, no legislative move was taken in this regard.

J J Irani Committee (2004)- J J Irani Committee was constituted under the chairmanship of Dr. J. J. Irani in 2004, with the task of giving advice to the Government and proposing revisions to the Companies Act, 1956, to have a simplified compact Company law for meeting requirements of a competitive economy. The committee in 2005 recommended that the insolvency tribunal should have a supervisory, general[12] and non-intrusive role and greater intervention is required to resolve disputes via, a fast trackapproach in the

[12]Government of India, "Report of the High Level committee on Law relating to Insolvency and Winding up of Companies 2000" (Ministry of Law, Justice, Department of Company Affairs, 2000).

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rehabilitation and liquidation process. The committee proposed amendments to the RDDBFI Act and SARFAESI Act.

COMPARATIVE STUDY OF IBC WITH THE EARLIER INDIAN CORPORATE INSOLVENCY LAWS

3.1.1. REHABILITATION PROCEEDINGS UNDER SICA, 1985

In the 1980s, there was rampant [13]Industrial Sickness in India and to combat this issue the Government of India came up with the crucial legislation – SICA. This Act was brought to spot the sick or potentially sick companies and for taking faster remedial measures to revive these companies and to close the units when their revival is not possible, which was an action to release the locked up investment. As per Section 3(1)(o) of SICA, when there was complete net worth erosion of a Company (the company should have existed for at least five years) and its accumulated losses exceeded or equaled 'its entire net worth of any financial year', then it was termed as Sick Company. The concept of "Potentially Sick Companies" was perceived and recognized to make sure that the steps for resolution and revival could be taken up at an early stage. An industrial unit which existed for at least five years, 'at the end of any financial year' had accumulated losses of 50% of its average net worth in 'the immediately preceding four financial years' and had failed to repay its debts to its creditors in three consecutive quarters on demand made was called as Potentially Sick Company.

The Quasi-Judicial bodies under SICA were BIFR (Board of Industrial and Financial Reconstruction) and AAIFR (Appellate Authority for Industrial and Financial Reconstruction). BIFR was an apex board for discharging the functions and duties conferred and imposed by SICA. AAIFR was an appellate body constituted to hear appeals against the orders of BIFR. Reference of the sick company had to be made to the BIFR (under Section 15 of SICA) for determining the remedial measures with respect to the sick company by the Board of Directors of the company itself or the Central Government or Reserve Bank of India or Public Financial Institution or State Government or a Scheduled Bank. Suo Moto enquiry could be made by the BIFR, without any reference, for determining the financial state of the company. The reference was required to be made within sixty days from the date of

[13]Reserve Bank of India, Various Reports.

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finalization of the duly audited accounts of the company for the financial year 'at the end of which the company had become sick'.

Consequently, BIFR had to make an enquiry into the sick company within sixty days of the reference made to it under Section 16 of SICA. BIFR was left with two options, one was passing an order to give time to the company to escape insolvency and other was passing an order for revival of the company. Generally, it took the help of an operating agency. The BIFR could direct the agency to prepare a scheme for revival or BIFR could also pass the order of giving time to the company to make its net worth exceed the accumulated losses or to prepare a scheme for financial reconstruction of the company or to change the management of the sick unit. When after making due enquiry BIFR was of the opinion that it was just and equitable to wind up the company then it could forward its opinion to the High Court. The High Court ordered Winding up of such sick company and the proceedings of winding up were taken up in accordance with the Companies Act, 1956.

On the other hand the IBC has provided very simple process to resolve insolvency of sick companies.

KEY DIFFERENCES BETWEEN SICA AND THE CODE :

i. **Objective of legislations** - The objective of SICA is to timely detect the sick and potentially sick companies and their revival whereas the objective of IBC is to resolve the insolvency of companies through restructuring tools, maximize the value of assets, promote entrepreneurship, availability of credit and balance the interests of all stakeholders.

ii. **Who triggers the process** - There is no requirement of determination of sickness of a company under the Code and upon default any FC or OC or the CD itself can file the application with the NCLT for initiating a CIRP but under SICA the reference of sick company is made to the BIFR by the BoD of the company itself or the Central Government or RBI or State Government or Public Financial Institution or State Level Institution or Scheduled Bank.

iii. **Amount of default** - The minimum amount of default threshold is set at Rs. 1 Crore (this limit is enhanced from Rs. 1 Lakh by Amendment Act of 2020) for triggering the insolvency proceedings under the Code but the SICA is triggered when there is a loss of 50% of the net

