THE NEED FOR REIMAGING AND RE-THIKING THE INSOLVENCY AND BANKRUPTCY CODE, 2016 IN INDIA

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Submitted by

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(June, 2023)

CERTIFICATE

This is to certify that CHETAN AGARWAL has completed his dissertation titled "THE NEED FOR REIMAGING AND RE-THIKING THE INSOLVENCY AND BANKRUPTCY CODE, 2016 IN INDIA" under my supervision for the award of the degree of MASTERS OF LAWS/ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

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DECLARATION

I CHETAN AGARWAL, do hereby declare that the dissertation titled "THE NEED FOR REIMAGING AND RE-THIKING THE INSOLVENCY AND BANKRUPTCY CODE, 2016 IN INDIA", submitted by me for the award of the degree of MASTERS OF LAWS/ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in full or part anywhere else for any purpose, academic or otherwise.

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1993 - The Recovery of Debts due to Banks and Financial Institution Act

2002 - Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act.

2016 - Insolvency and Bankruptcy Code.

LIST OF ABBREVIATION

1.	NPA	Non-Performing Assets
2.	RBI	Reserve Bank of India
3.	IBC	Insolvency and Bankruptcy Code, 2016
4.	SARFESAI	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
5.	SICA	The Sick Industrial Companies Act
6.	BFIR	Board for Industrial and Financial Reconstruction
7.	DRT	Debts Recovery Tribunal
8.	NCLT	National Company Law Tribunal
9.	IBBI	Insolvency and Bankruptcy Board of India
10.	IRP	Interim Resolution Professional
11.	RP	Resolution Professional
12.	COC	Committee of Creditors
13.	SCC	Stakeholders Consultation Committee
14.	IU	Information Utility
15.	BLRC	Bankruptcy Law Reform Committee
16.	PSU	Public Sector Undertaking
17.	QIB	Qualified Institutional Buyers

18.	ARC	Asset Reconstruction Companies
19.	LPG	Liberalization, Privatization and Globalization
20.	PSU	Public Sector Units
21.	CPSE	Central Public Sector Enterprises
22.	SLPE	State Level Public Enterprises
23.	HAL	Hindustan Antibiotics Limited
24.	HPC	Hindustan Paper Corporation
25.	Pvt.	Private
26.	FMCG	Fast Moving Consumer Goods
27.	U.S.	The Unites States of America
28.	U.K.	The United Kingdom
29.	UNCITRAL	United Nations Commission on International Trade Law
30.	&	And

CHAPTER 1: INTRODUCTION

1.1 Introduction

India is poised to become an economic superpower, and in order to achieve this, various legislations have been enacted to promote and develop foreign investment in the country. Experts worldwide have consistently recognized India as one of the fastest growing economies, applauding the ease of access to Indian markets. Until 2014, India ranked 142nd in the "Ease of Doing Business" rankings, but due to factors such as simplified Foreign Direct Investment regulations, advancements in E-Governance, and the repeal of outdated laws, the country has made significant progress. One notable development that has contributed to this improved ranking is the introduction of the Insolvency and Bankruptcy Code in 2016, which aimed to provide an exit mechanism for businesses.

The implementation of the Code was highly appreciated as it resolved the long-standing issue of business exits in the country. Prior to its introduction, India was known for its favourable business entry opportunities but lacked provisions for business exits. The Code addressed this gap and, alongside other reforms, contributed to the improvement of India's "Ease of Doing Business" ranking. This paper seeks to analyse the rationale behind the introduction of the Code and exploring its objectives and purpose in the Indian context. It examines the developments within the Code, highlighting their benefits for the general population and comparing the events that led to these advancements.

Additionally, the paper delves into cross-border insolvency issues and assesses the readiness of the Indian Code to handle evolving cross-border insolvency cases. It presents various case analyses to understand the practical application of the Code, examining both its shortcomings and advantages in different spheres. The paper provides a comprehensive analysis of the Code's scope, implementation, and outcomes based on cases adjudicated by the Hon’ble National Company Law Tribunal and various rulings passed by the Hon’ble Supreme Court of India.

Furthermore, it highlights the legislative amendments and Supreme Court rulings that have brought about fundamental changes in the Code. The paper aims to present an overarching perspective on the Code, emphasizing the need for further changes to effectively accomplish its objectives.

1.2 Statement of Problem

The introduction of the Insolvency and Bankruptcy Code in 2016 has significantly improved India's global image in terms of ease of doing business. However, the Code, which aimed to maximize asset value and ensure equal treatment for stakeholders, is facing threats due to its inherent shortcomings.

The primary problem is that the Code is being misused by corporate debtors and prospective bidders. Instead of functioning as an effective resolution mechanism, it is being exploited to legally evade outstanding dues and claims to creditors. The result is that the Code allows for large haircuts to be offered to creditors, effectively diminishing their claims, while benefiting the corporate debtors and prospective bidders who can start afresh without addressing their financial responsibilities.

This misuse of the Code undermines its intended purpose and poses a threat to the principles of asset maximization and equal treatment of stakeholders. The Code's current implementation allows for the erasure of outstanding debts and claims, benefiting certain parties at the expense of creditors. Such a situation not only compromises the rights and interests of creditors but also erodes trust in the insolvency resolution process.

Therefore, the problem at hand is the need to address the shortcomings of the Insolvency and Bankruptcy Code and ensure its proper implementation as an effective resolution mechanism. It is crucial to prevent the misuse of the Code by corporate debtors and prospective bidders, establish greater transparency and accountability in the insolvency resolution process, and strengthen the rights and powers of creditors.

1.3 Literature Review

- **Sumant Batra in his book Corporate Insolvency Law and Practice** provides for the roundabout of the entire Insolvency and Bankruptcy Code. The author dives into the various law committees' reports, suggestions and highlights the basis of introducing the Code in the Country. The author has very meticulously portrayed the entire development of the Code and have highlighted the need throughout his book. The book

deals with the scheme of arrangements for various entities and highlights the dimensions of the Code by providing insightful explanation to the Code. The author though had provided insights into the Code, but have failed to provide corresponding analysis of the working of the Code in the Country. The author has limited himself to providing only insights into the history and developments of the Code in the Country and have not provided insights into the practical implications of the Code in the Country.

- **Mr. Ravi Mittal in his Book IBC Idea, Impressions and Implementation** have taken a broad approach in covering every aspect of the Insolvency and Bankruptcy Code. The Book has covered variety of aspects and have culminated a large section of notable articles to provide a broad view of various topics covered in the Code. The Book provides for the opinions of various notable experts and is a step in providing brief summary of the dimensions of the Code. The book though acts as a compilation of experts views for the Code, but the same is only restricted to providing insights into the relative progress of the Code. The author have not dealt with the failure of the Code and have neither provided information relating to the practical implications of the Code in the Country. The author remains confined only to providing the merits of the Code and provides a one sided story of the implantation of the Code.
- **Krati Rajoria in his article Insolvency and Bankruptcy Code in India: The Past, the Present and the Future** draws a natural corollary in between the pre-existing laws and the Insolvency and Bankruptcy Code, 2016. The author provides a brief historical background relating to the Insolvency regime in the Country coupled with forecasting bright future in the Insolvency Regime with the Introduction of the Code. The author manifests into highlighting the increase in recoveries through the new code in comparison to the old laws and marks a statement to prove a bright future for the Code in the Country. The author however fails to underline the key differences in the Acts and further fails to provide the applicability of the old Acts in todays time, even after implementation of the Code.
- **Jason D. Woodard in his article Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code** highlights the improvement of Global Ranking in the Ease of Doing Business of the Country after introduction of the Insolvency Code. The author highlights the need and importance of the Code and provides as to how the Code helped in improving the Country's image across the World. The author further provides

for a comparative analysis study of the Insolvency Regime at both India and the United States. It also includes a study on the usage of the Code for recoveries of Bank's NPA and stimulates a passage for a positive recovery as compared to the pre-existing laws. The author commends the introduction of the Code and projects a much promising impact of the Code towards improving recoveries and improving the Country's image in terms of carrying out business. The author fails to provide relative statics to assert the claim of improving recoveries and only relies on statements released by various departments relating to improved recoveries.

- **V. Anantha Nageswaran and Aakanksha Arora in their article Insolvency and Bankruptcy Code: A Path Well Travelled** provides for a brief understanding of the Code coupled with comparisons across Countries, problems and future developments of the Code. The author most importantly highlights the importance of the "Ease of Exit Option" which has been provided through the introduction of the Code and further talks about the improvement in rankings for the Ease of Doing Business Worldwide. The author further transgresses into providing an insights into the success of the Code by providing data and statistics for the number of resolutions undergone under the Code and the recovery percentage accrued of the admitted and resolved cases under the Code. The author does not only limit themselves to the findings, but also divulges upon important aspect of cross border insolvency, by comparing the Insolvency regimes in Countries like that of The United States and The United Kingdom. Based on the comparisons and statistics provided, the authors highlights certain concerns associated with the Insolvency Regime and provides for recommendations to overcome the barriers associated for a more robust implementation and success of the Code. The author however provides limited statistics to assert its claim and further does not provide sector wise statistics, which would be essential in determining the recoveries under the Code.
- **Pratik Datta in his article The Evolving Indian Distressed Debt Market: Reading the Tea Leaves** provides for a detailed study of the distressed market in the Country since Independence and highlights the important provisions which were in existence for dealing with the problem. The author highlights the post-independent laws to deal with the issue and more particularly to the Banking Act and the Companies Act. Further, the author envisages on the other insolvency laws which were brought forward to deal with the matters of Insolvency and bad debts in the Country. The author looks

upon a leap with the introduction of the Code and further provides for various alternative mechanism adopted by the Country to necessitate lowering down of NPA problems and effective means of solving the problem with the new Code. The author however fails to provide relative insights into the applicability of the Code in the banking sector and further assert its claim of solving the NPA problem through the Code.

- **Jai Deo Sharma in his article Adherence to Timelines is of Essence in Insolvency Resolution** provides and necessitates the need for timelines in the entire Insolvency Proceeding. The author acknowledges the recommendation which was provided by the Bankruptcy Law Reform Committee, which had provided for the same stand and effectively had carved out provisions in the Code. The author identifies the need for time adherence since the assets diminish value when prolonged and further for the fact that businesses suffer due to prolonged period of adjudication. The author has highlighted the very need in the Code and have provided statistics indicating the delay in disposition of cases under the Code. The author further contemplates the reason citing heavy caseloads as compared to the number of National Company Law Tribunal in place. Further, the author suggests certain ways to deal with the problem and re-iterates the need for time adherence in the cases tried under the Code. The author though suggest certain measures to ensure timeliness under the Code, such measures does not seem effective in ensuring that the assets does not diminish its value in the entire process.
- **R.K. Bansal in his article IBC The Journey So Far, Challenges Ahead And Way Forward** discusses the entire working of the Code by analysing the number of admitted cases, recoveries therein and challenges attached to the proceedings. The author has very articulately identified the challenges and have successfully highlighted the judicial pronouncements which has/had large bearing in the Insolvency and Bankruptcy Code, 2016. The author further analyses the impact of the Code in the society and have highlighted the average number of days taken for adjudication and repudiation of cases. The author identifies the Code as a major achievement in terms of Ease of Doing Business and further applauds better recovery than its predecessor with the hope that the Code strives and proves it much better in the coming years. The author while providing for better recoveries have failed to provide a complete picture of the

recoveries made in various sector and have only relied upon the Global Ease of Doing Business Ranking for asserting the claims of higher recoveries under the Code.

- **Udichilbarna Bose, Stefano Filomeni and Sushanta Kumar Mallick in their article Effectiveness of Recent Bankruptcy Reforms in India** have highlighted the Code as a much-sought reform in the Country. The authors transgress to prior regimes, wherein the authors have admitted the fact that there was no efficient bankruptcy reform prior to the introduction of the Code in the year 2016. The author further provides for the efficient role of IBC in managing the firms which was admitted under the Code and draws an analysis based on the distressed firms and non-distressed firms. The author however only portrays a still picture of the Code at the time of its implementation. The author does not transgress into details of the applicability of the Code and further does not provide any data and analysis into the overall effect of the Code in the Country.
- **Ajanta Gupta and Ritesh Kavdia in their article Demystifying the Position of Secured Creditors under the Code** provides for striking a balance in between the stakeholders in pursuant to the objectives of the Code. The author highlights the preference of secured creditors over other financial creditors and as such questions the fulfilment of the objective of the Code. The authors however provides for a catena of judgements wherein secured creditors are being provided an upper hand in terms of payment of dues. The authors further gets involved in analysing the foreign jurisprudence along with International perspective on Insolvency Laws and thereby conclude that the Code maintains a holistic equilibrium for the fact that non-preference treatment of secured creditors would jeopardize the economy and further the fact that to ensure the best possible outcome Committee of Creditors is already in existence to provide every stakeholder an opportunity of being heard and as to balance the objective of the Code. The author however does not provide an analysis as to the need for adoption of "Creditors in Control" mechanism under the Code and further does not provide for any comparative analysis as to the outcome of the Creditors in Control mechanism to that of the Debtors in Possession Model, which is prevalent in developed nations.
- **Debajyoti Ray Chaudhari in his article Information Utility: Evolution of an Institution** discusses the need for setting up of a universal asymmetry for the Indian Credit Market. The Author acknowledges the need for setting up of Information Utility as was provided by the Committee and highlights the importance of such utility in the

staggered credit market of the Country. The author provides for timely recovery of dues, early detection of stressed assets along with broader support to the Adjudicating Authority as some advantages of the Information Utility provided under the Code and as was rightly recommended by the Committee. The author while providing for the need for setting up of Information Utility under the Code, fails to acknowledge the infrastructure shortcomings, which hinders the implementation of Information Utility as envisaged under the Code.

1.4 Aim

The basic aim of the thesis is to critically analyse the Insolvency and Bankruptcy Code, 2016 and facilitate the need for amendment/upgradation of the Code to ensure fulfilment of its objective and further to ensure that any shortcomings are taken care for ensuring protection of rights of the stakeholders.

1.5 Research Objectives

The Objective outlined for the Thesis are as under:

a. To analyse the need for introduction of the Insolvency and Bankruptcy Code, 2016.
b. Analyse the objective of the Code.
c. Analyse and interpret landmark cases arising out of the Code.
d. Analyse the practical implication of the Code in the Economy.
e. Highlighting the need for reforms in the Code to ensure adequate protection of rights of the stakeholders.
f. Providing for necessary suggestions to revisit the Code.

1.6 Scope and Limitations

The scope of this analysis focuses on the Insolvency and Bankruptcy Code in India, specifically examining its impact on the country's global image in terms of ease of doing business. It aims to evaluate the Code's ability to maximize assets and provide equal treatment to stakeholders. The analysis considers the misuse of the Code by corporate debtors and prospective bidders and suggests potential improvements to address these issues.

The limitation of the present paper is that the present analysis primarily concentrates on the impact of the Insolvency and Bankruptcy Code on the ease of doing business in India. It may not encompass all aspects of the Bankruptcy Code or its wider implications. Further, the Insolvency and Bankruptcy Code is a complex legal framework, and this analysis does not provide a comprehensive legal interpretation or advice. It aims to highlight general issues and potential improvements rather than provide detailed legal guidance. Further, the analysis recognizes the need for improvements but does not delve into the practical challenges or feasibility of implementing the suggested measures. The actual implementation and effectiveness of the proposed solutions may depend on various factors and require further examination

1.7 Research Questions

1. What was the need of introducing the Insolvency and Bankruptcy Code, 2016?
2. Whether the Code was beneficial then already existing laws?
3. Whether the Code violates the fundamental rights as enshrined in the Constitution of India, 1950?
4. Whether the Code attained its objective as laid down by the legislator?
5. How the Code has affected various sectors of the Economy?
6. Whether the Code needs amendments to fulfil its objective?

1.8 Hypothesis

The implementation of the Insolvency and Bankruptcy Code, 2016 requires necessary amendments to address its shortcomings and ensure the achievement of its intended objectives. The Insolvency and Bankruptcy Code in India is facing challenges in its current implementation, primarily due to its misuse by corporate debtors and prospective bidders. To maintain the integrity of the Code and achieve its intended purpose of maximizing assets and ensuring equal treatment to stakeholders, necessary improvements, including stricter regulations, enhanced transparency, and strengthened creditor rights, are required.

1.9 Research Methodology

The legal research conducted for this study is primarily focused on doctrinal legal research and follows an analytical methodology. The research has relied on both primary and secondary sources of data to gather relevant information. Primary sources, including legislations and committee reports, have been referred to extensively in relation to the research topic. The legislations and committee reports serve as important primary sources to analyse the provisions, objectives, and developments in the specific area of law. Secondary sources, such as books, journals, articles, and online databases, have been relied upon to supplement the primary sources and provide a broader understanding of the research topic. The doctrinal legal research approach, along with the use of analytical methodology, facilitates a thorough analysis of the legal principles, rules, and developments pertinent to the research area, contributing to the generation of meaningful findings and conclusions.

1.10 Research Design

The Thesis paper has been divided into 5 Chapters for presenting a detailed study and analysis:

a. **Chapter 1: Introduction:** The Introduction Chapter deals with providing an overview of the basis of the thesis paper by providing insight into important areas aimed to be covered under the present paper. It provides an overall narration of the research areas divulged into the current paper and aims to provide a systematic understanding of the scheme followed in the current paper.

b. **Chapter 2: Genesis and development of the Insolvency and Bankruptcy Code, 2016:** The Second Chapter deals with the overview of the Code and aims to provide a brief historical background towards the introduction of the Insolvency and Bankruptcy Code, 2016. It aims to provide an historical perspective along with the previous laws, which were in existence prior to introduction of the Code. Along with providing the historical perspective, the Chapter aims to provide an overall understanding of the Insolvency and Bankruptcy Code, 2016 by transgressing into important provisions under the Code and providing for the functioning of the Code.

c. **Chapter 3: Analysing the Implications of the Code** The Third Chapter deals with the various challenges associated with the Code. It provides for an overall analysis of the various judgements of the Hon'ble Supreme Court, which had large impact in the Code and also analyses the various other cases wherein the Code was heavily mis-utilized.

d. **Chapter 4: Comparative Analysis:** The Fourth Chapter deals with comparing the Code with that of international Countries. It also aims to shred light on the Cross Border Insolvency issue by analysing an important case and further analysing the need for developing and incorporating the need for cross border insolvency in the Code.

e. **Chapter 5: Conclusion:** The Final Chapter wraps the findings and analysis and provides for a reasonable conclusion along with providing for recommendations and suggestions.

CHAPTER-2: GENESIS AND DEVELOPMENT OF THE INSOLVENCY AND BANKRUPCTY CODE, 2016

2.1 Historical Perspective

2.1.1 Pre-Independence Era

Throughout the times, the problem associated with recoveries of monies from corporations/individuals which debts have been classified as Bad Debts have always been a concern. The genesis of dealing with the problem can be traced back to the Government of India Act, 1800[1], wherein insolvency proceedings powers were provided to Madras Supreme Court and Fort Williams Supreme Court to draw up rules and regulations for trying any insolvency case. Later, as the Britishers trade had expanded in the Country, Insolvency Courts were being established.

Soon thereafter, as the trades kept on flourishing the British Government had deemed it appropriate to pass a new legislation to deal with Insolvency and accordingly India's first Insolvency Act was passed, which was termed as the Indian Insolvency Act, 1848 and was restricted to Presidency Town of then British Ruled India. With time development of a mature Act to ascertain the overall objective of Insolvency was observed and following which the Presidency Towns Insolvency Act, 1909 was passed by the Imperial Legislative Council. The Imperial Legislative Council was the legislative body which was established by the British. The Act was passed with the broad perspective of ensuring that unsecured creditors were being paid against their debts and that the debtors were able to find a solution to meet up their dues against the creditors. The Act dealt with Individual Insolvency provisions in the Country and even today is in existence for adjudicating the Individual Insolvency cases, as the Part dealing with the Individual Insolvency in the present Code is not notified by the Government till date. Upon implementation and proper functioning of The Presidency Towns Insolvency Act,1909 it was found to be more inclined towards debtors, who were undergoing Insolvency under the Act, as compared to the creditors who were supposed to recover their dues from the debtors. Accordingly, after Independence, various Law Commission Reports were provided for improving and amending the existing Act. The Act was however not amended and as such the

[1] Law Commission of India, Twenty-Sixth Report on Insolvency Laws, 1964, Ministry of Law (April, 30, 2023, 5:55 PM), https://ibbi.gov.in/uploads/resources/February%201964,%20Twenty-sixth%20Report%20of%20the%20Law%20Commission%20on%20Insolvency%20Laws.pdf.

Act is in existence till date, even after introduction of the Insolvency and Bankruptcy Code, 2016.[2] The Act was time and again re-visited, however instead of developing and amending the aforesaid Act, the Government of India after its Independence from the Britishers Rule, introduced a series of other laws to cater to the issue of debts repayment.

2.1.2 Post Independence Era

After Independence, a series of legislations were brought forward. Various Committees were being formed for adjudicating and resolving the Insolvency Laws in the Country. It may be necessary to provide an oversight of the various Committees which were set up and further which even led to introduction of significant legislation.

