CHAPTER 2

REVIVAL & REHABILITATION OF COMPANIES
CHAPTER- 2.

REVIVAL & REHABILITATION OF COMPANIES

This chapter shall deal with:

- REVIVAL & REHABILITATION OF SICK INDUSTRIAL COMPANIES
- TIWARI COMMITTEE
- DEFICIENCIES IN THE FUNCTIONING OF SICA
- JUSTICE ERADI COMMITTEE
- MAJOR RECOMMENDATIONS BY ERADI COMMITTEE
- REPEAL OF SICA AND BIRTH OF PART VI A
- REVIVAL UNDER COMPANIES ACT 2013
- EFFECT OF THE SICA REPEAL ACT, 2003 & The Insolvency and Bankruptcy Code (IBC, 2016)
REVIVAL & REHABILITATION OF SICK INDUSTRIAL COMPANIES

BIRTH OF SICA

1. INDUSTRIAL SICKNESS: POST-INDEPENDENCE CONDITION

With the formation of the Indian Constitution and the chief aim of the Constitution makers to change India from a colonial nation to a socialist welfare state, as enshrined in the preamble and the ‘Directive Principles of State Policy’, urged the government of India to go for fast industrialization of fundamental and substantive industries in order to change India from agricultural to industrial economy. The Government took the route of mass industrialization of the Indian economy. ¹It was realized by the Government that a various industries were becoming sick and getting to be noticeably wiped out for one reason or the other.

There was deficiency of merchandise and services in the country due to either the total absence of production or low industrial yield. The government adopted the methodology of taking over ‘sick industrial company’ to prevent its closure in light of the fact that such closures would not just hamper the production of goods and services yet would likewise prompt social issues like unemployment, labour agitation and social distress. However, most of the sick industrial companies that were nationalized turned into heavy burden on the exchequer as their plants and hardware were old and outdated and innovation obsolete, they had tremendous liabilities of workers’ wages, their standing obligations towards the financial institutions and the banks, and so on.²

The government of India adopted the measure of assuming control over the management of sick industrial companies for a concise period and managed them for quite a while and then the undertakings were sent back to the proprietors after the sickness was removed.³ But very soon the government realised that measures taken by it were not useful and economical, but rather irregular and haphazard to control industrial sickness. However the government was

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² Ibid.
³ Ibid.
very keen to deal effectively with industrial sickness because of its far reaching antagonistic results on the Indian society.\footnote{Ibid.}

**TIWARI COMMITTEE AND THE BIRTH OF SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985**

**NEED FOR SICK INDUSTRIAL COMPANIES ACT, 1985**

The terrible impact of ‘sickness’ in industrial companies, for example, revenue loss, joblessness, loss of central and state governments exchequer and locking up of investible funds of banks and financial institutions, that is Non Performing Assets (NPAs) were grave concern to the government and the company at large.\footnote{Annual report(2015-2016) Ministry of Finance(budget division);Available at:<mof.gov.in/reports/AnnualReport2015-16.pdf> accessed on 30th January,2016}

Thus the necessity of the revival and rehabilitation of the potentially liable sick industrial companies was recognized to rescue the fruitful assets and realize the amounts due to the banks and financial institutions. The then existing institutional plans for revival were deficit and tedious and the large number of laws and agencies made the coordinated approach for dealing with sick companies even more troublesome.\footnote{Ibid.} Therefore there was a need to formulate a statute to provide for timely solution for the sick companies.

**TIWARI COMMITTEE: BIRTH OF SICA**

The Reserve bank of India, profoundly worried over the concern of disturbing increase in the occurrence of ‘industrial sickness’ which was bringing in the loss of production, loss of employment, loss of government revenue and redundant blocking of huge amounts advanced by the banks and financial institutions to the industrial undertakings, in the year 1981, constituted a committee under the chairmanship of Shri.T.Tiwari, (chairman, Industrial Reconstruction Corporation of India) to investigate the reasons for industrial sickness, to dig into the issue and to recommend healing measures.\footnote{GENISIS OF SICA,1985;Available at:<http://bifr.nic.in/genisis.htm> accessed on 22nd february,2016} The Tiwari committee analysed the matter in incredible profundity and suggested special legislation and in addition to this setting up of exclusive quasi-judicial body for handling industrial sickness. The government subsequent to carrying out a detailed consultation with all the individuals who were troubled
and worried because of industrial sickness accepted the recommendations of the Tiwari committee with some modifications and, therefore, the SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 accordingly came into force.\(^8\)

The SICA was primarily and typically a remedial and ameliorative piece of legislation, as it empowered the quasi-judicial body, the Board of Industrial and Financial Reconstruction (BIFR), to take suitable and proper measures (legal, financial restructuring and managerial measures) for revival and rehabilitation of sick industrial companies and liquidation of companies where carrying out of business is not feasible any more.\(^9\)

**STATEMENT OF OBJECTS AND REASONS**

The objectives of this Act (SICA) as incorporated in its preamble, emphasises the following points:

The SICA had been enacted in the public interest to deal with the problems of industrial sickness with regard to the crucial sectors where public money is locked up. It contains special provisions for timely detection of sick and potentially sick industrial companies, speedy determination and enforcement of preventive, remedial and other measures with respect to such companies.\(^\text{10}\) Those measures are to be taken by a body of experts.

The measures are mainly\(^\text{11}\)

(a) Legal

(b) Financial restructuring

(c) Managerial

**Optimum utilization of economic resources:** - so as to completely use the beneficial industrial assets, to provide the best possible shield to employment and the best effective use of funds of the banks and financial institutions, it would be vital to revive and rehabilitate the potentially viable ‘sick industrial companies’ as early as possible. It further stated that it

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\(^8\) Ibid.

\(^9\) GHANSHYAM SARDA Vs. SHIV SHANKAR TRADING CO. and Others.; FAO No. 10/2013, WPC No. 4303, WPC No. 6286 Of 2013 ;Available at :<ghconline.gov.in/Judgment/FAO102013.pdf> accessed on 4\(^\text{th}\) August,2017

\(^\text{10}\) “OBJECTIVES OF SICA”;Available at:<http://bifr.nic.in/objectives.htm> accessed on 12\(^\text{th}\) April,2017

\(^\text{11}\) Ibid.
would be equally crucial to rescue any productive assets and realize the amounts due to banks and financial institutions, as much as possible, from the industrial companies which are not feasible to carry out business. The SICA was enacted in the public interest to manage the issues emerging out of industrial sickness with regard to critical sectors where public money was locked up.\(^{12}\)

In the case of *Navnit R Kamani v. R.R.Kamani*,\(^ {13}\) the Supreme Court held that “the statement of objects and reasons of SICA reveals the purpose underlying the benevolent legislation as also the anxiety of the legislature to provide for preventive, ameliorative and remedial measures essential for reviving sick or potentially sick companies and for ensuring expeditious enforcement of the measures devised by the competent authority under the Act. The statement of objects and reasons discloses the anxiety of the legislature at the alarming increase in the incidence of sickness of industrial companies and it also reveals that the legislation has been enacted with the end in view to:

1. Afford maximum protection of employment;
2. Optimise the use of funds of the companies etc.;
3. Salvaging the production assets;
4. Realising the amounts due to the Banks etc.; and
5. To replace the existing time-consuming and inadequate machinery by efficient machinery for expeditious determination by a body of experts.”\(^ {14}\)

In the case of *Testeels Limited & Arvindbhai n. Talati v. Radhaben Ranchhodlal Caritable Trust & Testeels Limited*\(^ {15}\), the High Court held that “the various provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, which have been enacted to safeguard the economy of the nation and to protect the viable sick companies definitely puts an end both to the contemplated winding up proceedings and the pending winding up proceedings.”\(^ {16}\)