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worth of a company. Hence, it is already too late totrigger a process under SICA because by the time BIFR decides revival or liquidation of a company, half of the company's net worth already gets eroded. So, IBC provides a safe route of triggering a corporate insolvency resolution process and quickly revives the company before its net worth starts getting eroded.

iv. **Moratorium Period** - Under the IBC proceedings A Moratorium period is declared by the NCLT after admission of the application on the contrary there is no provision of moratorium period under the SICA proceedings.

v. **Call for claims** - The NCLT calls for claims in the insolvency proceedings and no such call is made under SICA.

vi. **Resolution Professional** - An insolvency resolution professional termed as IRP is appointed by the NCLT under the IBC who takes over the company whereas no IRP is appointed during the revival proceedings under SICA.

vii. **CoC** - A CoC is formed under the IBC proceedings which takes all the decisions and the IRP or the RP acts on the decisions of the CoC. On the other hand no such committee of creditors is formed under SICA. That is why the Code is creditor-in-possession regime while SICA was not so.

viii. **Time-bound process** - A time-bound resolution process is provided by the Code whereas there is no time-bound revival process under SICA and it takes around one to two years for a company to get admitted for further investigation.

ix. **Misuse by Debtor companies** - SICA was misused by the debtor companies to stall the proceedings and to save themselves from the claims of creditors and therefore, creditors had to suffer but under the IBC proceedings there is no such possibility because all the decisions are taken by the creditors and the resolution plan is also approved by the CoC and then approved by the NCLT.

x. **Waterfall mechanism** - There is no provision of waterfall mechanism for the distribution of assets under SICA in the event of liquidation. On the contrary the Code provides a waterfall mechanism for the distribution of assets in the event of liquidation and this waterfall mechanism enhances the rights of creditors. The priority of payment starts from securing the rights of secured creditors to workmen and then to the payment of equity

In a nutshell the decision of closing down the sick company was taken in a court of law in SICA proceedings. This procedure took a long period of time and the sickness took even longer period to get cured. Time happens to be money in business and a collapsingbusiness

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sees erosion of Capital on a daily basis. Consequently, SICA failed due to its procedure and approach in dealing with these issues.

FLAWS IN SICA:

The glitches found in the functioning of SICA are mentioned as under-

I. Extremely difficult to rehabilitate the company- It was highly difficult to rehabilitate the sick company because the detection of sickness was made at a stage when the accumulated losses of the company grew large enough to wipe out the equity reserves and base. By the time BIFR could decide to revive or liquidate a company, halfof the company's worth was already eroded.

II. Section 22 of SICA was misused by the Promoters of the company-Section 22 of SICA allowed the debtor companies to seek bar on legal proceedings for arbitration, execution, enforcement of security interest, recovery suits, etc and hence was misused by unscrupulous promoters. The Section dealt with Moratorium and was rampantly misapplied by the promoters for deferring action by the creditors.

III. Inordinate delay- The proceedings under SICA faced undue delays in the completion of the inquiry and sanctioning of the scheme. There was absence of definite timelines in SICA.

IV. Reluctance in Liquidating a Sick Company – The High Courts and theBIFR followed Socialist mindset and were reluctant in liquidating a Sick company. This was due to the fear of unemployment, labour unrest, etc.

3.1.2. RECOVERY PROCEEDINGS UNDER RDDBFI ACT, 1993

Narasimham Committee I, 1991 endorsed the view of Tiwari Committee, 1981 for establishing a Quasi-Judicial set up exclusively for banks and financial institutions which can quickly dispose off the recovery cases by adopting a summary procedure. Pursuant to these recommendations, the Government of India enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) under which Quasi-Judicial Authorities were constituted. RDDBFI Act was renamed as "Recovery of Debts due to Banks and Financial Institutions and Bankruptcy Act, 1993" by the amended in 2016. Section 1(4) of the RDDBFI Act says that the provisions of this Act are applicable where the amount of debt due to a bank or financial institutions or consortium of banks/financial institutions is not less than Rs. 10

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Lakh and also empowers the Central Government to specify (by notification) a minimum debt of not less than Rs. 1 Lakh.

The Debt Recovery Tribunals (DRTs) have the jurisdiction, power and authority for entertaining and deciding applications from banks and financial institutions to recover the debts due.[2] The Debt Recovery Appellate Tribunal (DRAT) is conferred the Appellate jurisdiction and the power of general superintendence and control over DRT. An application has to be filed before the DRT of relevant jurisdiction along with the certified true copies of the documents in support of the claim and if another bank/financial institution has to recover its debt from[14] the same person then the other bank/financial institution can join the applicant bank/financial institution by making an application to the DRT at any stage of the proceedings but before the final order is passed. The Registrar of the DRT or any other Presiding Officer authorized in this behalf shall issue Summon/Notice which will be served by the applicant to the defendant.

