CHAPTER-5

THE INSOLVENCY AND BANKRUPTCY CODE, 2016- A HISTORICAL ECONOMIC REFORM IN INDIA
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This chapter shall deal with:

- The INSOLVENCY & BANKRUPTCY CODE, 2016
- WHY IS THE CODE IMPERATIVE TODAY?
- SALIENT FEATURES OF THE CODE
- KEY DIFFERENCE BETWEEN THE CODE AND THE CURRENT INSOLVENCY REGIME
- CRITICAL ANALYSIS OF THE IBC, 2016
- FIRST LIQUIDATION ORDER UNDER INSOLVENCY CODE PASSED BY (NCLT)
The INSOLVENCY AND BANKRUPTCY CODE, 2016

The government of India has passed a new bankruptcy law that aims at making it easier to wind up a failing business and recover debts in our nation. Accordingly I have made an attempt to give a brief explanation as to how THE INSOLVENCY AND BANKRUPTCY CODE, 2016, could make India a business friendly country.

The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports, the most important of which is the report of the Bankruptcy Law Reforms Committee of November, 2015\textsuperscript{326}. The Statement of Objects and Reasons of the Code reads as under:

There is no single statute in our country that deals with insolvency and bankruptcy. In India, provisions relating with ‘insolvency and bankruptcy’ for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple forums such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals.\textsuperscript{327} Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.\textsuperscript{328}

The aim and objective and of the ‘Insolvency and Bankruptcy Code, 2016’ is to merge and modify the laws relating to ‘reorganization and insolvency resolution’ of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of liquidation proceeds regarding government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution

\textsuperscript{326} Report of the Joint Committee on Insolvency and Bankruptcy Code, 2015(sixteenth lok sabha); available at: \texttt{http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf} accessed on 1\textsuperscript{st} july 2017

\textsuperscript{327} Ibid.

\textsuperscript{328} Ibid.
of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.\textsuperscript{329}

The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy.\textsuperscript{330} The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities.\textsuperscript{331} Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings.\textsuperscript{332} The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.\textsuperscript{333}


One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA

\textsuperscript{329} Ibid.
\textsuperscript{330} Ibid.
\textsuperscript{331} Ibid.
\textsuperscript{332} "Parliament passes Bankruptcy Code; New law to help recovery action for debt default.", Tax India Online, May 12 2016 Issue
\textsuperscript{333} Ibid.
\textsuperscript{334} Supra n. 326
(1.5 years) and South Africa (2 years). The World Bank’s Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.

Other nations are have marched ahead much before us. For example, the USA has adopted the Bankruptcy Reform Act of 1978, which has since been codified in Title XI of the United States Code.

The US Code continues to favour the debtor. In a reorganization case under Chapter 11, the debtor and its existing management ordinarily continue to operate the business as a “debtor in possession” – See USC 11, Sec. 1107-1108. The Court can appoint a trustee to take over management of the debtor’s affairs only for “cause” which includes fraud, dishonesty or gross mismanagement of the affairs of the debtor – See USC 11, Sec. 1104. Having regard to the aforesaid grounds, such appointments are rare. Creditors are not permitted a direct role in operating the on-going business operations of the debtor. However, the United States Trustee is to appoint a committee of creditors to monitor the debtor’s ongoing operations. A moratorium is provided, which gives the debtor a breathing spell in which he is to seek to reorganize his business.

While a Chapter 11 case is pending, the debtor only needs to pay post petition wages, expenses etc. In the meanwhile, the debtor can work on permanent financial resolution of its pre-petition debts. It is only when this does not work that the bankruptcy process is then put into effect.

The UK Law, on the other hand, is governed by the Insolvency Act of 1986 which has served as a model for the present Code.

While piloting the Code in Parliament, Shri Arun Jaitley, learned Finance Minister, stated on the floor of the House:

“SHRI ARUN JAITLEY: One of the differences between your Chapter 11 and this is that in Chapter 11, the debtor continues to be in possession. Here the creditors will be in possession. Now, the SICA is being phased out, and I will tell you one of the reasons why SICA didn’t function. Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments
were passed. Now since they were challenged before the Supreme Court, it didn’t come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place.

But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created.”

At this stage, it is important to set out the important paragraphs contained in the report of the BANKRUPTCY LAW REFORMS COMMITTEE OF NOVEMBER, 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:

“As Chairman\textsuperscript{335} of the Committee on bankruptcy law reforms, I have had the privilege of overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy. This is a matter of critical importance: India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently. The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how

\textsuperscript{335} Dr. T. K. Viswanathan, former Law Secretary
the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.”