\(^{12}\)[1989]66CompCas555(Guj); (1989)2GLR1158

\(^{13}\)1989 AIR, 9 1988 SCR Supl. (3) 123

\(^{14}\)1989 AIR, 9 1988 SCR Supl. (3) 123

\(^{15}\)[1989]66CompCas555(Guj); (1989)2GLR1158

\(^{16}\)[1989]66CompCas555(Guj); (1989)2GLR1158
2. REVIVAL & REHABILITATION UNDER SICA

APPLICABILITY OF SICA

SICA applies to companies both in public and private sectors owning industrial undertakings:-

(a) pertaining to industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, (IDR Act) except the industries relating to ships and other vessels drawn by power and;

(b) not being "small scale industrial undertakings or ancillary industrial undertakings" as defined in Section 3(j) of the IDR Act.\(^{17}\)

(c) The criteria to determine sickness in an industrial company are (i) the accumulated losses of the company to be equal to or more than its net worth i.e. its paid up capital plus its free reserves (ii) the company should have completed five years after incorporation under the Companies Act, 1956 (iii) it should have 50 or more workers on any day of the 12 months preceding the end of the financial year with reference to which sickness is claimed. (iv) it should have a factory license.\(^{18}\)

WHAT IS A SICK COMPANY?\(^{19}\)

A.) According to SICK INDUSTRIAL COMPANIES ACT, 1985

The Sick Industrial company is defined u/s 3(o) as:-

"Sick industrial company means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth".\(^{20}\)

B.) According to THE COMPANIES ACT, 1956

The term Sick industrial company means an industrial company which has-

1. "Accumulated losses in any financial year which is equal to 50%, or more of its average net worth during four years immediately preceding such financial year; or

\(^{17}\) Brief Introduction of BIFR and its Functioning; Available at: <http://www.bifr.nic.in/introduction.htm> accessed on 5th April, 2017

\(^{18}\) Ibid.

\(^{19}\) Supra n.2

\(^{20}\) S.3 (o) of SICA, 1985
2. Failed to repay its debts within any three consecutive quarters on demand made in writing for its repayment by a creditor or creditors of such company.”

C.) THE COMPANIES BILL, 2009

The term has not been defined under the Companies Bill, 2009 and it has been left to the discretion of the Tribunal to determine and classify a company as a sick company.  

Who can make a reference before (The Board of Industrial and Financial Reconstruction) [BIFR]?  

Reference before the Board of Industrial and Financial Reconstruction (BIFR) for the revival and rehabilitation of a sick company can be made by:  

1. Board of Directors: can make a reference to BIFR within 60 days of:
   A. finalization of the duly audited accounts of the company for the financial year (at the end of which the company becomes a sick company);
   B. If the board has reasons to form an opinion even before the finalization of the accounts.

However, no such reference can be made by the ‘Board of Directors’, where the financial assets have been acquired by a securitization company or reconstruction company u/s 5(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security interests Act, 2002 (hereinafter referred to as “SARFAESI”). Even a reference pending before the BIFR will also abate if the secured creditors, representing 3/4th or more in value of the amount outstanding against financial assistance, have taken measure u/s 13(4) of the SARFAESI Act to recover their secured debt.  

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21 Section 2(46AA) of Companies Act, 1956
22 Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module VII, (2010). pp. 449-483
23 Supra n.2
24 Section 15 of SICA, 1985
25 Ibid.
2. Central Government

3. State Government: - if all or any of the industrial undertakings belonging to the sick company are situated in the state making the reference.

4. Public financial institutions/State level institutions/scheduled bank: - if it has an interest in the sick company by reason of any financial assistance or obligation rendered by it, or undertaken by it.\(^{26}\)

**PROCEDURE TO BE FOLLOWED BY BIFR**

In order to determine whether any industrial company has become a sick company or not, the Board may make such inquiry as it may deem fit. The board may require by order any operating agency to enquire into and make a report which represent to such matters as may be specified in the order. The endeavor shall be made to complete the enquiry within 60 days from the commencement of the inquiry. During the period inquiry, the board may, if it deems fit, appoint one or more persons to be a special director/directors of the company for safeguarding the financial and other interests of the company or in public interest. Such special director may be given directions as Board may deem necessary or expedient for proper discharge of his duties and can be removed or substituted by any person by the order of the Board.\(^{27}\)

If the inquiry report satisfies the Board that the company has become a sick company, the Board shall decide, whether it is practicable for the company to make its net worth exceed the accumulated losses, within a reasonable time. In such situation the Board shall give such company a reasonable time to make its net worth exceeds the accumulated losses. But if the Board decides that it is not possible, then, it will direct the operating agency to prepare a scheme for further measures to be taken in relation to such company.\(^{28}\)

The operating agency, then, within 90 days, or within such period as extended by BIFR, shall prepare a scheme providing for any one or more of the following measures:\(^{29}\)

- Financial reconstruction of the sick industrial company;

\(^{26}\) Ibid.  
\(^{27}\) Section 16 of SICA,1985  
\(^{28}\) Section 17 of SICA,1985  
\(^{29}\) Section 18 of SICA,1985
• The proper management of the sick industrial company by change in, or takeover of, the management of the sick industrial company;
• Merger with another company or other way round;
• Sale or lease of its undertaking;
• Rationalization of its staff;
• Any other preventive or remedial measures; and
• Incidental or consequential measures.

The nature of the revival scheme depends on the nature of the problems of the company. So it may differ from one company to another. The scheme prepared by the operating agency shall be examined by the board, and after its approval by the board, shall be sent to the sick industrial company, operating agency and in case of amalgamation, to the other concerned company also. The Board shall publish the draft of the scheme in brief, in daily news papers for suggestions and objections, if any, within such period as the board may specify and may make such modifications, in the draft scheme as it may consider necessary. The “Sanctioned scheme” shall come into force on such date as specified by the Board. The Board may on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit. The Board may direct the operating agency to prepare a fresh scheme providing for such measures as the operating agency may consider necessary. If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may by order do anything, which appears to it necessary or expedient for the purpose of removing difficulty.

The scheme may refer to provide for financial assistance to sick industrial company by providing loans, advances or guarantees or any other reliefs deemed proper or sacrifices from the central government/state government/bank/public financial institution or other authority.

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30 Section 18(3)(a) of SICA, 1985
31 Supra n.2
32 Section 18(9) of SICA, 1985
33 Section 18(11) of SICA, 1985
34 Section 19(1) of SICA, 1985
In such case, the scheme shall be circulated to every person required to provide financial assistance for the consent within 60 days.\(^{35}\) If they consent to provide financial assistance, the board may, as soon as may be, sanction the scheme and shall be binding on all concerned from the date of such sanction. But where in respect of any scheme consent required is not given, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.\(^{36}\)

If after inquiry, the Board is of the opinion that revival scheme will not become effective and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High court and the High court shall order winding up of sick industrial company on the basis of the opinion of the board.\(^ {37}\) Or the Board may cause to be sold the assets of such company in such manner as it deems fit and forward the sale proceeds to the High court for orders for distribution in accordance with the provisions of section 529A and other provisions of the Act. The sanctioned scheme shall be binding on the sick industrial company, and also on the shareholders, creditors and guarantors and the employees of the said companies.\(^ {38}\) As per S. 3(1)(o) of SICA, 1985 'sick industrial company' means an industrial company which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth and is registered for not less than three years.\(^ {39}\) The concept of 'sick industrial company' has been utilised, many times, by promoters and company management for preventing recovery and to get the advantage of remissions and concessions, simply, by manipulating the accounts of the company in any financial year just to come within the definition of 'sick industrial company' as mentioned in SICA, and to flee from any further liability.\(^ {40}\)

\(^{35}\) Section 19(2) of SICA, 1985

\(^{36}\) Section 19(4) of SICA, 1985

\(^{37}\) Section 20(2) of SICA, 1985

\(^{38}\) Section 20(4) of SICA, 1985

\(^{39}\) S. 3(1)(o) of SICA, 1985

\(^{40}\) Vasudha Mehta, Corporate Insolvency Law Reform – By Half Measures ?; Available at:<http://www.algindia.com/publication/article1700.pdf> accessed on 23\(^{rd}\) January, 2017
DEFICIENCIES IN THE FUNCTIONING OF SICA

It is really unfortunate that the performance of SICA has been unsatisfactory, dysfunctional and not being used for legitimate rescue purposes. Many shortcomings have been noted in its functioning. One of the main drawbacks of the SICA regime was that it allowed the existing management of the debtor company to remain in control of the company during the course of rescue proceedings (which facilitated practices involving siphoning of assets, etc.)