Table 3.1: Government committees on bankruptcy reforms

Year	Committee	Outcome
1964	24th Law Commission	Amendments to the Provincial Insolvency Act, 1920.
1981	Tiwari Committee (Department of Company Affairs)	SICA, 1985.
1991	Narasimham Committee I (RBI)	RDDBFI Act, 1993.
1998	Narasimham Committee II (RBI)	SARFAESI Act, 2002.
1999	Justice Eradi Committee (GOI)	Companies (Amendment) Act, 2002, Proposed repeal of SICA.
2001	L. N. Mitra Committee (RBI)	Proposed a comprehensive bankruptcy code.
2005	Irani Committee (RBI)	Enforcement of Securities Interest and Recovery of Debts Bill, 2011. (With amendments to RDDBFI and SARFAESI).
2008	Raghuram Rajan Committee (Planning Commission)	Proposed improvements to credit infrastructure.
2013	Financial Sector Legislative Reforms Commission (Ministry of Finance)	Draft Indian Financial Code which includes a 'Resolution Corporation' for resolving distressed financial firms.

Table 1: Indicating the Various Committee recommendations to the Government before the Bankruptcy Law Reforms Committee.

Source: The Report of Bankruptcy Law Reform Committee on November, 2015.[3]

Based on the tabular representation, it could be easily understood that various committees have earmarked their recommendations towards bringing the erstwhile laws prior to the Introduction

[2] Insolvency & Bankruptcy Code § 243 (2016).

[3] Bankruptcy Law Reform Committee, The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, Bankruptcy Law Reforms Committee (April, 30, 2023, 8:30 PM), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

of the Insolvency and Bankruptcy Code, 2016 and from the presented fact, the need and development of Insolvency Laws could be meted out.

Though, the problem of debts was not new, however it may be noted that the Banking Regulations Act, 1949[4] and Companies Act, 1956[5] was passed by the Indian Parliament and as such the problem of bad debts started further evolving. Many Individuals along with Companies took loans from banks and had defaulted upon payments, giving rise to Non-Performing Assets. Furthermore, with the emergence of various industries, additional challenges arose, including operational and management failures leading to the closure of companies without the payment of dues. These issues garnered immediate attention, prompting the need for swift action and resolution. Thereafter, The Sick Industrial Companies Act, 1985[6] (commonly referred to as SICA) was passed. Further, to transgress upon recovery of unpaid dues, the establishment of Debts Recovery Tribunals were made under The Recovery of Debts due to Banks and Financial Institution Act, 1993[7] Further, to protect and safeguard the interest of the banks, the Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act, 2002[8] was passed, which aimed at providing relief to the banks by enabling recoveries of their dues without the hassle of approaching the Debts and Recovery Tribunal. In other words, the Act aimed at easing the process of recoveries of dues by the banks.

For a better understanding of the laws which were in place prior to the introduction of the Insolvency and Bankruptcy Code, 2016, a brief summary of the laws is provided as under

- **The Recovery of Debts due to Banks and Financial Institution Act, 1993**[9]: The year 1991 witnessed the large scale development with the adoption of the Liberalisation, Privatisation and Globalisation (LPG Scheme) in the Country, which saw a major boost in trade and commerce with an increased role of the banks in the Country.[10] With increased trade, the dependency on banks for loans increased and so also the Non-Payments of Bank Loans. The issue was long pending and immediately the Act was passed by the Parliament. The Act paved way for establishment of Debt Recovery

[4] Banking Regulations Act (1949).
[5] Companies Act (1956).
[6] The Sick Industrial Companies Act (1985).
[7] The Recovery of Debts due to Banks and Financial Institution Act (1993).
[8] Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act (2002).
[9] The Recovery of Debts due to Banks and Financial Institution Act (1993).
[10] ET Online, On this day in 1991: A landmark budget that changed India's fortunes, The Economic Times (April, 30, 2023, 6:00 PM), https://economictimes.indiatimes.com/news/economy/policy/on-this-day-in-1991-a-landmark-budget-that-changed-indias-fortunes/articleshow/93090439.cms?from=mdr.

Tribunals (DRTs) across the Country with the aim of faster disposal of cases relating to the default in payment of dues to the banks. The Act was brought forward with the sole motive of dealing with the NPA crisis which was looming towards the banking sector.

- **Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act, 2002[11]:** The establishment of DRTs was aimed at solving the emerging crisis in the banking system. However, the crisis started further depleting, and thereafter in the year 2002, the SARFESAI Act was enacted by the parliament. The Act provided powers upon the banks to directly recover their dues without the need for them in approaching the DRTs. The Act was aimed to provide respite to the banks from the rising NPA situation and further maintain an equilibrium with the economy. [12] The Act provided for three model recoveries methods, viz.:
    a. **Securitization Method:** Under this method, the role of Qualified Institutional Buyers (QIB) and Assets Reconstruction Companies (ARCs) were important, as they were involved in analysing and investing in various assets involved.[13]
    b. **Asset Reconstruction Method:** Under this method certain NPAs were directly taken over by the ARCs, resulting in complete transfer of the assets along with the responsibility upon the ARCs to pay the bank directly to the Banks.
    c. **Enforcement of Securities outside the Court:** This method is widely followed and commonly observed, wherein banks resort to taking possession of the mortgaged assets upon providing notice in accordance with the law.

The aforementioned developments in terms of recoveries of dues and/or relating to insolvencies were the only statutes which were in existence in the Country till the implementation of the Insolvency and Bankruptcy Code, 2016. It is interesting to note the numerous statutes which were in existence prior to the Code came to a standstill for the fact that the very core objective of the Act had diminished over time.[14] Further, the recoveries which were pressed upon in the

[11] Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act (2002).
[12] Clear Tax, SARFESAI ACT, 2002- Applicability, Objectives, Process, Documentation, ClearTax (April, 30, 2023, 6:25 PM), https://cleartax.in/s/sarfaesi-act-2002.
[13] Groww, Qualified Institutional Buyers, Groww (April, 30, 2023, 6:30 PM), https://groww.in/p/qualified-institutional-buyers.
[14] Satya Sontanam, All you wanted to know about SARFESAI Act, The Hindu Business Line (April, 30, 2023, 6:50 PM), https://www.thehindubusinessline.com/opinion/columns/slate/all-you-wanted-to-know-about/article31559808.ece.

Act fell tremendously, with rising Non-Performing Assets[15], increased corruption and heavy workload upon the judiciary.[16] On account of rising problems and staggering low level of recoveries[17], there arose a dire need for introducing special provisions and amending the prevalent Acts. Likewise, amendment was brought forward based on various consultations and recommendations to increase the horizons of the Act and provide for catena of protection to the creditors specially to that of secured creditors.[18]. It is interesting to note that that such amendments were only brought forward in the year 2016, i.e., at the time when the Code was enacted.

Nevertheless, the pre-existing laws created a huge gap in the recovery of monies/debts and was hurled to be regarded as a failure in terms of recoveries of dues.[19] Further, the stringent laws coupled with time consuming process was largely hounded upon by various investors and stakeholders, and the need for an Easy Exit of Businesses were sought. Observing the results of the existing laws in place and the need for an Easy Exit Option, the Ministry of Finance, Government of India ordered for setting up of a committee which was to be entrusted with the task of suggesting reforms in the existing laws while considering the practical scenario and the need for providing an easy exit option to businesses.[20] The Committee was headed by Dr. T.K. Viswanathan and was known as the Bankruptcy Law Reforms Committee (BLRC)[21] The Committee immediately after its formation was pleased to take over the matter and within a short period of a year produced the report before the Hon'ble Finance Minister for its due

[15] Amit Mudgill, NPA additions of lenders in 2016 equalled m-cap of 33 of 41 listed banks; Is the pain Over?, The Economic Times (April, 30, 2023, 6:55 PM), https://economictimes.indiatimes.com/markets/stocks/news/npa-additions-of-lenders-in-2016-equalled-m-cap-of-33-of-41-listed-banks-is-the-pain-over/articleshow/56269368.cms?from=mdr.

[16] Gunit Chadha, NPA problem: Bankers alone should not be blamed, The Economic Times (April, 30, 2023, 6:57 PM), https://economictimes.indiatimes.com/blogs/et-commentary/npa-problem-bankers-alone-should-not-be-blamed/.

[17] Subhashis Kundu, Debt Recovery Dilemma: RDDB&FI V/s. SARFESAI, Money Control (April, 30, 2023, 7:10 PM), https://www.moneycontrol.com/mccode/news/lp_news_detail.php?autono=2332&classic=true.

[18] Richa Saraf, Notification of Amendments to SARFESAI Act, Vinod Kothari (April, 30, 2023, 7:15 PM), https://vinodkothari.com/wp-content/uploads/2020/01/SARFAESI-amendments-1.pdf.

[19] RBI, Movement of Non-Performing Assets (NPAs) of Scheduled Commercial Banks, Reserve Bank of India (April, 30, 2023, 7:30 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

[20] Adv. Siddhant Kuwad, Reforms Committee under IBC, Edu Law (April, 30, 2023, 7:30 PM), https://portal.theedulaw.com/SingleNotes?title=reforms-committee-under-ibc#:~:text=The%20objectives%20of%20the%20Committee,of%20debt%20financing%20across%20instruments.&text=The%20Committee%20has%20recommended%20a,laws%20and%20amending%20six%20others.

[21] Anoop Rawat, 5 Year Journey of the Insolvency and Bankruptcy Code, Shardul Amarchand Mangaldas (April, 30, 2023, 8:05 PM), https://www.amsshardul.com/insight/5-year-journey-of-the-insolvency-and-bankruptcy-code/.

consideration.[22] The Committee submitted its report in two parts, one being that of "Rationale and Designs and Recommendations" and the other one being the "A Comprehensive Draft Insolvency and Bankruptcy Bill covering all entities" The Report identified the challenges in the existing systems and pointed out many important aspect, most important being that of recognizing and revisiting the role of creditors in cases of default. The Committee highlighted the depleting situation of the creditors in the current situation, wherein creditors did not enjoy protection in case of defaults of payment, and further such situation giving rise to low credit reliability. Further, the problem of a universal Insolvency Code was provided by the Committee, by highlighting the key aspect of multiple laws for multiple sets of persons. Moreover, apart from identifying the two critical problems, the Committee covered every aspect and submitted its recommendation along with the draft proposed Law. The Committee recommend the following in its Report:

- **Insolvency Regulator:** The Committee recommended the establishment of regulator to monitor the various branches like that of Insolvency Professionals, Insolvency Professional Agencies, and Information Utilities.
- **Adjudicating Authority:** The need for establishment of National Company Law Tribunal for adjudication of matters relating to Companies, Limited Liabilities Firms was emphasised upon along with emphasizing the need for DRTs to act as adjudicating authority for adjudicating cases of Individuals, Unlimited Liabilities Firms.
- **Insolvency Professionals[23]:** The need for Insolvency Professionals was provided to cater to a smooth process and further the authority for checking upon such Insolvency Professionals and Insolvency Professional Agency was re-iterated.
- **Insolvency Information Utilities:** The setting up of a database to collaborate and authenticate data was suggested. The primary aim was to collect, store and authenticate data not only that of Companies but individuals as well.

[22] Bankruptcy Law Reform Committee, The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, Bankruptcy Law Reforms Committee (April, 30, 2023, 8:30 PM), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[23] Press Information Bureau, Summary of the Recommendations of the Bankruptcy Law Reforms Committee (BLRC), Government of India (April, 30, 2023, 8:50 PM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=130208.

- **Essence of Time:** The Committee recognized the essence of time in matters of insolvency and bankruptcy and suggested various timeframes for adjudication and settlement of cases.
- **Repeal and Transfer of Proceeding:** The Committee suggested for transfer of every cases which was recommended under SICA Act to undergo Reconstruction under the Board for Industrial and Financial Reconstruction. Further, the transition process and transfer timings were also provided to be done in a time bound manner.
- **Including Individual and Unlimited Partnership Firms:** The Committee suggested for a detailed structure to include individuals and unlimited partnership firms within its ambit. It suggested arrangements for various income groups belonging to the above class to go insolvency proceedings under the suggested Code.

The Committee put forth several suggestions, but the ones mentioned above were recognized as the most significant and pivotal recommendations in establishing a new framework for addressing insolvency cases in the country. While the committee's report played a transformative role in the introduction of the Insolvency and Bankruptcy Code, 2016, it is important to acknowledge the reports of various other committees that contributed to the development of the preceding acts.

Furthermore, sticking to the fact that in the Month of November, 2015 the Bankruptcy Reform Committee had submitted its report to the Ministry of Finance for its perusal and necessary action. It may be noted that the after receipt of the Report, the then Finance Minister Shri Arun Jaitley had moved a Bill titled "The Insolvency and Bankruptcy Code, 2015" on 23rd December, 2015 before the Lok Sabha to refer the Bill to the Joint Committee.[24] It may be noted that both the housed had voted in favour of the motion and accordingly, a Joint Parliamentary Committee was formed and entrusted with the task of preparing and submitting the report for the presented bill. The Joint Parliamentary Committee held various discussions with experts and stakeholders and accordingly presented a report before the Lok Sabha on the 28th April, 2016 mirroring out changes suggested by taking into account the recommendations

[24] Lok Sabha, Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Lok Sabha Secretariat (April, 30, 2023, 9:30 PM),https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf.

of the experts and other stakeholders.[25] The Changes in the report were duly taken into account and accordingly after a month the Insolvency and Bankruptcy Code, 2016 was presented before the Houses and which was consented and ratified to by the Hon'ble President of India on the 28th of May, 2016. The Code once dreamt of and suggested by the Bankruptcy Law Reform Committee was a reality within 6 months of its report and the same was introduced with the aim of maximizing value of assets, balancing interests of the stakeholders and further establishment of an Insolvency and Bankruptcy Board of India and with the broader objective aimed to override any other existing laws on matters pertaining to Insolvency and Bankruptcy Code, 2016.[26]

The genesis of Insolvency and Bankruptcy Code, 2016 as provided above establishes the very fact that the need for Insolvency Laws in India is real and further many committees have time and again worked towards various other laws, which turned towards the direction of insolvency. Further, the fast adaptability of the Code from the recommendation of the Bankruptcy Law Reform Committee established the fact for the dire need of a legislation to not only put an end to the old laws, but also to the fact of providing an easy exit opportunity to business and further improve the Ease of Doing Business Ranking of the Country.[27]

2.2 Understanding the Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 had received the President's Assent on the 28th of May, 2016 and soon thereafter the Act was published and notified in the official gazette of the Government of India. The primary objective of the Code was to consolidate all existing bankruptcy and insolvency Acts. However, to this day, certain parts of the Act remain unnotified by the Government of India. As a result, the old Acts still govern the unnotified parts of the Code, leading to a coexistence of the old Acts alongside the Code. Apart from the basic objective of streamlining all the Acts, the Code aimed at providing value maximization

[25] Lok Sabha, Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Lok Sabha Secretariat (April, 30, 2023, 9:30 PM),https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf.

[26] Abizer Diwnaji, India: The Insolvency and Bankruptcy Code, 2016, Mondaq (May, 02, 2023, 1:30 PM), https://www.mondaq.com/india/insolvencybankruptcy/533486/the-insolvency-and-bankruptcy-code-2016.

[27] Ministry of Commerce & Industry, Ease of Doing Business, Government of India (May, 02, 2023, 1:50 PM), https://transformingindia.mygov.in/wp-content/uploads/2021/09/doc202110451.pdf.

along with balancing stakeholders interest along with setting up of a Governing Body, i.e., the Insolvency and Bankruptcy Board of India (commonly referred to as IBBI). The Code was divided into 5 parts, wherein Part I[28] dealt with the preliminary aspect of the Code providing for definition and applicability, Part II dealing with the Insolvency Resolution and Liquidation specifically for Corporate Persons, whereas Part III of the Code dealing with same aspect specifically for Individuals and Partnership Firms. The Code apart from providing for provisions dealing with insolvency resolution and liquidation for both Corporate Persons and that of Individuals and Partnership, also negated an important aspect of regulation of Insolvency Professionals, Insolvency Professional Agencies and the Information Utilities under Part IV of the Code. The Code however also inculcates other relevant provisions and is contained under Miscellaneous under Part V of the Code.

Though, the Code extensively covers 5 parts, however it may be noted that not all 5 parts of the Code are notified by the Government of India, and as such Part I, II, IV and some provisions of Part V are notified by the Government of India. Further, Part III of the Code, which deals with Individual and Partnership Insolvency are not yet notified and as such the same continues to be governed by the erstwhile Presidency Town Insolvency Act, 1909.[29]

On a wider pedestal arising out of introspection of the Code, the Code may be understood on various parameters such as objective, concept, process and the role and responsibilities of the IRP.

2.2.1 Objectives of the Code

The objectives of the code as has been narrated and provided explicitly provides as under:

- **To reorganize, consolidate laws relating to Insolvency of all class of persons, be it Corporates, Partnerships, and Individuals[30]:** The present Code aims to override and accommodate all existing provisions which were prevalent and were actively used for insolvency and restructuring purposes. The notable laws which have already been highlighted above includes SICA, SARFESAI and the Recovery of Debts due to Banks

[28] Legislative Department, The Insolvency and Bankruptcy Code, 2016, Ministry of Law and Justice (May, 02, 2023, 03:30 PM), https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf.
[29] Sunil Gupta, Personal Guarantors of Corporate Debtors Finally in the Net of IBC, SCCOnline (May, 02, 2023, 03:45 PM), https://www.scconline.com/blog/post/2022/06/29/personal-guarantors-of-corporate-debtors-finally-in-the-net-of-ibc/.
[30] Legislative Department, The Insolvency and Bankruptcy Code, 2016, Ministry of Law and Justice (May, 02, 2023, 03:30 PM), https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf.

and Financial Institution Act, 1993. The earlier Acts provided for the "Debtor In Possession" model wherein even after default of any dues had occurred and matters were brought before the Hon'ble Adjudicating Authority for adjudication, the debtors, i.e., the original owners/promoters/directors remained to be in custody of the businesses and such much less scope of recoveries were available to the creditors. However, upon enactment of the present code, the entire gamut of "Debtor in Possession"[31] got converted into "Creditor in Control" wherein the creditors were provided with the powers to take decision on behalf of the debtor's business and further helping in protection of the interest and stakes of the creditors. The move and transition was aimed in providing for maximized value of assets in case of liquidation, which was/is in fact one of the core objectives of the Code.

- **Promotion of Entrepreneurship:** The other objective of the Code is to promote entrepreneurship spirit. The move is aimed for the fact that the Code aimed to provide an Easy Exit Opportunity to businesses. On light of the same, it aims to promote entrepreneurship spirit among the people with the Ease of Exit Option as is provided with the very introduction of the Code.
- **Increasing Availability of Credit:** The Codes other objective is to create a positive impact in the economy through improving and increasing availability of credit. The same is aimed to be achieved through the fact that Creditors are supposedly to be provided Control under the Code against the Debtor in Possession mechanism. Further, the mechanism devised in the Code of distribution of proceeds among the secured creditors is also seen as another way of achieving the said objective.
- **Balancing the Interest of Stakeholders[32]:** The Act identified the various stakeholders associated with any debtor and hence to provide equitable treatment and for protection of rights of the stakeholders, the objective haven been very well laid down in the Code. The Code through provision of providing for voting rights coupled with representation and further to the stage of distribution of proceeds aims at balancing the Interest of the Stakeholders.
- **Priority of Government Payment Dues:** The Code in its objective have laid down priority in payment of Government Dues at the time of distribution of liquidation

[31] ClearTax, Insolvency and Bankruptcy Code, 2016, ClearTax (May, 02, 2023, 03:50 PM), https://cleartax.in/s/insolvency-and-bankruptcy-code-2016.

[32] Legislative Department, The Insolvency and Bankruptcy Code, 2016, Ministry of Law and Justice (May, 02, 2023, 03:30 PM), https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf.

proceeds. The move is aimed at ensuring that Government can recover the monies from Debtor, who was supposed to deposit taxes, already collected by the debtors. The move is aimed to ensure that tax recoveries are being made effectively at times when a person is being admitted for Insolvency Proceedings under the Code.

- **Establishment of the Insolvency and Bankruptcy Board of India:** The last objective of the Code is to establish the Insolvency and Bankruptcy Board of India (IBBI). The setting up of IBBI was suggested by the BLRC and accordingly was supposed to be an organization for the management of Insolvency Professionals, Agencies thereto and for maintenance of the IUs. Based on the recommendation, the same have been codified under the Code and the Code explicitly includes the same as one of its core objectives.

The above highlighted are the broad objectives provided under the Code. The objectives fomented in the entire codification of the Code and as a result of which the provisions under the Code are being devised with the motive of fulfilling the very objectives of the Code.