This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place: to a limited extent, banks are able to repossess fixed assets which were pledged with them.336

While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.337

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis. When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy: It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shrivelled.338

Both these phenomena are unsatisfactory. In many settings, debt is an efficient tool for corporate finance; there needs to be much more debt in the financing of Indian firms. E.g. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India’s rapid growth are those which are more labour intensive. These industries have been starved of credit.339

The key economic question in the bankruptcy process is: When a firm

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337 Ibid.
338 Ibid.
339 Ibid.
(referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.\textsuperscript{340}

The Committee believed that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it. Speed is of essence Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.\textsuperscript{341}

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay. The role that insolvency and bankruptcy plays in debt financing Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment.\textsuperscript{342} When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{340} Ibid.
\item \textsuperscript{341} Ibid.
\item \textsuperscript{342} Supra n.336
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\end{footnotesize}
Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or

Business failure – which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency. Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this.343

The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

1. Low time to resolution.

2. Low loss in recovery.

3. Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

343 Ibid.
The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework: 344

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

1. The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency. 345

2. The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

4. The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process. 346

II. The Code will enable symmetry of information between creditors and debtors.

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

344 Ibid.
345 Ibid.
346 Ibid.
7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.347

III. The Code will ensure a time-bound process to better preserve economic value.

8. The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.348

IV. The Code will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.349

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.350

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.351

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

347 Supra n.336
348 Ibid.
349 Ibid.
350 Ibid.
351 Ibid.
12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.\footnote{Ibid.}

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution. An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommended different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the IU). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered Insolvency Professional to manage the IRP. Operational creditors must present an “undisputed bill” which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered Insolvency Professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the Adjudicator to approach the Regulator for a registered Insolvency Professional for the case.\footnote{Ibid.}

In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility (if the default has been filed with an information utility, it such be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing

\footnote{Ibid.}
an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed. Steps at the start of the IRP In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a “calm period” with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability. The first steps that the Adjudicator takes is put in place an order for a moratorium on debt recovery actions and any existing or new law suits being filed in other courts, a public announcement to collect claims of liabilities, the appointment of an interim RP and the creation of a creditor committee.

The significant number of legislations and the complex interplay between them have made the recovery of debts cumbersome for lenders. Different acts define the powers of lenders and borrowers in the case of insolvency. The lack of clarity on jurisdiction and lack of commercial understanding have allowed stakeholders to manipulate the situation and stall progress. The average life of cases recommended for restructuring in 2002 was 7 years and the average life of cases recommended for winding up to the court was 6.5 years. Even as of October 31, 2015, only about 955 (out of 4,636) and 163 (out of 545) cases of court and voluntary winding up were resolved within 5 years. A significant number of such cases were pending for more than 20 years – 1,274 and 205 respectively

Therefore, there is an immediate need to overhaul the insolvency framework. A historical economic reform in India took place when the Rajya Sabha on 11th of May, 2016 passed the Insolvency and Bankruptcy Code, 2016. Insolvency & Bankruptcy Code, 2016 (IBC) received the assent of president on 28/05/2016. Indian government’s move to enact the Insolvency and Bankruptcy Code, 2016 (“Code”) will help in reorganising and consolidating all the laws/statutes regulating insolvency to make the

354 Ibid.
355 Ibid.
356 Ibid.
358 Report of the Joint Committee on Insolvency and Bankruptcy Code, 2015(16th lok sabha), p76-77 citing data from Department of Financial Services; available at: <http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf> accessed on 1st july 2017
359 It extends to the whole of India: Provided that Part III of Code shall not extend to the State of Jammu and Kashmir. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: (Note: Insolvency and Bankruptcy Code 2016 was published on 28.05.2016 read Insolvency and Bankruptcy Code 2016 Notified by Govt); available at: <www.mca.gov.in/MinistryV2/insolvency+and+bankruptcy+code.html> accessed on 8th april, 2017
process simpler. At present time, there are number of overlapping legislations and governing bodies dealing with financial failure and insolvency of companies and individuals in India. The current legal and institutional structure does not give support to lenders in effective and timely recovery or restructuring of defaulted assets and causes undue damage to the Indian credit system. Insolvency and Bankruptcy Code, 2016, will provide an easy exit option for insolvent and sick firms. The enactment of Code is an innovative plan awaiting correct execution. The Code creates a unified framework for resolving insolvency and bankruptcy matters and is a key element in the government’s strategy to rid the financial sector of its bad debt problem.

The Code is a landmark piece of legislation which will enable quick and prompt action to be taken in the early stages of debt default by a firm, maximizing the recovery amount and will extend to individuals, companies, limited liability partnerships and partnership firms in a time-bound manner.

According to the “World Bank’s Ease of Doing Business report”, on the parameter of resolving insolvency, India is ranked 136 among 189 countries. Company in India typically takes four years or twice as long as in China and Russia, a person on the ground would confirm that it takes much more time than that. The proposed insolvency and bankruptcy law seeks to cut down the time to less than a year. This will not only improve the ease of doing business in India, but also facilitate a better and faster debt recovery mechanism in the country. It is widely believed that this legislation will change the negative perception of recovery and litigation associated with India.