SICA failed in its mandate to provide a timely rescue mechanism for sick industrial companies. It has been suggested that delays were a routine matter with BIFR proceedings. It has been estimated that it takes round about 5-7 years for a sick industrial company to be revived after BIFR proceedings. These delays are amplified by the routine challenges to BIFR decisions before the AAIFR and High Courts. Consequently, although the SICA was originally meant to limit judicial oversight to the minimum required, there has been a significant degree of court involvement in the rescue process. Other criticisms relate to the involuntary nature of SICA rehabilitation packages, the inability of the BIFR to distinguish between cases suitable for rehabilitation and for winding up, the pro-debtor and anti-creditor nature of BIFR proceedings, the provision of an automatic moratorium on enforcement proceedings and the debtor-in-possession regime.

Some of the deficiencies are discussed in detail:

**BIFR process is very time consuming**

The main reasons for delays are the quasi-judicial nature of BIFR proceedings, which depends on consensus at almost all stages, and BIFR's clear preference for rehabilitation over winding-up, 'unless-repeatedly proven otherwise. The combination of; 'consensus' and

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41 Interim Report of The Bankruptcy Law Reform Committee; Available at: <http://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf> accessed on 14th September, 2016
42 van Zwieten citing Nimrit Kang and Nitin Nayar, 'The Evolution of Corporate Bankruptcy Law in India’ (2003- 2004) Money and Finance 37, 44 (hereinafter referred to as “Kang & Nayar”) - “In 2004, Kang and Nayar reported that it took the BIFR an average of 6.5 years to recommend liquidation, and an average of 7 years to sanction a rehabilitation scheme.” Available at: <http://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf> accessed on 14th September, 2016
43 Supra n.81
44 Kang & Nayar; Omkar Goswami, ‘Corporate Governance in India’ in Taking Action Against Corruption in Asia and the Pacific (ADB 2002) 94; Available at: <http://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf> accessed on 14th September, 2016
“sacrifice” is usually fatal for a sick company. Further, BIFR’s partiality towards rehabilitation has had three serious consequences

a) It has lengthened the processes

b) It has prevented BIFR from credibly using the threat of ‘winding up under section 20(4) of SICA to force quick consensus.

c) It has given tremendous opportunity to the promoters and occasionally state governments to delay matters.\(^{45}\)

In addition to this Sec. 23 of SICA, 1985 orders that when a company suffer loss of 50% or more of its peak net worth, it is to be characterized as “potentially sick company”, however ironically, useful measures were not taken by the BIFR to enquire into the potential ‘sickness’ of such companies and to prepare revival/rehabilitation scheme for such companies and they were compelled to wait till its total ‘net worth’ got completely eroded by 100% or more. So in spite of knowing the predicament situation of such potentially sick companies, BIFR did not take any effective step in formulating any revival/rehabilitation scheme for such potentially sick companies, when perhaps the decending trend of the company could be turned away. Here it is important to mention that sluggish and poor working cannot be ascribed exclusively to the BIFR for the very reason that the banks, financial institutions, Governments and creditors were also equally responsible because of their hesitant mentality. The operating agency was tormented by red-tapism and incompetence. Notwithstanding these factors, frequent appeal to High Courts against the decisions of BIFR was also one of the reasons accountable for delay in timely disposal of the cases.\(^{46}\)

**Blatant dispute of Sec. 22 of SICA**

Section 22 of the SICA deals with suspension of legal proceeding, contracts etc. with regard to the sick industrial company, in circumstance mentioned therein and with incidents specified under the provisions.\(^{47}\) The object of Section 22 is not to provide protection to

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\(^{45}\) Report of the Goswami Committee on Industrial Sickness and Corporate Restructuring: Available at:< reports.mca.gov.in/.../31-Goswami%20committee%20of%20the%20industrial%20sick...> accessed on 16\(^{th}\) September, 2016


\(^{47}\) Section 22 of SICA, 1985
unscrupulous persons, however, promoters and management of the companies have used this section as weapon to avoid payment to their creditors.²⁸ So it was a delay tactic to get more and more concession from creditors. Section 22 of the SICA provided protection to the sick company from the legal proceedings both pending and future, if an inquiry in respect of the sick company was pending before the BIFR. This provision was judicially interpreted by the Supreme Court of India to include the protection to a Guarantor in the case of Patheja Brothers vs. ICICI ⁴⁹. In an earlier judgment of the Supreme Court in the matter of Real Value Appliances⁵⁰, the court held that the protection under Section 22(1) of the SICA became applicable no sooner than the registration of the reference by the BIFR. This view was followed by the Court in another judgment of Rishab Agro Industries vs. PNB Capital Services Limited⁵¹. While the judicial interpretation was meant to give constructive and meaningful interpretations to the provisions of the SICA, it could not, as indeed it was not meant to, check the misuse of SICA and its ‘usage as per convenience’ of the erring promoters. Thus, while the courts enlarged the scope of the provisions of the SICA to aid industrial revival, it further incentivised the misuse of SICA by the erring promoters.⁵²

**Delay in winding up procedure**

One of the foremost shortcomings in the SICA regime was the avoidable delay in winding up of the corporate entities. The elaborate procedure provided under the Act and also the spiralling pendency of the cases before the BIFR/ AAIFR resulted in near nullification of the object of the Act. It was just like a doctor attending the patient too late.⁵³ The pendency and endemic delays also caused serious banking and labour concerns and increase in the cost of industrial restructuring/reformation. It must be pointed out over here that BIFR was not a winding up authority under the SICA. On the other hand it was only a recommendatory body and that is why the moment it recommended for winding up for ‘non-viable sick companies’, the complete burdensome procedure provided has to take place under the supervision of the High Court and therefore it is not denying the fact that winding up procedure under SICA took, in many cases, more than ten years.

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²⁸ Supra n.80  
²⁹ [2000] 26 SCL 404  
³⁰ [1998] 3 SC715  
³¹ [2000] 25 SCL 461  
³² Supra n.62  
³³ Supra n.80
Justice V. Balakrishna Eradi, presented the report of the High Level committee on Law relating to insolvency of Companies headed by himself to the then Prime Minister, Shri Atal Bihari Vajpayee, Minister of Law Justice & Company Affairs Shri Arun Jaitley and Secretary, Department of Company Affairs, Dr. P.L. Sanjeev Reddy were among others present on the occasion. The Government had constituted on 22.10.99 a Committee consisting of experts to examine the existing law relating to winding up proceedings of companies in order to re-model it in line with the latest developments and innovations in the corporate law and governance and to suggest reforms in the procedure at various stages followed in the insolvency proceedings of companies to avoid unnecessary delays in tune with the international practice in this field.54

This Committee was asked to examine and make recommendations with regard to:-

a. the desirability of changes in existing law relating to winding up of companies so as to achieve more transparency and avoid delays in the final liquidation of the companies.

b. the mechanism through which the management of companies will be conducted after the winding up of order is issued and the authority which will supervise timely completion of proceedings.

c. the rules of winding up and adjudication of insolvency of companies.

d. the manner in which the assets of the companies are brought to sale and the proceeds are distributed efficiently and

e. a self-contained note on winding up of companies having regard to the Sick Industrial Companies (Special Provision) Act, 1985 and the Securities

54 Eradi committee Report of High Level Committee on Law Relating to Insolvency and Winding Up of Companies; Available at: <http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20companies,%202000.pdf> accessed on 24th November 2016
Contracts (Regulations) Act, 1956 with a view to creating confidence in the mind of investors, creditors, labour and other shareholders.  