2.2.2 Important Concepts covered under the Code

Before bridging onto the understanding of the Code, it is imperative to understand and look upon certain important concepts covered under the Code. For providing the same, important developments in the Code by way of including comprehensive definitions of important terms needs to be observed. Some of the key definition like Claims, Corporate Debtor, Creditors Insolvency Professional, Financial Creditor and Operational Creditor are important in the Code, which provides a more holistic meaning under the Code as compared to the definition covered in other statues.

The definition of the claim is covered under Section 3(6) [33] of the Code. The Definition explicitly provides for Claim to mean for right to payment, which may not be arising out of any judgement, or be it disputed/undisputed, secured/unsecured.[34] Further, it is understood to mean a Right to remedy[35] arising out of any breach of contract giving rise to right to payment.

The definition as provided is a more comprehensive and inclusive definition for the debt resolution under the Code. Through the comprehensive definition, the Code aims to cover all aspects, which may give rise to any debt. The broader definition of not only including the acknowledged debts under claims, but also including any judgements passed for payments is

[33] Insolvency & Bankruptcy Code § 3(6) (2016).
[34] Insolvency & Bankruptcy Code § 3(6)(a) (2016).
[35] Insolvency & Bankruptcy Code § 3(6)(b) (2016).

also included under the Code, which aims to provide a more fair and equitable mechanism for debt resolution of the creditors.

Further, the definition of Corporate Debtor as covered under Section 3(7) [36] of the Code aims to provide a distinction to the defaulting parties. The definition of Corporate Debtor specifically includes all companies under its ambit and does not differentiate in between any Government Companies or Private Limited Companies. Through, providing a specific definition, the Code aims to minimise any confusion and provide a much-streamlined process of resolution under the Code.

The definition of Creditors, as provided under Section 3(10)[37] of the Code also need to be analysed, which though having common meaning and understanding is being divided and categorised onto include various creditors. The Creditors are being provided specific definition under the Code over and above the general meaning of Creditors. Two important classification of creditors is that of Financial Creditors, covered under Section 5(7) [38] of the Code and further the definition of Operational Creditors covered under Section 5(20) [39] of the Code. Through such distinction, effort has made in the Code to ensure protection of rights of various stakeholders and further provide for equitable treatment under the Code.

Another important definition provided under the Code relates to that of Insolvency Professional, which is covered under Section 3(19) [40] of the Code. The inclusion of Insolvency Professional, who is enrolled under Section 206[41] of the Code has been provided to ensure that the entire resolution is professionally handled and as such efficient and effective management of the entire process is being conducted by such professionals under the Code.

In having provided with a summary of important definitions covered under the Code, it would be important to introspect as to some aspect in the Code, specifically Part II of the Code, which covers Insolvency Resolution and Liquidation for Corporate Persons, as this Part has been notified and Part III, which deals with Insolvency Resolution and Liquidation for Individuals and Partnerships have not been notified till date.

[36] Insolvency & Bankruptcy Code § 3(7) (2016).
[37] Insolvency & Bankruptcy Code § 3(10) (2016).
[38] Insolvency & Bankruptcy Code § 5(7) (2016).
[39] Insolvency & Bankruptcy Code § 5(20) (2016).
[40] Insolvency & Bankruptcy Code § 3(19) (2016).
[41] Insolvency & Bankruptcy Code § 206 (2016).

For filing an application to the Hon'ble Adjudicating Authority for determination of the claim, it is necessary that the Corporate Insolvency Resolution Process can only be started by either the Corporate Debtor[42] itself, or through the financial creditor[43] and/or through the Operational Creditor[44] and only in cases where the minimum threshold limit is breached[45], i.e., one crore, as was recently notified by the Government.[46] It is mandatory under the Code, that a notice shall be provided to the corporate debtor by the Operational creditor, when in case any debt is being owed to operational creditor under the Code. In such circumstances, it is important to note that the operational creditor is supposed to provide a notice to the Corporate Debtor and accordingly Corporate Debtor is mandatorily required to submit a reply within 10 days of receipt of the notice[47]. The notice as stipulated is supposed to contain a repayment demand to the Corporate Debtor and in case where the Corporate Debtor failed to reply within the stipulated time and further failed to repay the owed amount, then the operational creditor stands at liberty to file claim before the Hon'ble Adjudicating Authority, in this case before the Hon'ble National Company Law Tribunal. However, the Hon'ble NCLT before admitting the claim for hearing is entrusted with the task of verifying the claims raised by the operational creditors against the Corporate Debtor through the invoices raised and submitted by the Operational Creditors.[48] As stated and provided under the Code, such exercise is to be completed within 14 days of receipt of any such application and accordingly from the date of approval of the application, the Corporate Insolvency Resolution Process is said to be flagged off.

Further, in case where the Financial Creditors are involved for initiation of Corporate Insolvency Resolution Process (CIRP), the Financial Creditors are required to directly file an application to the Hon'ble NCLT and alike that of Operational Creditors is not required to provide for a mandatory notice of 14 days, and instead upon default of payment by the Corporate Debtor can directly file an application for the initiation of the Corporate Insolvency Resolution Process (CIRP). Further, the steps remained alike that of operational creditors,

[42] Insolvency & Bankruptcy Code § 6 (2016).
[43] Insolvency & Bankruptcy Code § 7 (2016).
[44] Insolvency & Bankruptcy Code § 8 (2016).
[45] Insolvency & Bankruptcy Code § 4 (2016).
[46] Radhika Merwin, IBC: Increasing threshold to Rs. 1 crore for Insolvency plea is a welcome move, The Hindu Business Line (May, 03, 2023, 4:50 PM), https://www.thehindubusinessline.com/money-and-banking/ibc-increasing-threshold-to-1-crore-for-insolvency-plea-is-a-welcome-move/article31154352.ece.
[47] Insolvency & Bankruptcy Code § 8(2) (2016).
[48] Insolvency & Bankruptcy Code § 9 (2016).

wherein the time limit for admitting the claim is 14 days and further approval of which is supposed to kick start the CIRP Process. Likewise that of initiation of CIRP by both Operational Creditors and Financial Creditors, the Corporate Debtor may by itself submit an application before the Hon'ble NCLT, wherein the approval and initiation of CIRP is no different and enjoys the same standard of operation. Further, as suggested and provided by the Code, the CIRP Process is supposed to be completed within 180 days[49] from the day of admission of the application by the Hon'ble NCLT. Further, it is also provided where in case the need for further extension of time is being felt, the RP, which shall be appointed by the NCLT and ratified by the CoC, shall by taking vote of at-least 75% submit a request to Hon'ble NCLT. The Hon'ble NCLT as provided under the Act shall extend the time as may be deemed necessary by not more than 90 days.[50] The Code though provides for stringent time lines, but the same cannot be said to be adhered to and the same is only advisable in nature.

The above is the broad concept as to the Code including filing and admission of claims in the Hon'ble NCLT. On a later stage, wherein the claim is being admitted and tried on by the Hon'ble NCLT, a large area of operations come into play, which shall form part of the process of CIRP under the Code.

2.2.3 Process after commencement of Corporate Insolvency Resolution Process

Immediately after commencement of CIRP Process, i.e., upon admission of claim by the Hon'ble NCLT, the resolution process embarks under the Code. The first cause of action upon approval lies with appointing an IRP, who is appointed by the Hon'ble NCLT.[51] Apart from appointment of IRP, the Hon'ble NCLT declares moratorium in accordance with the provisions of Section 14[52] of the Code and further directs for issues of Public Notice for submission of claim in the given format under the rules by the IRP.[53]

Apart from the initial functions entrusted upon the IRP by the Hon'ble NCLT, the IRP by order of the law is mandatorily required to take over the operations and management of the Corporate Debtor[54] with the endeavour of protecting and preserving the Corporate Debtor's property

[49] Insolvency & Bankruptcy Code § 12(1) (2016).
[50] Insolvency & Bankruptcy Code § 12(3) (2016).
[51] ASC Group, Insolvency Resolution Professional, ASC Group (May, 03, 8:50 PM), https://www.ascgroup.in/service/interim-resolution-professional-irp-rp/#:~:text=Resolution%20Professional%20is%20appointed%20by,Company%20Law%20Tribunal%2C%20or%20NCLT.
[52] Insolvency & Bankruptcy Code § 14 (2016).
[53] Insolvency & Bankruptcy Code § 13 (2016).
[54] Insolvency & Bankruptcy Code § 17 (2016).

along with ensuring that the Corporate Debtor remains a Going Concern Entity.[55] Interestingly, after the collation of all claims by the IRP and taking over of the management and operations of Corporate Debtor by the IRP, the IRP performs the most important task entrusted in the Code. The IRP forms a Committee of Creditors (CoC)[56] in consonance with the relevant provisions which had arisen out of the claims received from the public notice issued by the IRP. The CoC formed immediately is supposed to appoint a Resolution Professional (RP), wherein the CoC enjoys the power to either re-appoint the IRP as RP or appoint a new RP and replace the existing IRP.[57] Though, the CoC forms and important and integral part of the resolution mechanism, it is interesting to note that only financial creditors forms part of the CoC and further operational creditors who enjoins 10% of the total debts of the Corporate Debtor entity is allowed to be present in the CoC meeting, but are left without the power along with CoC.[58] The RP which is appointed apart from holding CoC meetings is entrusted the same tasks as that of IRP, however the RP is overcharged with the responsibility of exploring options for resolutions and consequently preparing and submitting resolution plans received.[59] The resolution plan is presented before the Coc for approval and upon approval of the same by the CoC, the resolution plan acts as a binding upon all the stakeholders associated around the Corporate Debtor.[60] However, there is no bar for the number of occasions for submission of resolution plan by the RP to the CoC based on the plans received, but however upon expiry of time period, the Hon'ble NCLT directs the Corporate Debtor to be brought forward for liquidation process enshrined under the Code.

The liquidation proceeding drawn up against any Corporate Debtor also necessitates the job role change of RP, wherein the person responsible for liquidation proceedings is to be termed as "Liquidator" and alike that of appointment of RP, the Liquidator is also appointed in the same style and manner.[61] The liquidator apart from performing the regular function alike of RP is also responsible for collectively fetching and valuing the assets of the Corporate Debtor to be put up for auction to the interested bidders in the auction process. The Liquidator shall accordingly provide public notice for sale of assets and upon successful bid by the participating

[55] Insolvency & Bankruptcy Code § 20 (2016).
[56] Insolvency & Bankruptcy Code § 21 (2016).
[57] Insolvency & Bankruptcy Code § 22 (2016).
[58] Insolvency & Bankruptcy Code § 24(3) (2016).
[59] Insolvency & Bankruptcy Code § 30 (2016).
[60] Insolvency & Bankruptcy Code § 31 (2016).
[61] Insolvency & Bankruptcy Code § 34 (2016).

bidder and approval of the CoC, the assets shall be sold. The Assets could be either sold at large or can be even sold individually based on the discretion of the CoC. Later at the stage of liquidation, the liquidation proceeds obtained through the liquidation is to be distributed according to the Section 53 of the Code[62], which is commonly regarded as "Waterfall Mechanism of IBC". In the mechanism, the hierarchy of payments is being provided and it is only based on the scheme of arrangements provided under the Act that such proceeds be distributed to the stakeholders. In the waterfall mechanism, there lies no guarantee or distribution proportion as against the distribution proceeds received and the distribution of proceeds in accordance with waterfall mechanism may get diminished even before distribution reaches to the last layer specified in the provision.

Upon formidable distribution of proceeds, the last step lying for the Corporate Debtor shall for filing of an application for dissolution of the Corporate Debtor itself. [63] The Hon'ble NCLT upon any such application is supposed to pass necessary order and as such the entire presence of the Corporate Debtor is supposed to mark an end.

The entire narrated process is being followed in cases where any Insolvency Resolution is against Corporate Persons and it will be apt to only discuss the same, owing to the fact that the Part III of the Code, i.e., the Insolvency Resolution in case of Individuals and Partnerships are not notified by the Government of India. Further, it may be essential to note that till date the old laws, i.e., the Presidency Insolvency Act, 1908 governs Individual and Partnership Insolvency Process, despite the fact that the Insolvency and Bankruptcy Code, 2016 has been in existence in the Country for more than 6 Years.

[62] Insolvency & Bankruptcy Code § 53 (2016).
[63] Insolvency & Bankruptcy Code § 54 (2016).

CHAPTER 3: ANALYSING THE IMPLICATIONS OF THE CODE

The Insolvency and Bankruptcy Code, 2016 has been in existence for more than 6 years and since then it has undergone multiple amendments along with being challenged for its validity before the Hon'ble Supreme Court of India. During the passage of its journey, IBC have/has faced multiple challenges and have impacted various sectors of the Economy. Not only the Code has dealt with various Private Limited Companies, but the Code has also dealt with Public Limited Companies. It is interesting to note that the multiple cases were filed challenging the constitutional validity of the entire Code and it was only in the Case of *Swiss Ribbons Pvt. Ltd. V. Union of India*[64], that the Supreme Court upheld the Constitutional validity of the entire Code. The landmark decision paved out way for the argument of constitutional validity of the Code and even put an end to the challenge in the distinction between the two classes of creditors. The Hon'ble Supreme Court in its landmark judgement covered all aspect and ensured that the Constitutional sanctity is present in the Code. Further, in the Case of *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.*[65], the applicability of the Code was dealt with by the Hon'ble Supreme Court. The Hon'ble Apex Court while deciding the matter along with host of other issues in the matter provided that the Code was applicable to all Government Companies and as such there existed no difference in between the Government Owned Companies and Private Limited Companies in the Code. The Hon'ble re-iterated the fact that the Code shall be applicable to Corporate Persons and in case where a Government Company is formed under the Statute, then in such case no case under the Code shall be maintainable. The Hon'ble Court laid emphasis on the differentiating the Government Organization formed directly under the Statute and Government Companies which were running in accordance with the Companies Act. The Order of the Hon'ble Supreme Court further opened up other avenues and have settled the debated question, wherein exclusivity of Government Companies was being sought. Further, in the other case relating to that of rights of home buyers, the Hon'ble Supreme Court had upheld the ordinance providing for the right of homebuyers to be treated as "Secured Creditors" under the Code. The Hon'ble Supreme Court in the Case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*[66], had upheld the amendment Act of the Code providing for Secured Creditors Status to homebuyer

[64] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.
[65] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2020) 17 SCC 324.
[66] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416.

in the case of any proceeding being drawn against the promoter/builder under the Code. To provide more benefits to the Homebuyers, the Hon'ble Supreme Court in the Case of *Amit Katyal v. Meera Ahuja & Ors.*[67], allowed withdrawal of CIRP Proceedings, where settlement was reached by the Homebuyers and the Builder. The Hon'ble Supreme Court opined the view that maximum of the homebuyers were being promised possession within a year and further the Hon'ble Supreme Court deemed it fit on the interest of the Homebuyers allowing withdrawal of the Case, which would benefit the homebuyers in taking early possession of their flats from the builder.

Also, the Statutory dues have been classified as under the Secured Creditors, which in other terms were being meant to be categorized on a much lower pedestal at the time of distribution of liquidation proceeds. The Hon'ble Supreme Court in its Judgement in the Case of *State Tax Officer v. Rainbow Papers Limited*[68], had provided that all Statutory Dues shall be treated as Secured Creditors under the Code and further highlighted that such dues are created under the existing Statutory laws of the Country and further it was directed that in any case where a resolution plan is being received without covering the statutory dues, then in such cases the resolution plan shall be rejected by the Hon'ble NCLT.

Further, also in cases of salary payments to the employees, who were involved in service even after the initiation of CIRP process and till such time wherein the Corporate Debtor was a Going Concern entity under the Code, the Hon'ble Supreme Court have halted the controversy by pronouncing a detailed Judgement in the Case of *Sunil Kumar Jain & Ors. v. Sundaresh Bhatt & Ors.*[69], wherein the Hon'ble Court had provided for including the salaries of employees working during the CIRP process to be included under the CIRP Cost and further providing for autonomy of the highest pedestal of recovery apart from the already pending dues of such employees.

It may be noted that the IBC not only did impact the aforesaid sector but also put a way forward in deciding the Cross Border Insolvency issue at time of adjudicating the case of Jet Airways.[70]

The above highlighted cases have been prominent game changers in the Code and have further far-reaching impact on various sectors of the Economy. Notably, with landmark precedents

[67] Amit Katyal v. Meera Ahuja & Ors., (2022) 8 SCC 320.
[68] State Tax Officer v. Rainbow Papers Limited, 2022 SCCOnline SC 1162.
[69] Sunil Kumar Jain & Ors. v. Sundaresh Bhatt & Ors., (2022) 7 SCC 540.
[70] Poonam Nahar, Jet Airways: An Insolvency Resolution Journey, Khurana & Khurana (May, 10, 2023, 8:20 PM), https://www.khuranaandkhurana.com/2022/03/04/jet-airways-an-insolvency-resolution-journey/.

pronounced by the Hon'ble Supreme Court, it becomes imperative to transgress and analyse the various sectors which had large scale impact due to the Code and practically analyse the situation as to whether the Code did justice to the sector and the stakeholders associated or did it fail to deliver and act upon the objective of the very Code.

3.1 Implications of the Code in the Banking Sector

The banking sector is widely recognized as the backbone of a country's economy. Therefore, it is crucial to analyse the impact of the Code (IBC) on the banking sector, particularly in terms of its effectiveness in recovering non-performing assets (NPAs) held by banks in the country. By evaluating the recoveries made by banks under the IBC, we can gain insights into its influence on the banking sector and its ability to address the issue of NPAs. To gain a comprehensive understanding of the impact of the Code in the banking sector, it is crucial to first delve into the concept of Non-Performing Assets (NPAs). By exploring the significance and necessity of the Code in facilitating NPA recoveries, we can assess its role in addressing the issue. Furthermore, analysing the recovery patterns both before and after the introduction of the Code will provide valuable insights into its effectiveness in improving recovery outcomes. By following this approach, we can effectively evaluate the impact of the IBC on the banking sector's management of NPAs.

3.1.1 Understanding NPA

The most frequently discussed and contested subject in the nation is the term "non-performing assets." Since the banks have always been concerned about the rising NPA, the RBI and the government have occasionally intervened to address the issue, which has been having an adverse impact upon the economic health of the country. It is crucial to comprehend the meaning and concept of NPA before diving into the NPA problem. When the advances are not repaid[71] when due or go unpaid for 90 days[72], the bank classifies the asset as non-performing (NPA). The NPA has been a significant barrier to the profitability and viability[73] of banks

[71] Vishnava, NPA, Non Performing Assets, Cleartax (May, 10, 2023, 8:50 PM), https://cleartax.in/g/terms/npa-non-performing-assets.

[72] Definitions, What is 'Non Performing Assets', The Economic Times (May, 10, 2023, 8:50 PM) https://economictimes.indiatimes.com/definition/non-performing-assets.

[73] Radhika Pandey, India's Public Sector Banks are laughing all the way to profits. But new stress can interrupt, The Print (May, 10, 2023, 8:50 PM), https://theprint.in/macrosutra/indias-public-sector-banks-are-laughing-all-the-way-to-profits-but-new-stress-can-interrupt/1233480/.

since it has been steadily increasing[74] and the same could be easily traced back to the year 2000 wherein the growth of new businesses and industries were at peak. [75] The ease with which loans were granted to various business houses in an effort to advance commerce in the nation gave rise to the problem. The banks did not conduct enough background checks while advancing loans, and because of the bank's failure to do so, loans to various business houses were overleveraged. Due to the country's robust economic growth, everything appeared to be in order, but the 2008 Lehman Brothers financial crisis showed otherwise. [76] The Global Crisis of 2008 had a significant influence on the nation, and loan repayment to banks became a significant problem for citizens. People were given new/fresh loans to pay off their interest on the previously borrowed debts in order to deal with the temporary setback, although this measure did not technically prove to serve any purpose other than to temporarily improve the balance sheet of the bank. The entire process was implemented to mitigate the effects of the global financial crisis, but it was unsuccessful in the sense that it planted the seeds for a far more serious issue, namely the NPA issue. [77]The NPA issues are strongly linked to the country's economic state and could also be easily accessed through the other significant economic crisis that engulfed the nation in 2013. [78] Every other industry suffered due to the economic crisis, and which made it difficult for creditors to keep up in time with their payment obligations along with a number of additional challenges. The situation further detreated the nation's economic state and, resulted in further increase of NPAs. Although the scenario may not be entirely to blame for the country's rising NPAs, but however the rising NPA are also a result of laxer lending regulations, legal loopholes, excessive borrowing, etc. [79]

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[74] PTI, Bank's Gross NPAs may rise to 9.5% in September 2022: RBI Report, The Economic Times (May, 10, 2023, 8:50 PM), https://economictimes.indiatimes.com/industry/banking/finance/banking/banks-gross-npas-may-rise-to-9-5-in-sept-2022-rbi-report/articleshow/88572587.cms.

[75] Ahita Paul, Examining the rise of Non-performing Assets in India, PRS Legislative Research (May, 10, 2023, 8:50 PM), https://prsindia.org/theprsblog/examining-the-rise-of-non-performing-assets-in-india.

[76] Anand Sinha, Changing Contours of Global Crisis-Impact on Indian Economy, RBI Monthly Bulletin April 2012 (Nov. 26, 2022, 3:50 PM), https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/05SPBUL090412.pdf.