The Defendant is required to file the reply/Written Statement within one month from the date of service of the Summon/Notice. With the permission of the DRT the defendant can seek extension of the time for filing reply and if the defendant fails to file his reply within the time or the extended time, then the DRT may proceed ex-parte. At the first hearing,[15] the defendant can file claim for set-off/counter claim. If the defendant admits his liability, then the presiding officer will pass an order directing the defendant to pay off the admitted[16] amount within 30 days of the date of order of the DRT. On the failure of the defendant in paying the admitted claim within the period, the presiding officer may issue a certificate of debt due in terms of Section 19 of the Act. After giving opportunity of hearing to both the parties and hearing their submissions, the DRT shall pass its interim or final order. The DRT will issue a Recovery Certificate (RC) within 15 days of the order and forward it to the Recovery Officer. The RC has the same effect as the decree of the civil court.Any aggrieved party may file an appeal against the order of the DRT to the DRAT within 30 days from the date of receipt of the order. No appeal lies against the order of the DRT which was passed with the consent of the parties. The DRAT shall endeavor to dispose off the appeal within the period of six months.

[14]The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act 51 of 1993), s. 17
[15]The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act 51 of 1993), s. 19(1).
[16]The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act 51 of 1993), s. 17A

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KEY DIFFERENCES BETWEEN THE CODE AND RDDBFI ACT :

i. **Objectives of legislations** - The objective of RDDBFI Act is debt recovery through establishment of Tribunals (DRTs and DRATs) for speedy adjudication whereas the objective of the IBC is reorganizing and insolvency resolution within the timeframe for maximizing the value of the assets. So, the purpose of the Code is not just recovery of debts rather it tries to restructure the debtor companies which are sick yet viable.

ii. **Applicability of legislations** – The Code applies to companies, individuals, partnership firms, limited liability partnership firms and other notified bodies but the RDDBFI Act is applicable on Banks, Financial Institutions, Asset Reconstruction Companies and other as specified by the Government.

iii. **Initiation of proceedings** – Only the Banks and Financial Institutions can initiate recovery proceedings under the RDDBFI Act while any of the creditors or the debtor can itself make an application for initiation of IBC proceedings before the NCLT. That is, anyone is authorized to initiate insolvency proceedings.

iv. **Default limit** – The default threshold for initiation of IBC proceedings is Rs. One Crore whereas the under the RDDBFI Act the default threshold is the debt of not less than Rs. Ten Lakh but the Central Government is empowered to notify this limit to not less than Rs. 1 Lakh.

v. **Value of Assets** – The assets are blocked under the RDDBFI Act for a considerable period of time and this renders the assets unproductive. But under the IBC the assets are efficiently managed by the insolvency professional and the business of the company keeps on going well as per the decisions of the CoC. Therefore maximum value of the assets is realized via, the Code but there is either reduction or complete erosion in the value of assets.

vi. **Judicial Intervention** – There is judicial intervention during the RDDBFI Act proceedings because for stalling the proceedings, the borrowers raised claims against lenders in the civil courts. For ensuring smooth proceedings under the IBC, section 238 of the Code provides that the IBC shall prevail over any other provision or law contrary or inconsistent with any of the provisions of the IBC. Also no claims can be raised during the IBC proceedings by the creditors under any other forum or court.

vii. **Easy proceedings** – The IBC provides an easy and simple proceeding with the specified timelines but no timelines are fixed under the RDDBFI Act and its

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proceedings are unclear and complex. Moratorium period is also fixed under the IBC while no such moratorium period is provided under the RDDBFI Act.

FLAWS IN RDDBFI ACT:

I. Judicial intervention in the recovery proceedings – The DRTs were established for helping the banks and financial institutions in recovering their dues speedily without being subject to the lengthy procedures of Civil Courts. The cases were delayed because the High Courts were not using statutory remedies available to them under the DRT Act. They exercise their jurisdiction under Article 226 for passing the orders and this had serious adverse impact on the rights of banks and financial institutions. In order to stall the proceedings, the borrowers raised claims against lenders in the civil courts.