The committee after hearing the perspectives of all the interested parties concerned and subsequent to looking into all the issues identified with insolvency laws and the worries communicated by different bodies and experts, reached the conclusion that BIFR and its appellate body AAIFR have failed to fulfill the purpose and mandate as visualized under SICA. The Eradi committee took serious view of the issue that out of 3068 cases reported to BIFR from 1987 to 30th June, 2000, only 1062 cases have been disposed of. The committee noticed that BIFR endeavors to prepare a design for ‘revival and rehabilitation of sick industrial companies’ in consultation with the participating financial institutions, banks and secured creditors and that such scheme substantially took more than two years. The committee came to the conclusion that Section 22 was horribly abused by the deceitful ‘promoters’ of the companies to freeze any legal proceedings against the debtors by the creditors once a reference is made to BIFR by the companies and thus a cover and unjustifiable security is provided to incompetent and hopeless management.

THE ERADI COMMITTEE HAS MADE THE FOLLOWING RECOMMENDATIONS:\textsuperscript{56}

i. The Committee, recommended that the provisions of Part VII of the Companies Act, 1956, be amended to include the provisions for setting up of a National Tribunal which will have,\textsuperscript{57}

a. the jurisdiction and power presently exercised by Company Law Board under the Companies Act, 1956;

b. the power to consider rehabilitation and revival of companies – a mandate presently entrusted to BIFR/AAIFR under SICA ;

c. the jurisdiction and power relating to winding up of companies presently vested in the High Courts. In view of above recommendations Article 323B of the Constitution should be amended to set up National Tribunal. SICA should be repealed and the Companies Act, 1956 be amended accordingly.\textsuperscript{58}

\textsuperscript{55}\textsc{Ibid.} 
\textsuperscript{56}\textsc{Ibid.} 
\textsuperscript{57}\textsc{Ibid.} 
\textsuperscript{58}\textsc{Ibid.} 

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i. Committee recommended that the Tribunal should be headed by a sitting judge or a former judge of a High Court and each of its Benches should consist of a judicial member and a technical member.

Tribunal shall have such number of member as may be prescribed by the Central Government. The principal Bench of the Tribunal should be located at New Delhi and its Benches should be located at the principal seats of each High Court. The Central Government may set up more such Benches if so required. While passing the order for winding up of a company, the Tribunal shall have power to prescribe time limit for each step to be taken by the Liquidator in the course of winding up process. The Tribunal shall also have power to prescribe the time limits for compliance of each step by parties while considering the reference for revival of sick companies.  

The Tribunal should be vested with the power to transfer all proceedings from one Private Liquidator to another "Private liquidator" or to the "Official Liquidator", as the circumstances of case may require. The Tribunal shall have the power to direct the sale of business of the company as a going concern or at its discretion to sell its asset in a piece-meal manner.

(iii) There should be two distinct aspects of the liquidation :-

(i) sale of assets (ii) distribution of sale proceeds

An all-out effort should be made by the Liquidator for sale of assets of the company promptly as in absence of the receipt of sale proceeds, timely distribution among the creditors. The pending references before BIFR/AAIFR under SICA should abate in view of repeal of SICA recommendations by the Committee. However, the winding up proceedings pending in High Courts under Companies Act, 1956 shall stand transferred to National Tribunal for expeditious disposal of those cases.

(iv) Part VII of the Companies Act, 1956 should incorporate a new substantive provision to adopt the UNCITRAL Model Law as approved by the United Nations and the Model Law

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59 Ibid.
60 Ibid.
61 Ibid.
itself may be incorporated as a Schedule to the Companies Act, 1956, which shall apply to all cases of Cross-Border insolvency.\(^{62}\)

(v) The Companies Act, 1956 should adopt the necessary principles enunciated under the heading "Legal Framework", "Orderly and Effective Insolvency Procedures – Key issues" on page 9 of the publication of the Legal Department of International Monetary Fund (Annexed as…..) to bring the provisions of the Companies Act, 1956 in line with international practices.\(^{63}\)

(vi) The Committee was of the view that there was a need to encourage voluntary winding up of companies. To achieve this object, a provision may be made in the Companies Act, 1956 to provide a company having paid-up capital of Rs. 10 lac or more may submit a petition for its winding up in the process Tribunal and companies with paid-up capital below that amount must resort to voluntary winding up. Creditors may approach the Tribunal for winding up only if a company defaults in payment of undisputed debts exceeding Rs. 1,00,000 and in other cases of default, creditors voluntary Winding up should be resorted. The provisions regarding winding up subject for supervision of court may be deleted as such cases will be taken care of by procedure of compulsory winding up by Court.\(^{64}\)

(vii) Tribunal may continue to have jurisdiction for winding up the companies on grounds stated in section 433 but following further grounds may be added therein, namely:-

a. a company has failed to file balance sheet and profit and loss accounts and/or annual returns for last three years on due dates;or

b. any action of the company has or is likely to threaten the security or integrity of India. Share holder or the Central Government will be entitled to file the petition under on aforesaid grounds.\(^{65}\)

(viii) Provisions of Companies Act, 1956 be expanded to allow petitioners to take recourse to Administrative Order Procedure (Annexed as…….), on the lines of UK Insolvency Act, 1986. The Committee strongly recommends appointing Insolvency Professionals who are members of Institute of Chattered Accountant of India (ICAI), Institute of Company

\(^{62}\) Ibid.
\(^{63}\) Ibid.
\(^{64}\) Ibid.
\(^{65}\) Ibid.
Secretaries of India (ICSI), Institute of Cost and Work Accountant of India (ICWAI), Bar Councils or corporate managers who are well versed in Corporate management on lines of U.K. Insolvency Act. For this purpose Central Government may maintain a panel of persons who may act as professional Insolvency practitioners subject to their fulfilling of the qualification and experience as may be specified by rules.66

(ix) The provisions of section 435 of the Companies Act, 1956 empowering courts to transfer winding up cases to District Courts may be deleted.

(x) It should be obligatory for a company filing a winding up petition to submit the Statement of Affairs along with the petition for winding up. In cases where the company opposes winding up petition, it should file Statement of Affairs along with its counter affidavit/reply statement. The Statement of Affairs should be accompanied by latest addresses of directors/company secretary of company, a details of location of assets and their value and debtors and creditors list with complete addresses. This will ensure speedy winding up of the company.

xi. (a) "A Fund for Revival and Rehabilitation" preservation and protection of companies may be created under the supervision and control of the Government. The Fund shall be maintained and operated by an officer authorised in that behalf of such Government.67

(b) The Committee favoured the contribution of specified percentage of turnover to the Fund than of contribution based on profits. The companies, formed and registered after the establishment of proposed Tribunal, shall contribute annually specified percentage (say 0.1%) of its turnover immediately after commencement of business. The companies already existing shall contribute annually from the financial year immediately succeeding the year in which proposed Tribunal is established.68

66 Ibid.
67 Ibid.
68 Ibid.
(xii) The Committee was of the view that the winding up order passed by the Tribunal should be made available to the liquidator within a period not exceeding two weeks from the date of passing of the order. ⁶⁹

(xiii) The directors and officers of the company should be responsible for ensuring that books of account are completed and got audited up to the date of winding up order and submitted to the Tribunal at the cost of company failing which such directors and officers should be subjected to monetary penalty as well as imprisonment. ⁷⁰

(xiv) The Committee recommended that, the present system of liquidator required to seek the court’s directions, even for small matters relating to routine administrative decisions not only causes delay in winding up but also takes valuable time of the court. Therefore, the Committee recommended that the liquidator should not seek the sanction of the court except for important matters such as confirmation of sale of assets and distribution of proceeds realised. ⁷¹