[77] Ananth Narayan, Global Financial Crisis: Lessons for India from the 2008 crisis and beyond, Business Standard (May, 10, 2023, 09:30 PM), https://www.business-standard.com/article/markets/global-financial-crisis-lessons-for-india-from-the-2008-crisis-and-beyond-118091001256_1.html.

[78] Shankar Acharya, 5 Policy missteps that have led India to economic crisis, Business Standard (May, 10, 2023, 09:30 PM), https://www.business-standard.com/article/opinion/5-policy-missteps-that-have-led-india-to-economic-crisis-113080701462_1.html.

[79] Elearnmarkets, Banking NPA-Causes, Solution and Financial Sector Miseries, Elearnmarkets (May, 10, 2023, 09:30 PM), https://www.elearnmarkets.com/blog/banking-npa-the-black-hole/#:~:text=Low%20earnings%20affected%20their%20ability,rating%20were%20not%20analysed%20properly..

The NPA crisis has been framed through a number of perspectives, and both the RBI and the Government of India have repeatedly intervened to establish various rules and regulations and have adopted several legislation to recover NPA along with addressing the ever growing NPA menace. The establishment of DRTs, the SARFESAI Act, and the adoption of the IBC have all been crucial in helping the bank recover from its mounting NPA. The SARFESAI Act was in effect prior to the introduction of IBC, and over time, the recovery of NPA decreased to about 15-20%[80]. The introduction of IBC is thought to have increased the recovery rate to about 50%[81]. The implementation of the IBC is thought to have been crucial in resolving the NPA problem, but reports and data to hand suggest the opposite. The data available provides for prima-facie positive impact upon recoveries of NPA, but however upon a greater analysis, it could be understood that write-offs have outpaced recoveries[82], making the shiny recovery under the Code questionable. Additionally, there has been debate over the viability and effectiveness of the Code, which instructs institutions on how to deal with NPA issues. This debate has arisen in light of periodic circulars issued by the RBI, which instruct banks to deal with NPA at the front lines and, in the event that they are unable to do so, to handle the issue in accordance with the IBC procedure. [83] In light of recent events and the growing threat that NPA poses to the nation, it is essential to examine all relevant factors, conduct a thorough analysis of the data, and decide whether the NPA crisis could be handled more effectively and strategically than it currently is by existing laws, regulations, and other methods.

3.1.2 Present Scenario of Non-Performing Assets in the Country

The data pertaining to NPA in the country is regularly updated by RBI. It is shocking to learn the fact that NPA has decreased even during the COVID-19 pandemic period, as the relative data provided by RBI provides for reduction in Gross Non-Performing Assets by a staggering

[80] Livemint, Recoveries under IBC far better than SARFESAI and DRT, says Governor Das, Mint (May, 10, 2023, 09:50 PM), https://www.livemint.com/news/india/recoveries-under-ibc-far-better-than-sarfaesi-and-drt-says-governor-das-11628306992942.html.
[81] *Ibid.*
[82] FE Bureau, SARFESAI Outperforms IBC in FY21 loan recovery: RBI Data, Financial Express (May, 10, 2023, 09:50 PM), https://www.financialexpress.com/industry/banking-finance/sarfaesi-outperforms-ibc-in-fy21-loan-recovery-rbi-data/2393187/.
[83] Siddhi Nayak, Bankruptcy Board chief asks banks to initiate proceedings soon after NPA Classification, Money Control (May, 10, 2023, 09:55 PM), https://www.moneycontrol.com/news/business/bankruptcy-board-chief-asks-banks-to-initiate-proceedings-soon-after-npa-classification-9553471.html.

1.7%. [84] Additionally, it can be easily determined and understood from the data published by the Reserve Bank of India that write-offs of NPA have been significant in comparison to the reduction/recovery of NPA[85] over the course of the year for Big Public Sector Banks like State Bank of India and Bank of Baroda. [86] For instance, after carefully examining the data provided for State Bank of India, it was possible to determine that NPA during the year was reduced by Rs. 16,864.08 crores, while NPA was written off by Rs. 34,402.20 crores. As a result, there was a significant discrepancy of approximately Rs. 19,000 crores between the Opening and Closing of NPA of State Bank of India. Here, understanding the meaning of write-offs would be significant considering the fact that huge amount of monies were written off. Write-Offs are referred to mean those loans which would be treated as loss by the Banks instead of it being treated as Assets by the Banks. [87] The method is followed with dual perspective, first to shorten the NPA load from balance sheet and secondly to reduce tax liability of the banks.

In addition to the NPA data, the recovery rate of NPA through IBC has only been 10.7%, which casts major doubt on the recovery rates of NPA by the banks and raises serious concerns about future contingencies that could develop as a result of the country's diminishing NPA recovery rates. [88] It is also possible to attribute the rising NPA to the government-backed guaranteed loans given to various segments of society. The Reserve Bank of India has acknowledged the issue and made it clear in its master circular that loans that are guaranteed by the Central Government will not fall under the definition and scope of NPA until and unless the Government repudiates the guarantee when it is invoked by the banks. However, the RBI has also stated in the same circular that loans that are guaranteed by the State Government will be

[84] Subrata Panda, Banks' gross NPA drop below 6% in March, 2022, lowest in six years, Business Standard (May, 11, 2023, 02:30 PM), https://www.business-standard.com/article/economy-policy/banking-sector-s-gross-npa-falls-below-6-lowest-in-six-years-122061601135_1.html. 7

[85] RBI, Movement of Non-Performing Assets (NPAs) of Scheduled Commercial Banks, Reserve Bank of India (May, 11, 2023, 02:40 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

[86] Statista Research Department, Leading Public Sector Banks in India as of May, 2022, based on market capitalization, Statista (May, 11, 2023, 02:40 PM), https://www.statista.com/statistics/944665/india-leading-public-sector-banks-based-on-market-capitalization/#:~:text=State%20Bank%20of%20India%20was,Bank%20ranking%20third%20that%20year.

[87] George Matthew, What is a loan write-off and why do banks do it?, The Indian Express (May, 11, 2023, 02:40 PM), https://indianexpress.com/article/explained/explained-economics/what-is-a-loan-write-off-and-why-do-banks-do-it-8283568/.

[88] Banikinkar Pattanayak, Financial Creditors' recovery under IBC at just 10.7%, Financial Express (May, 11, 2023, 02:50 PM), https://www.financialexpress.com/industry/financial-creditors-recovery-under-ibc-at-just-10-7/2643102/.

handled under the standard classification of NPA. [89] The enormous number of government-backed loans made to a variety of borrowers has also contributed to the banks' rising NPA, as many of these loans have turned into Non-Performing Assets. Consequently, the current situation resulting from the data provided by the RBI relating to the opening balances, recoveries, and write-offs provides the relative contemporary state of NPA in India and also raises several grounds for consideration and discussion on the highly debated subject of NPA.

3.1.3 Role of Insolvency and Bankruptcy Code in Recoveries of NPA

The Insolvency and Bankruptcy Code, 2016 plays a dominant role in recoveries of dues of the banks. It may be noted that banks are ranked higher in the pedestal under the Waterfall Mechanism of the Code. However, it may be interesting to note that though, the banks enjoy the very first position immediately after payment of liquidation costs, the banks recoveries have depleted over the years. The very objective of the Code which provided for maximization of value of assets along with equitable treatment of all stakeholders has been tossed with multiple averments on the verge of un-aligned interest with the laws laid down under the Code.

The recovery of banks were initially accustomed to provide and cover for more than 50% of claims, however with advancing time, the same has slipped below 20% and as such the same is depleting further under the Code. It may be crucial to note that the Banks had earlier boasted and felt pride with the introduction of the Code, but with depleting nature of recoveries the banks move towards the Code seems dwindled.

The Code was introduced with the broad goal of consolidating and amending the existing insolvency provisions relating to corporations, partnership firms, and even individuals as well as providing a framework for the timely resolution of insolvency proceedings and providing for better asset realisation in case of liquidation. The Code has successfully completed five years since its introduction, during which time it has undergone a roller-coaster of changes and opinions regarding its feasibility and success. Throughout this regard, it is crucial to note that, despite the Code's continued expansion throughout the Country, the recovery rates and liquidation revenues have significantly fallen. It has become a common occurrence for large corporations with enormous business empires and heavy debt loads to fail, and upon starting the CIRP process, the affected company is either sold as-is to other interested parties/bidders

[89] RBI, Master Circular-Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, Reserve Bank of India (May, 11, 2023, 03:50 PM), https://rbi.org.in/scripts/NotificationUser.aspx?Id=5090&Mode=0.

for a pitiful price, or it is liquidated for a pitiful price, causing significant haircuts to banks and other stakeholders, who frequently lose the right to pursue a claim against a debtor. In this regard, even though the Government's primary goal in introducing the Code was to improve the entire process and alter impressions, time and various incidents have called into serious question the Code's entire purpose. It is now imperative to ascertain banks' confidence in the Code and further examine and understand whether banks have benefited from its introduction or whether it has in some cases proven to be a complete failure. In this regard, it would be crucial to examine whether the Banks have been able to maintain an acceptable recovery rate in comparison to the previous laws, like that of SARFESAI, where the recovery rates were set to extremely low levels while also being time-consuming. It would also be necessary to understand and analyse the practical problem faced by the banks while CIRP is initiated under the Code.

3.1.4 Analysis of NPA Position under the IBC Regime

Upon providing an understanding of the term NPA and negating therein through the rising menace of NPA in the Country, it is imperative to analyse upon the recovery rate of NPAs by the Banks under various statutes. To provide an greater perspective, it would be apt to provide for a comparative analysis of recoveries in the erstwhile SARFESAI Act and in the present Code. For, ensuring comparison the relative period prior to the year 2016 may be taken, wherein upon analysis it could be provided that an amount to the tune of Rs. 17,918.21 crores were recovered by the largest banker of the Nation, i.e., State Bank of India and further the banker had written off a quantifiable amount of Rs. 12,882.50 crores from its books of accounts.[90] Upon, further analysis of the available data, it was further discerned that during the aforesaid period, there existed three modes of recoveries, i.e., through DRTs, through Lok Adalat and under the SARFESAI Act. The cumulative recovery percentage of the three modes were 12% among which the highest traction of recovery was provided by SARFESAI, having recoveries at the rate of 16%, followed by DRTs having recoveries at the rate of 7% and Lok Adalat which constituted a meagre recovery rate of 3%.[91] The recoveries as was witnessed in the year 2014 took a nosedive in the year 2015, with recovery rate from the available channels

[90] RBI, Movement of Non-Performing Assets (NPAs) of Scheduled Commercial Banks, Reserve Bank of India (May, 11, 2023, 04:55 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

[91] RBI, NPAs of Scheduled Commercial Banks Recovered through various Channels, Reserve Bank of India (May, 11, 2023, 06:30 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

to only 10%[92], wherein the State Banker had managed to recover a meagre Rs. 13,011.57 crores and had written off NPAs to the tune of Rs. 21,303.46 crores. [93]

Upon further introspection of the data, the bleeding of the banks on account of negligible recoveries and further maximizing write-offs could be witnessed, wherein for instance in the Year 2016, the State Bank of India had written off a amount of Rs 40,195.42 crores against recoveries to the tune of Rs. 9,023.76 crores. The situation remained indifferent in the succeeding year, wherein only Rs. 4,331.39 crores were being recovered and a write off to the tune of Rs. 20,569.80 crores was made by the Largest Banker.

The other Public Sector Banks were in a better position overall than the largest lender, with the Public Sector Banks recovering a total of Rs. 48,691.39 crores while writing off Rs. 26,407.41 crores. The Second largest Bank, Bank of Baroda, also performed better than the largest lender. Notable banks like that of Union Bank of India, Central Bank of India had outperformed the overall performance by ensuring highest recoveries in the same year. The scenario as was subjected to improve with the Code could not make its way out in providing for promising recoveries, instead in the year 2019, the write-offs of the banks has superseded the recoveries, wherein Rs. 1,83,168.49 crores were written-offs by the banks in comparison to recoveries of only Rs. 1,27,835.39 crores. The situation continued to worsen over the year and upon introspection of the data for the year 2020, it could be ascertained that the write-offs nearly doubled to that od recoveries. In short, the write-offs stood at Rs. 1,78,305.31 crores whereas recoveries were only made to the tune of Rs. 99,691.54 crores. The saga continued for even the year 2022 wherein almost similar figures were reported, wherein Rs. 1,33,999.88 crores were written off and Rs. 74,685.13 crores were only recovered. In addition, a careful examination of the data revealed that the NPA closing balances of different banks had been significantly decreased, resulting in a drop in bank NPAs of close to 64% from the prior closing amounts.

The Reserve Bank of India's data, which was made public, paints a clear picture of the recovery of NPA both before and after 2016. Additionally, the data paints a clear image of the surge in write-offs performed by public sector banks and also offers a clear picture of the underlying factors of the country's declining NPAs. The information calls into severe doubt the country's

[92] RBI, NPAs of Scheduled Commercial Banks Recovered through various Channels, Reserve Bank of India (May, 11, 2023, 06:30 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.
[93] RBI, Movement of Non-Performing Assets (NPAs) of Scheduled Commercial Banks, Reserve Bank of India (May, 11, 2023, 04:55 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

depiction of NPA recovery and leads one to speculate about the potentially catastrophic consequences of the banks' actions to reduce their NPAs.

Furthermore, the data fails to address the crucial question of why there was a significant turnaround in the data after 2016, as well as the effectiveness of the recovery method used by the banks after 2016 and its rate of success. However, even if the data does not explicitly mention the mechanism, it is still clear that since the implementation of the IBC in 2016, the recovery rate of NPAs has significantly decreased and is now even lower than the recovery rates currently in effect under the SARFESAI Act.[94]

Additionally, the data paints a picture in which write-offs have been outpacing bank recoveries and, furthermore, have been contributing to an overall decline in NPAs. This picture is excellent when viewed in isolation, but when fully examined, it raises serious questions about the entire NPA recovery mechanism in which write-offs have been used to portray the banks' diminishing NPAs.

For a clear understanding and comparison of the aforesaid figures and data, a tabular representation comprising of the year wise data presented based on the data available and provide by the Reserve Bank of India may be provide below. The table shall provide a crisp and immediate Data showing the recoveries and write-offs of NPAs by Public Sector Banks from 2011 to 2021.

[94] Banikinkar Pattanayak, Financial Creditors' recovery under IBC at just 10.7%, Financial Express (May, 12, 2023, 02:30 PM), https://www.financialexpress.com/industry/financial-creditors-recovery-under-ibc-at-just-10-7/2643102/.

NPA relating to Nationalized Public Sector Banks (Figures in Crores)				
Year	**Opening Balance of Gross NPA**	**Recoveries of NPA**	**Write-Off of NPA**	**Closing Balance of Gross NPA**
2010	26,543.47	18,966.52	884..07	36,394.80
2011	36,394.80	25,926.10	1,712.37	44,271.10
2012	44,533.43	32,611.69	1,328.23	69,624.51
2013	69,624.51	43,543.23	1,128.84	1,02,227.23
2014	1,02,227.22	57,513.26	912.57	1,48,457.21
2015	1,47,447.41	48,691.39	26,407.41	2,04,959.47
2016	2,04,959.47	43,025.49	39,131.08	4,17,987.79
2017	4,17,987.79	72,884.22	54,152.00	5,06,921.66
2018	6,19,209.66	82,280.21	1,29,503.57	8,95,601.26
2019	8,40,013.01	1,27,835.39	1,83,168.49	7,39,541.00
2020	7,17,849.74	99,691.54	1,78,305.31	6,78,316.98
2021	5,46,589.69	74,685.13	1,33,999.88	6,16,615.55

Table 2: Collated Data providing for Year Wise recoveries of NPA.

Source: Reserve Bank of India[95]

The above data provides a culminated view on account of the recoveries of NPA over the year and further provides for write-offs of NPA which has been accrued during the same year. The data could be collated to understand as to how the write-offs of NPA has risen tremendously from the year 2017 onwards and continue to rise. Notably, the current situation determines the fact that the recoveries have plummeted to low levels whereas write-offs have nearly doubled in the current regime.

[95] RBI, Movement of Non-Performing Assets (NPAs) of Scheduled Commercial Banks, Reserve Bank of India (May, 11, 2023, 04:55 PM), https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#!4.

3.2 Implications of the Code upon the Public Sector Units

The Public Sector Units (commonly referred to as PSUs) are the Government owned companies wherein the majority stake of the Company, i.e., 51% of the company is owned either by the Central Government or State Government and/or by combination of the both the Government. The PSUs have played a major role in uplifting the economy of the nation, wherein the Government had established such PSUs limited to core and strategic sectors and further transgressing into facilitating industrial development in sparse region of the Country and providing for larger economic development of the nation.[96] The PSUs are classified into Central Public Sector Enterprises, i.e., Public Sector Units in which the Central Government have more than 51% of the ownership. The other PSU classification is that of State Level Public Enterprises (SLPEs) wherein the State Government have more than 51% ownership. On account of classification, it may be interesting to note as of 31/03/2021, a total of 389 Central Public Sector Undertakings were reported, out of which 26 of the PSUs were undergoing liquidation proceedings. It may be further noted that there lies further categorization of PSU into Maharatna, Navratna and Miniratna categories based on the performance and progress of the PSUs. A PSU is categorized as a Maharatna Company, when any PSU is classified under Navratna Company and further has an average yearly sales of more than Rs. 20,000/- crores for previous three financial years coupled with a net worth of more than Rs. 10,000/- crores for the previous three financial years. Further, Navratna Companies are classified on the basis of a Score of 60 out of 100 on the parameters of net worth, net profit, cost of production, cost of services and Capital employed in the PSU. The last classification is that of MiniRatna, wherein PSUs having earned profit in the previous three financial years coupled with having a Profit Before Tax (PBT) of Rs. 30 crores, shall be categorized as a MiniRatna PSU. The three classification of PSUs are much sought after rankings by the PSU and the same can be admitted by the fact that only 10 PSUs are categorized as Maharatna, 13 PSUs are being categorized as Navratna[97] and further a total of 68 PSUs are categorized as MiniRatnas[98]

The above classification is necessary to understand in order to correspond the impact of the Code in the Public Sector Units. It may be noted that many PSUs which fell under the 3

[96] HT Brand Studio, What are Public Sector Undertakings (PSU) in India, The Hindustan Times (May, 14, 2023, 07:50 PM), https://www.hindustantimes.com/brand-post/what-are-public-sector-undertakings-psu-in-india-101630595688750.html.

[97] BSE, The Navratnas, BSEPSU.COM (May, 14, 2023, 07:50 PM), http://www.bsepsu.com/navratnas.asp.

[98] BSE, The Miniratnas, BSEPSU.COM (May, 14, 2023, 07:50 PM), http://www.bsepsu.com/miniratnas.asp.

exclusive categorises as provided above, have fallen into the trap of mismanagement and accordingly were being admitted under the Code for adjudication. Later, PSUs like that of Hindustan Paper Corporation, which was a Miniratna PSU[99] as designated by the Government of India had to undergo liquidation proceedings under the Code and was forced to be sold at a miniscule value.[100] Other PSU like that of Hindustan Antibiotics was also dragged into the Code, however the same was stayed by the Hon'ble Bombay High Court while appreciating the fact that it was a Government Company and it was not deemed appropriate by the Hon'ble Court to try any proceeding under the Code.[101] The differential status, one where a Government Company was barred from being tried and the other where the petition was admitted by the Hon'ble NCLT under the Code and thereafter liquidation of assets was conducted under the Code needs to understood to understand the impact of the Code in PSUs.

3.2.1 Recognizing PSUs under the Code

Right after the introduction of the Code, the PSUs which were earlier dealt under BFIR under SICA found itself in a turmoil as to the applicability of the Code. Industries as well as stakeholders provided for different point of view for the application of the Code to the PSUs. Some stakeholders were of the opinion that the Code applies to PSUs as well and other provided contrary views. In the continued conflicting views among the stakeholders, interested stakeholders moved to file application for initiation of CIRP for PSUs under the Code. Some of the application were accepted, whereas some were rejected on the ground of jurisdiction of the Hon'ble NCLT in bringing PSU under the ambit of the Code. In some cases, where application was admitted by the Hon'ble NCLT, the decision of such admission was challenged in the Hon'ble High Courts, which in turn had reversed the decision of the Hon'ble NCLT. In the narrated scenario, one PSU namely Hindustan Antibiotics Ltd. (HAL) was found to be entangled with under the same scenario, wherein even though it was earlier admitted under the Code, but the same was stayed by the Hon'ble High Court. The said PSU was declared as a Sick Industries under the provisions of the SICA Act and as such the same was pushed under BFIR. Further, there were no developments in the matter, as the company stayed dwindled with

[99] DPE, List of Maharatna, Navratna and Miniratna CPSEs, Department of Public Enterprises (May, 14, 2023, 08:50 PM), https://dpe.gov.in/sites/default/files/List_of_Maharatna_Navratna_and_miniratna_CPSEs.pdf.