The legislative process of bankruptcy proceedings is covered over multiple laws, and adjudication takes place in multiple fora. Some of the statutes are the Companies Act 2013, ‘Sick Industrial Companies (Special Provisions) Act, 1985 (“SICA”), the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (“RDDB Act”) and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“SARFAESI”) . So we can say that the Insolvency and Bankruptcy Code, 2016 is,

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362 http://www.legallyindia.com
363 Supra n.360
364 ibid.
therefore, a complete compilation of laws and rules relating to the bankruptcy laws in India. The Code will lead to repeal the Presidency Towns Insolvency Act, 1909 & Provincial Insolvency Act, 1920.\textsuperscript{365} Additionally, the Code will amend 11 statutes.\textsuperscript{366}

**SALIENT FEATURES OF THE CODE**

The Code consolidates and amends the legislations relating to the reorganization and insolvency of corporations, partnerships and individuals. It seeks to achieve reorganization and, failing that, liquidation of the concerned entity. The Code makes some fundamental changes to the existing insolvency resolution process, procedurally as well substantively.

- The Code prescribes a timeline of 180 days for the insolvency resolution process, which begins from the date the application is admitted by the NCLT. The period is subject to a single extension of 90 days in the event the Adjudicating Authority (being petitioned by a resolution passed by a vote of 75% of the COC) is satisfied that the corporate insolvency resolution process cannot be completed within the period of 180 days. This time period is also applicable to individual insolvency resolution process. During this period, the creditors and the debtor will be expected to negotiate and finalize a resolution plan (accepted by 75% of the financial creditors) and in the event they fail, the debtor is placed in liquidation and the moratorium lifted.

- The Insolvency and Bankruptcy Board of India will be established to control, maintain, manage and supervise functioning of IPs, IPAs and IUs. The Code seeks to set-up this Insolvency and Bankruptcy Board of India (Board) which will function as the regulator for all matters dealing with insolvency and bankruptcy.

- The Bankruptcy Code attempts to harmonise the process of insolvency, restructuring and rehabilitation under the umbrella of the “corporate insolvency resolution process”. Under the Bankruptcy Code, the process for corporate insolvency may be initiated by a financial creditor, an operational creditor or the company (irrespective of whether the same owns an industrial undertaking or not) itself (“Insolvency

\textsuperscript{365} Ibid.
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 significant to make a note that the Bankruptcy Code aims to shift away from the “sickness” test coined 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 evaluation.

The Code establishes some very basic principles of borrowing and corporate insolvency resolution:

- It recognizes that all businesses cannot succeed; therefore, it emphasizes on decisive corrective action instead on the part of all its stakeholders. Until now, multiple laws had often protected promoters and enabled “debtor in possession” to continue. The Code now unifies the legal framework to deal with insolvency. It also establishes that insolvency is a commercial issue and the law should not be left to decide if a business should be liquidated or revived- after it is insolvent. It is the creditors’ prerogative to decide. To this end, the Code prescribes a “creditor in control” regime with creditors exercising timely control in the event of a default in the repayment of any debt including interest. The Code replaces the former "debtor-in-possession" model of Indian insolvency law with a "creditor-in-possession" model, thereby allowing the committee of creditors and the insolvency professional to replace the board of directors of the borrower. These, amongst others, are important elements of the Code, which now stands notified into law.

- Creditors Power enhanced under Insolvency and Bankruptcy Code 2016:
  - The Insolvency and Bankruptcy Code 2016 empowers the operational creditors (workmen, suppliers etc.) also to initiate the insolvency resolution process upon non-payment of dues.
  - In order to develop the credit market in India, in case of liquidation, financial debts owed to unsecured creditors have been kept above the Government’s dues in the list of priorities (waterfall).
• The resolution processes will be conducted by licensed insolvency professionals (IPs)\(^{367}\). These IPs will be members of insolvency professional agencies (IPAs)\(^{368}\).

• One of the dilatory factors plaguing the existing winding up proceedings has been the time taken by the courts in deciding whether a debt exists or not. In order to address this issue in an objective way, the Code seeks to put in place a robust infrastructure of IUs with an aim to have such information readily available for an Adjudicating Authority to rely upon. Information utilities (IUs)\(^{369}\) will be established to collect, collate and disseminate financial information to facilitate insolvency resolution. One of the unique features of the code is to establish an information utility for collection of all authentic information at one place. It is a new concept in India that will facilitate one to check the information before investing.