(xv) The Committee was of the view that appropriate legislative action must be taken to ensure that the claims of all employees of a company and its secured creditors are ranked "pari-passu". ⁷²

(xvi) The Committee was of the view that the specific provisions may be made in the Companies Act, 1956 that the liquidator may distribute interim dividend. ⁷³

(xvii) The Committee recommended that there should be a two point criteria for determining the maintainability of the reference for revival and rehabilitation to the of a company to the Tribunal, namely, that the company has suffered 50% of erosion of its net worth or there is a debt default involving a sum of not less than Rs.1 lakh in respect of undisputed debts. ⁷⁴

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⁶⁹ Ibid.
⁷⁰ Ibid.
⁷¹ Ibid.
⁷² Ibid.
⁷³ Ibid.
⁷⁴ Ibid.
(xviii) The reference to the Tribunal for revival by a company should be voluntary. As already stated the jurisdiction of hearing references of revival and rehabilitation of companies will vest in the Tribunal and not BIFR as at present.\(^75\)

(xix) Apart from the paucity of qualified, competent and trained staff, OLs have not been provided with modern infrastructure facilities and in absence thereof, they are unable to cope with the increased work load and are unable to discharge their duties efficiently. Committee was of the view that offices of OLs should be strengthened by appointing qualified, competent and trained staff. In addition computers and other modern facilities be provided in OL offices.\(^76\)

xx. The committee was of the view that an explicit provision need be made in the Companies Act giving a right to the secured creditors to file proof of debt with the liquidator without surrendering his status as a secured creditor and get the dividend in accordance with the priority to which he is entitled.\(^77\)

**REPEAL OF SICA AND BIRTH OF PART VI A**

THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) REPEAL ACT, 2003 was passed to repeal the Sick Industrial Companies (Special Provisions) Act, 1985 and the Appellate Authority (AAIFR) and the Board(BIFR) will stand dissolved. THE Act further provides that any appeal preferred to the Appellate Authority or any reference made to the Board or any inquiry pending before the Board or any other authority or any proceeding of whatever nature pending before the Appellate Authority or the Board immediately before the commencement of this Act shall stand abated.\(^78\) The Act further envisages that a company in respect of which such appeal or reference or inquiry stand abated under this clause may make a reference under PART VIA of the Companies Act, 1956 (1 of 1956) within one hundred and eighty days from the commencement of this Act in accordance with the provisions of the Companies Act, 1956.\(^79\) In addition to this the Act states that a company which had become a sick industrial company as defined in clause (46AA) of section 2 of the Companies Act, 1956

\(^75\) ibid

\(^76\) Ibid.

\(^77\) Ibid.


\(^79\) Ibid.
(1 of 1956), before the commencement of the Companies (Second Amendment) Act, 2002
(11 of 2003) may make a reference under PART VIA of the Companies Act, 1956 within one
hundred and eighty days from the commencement of the Companies (Second Amendment)
Act, 2002 or within sixty days of final adoption of accounts after such commencement,
whichever is earlier and reference so made shall be dealt with in accordance with the
provisions of the Companies Act, 1956 (1 of 1956). Provided further that no fee shall be
payable for making such reference under PART VIA of the Companies Act, 1956 (1 of 1956)
by a company whose appeal or reference or inquiry stand abated under this clause\textsuperscript{80}

PART VIA : REVIVAL AND REHABILITATION OF SICK INDUSTRIAL
COMPANIES UNDER THE COMPANIES ACT,1956\textsuperscript{81}

Sec. 424A. of the Companies Act,1956 reads as follows- REFERENCE TO TRIBUNAL
(1) Where an industrial company, has become a sick industrial company, the Board of
directors of such company shall make a reference to the Tribunal, and prepare a scheme
of its revival and rehabilitation and submit the same to the Tribunal along with an
application containing such particulars as may be prescribed, for determination of the
measures which may be adopted with respect to such company : Provided that nothing
contained in this sub-section shall apply to a Government company : Provided further that
a Government company may, with the prior approval of the Central Government or a
State Government, as the case may be, make a reference to the Tribunal in accordance
with the provisions of this subsection and thereafter all the provisions of this Act shall
apply to such Government company. (2) The application under sub-section (1) shall be
accompanied by a certificate from an auditor from a panel of auditors prepared by the
Tribunal indicating - (a) the reasons of the net worth of such company being fifty per cent
or less than fifty per cent ; or (b) the default in repayment of its debt making such
company a sick industrial company, as the case may be. (3) Without prejudice to the
provisions of sub-section (1), the Central Government or the Reserve Bank or a State
Government or a public financial institution or a State level institution or a scheduled
bank may, if it has sufficient reasons to believe that any industrial company has become,

\textsuperscript{80} Ibid.

\textsuperscript{81} Companies Act,1956; Part VIA including sections 424A to 424L, inserted by the Companies (Second
Amendment) Act, 2002 (w.e.f. a date yet to be notified).
for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company: Provided that a reference shall not be made under this sub-section in respect of any industrial company by - (a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State; (b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company. (4) A reference under sub-section (1) or sub-section (3) shall be made to the Tribunal within a period of one hundred and eighty days from the date on which the Board of directors of the company or the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank, as the case may be, come to know, of the relevant facts giving rise to causes of such reference or within sixty days of final adoption of accounts, whichever is earlier. (5) The Tribunal may, on receipt of a reference under sub-section (1), pass an order as to whether a company in respect of which a reference has been made has become a sick industrial company and such order shall be final.82

Sec.424B. of the Companies Act,1956 reads as follows- INQUIRY INTO WORKING OF SICK INDUSTRIAL COMPANIES (1) The Tribunal may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company - (a) upon receipt of a reference with respect to such company under section 424A; or (b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company. (2) The Tribunal may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under subsection (1), require by order any operating agency to enquire into the scheme for revival and make a report with respect to such matters as may be specified in the order. (3) The operating agency shall complete its inquiry as expeditiously as possible and submit its report to the Tribunal within twenty-one days from the date of such order: Provided that the Tribunal may extend the said period to forty days for reasons to be recorded in writing for such extension. (4) The Tribunal shall conclude its inquiry as expeditiously as possible and pass final orders in the proceedings within sixty days from the commencement of the inquiry:

82 SEC.424A of the Companies Act,1956
Provided that the Tribunal may extend the said period to ninety days for reasons to be recorded in writing for such extension. Explanation. - For the purposes of this sub-section, an inquiry shall be deemed to have commenced upon the receipt by the Tribunal of any reference or information or upon its own knowledge reduced to writing by the Tribunal. (5) Where the Tribunal deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), it may appoint one or more persons who possess knowledge, experience and expertise in management and control of the affairs of any other company to be a special director or special directors on the Board of such industrial company on such terms and conditions as may be prescribed for safeguarding its financial and other interests or in the public interest. (6) The special director or special directors appointed under sub-section (5) shall submit a report to the Tribunal within sixty days from the date of appointment of such director or directors about the state of affairs of the company in respect of which reference has been made under sub-section (1) and such special director or directors shall have all the powers of a director of a company under this Act, necessary for discharge of his or their duties. (7) The Tribunal may issue such directions to a special director appointed under sub-section (5) as it may deem necessary or expedient for proper discharge of his duties. (8) The appointment of a special director referred to in sub-section (5) shall be valid and effective notwithstanding anything to the contrary contained in any other provision of this Act or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any special director or directors appointed by the Tribunal. (9) Any special director appointed under sub-section (5), shall - (a) hold office during the pleasure of the Tribunal and may be removed or substituted by any person by order of the Tribunal; (b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto; (c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement; (d) not be liable to be prosecuted under any law for
anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.\footnote{Sec.424B of the Companies Act}

Sec.424C. of the Companies Act,1956 reads as follows- POWERS OF TRIBUNAL TO MAKE SUITABLE ORDER ON COMPLETION OF INQUIRY