[100] Press Trust of India, Assam Govt. acquires Hindustan Paper Corp's two defunct mills for Rs. 375 cr, Business Standard (May, 14, 2023, 09:30 PM), https://www.business-standard.com/article/companies/assam-govt-acquires-hindustan-paper-corp-s-two-defunct-mills-for-rs-375-cr-122032801461_1.html.

[101] Nitish Kashyap, Bombay HC to Decide Whether IBC Can be Invoked Against Govt. Owner Companies, LiveLaw (May, 15, 2023, 05:30 PM), https://www.livelaw.in/news-updates/bombay-hc-to-decide-whether-ibc-can-be-invoked-against-govt-owned-companies-read-order-150715.

heavy debts. However, to negate itself out of the debts, the Company entered into various rounds of negotiations with stakeholders and remained afloat till some time. The negotiation did provide some respite to the PSU but later upon introduction of the Code, one of the creditors of the PSU filed an application for initiation of CIRP under the Code. The Hon'ble NCLT of Mumbai Bench had admitted the CIRP proceedings against HAL and had passed necessary directions for appointment of IRP. However, the same was challenged by the Corporate Debtor itself challenging the views expressed by the Hon'ble NCLT Mumbai Bench in accepting the application for initiation of CIRP. The Hon'ble High Court had excused itself from commenting upon the maintainability of the application before the Hon'ble NCLT, Mumbai Bench and had instead sticked to the constitutional validity aspect of IBC, which was under challenge before the Hon'ble Court. For proper adjudication, the Hon'ble Court directed for seeking response for IBC being *ulta vires* of the Constitution and had provided for an Interim Stay upon the act of the Hon'ble NCLT, which was in a way of putting forward a stop to admitting PSU under the Code.[102]

The dilemma was faced in multiple other companies, wherein the argument of the Corporate Debtor, i.e., the PSUs was that they were not included under the Code, for the sole reason being that of a Government Company. However, the same was also countered in various instances, wherein the Hon'ble NCLT had admitted the application under the Code for adjudication of claims. One notable case may that of Hindustan Paper Corporation Limited, which was admitted for initiation of CIRP under the Code before the Hon'ble NCLT, Principal Bench (New Delhi).[103] The different action on part of Hon'ble NCLT had further spurted the dispute for the admissibility of a Government company under the Code. However, the same was rest to dispute in *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.*[104] pronounced by the Hon'ble Supreme Court. The Case was filed by the petitioner against outstanding dues from National Highway Authority of India. The petitioners in the case were engaged in construction of roads/bridges and other high value construction in the Country. Being a Government Registered Contractor, the petitioner had availed a large-scale project from the State Authority, however the petitioners had faced non-payments issue from the State,

[102] Nitish Kashyap, Bombay HC to Decide Whether IBC Can be Invoked Against Govt. Owner Companies, LiveLaw (May, 15, 2023, 05:30 PM), https://www.livelaw.in/news-updates/bombay-hc-to-decide-whether-ibc-can-be-invoked-against-govt-owned-companies-read-order-150715.

[103] HPCL, Public Notice (CIRP), Hindustan Paper Corporation Limited (May, 15, 2023, 06:30 PM), https://www.hindpaper.in/press/public_notice.htm.

[104] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2020) 17 SCC 324.

wherein not only the project was delayed but the financial condition of the petitioners was also affected for the fact that they were not able to service their creditors due to non-payment of the dues by the State Authority. The contract entered in between the petitioner and the State authority provided for agreed terms only through arbitration or through civil proceedings. Accordingly, the petitioners had moved with an arbitration proceeding and were granted award in their favour. The award was put on stay upon challenge by the State Authority and the complexity started increasing, wherein in one hand the petitioners were unable to receive their legitimate claims due to stay on arbitration award already granted to the petitioner and on the other hand the fear of insolvency was looming on part of the petitioners by the unpaid creditors. The petitioners in the present case questioned the very nature and implication of the Code, wherein the State Authority was exempted from being tried under the Code and on the other hand the petitioners loomed being drawn under IBC. The case had projected other issues as well, but for the sake of brevity and for maintaining the discussions pertinent to the thesis, the other aspect discussed and dealt with by the Court are not discussed.

The Hon'ble Supreme Court on the matter arising out of in admission of Government Companies under the Code ruled that only Government bodies like that of National Highway Authority of India, or those instrumentalities of the Government involved in performing sovereign functions shall be excluded under the purview of the Insolvency and Bankruptcy Code.[105] Further, the Hon'ble Court provided thx`at Government companies shall be subsumed to be covered under the Code through virtue of Section 2(20) and 2(45) of the Code and as shall the Hon'ble Supreme Court opened bars for the dilemma of admission of Government companies under the Code. The Hon'ble Supreme Court through the landmark judgement rested all the arguments and confusion with regards to the applicability of the Code to Government Companies and further ensured that the statutory bodies of the Government are well protected and are not included within the ambit of the Code.

The decision though paved way for inclusion of the Government Companies under the Code, however the same when introspected and when to light is only limited to the companies covered under the Companies Act. Further, those companies which are created by way of passing of a

[105] Guest, Can Government Companies be Brought under the Aegis of the IBC?, IndiaCorpLaw (May, 15, 2023, 06:50 PM), https://indiacorplaw.in/2022/05/can-government-companies-be-brought-under-the-aegis-of-the-ibc.html.

special statute shall be excluded. Some companies which are formed under special statutes are Reserve Bank of India, Life Insurance Corporation of India and Industrial Finance Corporation.

Having provided the inclusion of the PSU under the Code, it would be imperative to examine a particular case by divulging into the practical aspect involved coupled with the impact of the Code. It would be necessary to analyse the very journey of the PSU in the Code.

3.2.2 Practical Analysis of the Effect of Code to PSU

To practically examine the effect of the Code to PSU, the case of Hindustan Paper Corporation (HPC) needs to be analysed, wherein a Miniratna CPSU was admitted under the Code and was later sold on piecemeal value to the State Government. It would be interesting to analyse the circumstances which called for the admission of HPC under the Code and the further dimension wherein one of the Asia's largest paper mill providing direct and indirect employment to lakhs of people was being dealt with under the Code.

The aforementioned case was initiated by M/s. Alloy Metal India (Pvt.) Ltd., a vendor seeking recovery of unpaid dues amounting to Rs 98 lakhs. The application was filed before the Hon'ble National Company Law Tribunal, Principal Bench at New Delhi in 2018, and was registered as Case No. CP(IB) No. 418 (ND) of 2018. On 13.06.2018, the Hon'ble NCLT admitted the application, initiating the Corporate Insolvency Resolution process and imposing a moratorium under Section 14 of the Insolvency and Bankruptcy Code. In a subsequent order dated 22.04.2019, the Hon'ble NCLT observed that despite the provision of Rs. 90 Crore through a July 2018 notification, the Union of India failed to disburse funds for the payment of wages and dues to the workers. The lack of a valid reason for the non-disbursement of funds was highlighted, as acknowledged by the Ld. ASG representing the Union of India. It was stated that although a proposal for the distribution of salaries had been made under the Consolidated Fund, the necessary budgetary allocation was not sanctioned by the cabinet after the Corporate Insolvency Resolution Process (CIRP) was initiated. The liquidation value of the company was assessed to be over Rs. 1100 crores. Considering these developments, the Hon'ble Tribunal issued an Order dated 02.05.2019 for liquidation since the 270-day CIRP period had expired without receiving any resolution plan. The Corporate Debtor challenged this order before the Hon'ble National Company Law Appellate Tribunal, which, in its order dated 29.05.2019, upheld the impugned order. The NCLAT directed the Liquidator to approach the Union of India through the concerned department for the realization of funds to ensure the continuity of the 'Corporate Debtor' as a going concern. The Union of India, as a respondent in the case, was

directed to release certain funds from the Consolidated Fund if permissible to facilitate the continued operation of the 'Corporate Debtor.' Additionally, directions were given to explore schemes or arrangements under Section 230 of the Companies Act, 2013, and to explore the possibility of selling the 'Corporate Debtor' as a going concern along with its employees/workmen to a third party. Subsequently, the Liquidator, in accordance with the Court's order, requested funds from the Union. However, as per the Union of India's submission on 08/11/2019, they expressed their inability to offer a scheme or arrangement under Section 230 of the Companies Act, 2013, and their inability to provide or release any amount. Due to the expiration of the extended time and the affidavit submitted before the Hon'ble NCLT, the Court, in its Order dated 25/11/2019, directed the Liquidator to proceed with the liquidation of the Corporation's assets. In line with the Court's order, the Liquidator issued a public announcement on 09/01/2020, inviting expressions of interest from potential bidders for the sale of certain non-core assets of the Corporate Debtor. However, soon thereafter the pandemic had hit the Country and accordingly upon consultation of the liquidator with the members of the CoC, decision was taken to provide for re-issuance and re-invitation of prospective bidders under the Scheme of Arrangements. Accordingly, on the 09th of June, 2020, Liquidator issued a fresh invitation for submission of a scheme under Section 230 of the Companies Act, 2013 along with a Process Document which gave the following details-

- Reserve price was fixed at Rs.1139 Crores
- Last date of submission of scheme was 29.06.2020

Applicants were required to submit a Binding Submission Bond Guarantee of Rs. 55 Crore along with all documents. In response to the said proposal, one prospective bidder had submitted a conditional offer and as such the same was put for approval before the CoC. It may be noted that a meeting was convened by the Liquidator on 02/09/2020 and accordingly the scheme was agreed to with by one section of the Committee comprising 42.3% of the total voting share. The Scheme later failed to get any nod as the other members continued to remain absent and accordingly the Liquidator filed for Exclusion of time period, considered for exploration of the Scheme under Section 230[106] of the Act on 21/05/2021. Immediately after filing for such exclusion, the Hon'ble NCLT had provided for the said relief and as such the liquidation commencement date which was earlier order was brought to the understanding to have started at time of filing of the exclusion application. On 01/06/2022, Liquidator issued an

[106] Companies Act § 230 (2013).

e-auction sale notice for the sale of the Corporate Debtor for a reserve price of Rs. 1139 crores. On 22/06/2021, Liquidator issued another e-auction sale notice for the sale of the Corporate Debtor for a reserve price of Rs. 969 crores.[107] On 06/08/2021, the Liquidator issued another e-auction sale notice for the sale of assets of the Corporate Debtor in lots. [108]

Interestingly, after a series of event at the time when auction notices were issued by the Liquidator, the prospective buyer, i.e., the Assam Government on 30/09/2021 took a Cabinet Decision, for providing for Rs. 700 crores Relief Package for Hindustan Paper Corporation Employees. The Government decision was aimed to provide a relief package to all 1100 employees of the Hindustan Paper Corporation Ltd., and as such quantum of relief package was to be assessed based on PF, Gratuity, Pension, Salaries and other dues as claimed and admitted before the liquidator. The relief to also be provided to schoolteachers, contractual co-operative workers of HPCL. Further, a fund of Rs. 10 crores to be set up for welfare of HPC workers. Furthermore, Government of Assam was supposed to approach the Hon'ble NCLT, New Delhi, through official liquidator for taking over the assets of HPC Ltd. after applying due diligence. [109] Further, amidst such announcement, on 25/11/2021, Liquidator issued an e-auction sale notice for the sale of assets of the Corporate Debtor in lots, with cumulative Reserve Price of around Rs. 800 crores.[110] The same was continued further with cumulative Reserve Price of around Rs. 700 crores and later to Rs. 600 crores and further down to Rs. 500 Crores and significantly dropped down to a cumulative reserve price of Rs. 400 crores on 03/03/2022. The entire aspect of degrading of the price of auction was conducted within a span of a mere 3 months from the date of announcement by the perspective bidder regarding the benefits to be provided. In light of the last degradation, the State Government through its instrumentality namely the Assam Industrial Development Corporation Limited bided at the auction at a throwaway price of Rs. 375 crores for two assets of the Corporate Debtor. Accordingly, for the eligibility of the bid of the State Instrumentality, a Cabinet Decision was

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[107] HPC, Public Notice (CIRP), Hindustan Paper Corporation (May, 17, 2023, 02:30 PM), https://www.hindpaper.in/press/public_notice.htm.

[108] *Ibid.*

[109] Ail India Radio News, Assam Govt. approves expenditure of Rs. 700 crores for Paper Mills employees, News Service Division All India Radio (May, 20, 2023, 5:55 PM), https://newsonair.gov.in/News?title=Assam-govt-approves-expenditure-of-Rs-700-Crore-for-Paper-mills-employees&id=427147#:~:text=Assam%20govt%20approves%20expenditure%20of%20Rs%20700%20Crore%20for%20Paper%20mills%20employees,-newsonair.com&text=The%20Assam%20Government%20has%20approved,meeting%20held%20at%20Dhemaji%20today.

[110] HPC, Hindustan Paper Corporation Limited in Liquidation, Hindustan Paper Corporation (May, 17, 2023, 02:50 PM), https://www.hindpaper.in/press/hpc_liquidation.htm.

taken for sanctioning Rs. 375 crores for participation in the bidding process for taking over all the assets of Nagaon paper Mill, Cachar Paper Mill and the Leasehold Land of Hindustan Paper Corporation at Haflong.[111] It may be noted that the Auction was concluded on 28/03/2022 and as such The most valuable assets of the Corporate Debtor- i.e., land areas of the Nagaon Paper Mill, plant area and township of the Cachar Paper Mill and leasehold land in the Haflong District, having a value of over Rs.700 crores, was being auctioned off for a reserve price 46% lesser than the Government prescribed circle rates i.e., at Rs. 375 crores.

The entire factual narration as to the process which was adopted under the Code for initiation of CIRP under the Code and later the same led to transgressing of the Corporate Debtor to liquidation, wherein miniscule value was obtained. The overall narration provides for providing a practical insight into the scenario put forward in the liquidation of a Miniratna, which lost its value under the Code and the fact that a CPSU was being undertaken by the State Government through unjust utilization of the Code. It is apparent to note the timings and the workings of various E-Auction Notices, wherein the PSUs having large scale value and being placed in large plots of land at strategic locations invites for various deviation and manipulation, wherein the sole aim of the miscreants is to take over possession of the assets of the PSUs at minuscule value, rather than giving any heed to fulfilling and adhering to the objective of the Code.

The Case though less talked about and discussed provides for ample of areas for scrutinization and for providing an overall practical implications of admission of PSU under the Code. It may also be noted that such PSU owe thousands of crores to multiple stakeholders, due to the quantum of the PSU and as such with the Insolvency Proceeding drawn for any PSU invites threats to the large stakeholders who are associated with the PSU for their livelihood. Though, the case has not been officially closed by the Hon'ble NCLT, however upon sale of strategic assets of the Corporation, the only task of the Liquidator is to distribute proceeds of the distribution which shall be less than 10% of the admitted claims.

In regards to the narration of the factual gamut of the case, it would be imperative to highlight some important observation considering the provisions of the Code and its regulations:

- Failure to meet the requirements of the Liquidation Process as envisaged under Insolvency and Bankruptcy of India (Liquidation Process) Regulations, 2016. Under

[111] Time8Webdesk, Assam Govt. sanctions Rs. 375 crores to participate in bidding for taking over assets of HPCL Paper Mills, Time8 (May, 22, 2023, 8:50 PM), https://www.time8.in/assam-govt-sanctions-rs-375-crore-to-participate-in-bidding-for-taking-over-assets-of-hpcl-paper-mills/.

Chapter VI (Realisation of Assets) Rule 32, it provides for the modes available on part of the liquidator to sell the assets of the Corporate Debtor.

The Rule focuses on attaining the objective of the Code, wherein direction is provided upon Liquidator to sell the Corporate Debtor as a Going Concern. Further, it is only when the liquidator fails to sell the Corporate Debtor as a Going Concern, then in such case the assets may be sold individually or through blocks, with the idea of realizing the maximizing value of the assets of the Corporate Debtor. Upon the bare perusal of the relevant rules as provided, it makes it evidently clear that the liquidator shall first try to sell the corporate debtor as a going concern and further after the expiry of 90 days (to be counted from the liquidation commencement date) shall opt for other methods as has been specified in Rule 32.

It may be pertinent to note that Hon'ble NCLT on 02/05/2019 had passed for liquidation order against HPC, which was challenged by HPC on 29/05/2019, wherein a direction was provided to the liquidator to ensure HPC as a going concern. Further, on 25/11/2019, as no scheme under S.230 was received, liquidation order was being passed.

Later, important developments engulfed, wherein on 28/09/2021, a meeting was convened by Hon'ble CM and agreement in between employees and the State Government was entered into. Further, on 11/10/2021, the liquidator had filed an amendment petition wherein 608 days were sought to be excluded from liquidation, and further prayer to consider the date of order to be the date of order of liquidation**.**

In this regard, it may be noted that since, the prayer was granted, the liquidation order came into play from 11/10/2021, and as per Rule 32 and 32A of the aforesaid Regulations, it was a duty of the Liquidator to sell the corporate debtor as a going concern (i.e., till a period of 90 days). Only upon failure of the same, the liquidator should have resorted to other means of sale, as specifically provided under Rule 32A. The liquidator instead of trying to sell the corporate debtor as a going concern, considering that liquidation order was to be considered from 11/10/2021, should have again tried to sell it as a going concern till a period of 90 days, which he miserably failed, for the reasons best known to him.

In this regard, it may be noted that since Assam CM, had assured of providing relief to employees, the intention of a purchaser was befittingly developed, and only after the meeting, the liquidator had amended his IA and sought for such direction. In this regard,

HPC should have been sold only as a going concern and not through any other means, which the liquidator had erred.

- **Related Party Transaction**

  It may be noted that both the State Government and the Central Government are related parties, but it is imperative to note that even Banks, who are having decision making power in the CoC are also related parties. Hence, it is safe to provide that right from Banks (PSU's), AIDC are related parties of HPC.

  In terms of understanding the meaning of related party, the definition as provided under Section 2(54)[112] of the IBC Code may be observed, r/w. Section 21(2)[113] of the Code, 2016. The provisions contained under Section 2(54) of the Code explicitly provides that a related party shall mean to include *"any person who ca control the composition of the board of directors or corresponding governing body of the corporate debt".*

  It also means to include any person who participates in the policy making process of the Corporate Debtor. Furthermore, under Section 21 of the Code, which deals with the composition of Committee of Creditors, it is explicitly provided that any related party of the Corporate Debtor shall have no right of either representation, participation or even voting in the Committee. It may be noted that the meaning of the term "person" is wide, and as such includes both natural and juristic persons,

  In this regard, it is imperative to note prima-facie the banks, i.e., SBI, Canara Bank shall not form part of the CoC. For understanding the relativity and importance of the same in the present provided case, the case of *Phoenix Arc Private Limited v. Spade Financial Services Limited and Ors.*[114]*, reported in (2021) 3 SCC 475*, may be pursued, which signifies the meaning and understanding of Related Party in any transaction covered under the Code.

3.3 Implications of the Code on Other Sectors

The Code has large impact on other strategic sectors as well. Some of the sectors like that of Airlines, Fast Moving Consumer Goods (FMCG) also had large scale impact with the introduction of the Code. It may be noted that the first case of that of Airlines Industry dealt

[112] Insolvency and Bankruptcy Code § 2(54) (2016).
[113] Insolvency and Bankruptcy Code § 21(2) (2016).
[114] Phoenix Arc Private Limited v. Spade Financial Services Limited and Ors., (2021) 3 SCC 475

under the Code was that of Jet Airways, followed by SpiceJet and the current one being that of the Goair. Further, in terms of FMCG, through there has been multiple advents in small categories, however large-scale companies like that of Ruchi Soya, Future Group could be seen have impacted under the FMCG Sectors under the Code.

3.3.1 Impact on the Airline Sector

The Airline Industry is believed to have far reaching impact on the economic growth of a nation.[115] Having said that insolvency of any one of the service providers not only hampers economic growth but also hampers the travellers. One such situation arose with the liquidation of Jet Airways, which as admitted and known was the first Indian Airline Company to have undergone Insolvency Proceeding under the Code.[116] The Company which was started in the year 1995 by Shri Naresh Goyal had to halt it operation on 17th April, 2019[117] owing to cash crunch in the Company. The Company owed a heavy debt and was in a tight position to repay the debts and even on a much tighter position to re-take any further loans. Upon suspension of operations, the State Bank led consortium had moved an application before the Hon'ble NCLT. The Airline was admitted by the Hon'ble NCLT under the Code and accordingly all processes were being followed. A total of Rs. 40,0000/- crores claims were received by the IRP, out of which the IRP had admitted a sum total of Rs. 22,000/- crores based on scrutiny of the documents available on records. Out of the total admitted claims, a sum of Rs. 7800/- crores was alone due to the financial creditors.

Upon admission of the application by the Hon'ble NCLT, there were multiple other claims including customers who had purchased advanced tickets for travel, overseas creditors, aircrafts lessors and thousands of operational creditors along with that of Financial Creditors. The virality of the matter was such that multiple insolvency proceedings were initiated in various Countries by various creditors and the Airline was heading for a much turbulent time.