II. **DRT being headed by One Presiding Officer** – There is only one presiding Officer appointed for each DRT. On comparison of the cases and appeals being filed with the DRT headed by one Presiding Officer, does not suffice imparting judgment judiciously. The main objective of RDDBFI is speedy disposal of cases which cannot be achieved with one presiding officer in comparison to the pending sea of cases awaiting trial and decision. One Presiding Officer may not have good legal acumen.

III. Applies only to the Banks and Financial Institutions – The provisions of the RDDBFI Act apply only to the banks and financial institutions. The other creditors, equity investors or the suppliers of goods and services are not given legal remedy under the Act.

IV. Assets are blocked for considerable time – The assets are blocked for a considerable period of time under the DRT and this renders the asset unproductive. The value of the asset gets eroded with the passage of time and then in the end either no value or a very small value is realized.

V. DRTs were over burdened with the cases –The DRTs were to reduce the burden of the judiciary. As per the Deshpande Committee Report, the problem has been transferred to the DRTs, as the ideal number of cases to be handled by the DRT at any given point of time was supposed to be 30, but this number in the inception was around 4000 in major cities.[5] The success rate of the DRTs was pegged below 25 per cent, which is of serious concern.

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VI. Limited Powers of DRT – The DRTs have summary proceedings and hence they are not equipped for addressing the complex questions of fraud and misrepresentation and questions of law and the DRTs across India are ill-equipped to handle the huge number of cases.

The RDDBFI Act was the first creditor friendly legislation enacted and a mechanism put in place in India. Despite the constitution of the DRTs, banks were not powerful in the recovery process and hence, they could not achieve the desired extent of recovering capability. The amount of NPAs kept on increasing and accumulating in the country.

3.1.3. RECOVERY PROCEEDINGS UNDER SARFAESI ACT, 2002

The Narasimham Committee II, 1998 on Banking Sector Reforms raised concern around the rising NPAs of the Indian Banking Sector. The recommendations of the Committee led to the enactment of the **Securitisation and Reconstruction of Financial Assets andEnforcement of Security Interests Act, 2002**(SARFAESI Act), to protect the financial creditors, who are mostly the banks and other financial institutions. The Act allowed them to recover NPAs and enforce their security interests without the intervention of the court. There are two methods provided under the SARFAESI Act for the recovery of NPAs and are:

a. Taking possession of the secured assets of the debtor (with the right to assign, lease and sell the secured assets) and

b. Taking over the business or management of the debtor company until the NPA is recovered.

The banks and financial institutions are also empowered under the SARFAESI Act to sell the financial assets to Asset Reconstruction Companies (ARCs). The sale of assets to ARCs should be in accordance with the guidelines issued by the RBI in this behalf. The account of the debtor or the borrower should be classified as an NPA by the secured creditor and must be of the outstanding balance of Rs. 1,00,000 or above. A 60 days Demand Notice should be served by the secured creditor on the debtor company demanding repayment of the due amount and should also specify the assets over which he proposes to enforce its security interest. The debtor retains the right to representation/objection within the 60 days notice period. The secured creditor should consider this representation/objection and communicate

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the acceptance or non acceptance of the representation/objection to the debtor within 15 days with the written reasons for non acceptance.

On the expiry of notice period of 60 days, if the debtor fails to discharge its liability then the secured creditor can enforce its security interest over the secured assets by, (a.) taking possession of the secured assets, (b.) taking over the management of the secured assets (along with the right to transfer by way of lease, assignment or sale of the assets), (c.) appointing a person to manage the secured assets, and (d.) requiring any person who has acquired the assets from the debtor to pay the amount necessary for satisfying the debt. When the secured creditor is unable to recover his entire dues, then he may approach the DRT or other court for the recovery. He is allowed to simultaneously pursue its remedies both under the DRT as well as the SARFAESI Act.

The SARFAESI Act was enacted with the intention of faster recovery of dues and reducing NPAs. It is said that the banks misused the SARFAESI Act at times. This issue went to the Supreme Court and the constitutional validity of the Act was upheld. The Judiciary was very much aware and cautious of the interests of the borrowers and since then every effort is made by the judiciary to ensure that the object of SARFAESI Act is not diluted.

When the debt burden is high then SARFAESI Act is not much effective because there is little scope of revival as the Public Auction kills the business whereas the Code is focused to ensure the securing the interests of all stakeholders and is directed towards reviving the business and that is why the IBC is highly effective in the large cases.