(1) If after making an inquiry under section 424 B, the Tribunal is satisfied that a company has become a sick industrial company, the Tribunal shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses or make the repayment of its debts referred to in clause (b) of sub-section (2) of section 424A within a reasonable time. (2) If the Tribunal decides under sub-section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses or pay its debt referred to in that sub-section within a reasonable time, the Tribunal shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses or make repayment of the debts. (3) If the Tribunal decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses or make the repayment of its debts referred to in clause (b) of sub-section (2) of section 424A, within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 424D in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company. (4) The Tribunal may, - (a) if any of the restrictions or conditions specified in an order made under sub-section (2) are not complied with by the company concerned, or if the company fails to revive in pursuance of the said order, review such order on a reference in that behalf from any agency referred to in sub-section (3) of section 424A or on its own motion and pass a fresh order in respect of such company under sub-section (3) ; (b) if the operating agency specified in an order made under sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate.\footnote{Sec.424 C of Companies Act,1956}
Sec. 424D. of the Companies Act, 1956 reads as follows: PREPARATION AND SANCTION OF SCHEMES (1) Where an order is made under sub-section (3) of section 424C in relation to any sick industrial company, the operating agency specified in the order shall prepare as expeditiously as possible and ordinarily within a period of sixty days from the date of such order, having regard to the guidelines framed by the Reserve Bank of India in this behalf, a scheme with respect to such company providing for any one or more of the following measures, namely:- (a) the financial reconstruction of such industrial company; (b) the proper management of such industrial company by change in, or take over of, the management of such industrial company; (c) the amalgamation of -

(i) such industrial company with any other company; or

(ii) any other company with such industrial company (hereafter in this section, in the case of sub-clause (i), the other company, and in the case of sub-clause (ii), such industrial company, referred to as "transferee-company");

(d) the sale or lease of a part or whole of any industrial undertaking of such industrial company;

(e) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(f) such other preventive ameliorative and remedial measures as may be appropriate;

(g) repayment of debt;

(h) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (g): Provided that the Tribunal may extend the said period of sixty days to ninety days for reasons to be recorded in writing for such extension.

(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely:

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee-company;

(b) the transfer to the transferee-company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(c) any change in the Board of directors, or the appointment of a new Board of directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

(d) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee-company for the purpose of altering the capital structure thereof, or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(e) the continuation by or against the
sick industrial company or, as the case may be, the transferee-company of any action or other legal proceeding pending against the sick industrial company immediately before the date of the order made under sub-section (3) of section 424C; (f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Tribunal considers necessary in the interests of the reconstruction, revival or rehabilitation or repayment of debts of such sick industrial company or for the maintenance of the business of such industrial company; (g) the allotment to the shareholders of the sick industrial company, of shares in such company or, as the case may be, in the transferee-company and where any shareholder claims payment in cash and not allotment of shares, or where it is not possible to allot shares to any shareholder, the payment of cash to those shareholders in full satisfaction of their claims - (i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or (ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced; (h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company; (i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale; (j) lease of the industrial undertaking of the sick industrial company to any person, including a co-operative society formed by the employees of such undertaking; (k) method of sale of assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor; (l) issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of such sick industrial company; (m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out. (3)(a) The scheme prepared by the operating agency shall be examined by the Tribunal and a copy of the scheme with modification, if any, made by the Tribunal shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Tribunal may publish or cause to be published the draft scheme in brief in such daily newspapers as the Tribunal may consider necessary, for suggestions and objections,
if any, within such period as the Tribunal may specify. (b) The complete draft scheme shall be kept at the place where registered office of the company is situated or at such places as mentioned in the advertisement. (c) The Tribunal may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee-company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies: Provided that where the scheme relates to amalgamation, the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the transferee-company. (4) The scheme may thereafter be sanctioned, within sixty days by the Tribunal (hereinafter referred to as the sanctioned scheme) and shall come into force on such date as the Tribunal may specify in this behalf: Provided [further] that the Tribunal may extend the said period of sixty days to ninety days for reasons to be recorded in writing for such extension:

Provided also that different dates may be specified for different provisions of the scheme. (5) The Tribunal may, on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines including the guidelines framed by the Reserve Bank of India in this behalf in order to prepare a fresh scheme providing for such measures as the operating agency may consider necessary. (6) When a fresh scheme is prepared under sub-section (5), the provisions of sub-sections (3) and (4) shall apply in relation thereto as they apply to in relation to a scheme prepared under sub-section (1). (7) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company. (8) The sanction accorded by the Tribunal under sub-section (4) shall be conclusive evidence that
all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Tribunal to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise), be admitted as evidence. (9) A copy of the sanctioned scheme referred to in sub-section (8) shall be filed with the Registrar within the prescribed time by the company in respect of which such scheme relates. (10) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee-company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies. (11) The creditors of a sick industrial company may also prepare a scheme for revival or rehabilitation of such sick industrial company and submit the same to the Tribunal for its sanction : Provided that no scheme shall be submitted by the creditors to the Tribunal unless such scheme has been approved by at least three fourth in value of creditors of the sick industrial company. (12) All the provisions relating to the preparation of scheme by the operating agency and sanction of such scheme by the Tribunal shall, as far as may be, apply to the scheme referred to in sub-section (11). (13) The scheme referred to in sub-section (11) if sanctioned by the Tribunal shall be binding on all the creditors and on other concerned. (14) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Tribunal may, on the recommendation of the operating agency or otherwise, by order, do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty. (15) The Tribunal may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to the sick industrial company as may be specified in the order. (16) Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Tribunal may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of this Act. (17) The Tribunal may monitor periodically the implementation of the sanctioned scheme.  

Sec.424E. of the Companies Act,1956 reads as follows- REHABILITATION BY GIVING FINANCIAL ASSISTANCE (1) Where the scheme relates to preventive,
ameliorative, remedial and other measures with respect to the sick industrial company, the
scheme may provide for financial assistance by way of loans, advances or guarantees or
reliefs or concessions or sacrifices from the Central Government, a State Government,
any scheduled bank or other bank, a public financial institution or State level institution
or any institution or other authority (any Government, bank, institution or other authority
required by a scheme to provide for such financial assistance being hereafter in this
section referred to as the person required by the scheme to provide financial assistance) to
the sick industrial company. (2) Every scheme referred to in sub-section (1) shall be
circulated to every person required by the scheme to provide financial assistance for his
consent within a period of sixty days from the date of such circulation or within such
further period, not exceeding sixty days, as may be allowed by the Tribunal, and if no
consent is received within such period or further period, it shall be deemed that consent
has been given. (3) Where in respect of any scheme the consent referred to in sub-section
(2) is given by every person required by the scheme to provide financial assistance, the
Tribunal may, as soon as may be, sanction the scheme and on and from the date of such
sanction the scheme shall be binding on all concerned. (4) On the sanction of the scheme
under sub-section (3), the financial institutions and the banks required to provide financial
assistance, shall designate by mutual agreement a financial institution and a bank from
amongst themselves which shall be responsible to disburse financial assistance by way of
loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be
provided or granted under the scheme on behalf of all financial institutions and banks
concerned. (5) The financial institution and the bank designated under sub-section (4)
shall forthwith proceed to release the financial assistance to the sick industrial company
in fulfilment of the requirement in this regard. (6) Where in respect of any scheme
consent under sub-section (2) is not given by any person required by the scheme to
provide financial assistance, the Tribunal may adopt such other measures, including the
winding up of the sick industrial company, as it may deem fit. 