It may be noted that though the Airline was admitted in the year 2018, still the year 2020, it failed to attract any interest from among prospective bidders for taking over the Airline and it

[115] IBEF, Indian Aviation Industry: An Overview, Indian Brand Equity Foundation (May, 25, 2023, 8:50 PM), https://www.ibef.org/pages/35892.#:~:text=It%20facilitates%20connectivity%20and%20access,gross%20domestic%20product%20(GDP).

[116] Manu Balachandran, Ashish Chhawchharia took Jet Airways out of its big mess. Can he help it fly?, Forbes India (May, 25, 2023, 8:55 PM), https://www.forbesindia.com/article/take-one-big-story-of-the-day/ashish-chhawchharia-took-jet-airways-out-of-its-big-mess-can-he-help-it-fly/83213/1.

[117] PTI, Jet Airways timeline: From Suspension to NCLT Order on Jalan Kalrock Consortium's resolution plan, The Indian Express (May, 25, 2023, 9:00 PM), https://indianexpress.com/article/business/aviation/jet-airways-insolvency-resolution-journey-timeline-7370647/.

was only towards the end of 2020, that a resolution plan was received by Jalan Kalrock Consortium providing for a total infusion of Rs. 1375 crores in the Airline, which was bifurcated as Rs. 900 crores towards Capital Expenditure and Working Capital and the balance Rs. 475 crores to settle the claims of the creditors. Further, the lenders were also provided for options to receive 9.5% stake in the airline along with proceeds received from sale of property owned by the Corporate Debtor. The proposal though provided for steep haircut on account of creditors, but the same was approved by the CoC with certain conditions like that of obtaining Air Operator's Certificate, Slot Allotment by the Directorate General of Civil Aviation and Ministry of Civil Aviation, among a host of other pre-operational requirements.[118] The Proposer acted on the requirements of the deal, but however as of now have failed to obtain any pre-operation's requirements coupled with multiple other rounds of litigations have stalled the revival plan. It may be noted that though officially the process under the Code has completed and it may be safe to infer that many vendors have been left unpaid along with steep haircuts to the creditors in the entire process under the Code.

The Airline remains hopeful for early start of operation amidst the volatility and contribute to the economic growth of the nation.

Unlike the Jet Airlines Case, wherein the Airline had stopped its operation and further an application was filed before the Hon'ble NCLT by the Consortium of State Bank of India, the Goair case of admission before the Hon'ble NCLT is totally indifferent. It may be noted that in the recent case of admission of Goair into CIRP process by the Hon'ble NCLT, the Corporate Debtor had itself filed for CIRP upon default of payment to the tune of Rs. 11.03 crores towards interest repayments of financial creditors.[119] The available data provides for an outstanding debt of Rs. 2660 crores towards aircraft lessors and further Rs. 1,202 crores towards its vendors. The Airline had sought for acceptance of its application under the Code and further sought imposition of moratorium under the Code, which in a way was a learning from the Jet Airlines incident, wherein lessors had taken aback their aircrafts prior to the admission of the CIRP process, more specifically prior to the moratorium period. The scenario in the Jet Airways CIRP Process under the Code as narrated above could be observed to have created a large impact in terms of regulatory hurdles, slot allotment and other practical challenges, the most

[118] Manu Balachandran, Ashish Chhawchharia took Jet Airways out of its big mess. Can he help it fly?, Forbes India (May, 25, 2023, 8:55 PM), https://www.forbesindia.com/article/take-one-big-story-of-the-day/ashish-chhawchharia-took-jet-airways-out-of-its-big-mess-can-he-help-it-fly/83213/1.

[119] Financial Services Division, GoAir Insolvency: Lessor's rights gone in thin air?, Vinod Kothari Consultants (May, 25, 2023, 09:30 PM), https://vinodkothari.com/2023/06/goair-insolvency-lessors-rights-gone-in-thin-air/.

important being the aircrafts being leased to other airlines. Having thought this in mind, Goair Airlines were swift in making a self-application for admission under the Code and to further seek commencement of moratorium. The entire act has been alleged to be vitiated with causing dents upon Indian Markets in respect of the Aircraft leasing market worldwide.[120] Though, the act may seem vitiated but upon a larger inspection, it may be observed that the Airline was faced with difficulty in operation due to delay in repair of faulty engines[121], and as such it was foresighted that the company might have difficulty in paying off the dues, in cases where the operation was supposed to stay affected due to faulty engines. The Airline deemed it right to barge in some time by admitting itself under the Code and further help itself re-structuring in order to service its debts and find a way around of keeping afloat the airlines. In other words, the airlines having observed the Jet Airways saga, preferred to avoid any such complexities and instead took for the proper and adequate utilization of the Code.

The third airline which has fallen under the gamut of the Code is that of Spicejet, which time and again have been brought under the Hon'ble NCLT by various lessors claiming unpaid dues. However, the same cannot be said to have yielded any result at present, as the Airline has been part of multiplicity of application for initiation of CIRP.[122] Though, the condition of the Airline has not been good and even the Directorate General of Civil Aviation have/has raised its eyebrows to ensure that no harm is being caused to passengers due to any issue on part of the airline.[123]

From the learning of the Jet Airways, Goair and Spicejet the implications of the code may be met out to understand the following:

- **Time if of Essence in case of CIRP against any Airlines:** The dwindling situation of the Jet Airways even after successful completion of the Resolution process, signifies the importance of timely resolution of CIRP Process against any airline. It was only due

[120] Financial Services Division, GoAir Insolvency: Lessor's rights gone in thin air?, Vinod Kothari Consultants (May, 25, 2023, 09:30 PM), https://vinodkothari.com/2023/06/goair-insolvency-lessors-rights-gone-in-thin-air/.
[121] Ishan Bakshi, Where does Go First's Insolvency Resolution Process Stand?, The Indian Express (May, 25, 2023, 09:50 PM), https://indianexpress.com/article/explained/explained-economics/go-first-insolvency-resolution-process-aviation-8679618/.
[122] Outlook Business Team, Aircastle files Second Insolvency Plea Against Spicejet; NCLT Questions Maintainability?, Outlook (May, 25, 2023, 09:58 PM), https://www.outlookindia.com/business/aircastle-files-second-insolvency-plea-against-spicejet-nclt-questions-maintainability-news-294476.
[123] IANS, Spicejet Insolvency Row: DGCA's early warnings reveal brewing trouble, The Times of India (May, 25, 2023, 10:05 PM), https://timesofindia.indiatimes.com/business/india-business/spicejet-insolvency-row-dgcas-early-warnings-reveal-brewing-trouble/articleshow/100395513.cms?from=mdr.

to the fact that the matter kept on prolonging, the various regulatory licenses have expired and being said that the same has not been renewed. The situation has adversely affected the Resolution Applicant who had projected different perspective and had aimed for re-starting the Dream Airline. But, due to heavy time being spent on the resolution itself due to multiple complexities, the dream of Jet Airways flying its wings remains a distant dream.

- **Aircraft Lessor's Role and Impact:** Based on data accumulated, it is noted that maximum of the aircrafts is taken on lease by airlines companies, and in case any aircraft is allowed to be move past, other than due to technical faults, then in such cases the airline companies fall prey to being severally affected. In the case of Jet Airways, many airlines were already taken aback by the lessors and thus as a result slot generation and other regulatory permission was difficult to apply for considering the fact that the Jet Airways after resolution had only limited number of airlines. Further, learning from the Experience of Jet Airways, the GoAir airlines moved a way ahead in ensuring that all the leased airlines stayed intact. This was accomplished by the fact that Jet Airwys had earlier suspended operation and it was only after several months that a CIRP Process was being initiated. However, in the case of GoAir, the Airline preferred to file an application for CIRP by itself upon observing its financial position and further getting moratorium, which ensured that all the aircrafts and other assets of the airline stayed intact.
- **Diminishing Value:** The Assets of the Airlines are that of aircrafts and employees. It is a known fact that every engineered products specifically transportation products fall prey to various damages by being kept still. It may be noted that such engines require regular maintenance and long haul of the flights without operations and proper maintenance degrades the assets value, i.e., in this case the aircrafts value.

3.3.2 Impact on FMCG Sector

The Fast Moving Consumer Goods Sectors are demand oriented sector and is believed to cater to every section of the society. In this regard, the case of major giant Ruchi Soya[124], which was one among the top five FMCG Companies along with being the number one cooking oil

[124] IBEF, Ruchi Soya, Indian Brand Equity Foundation (May, 25, 2023, 10:30 PM), https://www.ibef.org/industry/indian-food-industry/showcase/ruchi-soya.

manufacturer in the Country[125], was brought forward by the financial creditors to undergo proceeding under the Code.[126] The Company had a total debt of Rs. 12000/- crores at the time of admission into the CIRP process by the Hon'ble NCLT.

It is interesting to note the chain of events in the CIRP Process of the giant. Ruchi Soya had defaulted in payment of dues to the banks and accordingly two banks namely Standard Chartered Bank and DBS bank had filed an application under the Code for admission of CIRP Proceeding against the company.[127] At the time of admission of the company under CIRP, the total admitted claims were Rs. 9345/- crores to financial creditors and Rs. 2750/- crores to that of operational creditors. In pursuant to the Code, the IRP was appointed and later stakeholders claims were being admitted. Further, upon consultation of the IRP with the CoC formed, RP was appointed and in this case the IRP and RP was the same person, i.e., Shailendra Ajmera. Later, upon consultation from the committees, various resolutions plans were called for by the interested parties. In this regard, the Adani Wilmar group and Patanjali foods had emerged two prospective bidders for the resolution plan of Ruchi Soya. During the first instance, Adani Wilmar had emerged as a highest bidder by offering Rs. 6000/- crores, whereas Patanjali Foods had emerged as the second bidder by offering Rs. 5700/- crores.

The resolution plan submitted by the Adan Wilmar was approved by the CoC, however the same was challenged by the second highest bidders, i.e., Patanjali Foods before the Hon'ble National Company Law Appellate Tribunal on the grounds of eligibility of Adani Wilmar under Section 29A[128] of the Code.[129] However, before settling of the claims of Patanjali Foods before the Hon'ble NCLAT against Adani Wilmar resolution plan, Adani Wilmar omn its own decided to drop out of the bidding process and accordingly submitted a memorandum citing delay as reasons for its backing out. The exit of Adani Wilmar paved down the way for Patanjali

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[125] IBEF, Ruchi Soya, Indian Brand Equity Foundation (May, 25, 2023, 10:30 PM), https://www.ibef.org/industry/indian-food-industry/showcase/ruchi-soya.

[126] Indu Bhan, IBC Process: SC clears implementation of Ruchi Soya Resolution Plan, Financial Express (May, 26, 2023 02:20 PM), https://www.financialexpress.com/industry/ibc-process-sc-clears-implementation-of-ruchi-soya-resolution-plan/1786932/#:~:text=The%20company%20was%20admitted%20for,had%20moved%20the%20NCLT%2C%20Mumbai.&text=divided%20on%20allocation-,Ruchi%20Soya%2C%20which%20owes%20around%20Rs.,Standard%20Chartered%20and%20about%20Rs..

[127] Dr. Binoy J. Kattadiyil, et.al, Insolvency of Ruchi Soya: A Brief Analysis, 12 IJMER (2020).

[128] Insolvency & Bankruptcy Code § 29A (2016).

[129] Sunny Verma, How Adani won Ruchi Soya, why Patanjali objects, The Indian Express (May, 26, 04:00 PM), https://indianexpress.com/article/explained/how-adani-won-ruchi-soya-why-patanjali-objects-5336462/.

foods to submit a fresh resolution plan and take over the control and management of Ruchi Soya. Taking the advantage of the situation, as Patanjali foods emerged as loan bidder, the lone bidder submitted a bid of Rs. 4350/- crores,[130] which excluded the other Rs. 1700 crores which was provided by the Company in the earlier bidding process.

In the arrangement proposed by the Bidder, it aimed to provide to utilize the said monies by allocating a total sum of Rs. 4235/- crores for Creditors payment, out of the total claims of around Rs. 12,000/- crores. In the arrangement, it was provided that a total of Rs. 4053.19 crores would be paid towards secured financial creditors, Rs. 20 crores to unsecured financial creditors and Rs. 90 crores to the operational creditors. The entire distribution provided for haircut on part of the lenders to the tune of 70% of their admitted dues. With the offer at place, the same was approved by the CoC and effectively Patanjali Foods took over the possession of the distressed Ruchi Soya Industries, which was a pioneer in the FMCG Sector.

Further, the prominent and ongoing case of Future Group could also be accessed, wherein the company has been dragged into CIRP by the Financial creditors on account of default in payment of dues. In the year 2022, the Public Sectors banks had moved to the Hon'ble NCLT for initiation of CIRP against the Future Group, which was once regarded as the Country's Biggest Retail Chain.[131] The Future Retail accounts for a total debt of around Rs. 21000/- crores. The claim is a mixture of both financial and operational creditors claim and as such a total of around 17500 crores claims have been verified and admitted by the IRP.[132] The case is ongoing in the Hon'ble NCLT and as such is exploring options for resolution plans which may be submitted by prospective bidders. However, it is noteworthy to noted that on a real world aspect, maximum stores under the Control of Future Retail has been taken over and re-branded under various Reliance brands. The action on account of the fact that Reliance had taken over the leased spaces of Future wherein the Future Group had failed to pay the lease rent, and had

[130] Vatsala Gaur, Patanjali keen on buying Ruch Soya as Adani Wilmar pulls out of deal, The Economic Times (May, 26, 2023, 04:10 PM), https://economictimes.indiatimes.com/industry/cons-products/fmcg/patanjali-keen-on-buying-ruchi-soya-as-adani-wilmar-pulls-out-of-deal/articleshow/67223637.cms.

[131] Tarannum Manjul, From India's Biggest Retail Chain to Debt Ridden Firm: Saga of Future Group, BW Business World (May, 26, 2023, 05:30 PM), https://www.businessworld.in/article/From-India-s-Biggest-Retail-Chain-To-Debt-Ridden-Firm-Saga-Of-Future-Group-/12-04-2023-472592/.

[132] ET Now Digital, Future Retail Insolvency Resolution: Financial Creditors Claim Rs. 21,058 crore, ET Now (May, 27, 2023, 06:30 PM), https://www.timesnownews.com/business-economy/companies/future-retail-insolvency-resolution-financial-creditors-claim-rs-21058-crore-article-93714406.

consequently again sub-let the same to Future Group for Operations.[133] Furthermore, it is interesting to note that Reliance Industries for the inability on part of the Future Group had provided notice to the Future Group and have further taken steps to inculcate and take over the inventories which is said to be supplied by Reliance itself. In a very different situation, Reliance could be understood to have first taken over the lease for which Future Group had defaulted, further coupled with sub-letting the premises and introducing majority inventory of its own and later resorting to providing notices to Future Group for default in payment of lease rent and subsequently indulging in providing for taking over all the employees on its payroll and further changing the signage of the Future Retail stores to rebrand into Reliance brands. The act could be said to be on account of fulfilment of the very objective of agreement entered in between Reliance and Future Group, which was challenged by Amazon.[134] Further, the present act could be understood to have completed the agenda of the agreement, under the protection of law and is a classic example wherein even though the Future Group battles for its existence in the Hon'ble NCLT, but on the other hand the Conglomerated had taken over all the inventories and leased spaces.

The Future Retail Group thrives for a resolution plan, but however the same has not yielded any result, but wide the wide presence of the Group, as many as 55 prospective bidders are supposed to bid for providing the best deal for the cash trapped group.[135]

From the learning of the two major giants in the FMCG Sector, the implications of the code may be met out to understand the following:

- **Time Centric:** From the observation of the Ruchi Soya Resolution Bidding process, it may be understood that the Adani Wilmar Enterprises, which had emerged as the highest bidder had withdrawn itself from further bidding round citing the fact that the process was time consuming and as such due to the prolonged dispute, the value of the assets of Ruchi Soya would diminish. The contention was found valid for the fact that

[133] PTI, Reliance terminates sub-lease of 950 Future Stores, The Economic Times (May, 27, 2023, 04: 00 PM), https://economictimes.indiatimes.com/industry/services/retail/reliance-terminates-sub-lease-of-950-future-stores/articleshow/90123331.cms.

[134] Press Trust of India, Reliance calls off Rs. 24,713 crore deal with Future Group, India Today (May, 27, 2023, 04:10 PM), https://www.indiatoday.in/business/story/reliance-deal-future-group-retail-stores-creditors-1941081-2022-04-23.

[135] Nevin John, Reliance, Adani among 55 prospective bidders in race for Future Retail, Fortune India (May, 27, 2023, 04:30 PM), https://www.fortuneindia.com/enterprise/reliance-adani-among-55-prospective-bidders-in-race-for-future-retail/112419.

Ruchi Soya had multiple manufacturing units and constant delay in settlement of the Case would have rendered the manufacturing units useless.

- **Miniscule Settlement:** From the resolution proposal which was submitted by the Patanjali Foods, it may be observed that the creditors as a whole was only provided with a bare 30% against their admitted claims. It may be made to understood that 70% haircut was provided by Patanjali Foods in its resolution plan, and which was duly voted in favour by the CoC. The miniscule settlement proved to be a stellar deal for Patanjali, which later changed the names of Ruchi Soya to Patanjali Foods.
- **Diminishing assets value:** From the understanding of the Future Retail perspective, it may be noted that how assets which were under the Control of Future Retail was twisted into barging onto become assets of Reliance. The act may be understood to have diminished the value of the assets further which was under the control of Future Retail and further the prolonging delay in the CIRP process have rendered the inventories to be void of its original value.

3.4 Judicial Intervention in the Code

3.4.1 The Essar Steel Case

The Challenges as provided in various cases, may be understood to have answered the many problems being faced. To begin with the landmark judgement in the *Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Gupta & Ors.*[136], may be analysed wherein many important observations were being provided by the Hon'ble Supreme Court of India. The Essar Steel case was a high-profile insolvency and bankruptcy case in India that concluded in 2019. The case involved Essar Steel, one of India's leading steel companies, which had accumulated significant debt and defaulted on its loan payments.

3.4.1.1 Brief Facts:

In 2017, the case was admitted by the National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code (IBC) of India. The objective was to find a resolution for Essar Steel's outstanding debt and revive the company. Under the IBC, interested parties were invited to submit resolution plans for Essar Steel. Two prominent bidders emerged:

[136] Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Gupta & Ors., (2020) 8 SCC 531.

ArcelorMittal, a global steel company, and Numetal, a consortium led by Russia's VTB Bank in partnership with a company owned by Rewant Ruia, a member of the Essar family. Both ArcelorMittal and Numetal faced legal challenges regarding their eligibility to bid. ArcelorMittal was initially disqualified for being a promoter of a non-performing asset (NPA) company, while Numetal faced issues related to Rewant Ruia's association with Essar Steel. The disqualifications were later addressed, and both bidders became eligible to submit revised bids. In 2018, the Committee of Creditors (CoC) approved ArcelorMittal's revised bid of around ₹42,000 crore (approximately $5.7 billion), which included a substantial upfront payment to creditors. The CoC's decision was subsequently approved by the NCLT. Numetal and one of the unsuccessful bidders, JSW Steel, challenged the CoC's decision in the appellate courts. The case eventually reached the Supreme Court of India, which issued several rulings to address concerns related to the distribution of funds among various stakeholders. In November 2019, the Supreme Court upheld ArcelorMittal's resolution plan and cleared the way for the acquisition of Essar Steel. The judgment provided clarity on various aspects of the IBC and set precedents for future insolvency cases.

3.4.1.2 Observations of the Hon’ble Supreme Court:

The Supreme Court of India made several important observations and rulings in the Essar Steel case. Here are some of the key highlights:

1. **CoC's Commercial Wisdom:** The Supreme Court has underscored the significance of upholding the commercial wisdom of the Committee of Creditors (CoC) when assessing and endorsing resolution plans. It has firmly stated that the CoC's determinations should not be disrupted unless there is a breach of the law or the resolution plan itself is found to be arbitrary or unreasonable.
2. **Resolution Plan Approval:** The court clarified that once the resolution plan is approved by the CoC and meets the requirements of the Insolvency and Bankruptcy Code (IBC), it is binding on all stakeholders, including operational creditors and dissenting financial creditors.
3. **Distribution of Funds:** The court laid down guidelines for the distribution of funds among various stakeholders in a resolution plan. It emphasized that financial creditors should be given priority over operational creditors and that the distribution should be fair and equitable.

4. **Eligibility of Resolution Applicants:** The Supreme Court ruled that resolution applicants should be eligible to bid for stressed assets and should not be associated with defaulting entities or non-performing assets. This decision aimed to maintain the integrity and credibility of the resolution process.
5. **Time-bound Resolution:** The court stressed the importance of completing the resolution process within the timelines prescribed under the IBC. It encouraged expeditious resolution to maximize the value of distressed assets and minimize the burden on the economy.
6. **Judicial Review:** The Supreme Court clarified that the scope of judicial review in insolvency matters is limited. It stated that courts should not interfere with the commercial decisions of the CoC unless there are violations of law, mala fides, or manifest arbitrariness.
7. **. Protecting Operational Creditors:** The court recognized the importance of protecting the interests of operational creditors and ensuring a fair and equitable distribution of funds. It observed that operational creditors should not be discriminated against in resolution plans and should receive a reasonable share of the proceeds.