• The National Company Law Tribunal (NCLT) will have jurisdiction over insolvent companies.\(^{370}\) The Debt Recovery Tribunal (DRT) will have jurisdiction over insolvent individuals.\(^{371}\) All appeals from NCLT shall lie with the appellate authority, i.e. the National Company Law Appellate Tribunal (NCLAT).\(^{372}\) All appeals from The Debt Recovery Tribunal (DRT) shall lie with the Debt Recovery Appellate Tribunal (DRAT).\(^{373}\) Supreme Court of India shall have appellate jurisdiction over NCLAT and DRAT.\(^{374}\)

• The Code significantly changes the priority waterfall for distribution of liquidation proceeds. After the costs of insolvency resolution (including any interim finance), secured debt together with workmen dues for the preceding 24 months rank highest in priority. In order to develop the credit market in India, in case of liquidation, Central and state Government dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors. Under the earlier regime, Government dues were immediately below the claims of secured creditors.

\(^{367}\) Sec 3 clause 19 of Insolvency and Bankruptcy Code 2016.
\(^{368}\) Sec 3 clause 20 of Insolvency and Bankruptcy Code 2016.
\(^{369}\) Sec 3 clause 21 of Insolvency and Bankruptcy Code 2016.
\(^{371}\) Ibid.
\(^{372}\) Ibid.
\(^{373}\) Ibid.
\(^{374}\) CHAPTER VI, ADJUDICATING AUTHORITY FOR CORPORATE PERSONS, Insolvency and Bankruptcy Code 2016.
and workmen in order of priority. This is a welcome change as in most cases of corporate insolvency; the workers and employees end up bearing the brunt of long drawn insolvency/bankruptcy process.

- **The Committee of Creditors** (COC) shall only include financial creditors as decision makers (operational creditors with more than 10% aggregate exposure have mere observer status during the COC meetings) and shall be responsible for deciding the important affairs of the company. It shall also be responsible for authorizing the IP (acting as resolution professional) to take (or not to take) certain actions such as raising interim finance up to the limit specified by the committee, creating security on assets of the secured creditor, undertaking related party transactions, amending constitutional documents, change of capital structure or management of the Borrower etc. More importantly, the COC shall approve the resolution plans received by the IP. All decisions of the COC are required to be approved by a majority of 75% of the voting shares/value of the financial creditors.

- In order to accomplish fast resolution of distress, the Code has recommended a few ‘early detection’ devices which can be initiated on first signs of stress. The Adjudicating Authority (i.e. NCLT) may be approached with an application for initiation of IRP by the operational creditor or a corporate applicant or a financial creditor on the onset of default.

- One of the striking features of the Code is the grant of moratorium, duration of which, all the creditor’s actions will be stayed. It has to be granted by the Adjudicating Authority on the recommendation of the Resolution Professional and does not takes place automatically. However, the IP will be appointed as the resolution professional in terms of the procedure outlined in the Code, who will take over the management and powers of board of directors of the corporate debtor. All officers as well as managers of the corporate debtor are required to act on instructions of the IP and all accounts of the corporate debtor will be managed by it.

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377 insolvency professional
• Punishment is provided by the Code in the form of imprisonment as well as fine to the debtor or a creditor for providing false information in insolvency resolution process. Punishment is also provided for Insolvency Professional if they indulge in deliberate contravention of the provisions of the Code. The punishment is also provided for providing false information or concealment by bankrupt, by the Code.

• The Code for the first time attempts to addresses the issue of cross border insolvency given the multi-jurisdictional spread of assets of large corporates. In order to deal with this aspect, the Code stipulates a two pronged solution, one being the Central Government entering into agreements with other countries for enforcing the provisions of the Code and the other giving the Adjudicating Authority the authority to write a letter to the courts and/or authorities of other countries (as may be relevant) for seeking information or requesting action in relation to the assets of the debtor situated outside India. It is also relevant to note that the definition of ‘property’ under the code includes ‘MONEY, GOODS, ACTIONABLE CLAIMS, LAND AND EVERY DESCRIPTION OF PROPERTY SITUATED IN OR OUTSIDE INDIA’.

• Under the Code, each financial creditor of the COC, whether secured or not, gets to vote on the resolution plan of the corporate debtor on the basis of its voting share (proportionate to the money advanced by the creditor).

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378 CHAPTER VII, OFFENCES AND PENALTIES, of Insolvency and Bankruptcy Code 2016.
379 Sec 3 clause 27 of Insolvency and Bankruptcy Code 2016.
380 Committee of Creditors
KEY ISSUES AND ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Various new entities will have to be established in order to archive time-bound insolvency resolution. In addition to this, with the dismal situation of pendency and disposal rate of DRTs, their present potential may be inadequate to handle this additional role. A major overhaul of DRT infrastructure both in terms of physical facilities and manpower will be needed to achieve what the Code seeks.

- IPAs, controlled and maintained by the Board, will be formed for regulating the functioning of IPs. Instead of making the IPs and/or IPAs self-regulated, the Board has been assigned with the responsibility of regulating their performance and laying down the standards of performance. In most insolvency/liquidation proceedings, government will be an interested party for recovery of the unpaid statutory dues of its several departments. This will make the impartial operation of insolvency professionals (whose entry and exit in the insolvency profession is regulated by the government through the Board) difficult.