Sec.424F. of the Companies Act,1956 reads as follows-

ARRANGEMENT FOR CONTINUING OPERATIONS, ETC., DURING INQUIRY (1) At any time before
completion of the inquiry under section 424B, the sick industrial company or the Central
Government or the Reserve Bank of India or a State Government or a public financial
institution or a State level institution or a scheduled bank or any other institution, bank or

86 Sec.424 E of Companies Act 1956
authority providing or intending to provide any financial assistance by way of loans or advances or guarantees or reliefs, or concessions to such industrial company may make an application to the Tribunal - (a) agreeing to an arrangement for continuing the operations of the sick industrial company; or (b) suggesting a scheme for the financial reconstruction of the sick industrial company. (2) The Tribunal may, within sixty days of the receipt of the application under sub-section (1), pass such orders thereon as it may deem fit. 424G. WINDING UP OF SICK INDUSTRIAL COMPANY (1) Where the Tribunal, after making inquiry under section 424B and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record its findings and order winding up of the company. (2) For the purpose of winding up of the sick industrial company, the Tribunal may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of such industrial company and the officer so appointed shall for the purpose of the winding up of such sick industrial company, be deemed to be, and have all the powers of, the official liquidator under 5 this Act. (3) Notwithstanding anything contained in sub-section (2), the Tribunal may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and pass orders for distribution in accordance with the provisions of section 529A, and other provisions of this Act. (4) Without prejudice to the other provisions contained in this Act, the winding up of a company shall, as far as may be, concluded within one year from the date of the order made under sub-section (1).

Sec.424H. of the Companies Act, 1956 reads as follows - OPERATING AGENCY TO PREPARE COMPLETE INVENTORY, ETC Where for the proper discharge of the functions of the Tribunal under this Part, the circumstances so require, the Tribunal may, through any operating agency, cause to be prepared - (a) with respect to a company a complete inventory of - (i) all assets and liabilities of whatever nature; (ii) all books of account, registers, maps, plans, records, documents of title or ownership of property and all other documents of whatever nature relating thereto; (b) a list of shareholders and a list of creditors showing separately in the list of creditors, the secured creditors and

87 Sec. 424 F of Companies Act, 1956
unsecured creditors; (c) a valuation report in respect of the shares and assets in order to arrive at the reserve price for the sale of a part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio; (d) an estimate of reserve price, lease rent or share exchange ratio; (e) proforma accounts, where no up-to-date audited accounts are available.  

Sec. 424-I. of the Companies Act, 1956 reads as follows— DIRECTION NOT TO DISPOSE OF ASSETS The Tribunal may, if it is of opinion, that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order, direct such company not to dispose of, except with the prior approval of the Tribunal, any of its assets during the period of inquiry under section 424B or during the period of preparation or consideration of the scheme under section 424C.  

Sec. 424J. of the Companies Act, 1956 reads as follows— POWER OF TRIBUNAL TO CALL FOR PERIODIC INFORMATION On receipt of reference under section 424A, the Tribunal may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed the accumulated losses or to make repayment of its debts referred to in that section, as the case may be, and the company shall furnish such information.  

Sec. 424K. of the Companies Act, 1956 reads as follows— MISFEASANCE PROCEEDINGS (1) If, in the course of scrutiny or implementation of any scheme or proposal, it appears to the Tribunal that any person who has taken part in the promotion, formation or management of the sick industrial company or its undertaking, including any past or present director, manager or officer or employee of the sick industrial company - (a) has misapplied or retained, or become liable or accountable for, any money or property of the sick industrial company; or (b) has been guilty of any misfeasance, malfeasance or non-feasance of breach of trust in relation to the sick industrial company, the Tribunal may, by order, direct him to repay or restore the money or property or any part thereof, with or without interest, as it thinks just, or to contribute such sum to the assets of the sick industrial company or the other person, entitled thereto by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Tribunal thinks just, and also report the matter to the Central Government for any

88 Sec. 424 H of Companies Act, 1956
89 Sec. 424 I of Companies Act, 1956
90 Sec. 424J of Companies Act 1956
other action which that Government may deem fit. (2) If the Tribunal is satisfied on the
basis of the information and evidence in its possession with respect to any person who is
or was a director or an officer or other employee of the sick industrial company, that such
person by himself or along with others had diverted the funds or other property of such
company for any purpose other than a bona fide purpose of the company or had managed
the affairs of the company in a manner highly detrimental to the interests of the company,
the Tribunal shall by order, direct the public financial institutions, scheduled banks and
State level institutions not to provide, during a period often years from the date of the
order, any financial assistance to such person or any firm of which such person is a
partner or any company or other body corporate of which such person is a director (by
whatever name called). (3) No order shall be made by the Tribunal under this section
against any person unless such person has been given an opportunity for making his
submissions. (4) This section shall apply notwithstanding that the matter is pne for which
the person may be criminally liable. 91

Sec.424L. of the Companies Act,1956 reads as follows- PENALTY FOR CERTAIN
OFFENCES (1) Whoever violates provisions of this Part or any scheme, or any order, of
the Tribunal or the Appellate Tribunal or makes a false statement or gives false evidence
to the Tribunal or the Appellate Tribunal, and attempts to tamper the records of reference
or appeal filed under this Act, shall be punishable with simple imprisonment for a term
which may extend to three years or shall be liable to fine not exceeding ten lakhs rupees.
(2) No court shall take cognisance of any offence under sub-section (1) except on a
complaint in writing of an officer of the Tribunal or the Appellate Tribunal or any officer
of the Central Government authorised by it or any officer of an operating agency as may
be authorised in this behalf by the Tribunal or the Appellate Tribunal, as the case may
be.]92

The legislative attempts to overhaul the corporate rescue regime in India could not be made
operational .The changes made in the Companies Act, 1956 (“CA 1956”) could not enter into
force: Chapter VIA of the CA 1956, inserted by the Companies (Second Amendment) Act,
2002, which provided for the National Company Law Tribunal (“NCLT”) to exercise powers

91 Sec.424 K of Companies Act,1956
92 Sec.424 L of Companies Act 1956
in relation to sick industrial companies as the same could not be notified by the Government of India.\textsuperscript{93}

\textsuperscript{93} Interim Report of The Bankruptcy Law Reform Committee(February 2015); available at:<http://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf> accessed on 24\textsuperscript{th} February 2017
REVIVAL UNDER COMPANIES ACT 2013

The Companies Act 2013 provides for a new comprehensive regime for revival and rehabilitation of companies under Chapter XIX: unlike SICA which applied to specified industrial companies only, the Companies Act 2013 for corporate rescue is applicable to all companies. The procedure under the Companies Act 2013 in relation to corporate rescue shall be administered by the NCLT, a quasi-judicial body. The NCLT shall consist of both judicial and non-judicial members.94

The following features of Chapter XIX Companies Act 2013 make it significantly better than SICA: (i) greater involvement of the creditors in the rehabilitation process, (ii) reference criteria based on a liquidity test (instead of erosion of net worth), (iii) no automatic moratorium (the moratorium under the Companies Act 2013 will be available only on application to the NCLT, and is available only for a fixed duration of 120 days), (iv) provision for a committee of creditors (with representatives from every class of creditors) that will have a say in determining whether a company should be liquidated or rescued, (v) requirement of creditor consent for approving a scheme of rescue (that gives rights to both secured and unsecured creditors), (vi) provision for appointment of administrators (as against operating agency under the SICA) - appointed from a databank of authorised practitioners (company secretaries, chartered accountants, cost accountants and such other professionals) maintained by the government – who can even take-over the management of the debtor company under the NCLT’s directions, (vii) provision for a ‘Rehabilitation and Insolvency Fund’ for the purpose of liquidation and rescue of sick companies. Additionally, as under the SICA, it is possible for SARFAESI Act action to defeat the commencement of rescue proceedings altogether (see the provisos to Section 254 of CA 2013).95

Although the rescue related provisions of new Companies Act 2013 make several improvements over the old regime, there are several areas where its provisions need further changes to ensure that the new regime works efficiently and produces the desired outcomes. This not only requires few substantive changes to the Companies Act 2013, but also some institutional changes (to ensure proper implementation).96