THE OTHER POINTS OF KEY DIFFERENCES BETWEEN THE IBC AND THE SARFAESI ACT :

i. Objectives of legislations - The objectives of the SARFAESI Act are Enforcement of Security Interest over the property of the debtor and establishment of ARCs whereas the objective of the IBC is Revival and Rehabilitation of companies and Maximisation of the value of the assets.

ii. Trigger Amount – The triggering amount for initiating the proceedings under the SARFAESI Act is the amount owed to a Secured Creditor but the default threshold under the IBC is minimum amount of Rs. 1 Crore (prior to the 2020 Amendment Act, it was Rs. 1 Lakh). This means that there is no limit set for default under the SARFAESI Act.

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iii. Adjudicating Authorities – The adjudicating authorities under the SARFAESI Act are the Chief Metropolitan Magistrate and Chief District Magistrate for assisting in recovery of the dues and DRAT is the appellate authority while NCLT and NCLAT are the adjudicating authorities under the IBC.

Conclusion

The fragmented and muddled slew of legislations dealing with insolvency and bankruptcy issues in India led to the dire need of having a consolidated and efficient law. These were Provincial Insolvency Act of 1907, Provincial Insolvency Act, 1920, The Presidency Towns Insolvency Act, 1909, SICA, SARFAESI Act, RDDBFI, Companies Act, 1956 and The Companies Act, 2013. The Gross NPAs became a Gordian knot in the Indian Economy as it grew on the balance sheet of PSBs at an alarming rate of 2.2% from the year 20081 and reached to 11.7% by March, 2017. They are a big menace to an economy because it places financial burden on the lenders which ultimately creates scarcity of funds with the banks. The banks then provide credit at an escalated rate of interest, thereby lowering the confidence of borrowers and giving rise to obstacles in investment activity. Credit and investment activities slow down and so, the national economy gets badly affected. Also, the multiple laws failed to resolve the petrifying issue of NPAs and hence, NPAs became a stumbling block in

Indian Developing Economy. BLRC was constituted in the year 2014 under the Chairmanship of Former Secretary General, Lok Sabha and Former Union Law Secretary, Dr. T. K. Viswanathan and after studying the corporate bankruptcy legal framework in India, it advocated the passage of the Insolvency and Bankruptcy Code, 2015. The committee found the then existing insolvency framework had many difficulties which are as follows:

- Multiple overlapping, fragmented and unbalanced framework,
- Less chance of resolution of conflicts between debtors and creditors,
- Different judicial forums,
- Cases were involved in multiple proceedings under different forums and the laws were in conflict with each other,
- Debtor-in-saddle approach

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- Erring and defaulting promoters had control over the assets and management of the company even after committing default
- Low recovery rates to lenders

The financially distressed businesses are given early opportunities through the CIRP so that they can survive else the assets of those units will get stuck and their value will get eroded with the passage of time. The creditors are now able to get maximum value of their assets through insolvency resolution of their companies. The sick viable companies are revived, made to stand back on its own feet through CIRP and run as a going concern after the closure of CIRP. The IBC deems it fit to close down unviable sick companies because it is not profitable to revive them as they will be in losses forever and so they are sent for liquidation under the Code. In this way, the Code benefits all the stakeholders such as, creditors, debtors, employees, etc. That is why the IBC has proved to be a beneficial legislation and not merely a recovery legislation. Across the globe insolvency procedures have aided entrepreneurs in closing down unviable distressed businesses through restructuring mechanisms and so there is continuous transformation of economic resources of a nation to efficient use and increasing the overall productivity of the economy.

5.1.1. SIGNIFICANCE OF THE RESEARCH STUDY

Reforms in the Insolvency laws is one of the key pillars that help in the making or breaking an Economy and therefore, its developmental and incremental improvements are of great significance for improving the Indian economy. It can be easily concluded that the aim of the Code is resolution and not liquidation. Through this research study the researcher has figured out that how this premier insolvency legislation and its amendments introduced have shaped the emerging insolvency jurisprudence in India. This research study is the need of the hour and examines how the implementation of the Code, 2016 plays out in reality and checks the challenges that come in its way. This study is demanded to fuel up the Insolvency and Bankruptcy process in India and will provide a strong basis for future research works.

Bankruptcy of large companies (such as Kingfisher Airlines, Jet Airlines, Jaypee Infratech, Bhushan Steel, Lanco Infratech and ABG Shipyards, etc) shook the whole Indian Economy. But now after the advent of the IBC, the defaulting owners are constantly in fear of losing control over their company upon the initiation of CIRP and it is evidently perceptible that till

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the end of June, 2021 461 cases have been withdrawn out of 2,859 closed CIRP cases (which amounts to 16% of closed cases).

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