- A large number of trained and skilled insolvency professionals will be required for successful execution of the Code. A strong anchor, clear-cut plan will be needed to develop a large pool of insolvency professionals and an institutional structure which will produce, certify and regulate them. Such insolvency professionals will not only be needed to comprehend the subtle distinctions and differences of various aspects of restructuring/liquidation but must also be capable of carrying out the affairs of the company during the process. This exercise will definitely take a considerable amount of time, resources and expertise. Moreover, effort will be needed to ensure that such professionals are available all over the length and breadth of India and not just for high profile cases in economic and commercial hubs.

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381 Debt Recovery Tribunal
382 Ibid.
383 Insolvency professionals
384 Ibid.
• Even though the Code suggests 2 mechanisms concerning the cross border element of insolvency/liquidation, a comprehensive framework needs to be imbibed to effectively deal with this issue. A number of Indian companies have assets and creditors situated all over the world and at the same time various foreign companies have subsidiaries in India. Given the increase in foreign investments into India in the recent past, the impact of Indian laws that affect businesses ought to be viewed in conjunction with the laws of other jurisdictions. In this context, The Bankruptcy Law Reform Committee (BLRC) realised the importance of developing an efficient system for addressing cross-border insolvencies in India. In this regard, some of the previous law reform committees have recommended that the UNCITRAL Model Law on Cross-Border Insolvency should be adopted in India. The UNCITRAL Model Law provides a legal framework to coordinate cross-border insolvency proceedings so as to protect the interests of all stakeholders. The Model Law achieves this object by first, mandating judicial cooperation, secondly, by conferring on a foreign insolvency administrator (or a similar representative) standing in local proceedings and finally, by ensuring equal treatment to foreign and local claims. The Model Law is applicable in cases where the foreign creditor seeks to initiate insolvency proceedings before a local court or when a local court seeks the assistance of a foreign court or foreign representative and finally, in situations where there are parallel insolvency proceedings of the same debtor company in different jurisdictions. Issues relating to Insolvency/liquidation of Indian companies with assets located in several jurisdictions outside India and vice-versa cannot be achieved without having a mechanism like adoption of the UNCITRAL Model Law on Cross Border Insolvency\textsuperscript{385}. In case of bilateral agreements suggested by the Code presently, it will not only be difficult but will also take a very long time to negotiate an agreement with each country. Upon the receipt of a letter contemplated under the Code several countries may refuse to share any information about the assets located in their country. As such, while the Code recognizes cross border issues, it does not specifically deal with them other than providing the legal basis for dealing with the issue down the line.

Well organized bankruptcy legislations give order to the sales and distribution of assets of insolvent companies and can emphatically affect loan terms (such as spreads, rates, and

\textsuperscript{385} 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 12th October 2016
collateral essentials), leverage ratios, and bank recovery rates. For example, the establishment of Debt Recovery Tribunals in India decreased delinquency in loan repayment rates by between 3 and 11 percent and interest rates dropped by up to 2 percentage points.

The Insolvency and Bankruptcy Code, 2016, is one of the most progressive, dynamic, radical land modern-day statutes in contemporary times. This Code will be gladly received by creditors, investors and debtors alike. The distinctive features of the Code being streamlining of procedures, simplification of the insolvency process and fast-tracking of recovery will provide a form which is likely to result in an affirmative effect on India’s lending climate. The Insolvency and Bankruptcy Code, 2016, assures to bring about far-reaching reforms with creditor insolvency resolution as its pivot. The Code intends to achieve early recognition of financial failure and making the most of the asset value of insolvent companies.

The intention of the Code (Insolvency and Bankruptcy Code 2016.) is to do away with the antiquated existing laws covering aspects of insolvency and bankruptcy. Though the Code sets out certain provisions to amend and override the existing laws to avoid future litigation, a clear provision needs to be introduced to explicitly state the existing laws being repealed by the introduction of this legislation.

Thus this Code deals with nearly all the aspects and elements of insolvency, which will give a significant leap to the operating of the financial market. A well-operating bankruptcy regime is necessary to ensure financial discipline in successful market economies and this Code (Insolvency and Bankruptcy Code 2016) would help India to become one of the world’s best insolvency regimes instead of the relatively weak insolvency regimes which is prevalent today. It lays the ground for the growth of the corporate bond market, which would fund the infrastructure projects of the future. The passing of this Code and implementation of the same will give immense encouragement to the businessmen for doing business in India.