94 Ibid.
95 Ibid.
96 Ibid.
In order to facilitate early detection and intervention in case of corporate distress, it is crucial to devise an appropriate test for identifying when measures for corporate rescue are to be taken in relation to a company in financial trouble. Under the SICA, the ‘erosion of net worth’ test was used to determine whether an industrial company had become sick and rehabilitation proceedings were to be initiated in relation to it. This test was criticized by the Goswami Committee and the RBI Advisory Group on Bankruptcy Laws as failing to provide an appropriate trigger for taking measures for rehabilitation: the test determined a company to be sick only when it was in the final stage of sickness, at which point there was effectively no scope for rescuing the company.\(^{97}\) The Companies Act 2013 permits a secured creditor or the company to make a reference to the NCLT for declaring the company to be a sick company if it is unable to pay/secure/compound the debt when a demand for payment has been made by secured creditors representing 50% or more of the outstanding amount of debt within thirty days of the service of notice of demand.\(^{98}\) A reference may also be made by the Central or State Governments, the RBI, a public financial institution, a State level institution or a scheduled bank if it has sufficient reasons to believe that a company has become sick.\(^{99}\) Thus, typically, the triggers for making a reference to the NCLT for determination of ‘sickness’ of the company are: (i) non-payment of 50% or more of the outstanding amount of debt when a statutory demand has been made; or (ii) belief that the company has become sick. As per the draft NCLT rules, a ‘sick company’ is defined to mean and include “a company, which has failed to pay the debt of its secured creditors within 30 days of the notice of demand or to secure or compound it to the reasonable satisfaction of the secured creditors as per section 253 of the Act”\(^{100}\)

\(^{97}\) Ibid.
\(^{98}\) Section 253(1), (4), Companies Act 2013.
\(^{99}\) Section 253(5), Companies Act 2013.
\(^{100}\) Supra n.133
SICA REPEAL ACT, 2003

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was enacted for the timely detection of sick (and potentially sick) companies owning industrial undertakings. SICA was a unique statute that was enacted to identify ‘sick’ and ‘potentially sick’ companies dealing with commercial activities and for carrying out of appropriate measures to revive such sick companies, and to make sure speedy enforcement proceedings against such companies. BIFR was established under SICA as a specialized body for revival, rehabilitation and even winding up of sick industrial corporate entities and wherever essential, for providing them with monetary assistance.\(^\text{101}\)

By way of two notifications dated November 25, 2016 (“Repeal Notification”), the Ministry of Finance has appointed December 1, 2016 as the date on which the provisions of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (“SICA Repeal Act”) shall come into effect and Section 4(b) of the SICA Repeal Act shall be enforced. With the effectiveness of the SICA Repeal Act, the Sick Industrial Companies (Special Provisions) Act, 1985 (“SICA”) shall stand repealed and the Board for Industrial and Financial Reconstruction (“BIFR”) and the Appellate Authority for Industrial and Financial Reconstruction (“AAIFR”) shall stand dissolved.\(^\text{102}\)

As the year of SICA Repeal Act suggests, the repeal of SICA has been on the cards for a very long time. Originally, separate provisions were inserted in Companies Act, 1956 (sections 424A to 424L) through the Companies (Second Amendment) Act, 2002 to deal with the revival and rehabilitation of sick industrial companies. These provisions were never notified. The Companies Act, 2013 also contained a new Chapter XIX (sections 253 to 269) to replace SICA as and when the SICA Repeal Act would have been notified. However, these provisions have been deleted with effect from November 15, 2016 by way of Notification No. S.O. 3453(E), 30/7/2016-Insolvency Section, which inter alia notified section 255 of the Insolvency and Bankruptcy Code, 2016 (“Insolvency Code”). The relevant provisions of the

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\(^{101}\) Available at: [http://indiacorplaw.blogspot.in/2016/11/repeal-of-sica.html](http://indiacorplaw.blogspot.in/2016/11/repeal-of-sica.html) > accessed on 16th December 2016

Insolvency Code, which provide an alternative mechanism in place of SICA, are yet to be made effective.

It is instructive to note that section 4(b) of the SICA Repeal Act was also amended by section 252 of the Insolvency Code. Section 252 of the Insolvency Code came into effect on November 1, 2016, by way of Notification No. S.O. 3355(E), 30/7/2016-Insolvency Section. The effect of the amended section 4(b) is that from the date notified by the Government all proceedings pending before the BIFR and AAIFR shall abate and will come to an end. However, it shall be open to the company whose appeal, reference or inquiry has abated to initiate fresh proceedings (that is, the corporate insolvency resolution process under the Insolvency Code) before the National Company Law Tribunal (“NCLT”) in accordance with the provisions of Insolvency Code, within 180 days of the commencement of the Insolvency Code.
Procedure for Rehabilitation of Sick Companies under the Bankruptcy Code, 2016

The Bankruptcy Code attempts to harmonise the process of insolvency, restructuring and rehabilitation under the umbrella of the “corporate insolvency resolution process”. The process for corporate insolvency may be initiated under the Insolvency and Bankruptcy Code, 2016, by a financial creditor, or an operational creditor or the company (irrespective of whether the same owns an industrial undertaking or not) itself (“Insolvency Applicant”). Briefly understood, the corporate insolvency proceeds when there is a debt, in respect of which the corporate debtor has committed a default. The amount of default should be Rs. 1 lakh or more. It is important to note that the Bankruptcy Code aims to move away from the “sickness” test as contained under SICA and the Companies Act, 2013 (under Chapter XIX, which now stands deleted) to the “cash flow” test, allowing for a more objective standard of assessment.

After assessment of sickness, an Insolvency Applicant may file an application before the NCLT (National Company Law Tribunal) for the commencement of the corporate insolvency resolution process in respect of the corporate debtor upon complying with certain prescribed procedural requirements. Upon being satisfied with the contents of the application, the NCLT may admit or reject the application. The corporate insolvency resolution process for those corporate debtors commences whose application is admitted. If the application is admitted, the NCLT shall declare a moratorium period during which no legal proceedings may be instituted or continued against the corporate debtor. Further, an “interim resolution professional” will be appointed and a public announcement of the initiation of the corporate insolvency process issued. These resolution professionals have to be registered with the Insolvency and Bankruptcy Board of India after they have cleared an examination.

The Insolvency and Bankruptcy Code, 2016, substitutes the erstwhile “debtor-in-possession” model of Indian insolvency law with a “creditor-in-possession” model. By this replacement it allows the committee of creditors and the insolvency professional to replace the board of directors of the borrower. These, amongst others, are important components of the Code, which now stands notified into law.
The Bankruptcy Code has explained in detail the manner in which the corporate insolvency process is to be carried out. The corporate insolvency process includes the formation of a resolution plan with an aim to revive and rehabilitate the business of the company. If the resolution plan is approved, the same is implemented accordingly. However, in case no resolution plan is agreed upon or approved by the NCLT (National Company Law Tribunal) within 180 days of the admission of the application, the company will be wound up in accordance with the provisions of the Bankruptcy Code.

**Way Forward**

A significant change has been brought about in law by the repeal of SICA and the enactment of the dynamic Insolvency and Bankruptcy Code, 2016. We have moved beyond the concept of a “sick” company or an “industrial undertaking”, and there is streamlining and consolidation of the revival process for all companies under one law and before a single tribunal that is NCLT. This would make the process more easy, less rigid, speedy and efficient. The NCLT will have to be provided with the necessary infrastructural and legal support to handle the potential influx of matters for success of Insolvency and Bankruptcy Code, 2016. Now it remains to be seen whether a qualified pool of insolvency resolution professionals who will help with the implementation of the law will be efficiently formed. The new regime can also help the corporate achieve greater efficiency in functioning by encouraging an environment that supports commercial prudence and encourages people who want to do business. Banks, financial institutions and lenders may approve of the new insolvency regime as it allows for a speedy resolution of matters, where huge amounts of funds may be tied up, while concurrently allowing such creditors to be an active part of the resolution process of a corporate debtor.