These observations and rulings by the Supreme Court in the Essar Steel case provided clarity on several important aspects of the insolvency and bankruptcy process in India. They helped establish precedents and guidelines for future cases, ensuring a more transparent, efficient, and equitable resolution process.

3.4.2 The Swiss Ribbons Case

The Case of *Swiss Ribbons (P) Ltd. v. Union of India*[137],is a significant ruling by the Supreme Court of India regarding the constitutional validity of the Insolvency and Bankruptcy Code (IBC) and its provisions. It would be important to analyse the case for understanding the perspective as provided by the Hon'ble Supreme Court of India.

3.4.2.1 Brief Facts

In the case of Swiss Ribbons Pvt. Ltd., a notable non-banking financial company involved in providing loans and advances, the constitutionality of various provisions of the Insolvency and Bankruptcy Code (IBC) enacted in 2016 was challenged. The petitioner raised concerns regarding the violation of fundamental rights and principles of natural justice in relation to

[137] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

provisions pertaining to corporate insolvency resolution process, fast-track insolvency process, disqualification of defaulting promoters, and the constitutionality of the Hon'ble National Company Law Tribunal (NCLT). The petitioner argued that the IBC granted excessive powers to financial creditors, lacked adequate safeguards for operational creditors, and violated the principles of equality and non-arbitrariness. The Supreme Court, after thoroughly considering the arguments presented by both sides, upheld the constitutional validity of the IBC and dismissed the petitioner's contentions. The court acknowledged the vital role of the IBC in addressing corporate insolvency issues and facilitating the resolution of distressed assets. It emphasized the need to balance the interests of all stakeholders, including both financial and operational creditors, while preserving the value of the debtor's assets. The court recognized the National Company Law Tribunal (NCLT) as a quasi-judicial body responsible for overseeing the insolvency resolution process.

The court acknowledged the IBC's objective of preventing the misuse of the insolvency process by defaulting promoters and ensuring prompt payments to creditors. It highlighted the significance of resolution over liquidation, emphasizing the importance of revitalizing businesses and maximizing the value of the debtor's assets. The court affirmed the provision in the IBC that enables the disqualification of defaulting promoters from participating in the resolution process, aiming to prevent willful defaulters from regaining control of distressed assets.

3.4.2.2 Observations of the Hon'ble Supreme Court:

The Supreme Court of India made several important observations and rulings in the Swiss Ribbons case. Here are some of the key highlights:

1. **Constitutional Validity:** In 2019, the Supreme Court declared the IBC and its provisions constitutionally valid, upholding the law's objective of promoting the resolution of distressed assets and ensuring timely payments to creditors.
2. **Preventing Abuse of IBC:** The court recognized the IBC's role in preventing the abuse of the insolvency process by defaulting promoters and preserving the value of stressed assets. It emphasized that the objective of the IBC is not liquidation but resolution, with a focus on revival and maximizing the value of the debtor's assets.
3. **Corporate Insolvency Resolution Process (CIRP):** The court upheld the CIRP under the IBC as a creditor-driven process and highlighted its effectiveness in achieving a time-bound resolution of stressed assets. It emphasized the need to balance the interests

of all stakeholders, including financial and operational creditors, while maintaining the viability of the corporate debtor.\

4. **Role of the National Company Law Tribunal (NCLT):** The Supreme Court recognized the pivotal role of the NCLT in overseeing the insolvency resolution process and ensuring fair and transparent proceedings. It stressed the importance of the NCLT acting as a quasi-judicial body and providing a forum for stakeholders to present their claims and grievances.
5. **Disqualification of Promoters:** The court upheld the provision in the IBC that enables the disqualification of defaulting promoters from participating in the resolution process. It recognized the need to prevent wilful defaulters from regaining control of distressed assets and emphasized the IBC's focus on protecting the interests of creditors.
6. **Fast-Track Insolvency Process:** The Supreme Court acknowledged the provision for a fast-track insolvency process under the IBC, which allows for expedited resolution of certain categories of small companies. It recognized the need for a streamlined process to resolve smaller defaults swiftly and efficiently.
7. **Amendments and Interpretation:** The court clarified that amendments to the IBC should be made by the legislature, and any issues of interpretation should be addressed by subsequent legislation rather than judicial intervention.

The ruling provided clarity on several key aspects of the law, including the role of the NCLT, the disqualification of defaulting promoters, and the balance of interests among stakeholders. It solidified the IBC's position as a crucial tool for insolvency resolution and contributed to the development and effectiveness of India's insolvency regime.

3.4.3 Other Important Pronouncements

Apart from the two landmark cases, there are other notable cases wherein important decisions have been provided, which have helped in overcoming the challenges in the Code.

The applicability of moratorium is the key driver in the Code and it has always been a dispute before the Hon'ble Courts to determine whether moratorium is being applicable in certain assets despite being a pendency of the case of Corporate Debtor under the Code. To provide certain relief to the confusion for the applicability of the Moratorium, the Hon'ble Bombay High Court in the case of *Angre Port (P.) Ltd. v. TAG 15 (IMO. 9705550)*[138], analysed the other applicable laws on certain assets which was taken on lease by the Corporate Debtor. Here, the

[138] Angre Port Private Limited v. TAG 15 (IMO. 9705550), 2022 SCC Online Bom 56.

Corporate Debtor leased ship and had claimed moratorium upon institution of any suit by the owner. The Hon'ble Court while observing the fact took into recourse the applicable provisions of the Admiralty Act and came to the conclusion that Moratorium was not applicable in cases of ships, as ships are being regarded and classified as different juristic entity under the Admiralty Act. The decision of the Hon'ble High Court paved way in categorizing the applicability of moratorium under the Code and further even led to providing differentiation upon the applicability of Moratorium under the Code. In the same light, the Hon'ble Supreme Court in the Case of *Narinder Garg & Ors. v. Kotak Mahindra Bank Ltd. & Ors.*[139], had strictly emphasized that the applicability of moratorium shall only to be restricted to the Corporate Debtor and it shall not give immunity to any persons of the Corporate Debtor from any proceedings under the provisions of various acts.

The Hon'ble Supreme Court in the Case of *Invent Asset Securitisation and Reconstruction Pvt. Ltd. v. Girnar Fibres Ltd.*[140], had re-iterated the very objective of the Code. The Hon'ble Supreme Court provided that the objective of the Code is to ensure that the Corporate Debtor remains a going concern and further re-iterated that the provisions shall not be mis-utilized as money recovery proceedings. In regards to the objective of the Code, the Hon'ble Supreme Court in the Case of *Vidarbha Industries Power Limited v. Axis Bank Limited*[141], held that the admission of any application under the Code is discretionary in nature. The Court opined the view that even though there might be existence of debt of the Creditor initiating CIRP under the Code, however the Hon'ble NCLT has jurisdiction to accept any such application by weighing on multiple factors involved in admission of an application under the Code.

The aforementioned Judicial Pronouncements have significantly contributed to enhancing the efficacy of the Code; however, it still faces challenges in fully achieving its intended objectives.

[139] Narinder Garg & Ors. v. Kotak Mahindra Bank Ltd. & Ors., 2022 SCC Online SC 517.
[140] Invent Asset Securitisation and Reconstruction Pvt. Ltd. v. Girnar Fibres Ltd., 2022 SCC Online 808.
[141] Vidarbha Industries Power Limited v. Axis Bank Limited, (2022) 8 SCC 352.

CHAPTER 4: COMPARATIVE ANALYSIS

The introduction of the Insolvency and Bankruptcy Code, 2016 in the Country is a new approach towards dealing with insolvency in comparison to the existing laws of the nation. The Code which was introduced in the Country provided for facilitating an Easy Exit Option was one-of-a-kind approach in the Country, which introduction was very late in comparison to world economies. Many nations like that of The United States of America, the United Kingdom, Singapore, Australia had for a long time in possession of such significant laws in the nation. Since, the laws were strategically in place even before the relative introduction of the Code, it would be imperative to critically analyse the insolvency laws of such Countries and further compare such laws to provide a relative understanding as to the shortcomings in the Code of the Country. The same would be important for the fact that, Countries like the United Kingdom are stated to have an Insolvency Resolution score of 80.3, whereas the United States of America is having the score as 90.5, Australia is having the score of 78.9 and Germany having a score of 89.8 as compared to India having an Insolvency Resolution Score of mere 62, as has been provided and collated by the World Bank Report.[142] In this regard, the comparison of the laws of the various Countries becomes important for the portrayal of the shortcomings of the Code and further analysing the relative poor ratings of the Code by the World Bank.

4.1 Bankruptcy Laws of the Other Nations

To understand the shortcomings of the Code, the Bankruptcy laws of the United States of America, The United Kingdom, Australia and Germany would be apt to be discussed.

4.1.1 The Bankruptcy Laws of the United States of America

The United States of America is regarded as one of the developed nations of the world and in terms of the Insolvency Resolution Score, it enjoys the highest score of 90.5 as compared to other nations. The high score could be drawn to the existence of a strong Insolvency Act in place in the Country, which is known as the Bankruptcy Reform Act, 1978[143]. The Act is

[142] The World Bank, Resolving Insolvency, The World Bank Doing Business Archive (May, 25, 2023, 12:12 PM), https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency.
[143] Bankruptcy Reform Act (1978).

regarded as a debtor friendly approach and emphasis is made on restricting rather than liquidation. [144] The Chapter 11 of the Act is an important aspect which provides the ways, timelines, and other important aspect for dealing with insolvency in the Country.[145] In terms of the initiation of the process under the Act, the Chapter provides power upon the Debtor Company to start the proceeding under the Act. After filing of the application before the Bankruptcy Court of the State, the same concept of moratorium takes place along with providing a suitable timeline of 120 days for completion of the process under the Act. Immediately after acceptance of the application, management is overseen by a Court appointed trustee. Here, the debtor still remains in control and power of the business. Further, in order to complete the entire process within the act, the debtor is under an obligation to approve from the creditors by at-least 2/3rd of the creditors actually voting. Herein, the debtor enjoys the right to sell over the assets which are free from lien and also enjoys the power of further creating lien on those assets from the lenders. In here, the debtor is provided an opportunity to get nod from the creditors within 2 months, and only upon failure of which the said debtor is pushed to Bankruptcy, which shall be carried on under Chapter 7 of the Act. The hierarchy of payment as contained under the act is that of first payment is made to the secured creditors, then towards insolvency cost, then towards any operational cost incurred during the period, Employees dues, Statutory dues, unsecured interests and finally the equity shareholders. Further, in terms of the Cross Border Insolvency is concerned, the Act duly recognizes and includes the UNCITRAL provisions under Chapter 15 of the Act, which provides for co-operation and coordination in between the Courts for dealing with cross border insolvency.

The Act has been in existence till today witvfcxzxchnmnv cxcvnm,mbcxzcgjk,mvcxzmh only a recent amendment in the year 2005 which was known as Bankruptcy Abuse Prevention and Consumer Protection Act. The act was amended so as to ensure that the relative provisions of the Bankruptcy Act was not mis-utilised, as there was a growth in the number of cases of frivolous bankruptcy cases to forego dues of oneself. Hence, the need for amendment was sought and apart from minor changes like introducing stricter provisions for pulling the Act, the act remained strict in its core principles of the “Debtor-in-Possession” model.

[144] CFI Team, US Bankruptcy Code, Corporate Finance Institute (May, 25, 2023, 01:30 PM), https://corporatefinanceinstitute.com/resources/commercial-lending/us-bankruptcy-code/.

[145] Tim Vipond, Chapter 11 Bankruptcy, Corporate Finance Institute (May, 25, 2023, 01:30 PM), https://corporatefinanceinstitute.com/resources/commercial-lending/what-is-chapter-11/.

4.1.2 The Bankruptcy Laws of the United Kingdom

The U.K. Bankruptcy Law bear huge resemblance with that of the Indian Bankruptcy Law. The U.K. Bankruptcy Law is termed as U.K. Insolvency Act, 1986.[146] The act provides options to both creditors and debtors to initiate insolvency under the process. Immediately, after admission of the application is made by the Court, the moratorium becomes applicable and further a period of 12 months is provided for completion of the entire insolvency process. Here, the management is "Creditors in Control", where the entire management passes on to that of the Insolvency Practitioner, however the daily operation remains with the directors. In regards to the selling off the property of the debtor, the administrator/insolvency practitioner is adjudicated with the powers to sell the assets of the debtor without the requirement of order from the Court. The Administrator is treated as an agent of the debtor/company in question and is free from any personal liability at any such times. Further, the overall cost of the proceedings is borne by the Debtor by himself as contained under the Act. The one-year period is being strictly followed, and failure to obtain any resolution plan within the said period entails for mandatory liquidation of the debtor. The distribution of payment under the act is that of first for payments to secured creditors, then towards expenses of the Insolvent Estate, later the Employees' salaries restricted to 4 months prior to the date of insolvency, then the creditors having floating charges against the debtor, then unsecured creditors and finally the equity shareholders. The Cross Border Insolvency is also taken due care under the Act, which has been acted in accordance with the UNCITRAL Agreement on Insolvency.[147]

Furthermore, the act was very much in existence till the year 2020, however the same was updated with the introduction of the Corporate Insolvency and Governance Act of 2020.[148] The act changed at the entire "Creditor in control" mechanism to that of "Debtor-in-possession".[149]The act was specifically brought forward in light of the impact of COVID-19 in the Country. Here, the Court has been provided with the power of sanctioning a resolution plan, which shall be binding upon the creditors, in cases where the restricting plan is both "fair and equitable." In such cases, the creditors would be voting on the proposed plan, and in case of dissent, the

[146] U.K. Insolvency Act (1986).

[147] Dr. Binoy J. Kattadiyil, et.al, Corporate Insolvency in India and Other Countries-A Comparative Study, 149 IJMER (2020)

[148] Corporate Insolvency and Governance Act (2020).

[149] Ali Shalchi, New Business support measures: Corporate Insolvency and Governance Act 2020, UK Parliament House of Commons Library (May, 26, 2023, 03:30 PM), https://commonslibrary.parliament.uk/research-briefings/cbp-8971/.

Court would enjoin the powers to impose it on the dissenting creditors as well through the mechanism termed as "Cross-Class Cram Down." [150] Further, the act introduced mandatory supply by suppliers to companies undergoing restructuring under the Act. It provided a ban on stoppage of supply, but exempted small suppliers and businesses from making supplies to corporations undergoing restructuring under the Act. The Act changed the entire narratives of the Insolvency Act in the Country and further provided for an immediate measure arising out of the economy situation post COVID-19.

4.1.3 Bankruptcy Laws in Australia

The Bankruptcy Laws in Australia are covered by three major acts. The Bankruptcy Act, 1966[151], The Corporations Act, 2001[152] and the Australian Securities and Investment Commission Act, 2001.[153] The three acts govern the entire bankruptcy related matters int the Country. In cases where an application is being filed by any Creditors, Debtors or the Directors themselves, then in such cases the Australian Federal Court along with the Supreme Court of each respective Courts have the power to try the cases relating to that of insolvency. At the initial stage of the process, the trustee needs to be appointed by the debtor himself or through the lawyers on behalf of the debtor. It is mandated that such trustee before appointment shall furnish a signed declaration to the creditors that the appointment will not impact their independence and ability to act objectively. Further, the Country also adopts the "Creditor in control" principle model for adjudication for the matters. The priorities of payment under the Act relates to first towards secured creditors, second towards liquidation costs, then the outstanding employee settlements, forth the unsecured creditors and finally the shareholders.[154] The Cross Border Insolvency issue is also taken due care under the Act as per the UNCITRAL Agreement.

[150] Ali Shalchi, New Business support measures: Corporate Insolvency and Governance Act 2020, UK Parliament House of Commons Library (May, 26, 2023, 03:30 PM), https://commonslibrary.parliament.uk/research-briefings/cbp-8971/.
[151] The Bankruptcy Act (1966).
[152] The Corporation Act (2001).
[153] Australian Securities and Investment Commission Act (2001).
[154] Dr. Binoy J. Kattadiyil, et.al, Corporate Insolvency in India and Other Countries-A Comparative Study, 149 IJMER (2020).

4.1.4 Bankruptcy Laws in Germany

The Germany Insolvency Code, 1994[155] governs the Insolvency Regulation in the Country. In order to try any case under the Code, the District Court shall play the role of Bankruptcy Court for adjudication under the Act. Further, for various steps under the process, the professional are designated differently, and as for earlier Insolvency Proceeding is concerned, the professional is to be designated as "Preliminary Insolvency Administrator". Further, during liquidation, the professional is to be termed as "Liquidator". However, it is pertinent to note that only the debtors and the creditors have the power to initiate resolution under the Code. For any approval of resolution plan, it is provided that consent by way of voting of more than 50% of the creditors is taken to approve the plan. The "Debtor in Control" principle is being followed. Also, in terms of payment priorities, the first payment is to be made to Creditors those having the rights of separation, further towards Secured Creditors, later to Estate Creditors, followed by Insolvency Creditors and finally to the Equity Shareholders. Unlike the other nation, Germany has also adopted cross border insolvency as provided under UNCITRAL Model law.

4.2 International Undertakings and Similarities

Having provided the perspective and relevant laws of various nations, it would be imperative to look upon the various provisions which is being followed in India. For, the very initial step as to the eligibility to file for an application of insolvency, it may be noted that in India the same could be filed by the creditors or the debtor by itself. The same could be said to be existing and well followed in the United Kingdom, Australia as well as Germany. The United States only permit for the Debtor to file for Insolvency under the Code. Further, in terms of moratorium, every Country including India is said to provide for moratorium period to the debtor immediately after the application is accepted by the Adjudicating Authority. The second important aspect which could be made is that of the definite timeframe for the process. India has a timeline of 330 days, whereas other Countries have a similar timeline of 10-12 months. The time is considered as an essence by every Country and likewise, India being a developing Country and particularly new towards introducing a holistic Code has adopted the usual time frame which has been in existence for many years among various other nations.

[155] Germany Insolvency Code (1994).

The most Important aspect remains that relating to the Control of the Corporate Debtor, wherein India had adopted under the likes of the United Kingdom. Both India and the United Kingdom follows the "Creditor-in-Control" principle, wherein immediately after a Corporate Debtor is admitted in Insolvency the charge and functioning of the Company shifts to a professional appointed under the purview of the Court. However, the United Kingdom did away with the "Creditor-in-Control" model in the year 2020 and adopted the "Debtor-in-possession" model alike of the United States. Under the "Debtor-in-Possession" model, the operations rests within the control of the Debtor itself, however the same is supervised the professional/trustee. The Countries like that of the United States of America, the United Kingdom and Germany continue with the "Debtor-in-possession" model and India and Australia continue with that of the "Creditors-in-Control" concept. In terms of voting requirements for approval of resolution plan, the majority of the shareholders consent is sought to be required in every Countries, however with recent amendment in the laws of the U.K., the same cannot be the said to the case, where the Court has been provided with the power to provide for resolution plan, which shall be just and equitable and further the creditor are supposed to vote. Further, it is also provided in the act that in case of dissenting creditors, the Court enjoys the power to impose the same plan upon the creditors. Thus, in a way it does away with the voting requirements as is being followed in various other parts of the Country. Further, all the nations as discussed provides for priority payment to secured creditors and later payment of other dues like that of liquidation costs, workmen dues, unsecured creditors and finally the shareholders. However, the mechanism slightly deflects in India, wherein the very first priority is set out towards liquidation expenses, then workmen dues, secured creditors, salaries, unsecured creditors, Statutory dues and finally the shareholders. Also, in term of payment owing out of the entire process, the U.K., U.S. and Germany provides for such payment by the Debtor itself, whereas a slight different aspect is observed in the case of India and Australia, which follows the case of payment of the costs by the applicant itself, i.e., the creditors instituting the application or in opposite cases the debtors instituting a case on its own.

It may be noted that upon observation, India's entire Code may be termed as more adopted from the U.K. Laws along with certain principles with that of Australia. Further, the current Code has taken the other aspect of the applicability in the home state and have provided for a tailored Code to suit the requirements of the laws of the Country.