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387 Ibid.
389 "Parliament passes Bankruptcy Code; New law to help recovery action for debt default.", Tax India Online, May 12 2016 Issue
The newly framed bankruptcy law isn’t a “magic wand”. It is presumed that the benefits will flow in after 3-5 years from now. This Code in specific will, when implemented in letter and spirit, provide a major boost to the India economy, especially on account of timely resolution and certainty in recovery.
THE FIRST INSOLVENCY RESOLUTION ORDER UNDER INSOLVENCY AND
BANKRUPTCY CODE, 2016

The National Company Law Tribunal (NCLT) on 2nd August, 2017 pronounced the first insolvency resolution order under Insolvency and Bankruptcy Code, 2016, in the matter of Synergies-Dooray Automotive Ltd\(^{390}\), a maker of alloy wheels for cars.\(^{391}\) As per the NCLT orders, Visakhapatnam-based aluminium alloy wheels maker Synergies Castings Limited (SCL), which is a related party, will merge SDAL in a scheme of amalgamation as part of the insolvency resolution plan.

The facts of the case are as follows. This Company Petition was filed by ‘Synergies-Dooray Automotive Ltd’ for beginning of the Corporate Insolvency Resolution Process (CIRP) under Section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 17.01.2017. The Learned Counsel submitted that the Petitioner Company was earlier registered with BIFR as Case No. 135 of 2005 and formulation of Scheme was pending before the BIFR. During the pendency of the proceedings, the BIFR vide its Order dated 29.05.2012, directed the dues of EXIM bank to be settled @ 26.66% of principal in full and final settlement of its dues. Against the said order, the EXIM bank filed Appeal No. 137/2012 before AAIFR which is pending.

The BIFR vide order dated 25.06.2013 held that Alchemist Asset Reconstruction Company Co. Ltd (AARC) controls 55% and Edelweiss as 45% of the Debt (as per Section 2(I)(zd) of the SARFAESI Act and dismissed the said application. Edelweiss has filed Appeal No. 108/13 against the said order. The Learned Counsel further submitted that with the notification of SICA Repeal Act, 2003, all proceedings or appeals of whatever nature pending before BIFR/AAIFR got abated. He also submitted that, as per Section 4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 as amended by Section 252 read with Eight Schedule of the IBC, a company in respect of which such appeal or reference or inquiry pending before AAIFR or BIFR stands abated, may make reference to the National Company

\(^{390}\) BEFORE THE NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH, AT HYDERABAD CP (IB) No. 01/HDB/2017

Law Tribunal under the IBC within 180 days from commencement of IBC, without fees in accordance with the provisions of IBC. 392 The Learned Counsel, therefore, submitted that the present Company Petition has been filed under Section 10 of the IBC read with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and he has complied with prescribed procedure and filed supporting documents with respect to the issue.

The Learned Counsel for the Petitioner also submitted that the Corporate Debtor/ Company Petitioner has passed a resolution dated 9th December, 2016 proposing to appoint Ms. Mamta Binani as Interim Resolution Professional. In pursuant to the above, Ms. Mamta Binani (Reg. No. IBBI/IPA-02/2016-17/01) submitted a letter dated NIL to NCLT by agreeing to accept appointment as Insolvency Resolution Professional, if an Order admitting the present application is passed and further declared that she is duly qualified to practice as an Insolvency Professional and that she is not currently serving as Interim Resolution /Resolution Professional/liquidator and that there are no disciplinary proceedings pending against her with the Board or ICSI Insolvency Professionals Agency. So she submitted that she was eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor/ Company Petitioner in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. 393

The Tribunal considered the above submissions of the Insolvency Resolution Professional and was satisfied that Ms. Mamta Binani was eligible to be appointed as Interim Resolution Professional for the Corporate Debtor/ Company Petitioner and directed her to take all necessary actions in accordance with relevant provisions of Insolvency and Bankruptcy Code, 2016. So finally the resolution plan was submitted to NCLT on 21 July, within the 180-day period as envisaged by the code, and the tribunal approved the plan on 2 August.

As per the National Company Law Tribunal, Hyderabad the projected plan involves the merging of Synergies-Dooray with Synergies Casting, a creditor and the so-called related party. It also includes monetary restructuring of the dues of financial and operational creditors, payment of dues to the government and an infusion of capital (including equity)


393 http://www.ibbi.gov.in/23rdJan17SynergiesDoorayAutomative.pdf accessed on 7th september, 2017
from the promoters. The resolution plan is to be funded against receivables from other corporate debtors and through operations. The payments to the creditors and the government will be spread over the period of next three years.

Mamta Benani, the Insolvency Resolution Professional for Synergies-Dooray, said that, “There were three resolution plans out of which one was selected. The other two plans had good money in them, but the companies infusing capital were from a trading background. We went with the plan which had some manufacturing background to keep the company as a going concern”. She further added that the chosen plan also took care of dues of ‘operational creditors’ and the government, which is usually not the case when the liquidation value is nil. This shows that committee of creditors are conscious of the dues of operational creditors, as these are mostly miniature and average enterprises and if their dues do not get paid then the companies can go under and overall harm the economy.

The new IBC allows companies that have an opportunity to revive a second time, to disincentives a minority creditor from disrupting the majority creditor view, and forces decisions in a system where there is no incentive or penalty for inaction/indecision. These are the real virtues of the new IBC. The Synergies Castings revival of Synergies Dooray, a firm whose rehabilitation was objected to by a 8% minority’s creditor for 10 long years, which demonstrates both what was wrong about the previous system, and what is right about new IBC. Revival also demonstrates that IBC is not merely about liquidation but revival, which indeed should always be the first preference for all stakeholders, including creditors.  

394 the Insolvency Resolution Professional for Synergies-Dooray and past president of Institute of Company Secretaries of India (ICSI).
First Judgement on Insolvency and Bankruptcy Code, 2016 by the Supreme Court

M/S. INNOVENTIVE INDUSTRIES LTD vs. ICICI BANK

The present case raises interesting questions which arise under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code), which received the Presidential assent on 28th May, 2016, but which provisions were brought into force only in November-December, 2016. As this is the very first application that has been moved under the Code, the Supreme Court thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

The facts of the case are as follows. The appellant before the apex Court is a multi-product company catering to applications in diverse sectors. From August, 2012, owing to labour problems, the appellant began to suffer losses. Since the appellant was not able to service the financial assistance given to it by 19 banking entities, which had extended credit to the appellant, the appellant itself proposed corporate debt restructuring. The 19 entities formed a consortium, led by the Central Bank of India, and by a joint meeting dated 22nd February, 2014, it was decided that a CDR resolution plan would be approved. The details of this plan are not immediately relevant to the issues to be decided in the present case. The lenders, upon perusing the terms of the CDR proposal given by the appellant and a techno-economic viability study, (which was done at the instance of the lenders), a CDR empowered group admitted the restructuring proposal vide minutes of a meeting dated 23rd May, 2014. The Joint Lenders Forum at a meeting of 24th June, 2014 finally approved the restructuring plan. In terms of the restructuring plan, a master restructuring agreement was entered into on 9th September, 2014 (hereinafter referred to as the MRA), by which funds were to be infused by the creditors, and certain obligations were to be met by the debtors. The aforesaid restructuring plan was implementable over a period of 2 year.

It is important to mention over here that both sides have copiously referred to various letters which passed between the parties and various minutes of meetings.

Ultimately, an application was made on 7th December, 2016 by ICICI Bank Ltd., in which it was stated that the appellant being a defaulter within the meaning of the Code, the insolvency

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396 CIVIL APPEAL NOs. 8337-8338 OF 2017,decided on 31 August, 2017
resolution process ought to be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant dated 17th December, 2016, in which the appellant claimed that there was no debt legally due inasmuch as vide two notifications dated 22nd July, 2015 and 18th July, 2016, both under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (hereinafter referred to as the Maharashtra Act), all liabilities of the appellant, except certain liabilities with which we are not concerned, and remedies for enforcement thereof were temporarily suspended for a period of one year in the first instance under the first notification of 22nd July, 2015 and another period of one year under the second notification of 18th July, 2016. It may be added that this was the only point raised on behalf of the appellant in order to stave off the admission of the ICICI Bank application made before the NCLT. We are informed that hearings took place in the matter on 22nd and 23rd December, 2016, after which the NCLT adjourned the case to 16th January, 2017.

On this date, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under the MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under the MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it.

By an order dated 17th January, 2017, the NCLT held that the Code would prevail against the Maharashtra Act in view of the non-obstante clause in Section 238 of the Code. It, therefore, held that the Parliamentary statute would prevail over the State statute and this being so; it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared.

By a separate order dated 23rd January, 2017 passed by the NCLT, in which a clarification application was dismissed, it was held that the second application of 16th January, 2017 was raised belatedly and would not be maintainable for two reasons – (1) because no audience has been given to the corporate debtor in the Tribunal by the Code; and (2) the corporate debtor has not taken the plea contained in the second application in the earlier application.

This was because a limited timeframe of only 14 days was available under the Code from the date of filing of the creditors’ petition, to decide the application.
From the aforesaid order, an appeal was carried to the NCLAT, which met with the same fate. The NCLAT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other. Having recorded this, however, the NCLAT went on to hold that the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under Section 7 of the Code. It was further held as under:

“Insofar as Master Restructuring Agreement dated 8th September 2014 is concerned; the appellant cannot take advantage of the same. Even if it is presumed that fresh agreement came into existence, it does not absolve the Appellant from paying the previous debts which are due to the financial creditor.