CHAPTER 5: CONCLUSION AND SUGGESTIONS

Recommendations and Suggestions

Based on the above analysis of the Insolvency and Bankruptcy Code, 2016, through practical transgressing from that of the history to the modern-day development, it would be imperative to point the various implications of the code in various sectors as narrated and provided hereinabove. Considering the travesties faced by the stakeholders, at the time of the Insolvency process and further the misutilization of the Code in cases, it would be imperative to call for amendment of the Insolvency and Bankruptcy Code, 2016 which is prevalent in the Country. Some of the recommendations based on the observations highlighted in the current paper are as under:

- Strengthening the Infrastructure: India is a developing Country and so is the Code. However, there has a been a significant spike in number of cases of insolvency and the Adjudicating Authority, i.e., the Hon'ble NCLT has been overburdened with the number of cases. The overload of cases has increased the time taken by the Hon'ble NCLT for proper adjudication and disposal of cases under the IBC.[156] The mandatory timeline as provided under the Code is breached time and again and the Code may soon loose its uniqueness, due to prolonging delays in cases. In this regard, it is highly suggested that the Hon'ble NCLT benches shall be increased from the present 16 nos. of benches to that of at-least 28 nos. of benches, which shall cover all the States in particular. Further, for States, where maximum number of cases are registered in the Hon'ble NCLT, the number of Judges shall e increased to ensure timely resolution of the process.
- Providing for Rules and Procedures to govern CoC: The need for regulating the CoC by way of introducing standard set of rules and procedures. It may be noted that under the Code, the CoC is provided with utmost powers, whether it be appointing of RP to that of approval of any resolution plan.[157] The CoC is supposed to vote in various cases, and only in case where a majority of the vote is obtained, depending on the purpose,

[156] PTI, More than 21,200 cases were pending before NCLT till January-end: Govt., The Hindu (June, 20, 2023, 08:55 PM), https://www.thehindu.com/news/national/more-than-21200-cases-were-pending-before-nclt-till-january-end-govt/article66614567.ece.

[157] Ashutosh Kumar, A Code for Creditors, Business Today (June, 20, 2023, 09:15 PM), https://www.businesstoday.in/magazine/industry/story/a-code-for-creditors-308229-2021-10-06.

the purpose gets approved. Further, as was observed in the *Swiss Ribbons Case*, wherein the definition of related party was re-iterated and the idea of related party was discussed in terms of its role, it would be imperative that stringent rules in particular governance of CoC be introduced, which would ensure that the entire CoC meetings and decisions, remains transparent and further for the fact that no related party gets involved I whatsoever to influence any decisions of CoC. In terms of PSUs, the related party picture plays a prominent role, as it so happens that the PSUs are provided loans by majority of Public Sector banks owned by the Government, and as such when PSUs companies are brought under the ambit of the Code, and CoC is being formed, it remains a high possibility that any decision of the CoC may be influenced, considering the fact that both the PSUs and the Banks are governed by the Government.

- Strengthening the framework for pre-packaged insolvency resolution: Introduce a robust pre-packaged insolvency resolution process to facilitate the swift and efficient restructuring of viable businesses.[158] This would involve allowing distressed companies and their creditors to negotiate and agree upon a resolution plan before initiating the formal insolvency process. It may be treated as the need of the hour, which not only would promote a speedy resolution of any distressed company, but would ensure that the Debtor remains a going concern business during such times. It may be important to mention the fact that tough the Code provides for the objective of ensuring a going concern business, but with the IRP process in question, the very nature and operations of the Debtor becomes affected for variety of reasons, like that of limited to no knowledge of the business by the IRP, no proper resource to ensure debtor as a going concern entity, diminishing reputation of the Debtor in the market, among a host of others.
- Streamlining the insolvency process: Continue to streamline and expedite the insolvency process by reducing procedural delays and bottlenecks. This can be achieved by implementing strict timelines for each step of the process, encouraging the use of technology for documentation and communication, and ensuring adequate infrastructure and resources for the insolvency resolution professionals (IRPs) and the National Company Law Tribunal (NCLT). The IRPs are supposed to provide for newspaper advertisement for calling all stakeholders for submission of their respective

[158] Meghna Mittal, Govt plans pre-pack resolution for slightly bigger companies under IBC, Money Control (June, 20. 09:30 PM), https://www.moneycontrol.com/news/business/economy/govt-plans-pre-pack-resolution-for-slightly-bigger-companies-under-ibc-10241641.html.

claims against the Debtor undergoing CIRP. Further, such advertisements call for physical submission of claims through by post and in specified format provided under the Code. However, the same could be done by way of providing specific portal/websites along with an option to submit physical copy in special circumstances, which in a way would ensure that the entire collation of claim is done in a much faster way. This would also ensure that the data are stored in a more secured form, without the fear of theft, damage and other such situation. Furthermore, the entire idea of collecting the data/claims through websites/forms would ensure that all data submitted enjoys the same standard and would be easy to interpret and collate the claims under the Code. Further, with such step, it not only would decrease the time taken for collation of the claims, but would mean for a faster formation of the CoC in such cases. The faster formation of CoC would further entail that the entire process is completed in a faster and more economical way.

- Enhance transparency and accountability: Promote greater transparency and accountability in the insolvency process by ensuring the timely disclosure of relevant information to all stakeholders. This includes providing regular updates on the progress of the insolvency proceedings, financial statements of the company, and details of the resolution plan. In today's situation it is often observed that large corporate debtors having thousands of stakeholders are left in larch of information, wherein such information is only readily available for the CoC and a handful of stakeholders. It may be further be pointed out at the time of collation of claims, all details of the stakeholders are collected by the IRP. Further, as a stakeholder in the Debtors Company, it become a right on part of the stakeholder to be updated o every development by the IRP. In this regard, either sharing of minutes of the CoC meetings or intimating through the Debtors website regarding substantial developments should be warranted. This will not only ensure a proper service of rights of the stakeholders in general but would also ensure that a transparency model is being adopted in the entire process which is both accountable and transparent in its approach.
- Strengthening the role of IRPs: Empower IRPs with more authority and resources to effectively manage the insolvency resolution process.[159] This includes providing them with adequate training, establishing clear guidelines and standards for their conduct,

[159] Moneylife Digital Team, IBBI penalises 6 Insolvency Professionals in November for Not following IBC Procedure (June, 22, 2023, 08:30 PM), https://www.moneylife.in/article/ibbi-penalises-6-insolvency-professionals-in-november-for-not-following-ibc-procedure/69059.html.

and ensuring their independence from any undue influence or pressure. The role of IRP is inevitable under the Code and as such it becomes the need of the hour to ensure more stricter compliance of the role and powers of the IRP as provided under the Code. It is observed in many cases that the IRP are faced with limited or no resources due to the depleting state of the Debtor. In this regard, even the lenders tie their hands in providing any help for providing any resources and in this regard, the debtor continues to be a going concern only restricted to paper, while reality being that of the complete opposite. In this regard, the role of IRP needs to be strengthened and a mechanism for availability of resource shall be carved out to ensuring that the debtor remains a going concern. Further, the role of IRP shall also be governed in terms of ensuring integrity and transparency in the entire functioning. It is often observed and stated that IRP colludes with interested parties to provide a better deal and thereby completely ignoring the provisions of the Code and further in a way cheating the stakeholder by colluding with the prospective bidders. In this regard, an independent committee for random testing of every operation of IRP shall be appointed, which shall be of the duty to ensure any sudden checking on the works of IRP in every case and further a much stricter rules shall be enforced in placed, to ensure that IRP does not get involved in any such act.

- Encourage participation of creditors: Encourage active participation of creditors in the insolvency process by providing them with a stronger voice and representation.[160] This can be achieved by involving them in decision-making processes, ensuring their interests are adequately protected, and promoting the formation of creditor committees to facilitate effective negotiations. It may be noted that the CoC which is formed comprising mainly of the Financial Creditors re also represented by the Operational Creditors, if it has substantial claim over the Corporate Debtor under the Code However, such act is only limited to a quit participation, where there is no say provided to the operational creditor along with providing no voting rights in any matters put forward for voting. Further, the operational creditor presence remains immaterial, as non-presence of the class is said not to affect the meeting. Such type of act needs to be amended to provide equal say to the operational creditors as well, as they formed the backbone of the entire Debtor in business. Further, a complete disregard to the operational creditors in terms of both attending CoC meetings and further with regards

[160] Priyanka Gawande, Lenders must catalyse IBC proceedings, Mint (June, 22, 2023, 09:30 PM), https://www.livemint.com/companies/news/lenders-must-catalyse-ibc-proceedings-11678039771802.html.

to no voting rights being provided, creates a sense of discrimination in and among the creditors in the decision-making stage itself. Such, act shall be amended to provide a more holistic and inclusive approach in ensuring that creditors participation is encouraged for a more fruitful resolution.

- Promote the use of alternative dispute resolution mechanisms: Encourage the use of alternative dispute resolution mechanisms, such as mediation and arbitration, to resolve disputes arising during the insolvency process. This can help reduce the burden on the NCLT and expedite resolution by providing a more flexible and efficient means of resolving conflicts. During the start of the CIRP process, a notice is being provided to such Corporate Debtor for payment of dues. It is only when such dues are unpaid, then an application is being filed under the Code. In this regard, it is important to note that the very basis of initiating a CIRP Process is related to that of non-payment of dues. It is the only dispute in hand and as such payment of the dues entails for non-filing of any application. In this regard, it may be important to note that every business struggle during times and at such time, the payments are not functioned by the businesses. In such times, even when a CIRP is being admitted, other alternate mechanism for resolving in the mechanism like that of Arbitration in between the Corporate Debtor and the stakeholders shall be allowed to provide an opportunity to settle and work out a systematic plan for repayment. Such would not only ensure that the very objective of the Code is fulfilled, but would also ensure that the stakeholders interest remains intact with that of the operations of the Corporate Debtor.
- Strengthen cross-border insolvency framework: Enhance the cross-border insolvency framework by adopting the UNCITRAL Model Law on Cross-Border Insolvency and establishing bilateral agreements with other countries.[161] This would enable better coordination and cooperation between jurisdictions in cases involving multinational companies and facilitate the efficient resolution of cross-border insolvencies. As has been analysed and provided that many Countries already have adopted UNCITRAL Model Law for Cross Border Insolvency, but however India though have included the relevant provisions in the Code, but till date have not notified the same In the Het Airways resolution case, the need for such regulations was felt which in a way provided the need for Cross Border Insolvency Framework in the Country. The rising trade in

[161] Gireesh Chandra Prasad, Govt. halts plan to adopt cross-border insolvency rules, Mint (June, 22, 2023, 09:45 PM), https://www.livemint.com/news/india/foreign-lenders-of-indian-businesses-face-longer-wait-for-cross-border-insolvency-regime-as-government-prioritises-domestic-debt-resolution-11684087440089.html.

between nations and the growing economy of the Country surely entails that the Cross Border Insolvency provisions are being notified and as such the Code is being fostered with more developments in cases involving multinational disputes of a single Corporate Debtor.

- Improve coordination with other regulatory authorities: Foster better coordination between the Insolvency and Bankruptcy Board of India (IBBI) and other regulatory authorities, such as the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI). This would ensure a more holistic approach to resolving insolvency cases involving financial institutions and listed companies. It is observed that it is only when the IRP informs the organization, then in such cases all the stakeholders and other authorities are informed about the initiation of any CIRP Proceedings against a particular Company.[162] In such situation, there is instances where several authorities act indifferently, wherein one authority puts in some barrier wherein the other suggest some others. Such act shall be synchronized to ensure that a smooth CIRP Proceeding is being carried.
- Promote a culture of entrepreneurship and risk-taking: Encourage a culture of entrepreneurship and risk-taking by providing support mechanisms for distressed businesses, such as mentoring programs, access to finance, and skill development initiatives. This would help prevent viable businesses from prematurely entering insolvency and promote a more vibrant and dynamic business environment. It is the need of the hour, as there is fear among the new companies for being dragged in CIRP, in case of failure of their new product in the market. This disbars any entrepreneur to engage in any entrepreneurship project involving huge risk. In such situation, even including the old businesses, a support mechanism by way of putting out various measures for restructuring a business shall be developed, which will not only help attain the very objective of the code, but would also ensure that the Corporation remains a going concern.
- Continuously evaluate and update the regime: Regularly evaluate the effectiveness of the insolvency and bankruptcy regime and make necessary amendments to address emerging challenges and loopholes. This includes seeking feedback from stakeholders, conducting impact assessments of the reforms, and incorporating international best

[162] Money Control, New Highlights: Zee Entertainment excluded from F&O due to IBC proceedings, Money Control (June, 22, 2023, 10:30 PM), https://www.moneycontrol.com/news/trends/current-affairs/latest-news-today-live-23-february-2023-headlines-10144511.html.

practices to ensure the regime remains robust and responsive. It is important that problems are being heard and effective solutions are being developed in the Code. It is only when such act is being tried in the rigours of exposure that the shortcomings of the Code would be brought forward. Further, with the feedback received, every endeavour shall be made that the objective remains intact and as such the Code fulfils its objective by ensuring equality in between the stakeholder.

- Mandatory Credit ratings of company incorporated under the Companies Act: The Companies registered under the Company Act shall be mandatory required to obtain credit rating by specified Credit Rating agencies. The act would ensure that the stakeholders are made well aware of the risk in factor before any investment is being carried on. Such act would not only help to reduce the chances of a Company undergoing CIRP Process, but on the other hand would also help in building trust among the people in investing in the Company and be a stakeholder in any such company. Furthermore, the act would end the dispute of fraud and collusion, which in case would be evident from the Credit Ratings received by any Company. It would be on the sole discretion of the interested stakeholders to partake in any activity with the company having poor ratings and with companies having tremendous ratings.
- Providing Fixed Percentage of Share under Waterfall mechanism: As observed in number of cases and even from the observations of the Hon'ble Supreme Court, it may be observed that the operational creditors in any resolution plan are left at lark. Further, even when at the tome of distribution of proceeds of liquidation, the operational creditors are provided with a negligible or even zero returns from their admitted claim. In such cases, the secured creditors often take the large chunk of the resolution proceeds and the rest of the stakeholders in the Waterfall mechanism are left to dry. To rectify the same, provision providing for a mandatory percentage share of the liquidation proceeding among the stakeholders shall be introduced. This would ensure that an equitable distribution is being made of the proceeds received in case of liquidation.
- Providing Voting Rights to Operational Creditors: The current Code does not provide any voting rights to the Operational Creditors. However, to ensure that justice is being done in all respect, voting rights to operational creditors shall also be provided. This would ensure that a collective say is being present in CoC and further that the Financial Creditors are not the only when to take decisions. Since, the objective of the Code is to ensure assets maximization and further for the fact that liquidation shall be the last act,

in such circumstances it shall be the endeavour of all stakeholders when collective decision is being taken. The same could only be done when voting rights are being provided to that of Operational creditors also along with the Financial Creditor in the CoC meetings.

- Providing for setting up of CoC with different composition in case of Government Companies: In the Code every endeavour is being made, that the entire decision of the CoC remains uninfluenced. However, in case of Government Companies undergoing proceedings under the Code, the situation seems different wherein all parties forming part of the CoC (especially public sector banks) in a way could be said to be related party. Such is admittedly supposed to influence the decisions of the CoC and thereafter may be used to fulfil ulterior motive within the blanket cover of the Code. In this regard, it would be important that no such banks/financial institution forming or coming under the control of the Government be allowed to attend and vote in the CoC Meetings and instead the operational creditors and other financial creditors not related to the Government in any case be allowed to form part of the CoC. It is only when the said provision is implemented, then in such case the proceedings involving any Government companies be said to transparent under the Code and further such proceedings be understood to having fulfilled and served the best interests of the stakeholders.
- Addressing Haircuts and Recovery Rates: The haircuts taken by the stakeholders is a burning issue under the code and it is necessary to Analyse and address the issues of significant haircuts and low recovery rates experienced in some insolvency cases. Effort shall be made to identify relevant factors contributing to such outcomes and explore ways to improve recovery rates and minimize losses for stakeholders. This could be done at likewise industries undergoing liquidation, which had offered significant haircuts to the stakeholders. The cross verification and analysis would help to understand the causes, and further would help to devise rules and regulations for dealing with any issues of specific industries. This would ensure that large haircuts are being prevented with pro-active steps being taken by the IRP and other stakeholders in accordance with the Code.
- Strengthening the Insolvency Ecosystem: Continuously monitor and enhance the effectiveness of the insolvency ecosystem, including the Insolvency Professional Agencies (IPAs) and Information Utilities (IUs). Encourage innovation, technology adoption, and capacity building within the ecosystem to further streamline and improve

the insolvency resolution process. The Steps would further help in expanding the success of the Code and would further help in narrowing down the time taken for the entire resolution under the Code.

- A Hybrid mechanism of Control: In developed Countries like the U.S., the "Debtor in Possession" model is being followed, wherein debtors remain in charge of the business which is overseen by the trustee. However, in India the "Creditors in Control" mechanism is being followed, wherein the entire management and operation of the business is being taken over the IRP. Further, with the Country like that of U.K. which had earlier followed the "Creditors in Control" mechanism have also shifted to "Debtors in Possession" model. It may be pointed out that the IRP taking control of the entire management do not have experience and knowledge of the business of the Corporate Debtor, and in such situation the Corporate Debtor operations are affected. However, in the other model, the debtors understand the business and further in the supervision of the court appointed trustee/IRP the business is being run and operated. The later scheme ensures that the business is a going concern entity and further the chances of service of debts increases as compared to the earlier model, wherein chances of ensuring going concern entity diminishes and further the chances of services of debts also deceases. In this light, it is suggested that a hybrid mode be adopted which not only would ensure that the entity is being kept as a going concern, but on the other hand would also ensure the creditors interest are well protected.

The above are some of the recommendations based on the analysis drawn from the various submissions presented in the present paper. The suggestions if adopted would certainly draw a huge place in the entire development of the Code and would ensure a far-reaching success of the Insolvency Laws in the Country.

Conclusion

In light of the above, it may be concluded that The Insolvency and Bankruptcy Code, 2016 has undoubtedly been a game-changer for India's insolvency resolution framework. It has brought about a paradigm shift, creating a more efficient and creditor-friendly environment for resolving distressed assets. However, in order to address the evolving challenges and ensure the continued effectiveness of the IBC, there is a pressing need for reimagining and rethinking certain aspects of the legislation.

The suggestions put forth in this discussion, including timely adjudication, strengthening the resolution professional framework, promoting cross-border insolvency, streamlining the liquidation process, addressing operational creditors' concerns, encouraging stakeholder participation, tackling haircuts and recovery rates, and strengthening the insolvency ecosystem, highlight key areas that require attention.

Timely adjudication is crucial to expedite the resolution process and reduce the burden on the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT). Strengthening the resolution professional framework through enhanced qualifications and training programs will ensure the availability of competent professionals who can navigate complex insolvency cases.

Introducing provisions for cross-border insolvency will facilitate cooperation with foreign jurisdictions and provide a comprehensive framework for resolving multinational insolvency cases. Streamlining the liquidation process will help maximize asset realization and distribution to creditors in a more efficient manner.

Addressing the concerns of operational creditors is vital to maintain a fair and balanced resolution process. Their rights and protections should be reviewed and enhanced to ensure their voices are heard in the decision-making process.

Promoting stakeholder participation will lead to more inclusive and transparent insolvency proceedings. Creating mechanisms for meaningful consultation and engagement with creditors and shareholders will provide a platform for their valuable inputs and ensure their interests are adequately represented.

Further, mandatory credit ratings of companies registered under the Companies Act is essential to mitigate affect of any loss to the stakeholder and further ensure that there is minimal or no loss being incurred on by the stakeholder.

Also, the need for a hybrid control mechanism needs to be overseen, which in a way would ensure that the debtor remains a going concern and further would ensure that less time is being taken for the entire adjudication. This would ensure that the operations are well taken off along with ensuring that the relative rules and regulations are whole heartedly being followed.

Further, in terms of need for a fixed percentage of share under the waterfall mechanism is necessary as it would ensure that all stakeholders are enjoined equitable treatment and as such

the rights of all stakeholders are not washed away at the time of distribution of proceeds of liquidation.

Also, admitting the Operation Creditors and providing for Voting Rights is an important aspect, as the very objective and endeavour of the stakeholders is to take collective decision for ensuring that assets maximization is possible and further for the fact that every stakeholders enjoys equitable say in decision making process.

The need for Providing for setting up of CoC with different composition in case of Government Companies is also necessary for the fact that no one could influence the decisions of the CoC and further no one could fulfil ulterior motive within the blanket cover of the Code.

Tackling the issue of haircuts and recovery rates is critical. Analysing the factors contributing to low recovery rates and exploring strategies to improve recovery outcomes will help optimize the value realized from distressed assets.

Lastly, strengthening the insolvency ecosystem, including Insolvency Professional Agencies (IPAs) and Information Utilities (IUs), is essential. Emphasizing innovation, technology adoption, and capacity building within the ecosystem will enhance efficiency and effectiveness in implementing the IBC.

Reimagining and rethinking the IBC requires a comprehensive evaluation of its implementation, regular monitoring of outcomes, and a collaborative effort from all stakeholders. Policymakers, regulators, insolvency professionals, creditors, and other participants need to work together to ensure that the IBC remains responsive to the changing needs of the economy and provides an effective mechanism for resolving distressed assets.

By continuously adapting and refining the IBC, India can build a robust insolvency resolution framework that inspires confidence among domestic and international investors, enhances the ease of doing business, promotes timely resolution of distressed assets, and maximizes value for all stakeholders. This ongoing process of reimagining and rethinking is essential to create an effective and dynamic insolvency regime that aligns with the evolving needs and challenges of the Indian economy.

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