The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage of the Master Restructuring Agreement dated 8th September, 2014”

Dr. A.M. Singhvi, learned Senior Advocate, who appeared on behalf of the appellants, has argued before the Supreme Court that the Appellate Tribunal, in fact, decided in his favour by holding the two Acts to be not repugnant to each other, but then went on to say that the Maharashtra Act will not apply. According to him, the Maharashtra Act would apply for the reason that the moratorium imposed by the two notifications under the Maharashtra Act continued in force at the time when the insolvency application was made by ICICI and that; therefore, the Code would not apply. According to him, the debt was kept in temporary abeyance, after which the Code would apply. He argued that he had a vested right under the Maharashtra Act and that the debt was only suspended temporarily. According to him, no repugnancy exists between the two statutes under Article 254 of the Constitution and each operates in its own field. The Maharashtra Act provides for relief against unemployment, whereas the Code is a liquidation process. Further, the Code is made under Entry 9, List III of the Seventh Schedule to the Constitution, whereas the Maharashtra Act, which is a measure for unemployment relief, is made under Entry 23, List III of the Seventh Schedule. This being so, as correctly held by the Appellate Tribunal, the two Acts operated in different spheres and, therefore, do not clash. Dr. Singhvi mounted a severe attack on the Appellate Tribunal by stating that the Tribunal ought to have gone into the MRA, in which case it would have
discovered that there was no debt due by the appellant, inasmuch as the funds that were to be disbursed by the creditors to the appellant were never disbursed, as a result of which the corporate restructuring package never took off from the ground. He further argued that amounts due under the MRA had not yet fructified and for that reason also the application was premature.

Shri H.N. Salve, learned Senior Advocate, appearing on behalf of the respondents, took the apex court through the Code in some detail and argued before the Supreme Court that the object of this Code is that the interests of all stakeholders, namely shareholders, creditors and workmen, are to be balanced and the old notion of a sick management which cannot pay its standing obligation continuing however in the management seat has been negated by the Insolvency and Bankruptcy Code. When an application is made under Section 7 of the Code, the only narrow range of argument before the NCLT by a corporate debtor is that the debt is not due for any reason. In addition to this Shri Salve said that, the first application in reply to the corporate debtor was, in fact, the only arguable point in the case which has been concurrently turned down.

According to Shri Salve, after an interim resolution professional has been appointed and a moratorium declared, the directors of the company are no longer in management and could not, therefore, maintain the appeal before the Supreme Court. Also, according to Shri Salve, the NCLT and NCLAT were both right in refusing to go into the plea that, since the financial creditors had not pumped in funds, the corporate debtor could not pay back its debts in accordance with the MRA, as this plea was an after-thought which could easily have been taken in the first reply. Further, in order to satisfy the conscience of the apex court, he talked about the MRA to some detail to show the court that the appellant would emerge as a defaulter under the MRA in any case.

He has also argued that it is obvious that the two Acts are repugnant to each other, inasmuch as they cannot stand together. Under the Maharashtra Act, a limited moratorium is imposed after which the State Government may take over management of the company.

Under the Code, however, a full moratorium is to automatically attach the moment an application is admitted by the NCLT, and management of the company is then taken over by an interim resolution professional. Obviously, the moratorium under the Maharashtra Act and the management taken over by the State Government cannot stand together with the
moratorium imposed under the Central Act and takeover of the management by the interim resolution professional. According to him, therefore, no case whatsoever is made out and the appeal should be dismissed, both on grounds of maintainability and on merits.

Having heard learned counsel for both the parties, the Supreme Court found substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. The court further said that once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant and this being the case; the present appeal is obviously not maintainable. However, the court further added they are not inclined to dismiss the appeal on this score alone.

On the facts of the present case, we can say that in answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code. However, the Appellate Tribunal by the impugned judgment held thus:

Following the law laid down by Hon’ble Supreme Court in “Yogendra Krishnan Jaiswal” and “Madras Petrochem Limited” the Supreme Court held that “there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.”

In view of the finding as recorded above, the apex court held that “the Appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under Section 7 of the Insolvency & Bankruptcy Code, 2016.” This statement by the Appellate Tribunal has to be tested with reference to the constitutional position on repugnancy.”

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397 Initiation of corporate insolvency resolution process by financial creditor
In Hoechst Pharmaceuticals Ltd. v. State of Bihar, this Court after referring to the earlier judgments held:

“Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Art. 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Cl. (1) lays down that if a State law relating to a concurrent subject is ‘repugnant’ to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to cl. (2). The proviso to Art.254 (2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the ‘same matter’. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together.”

A brief reference was made to the three Australian decisions. The decision in Clyde Engineering Company’s case lays down that inconsistency is also created when one statute takes away rights conferred by the other. In Ex Parte McLean’s case, Dixon J. laid down another test viz., two statutes could be said to be inconsistent if they, in respect of an
identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties.\textsuperscript{401} \textit{In Stock Motor Ploughs Limited’s case}\textsuperscript{402}, supra, Evatt, J. held that “even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. The controversy in these appeals falls to be determined by the true nature and character of the impugned enactment, its pith and substance, as to whether it falls within the legislative competence of the State Legislature under Art. 246(3) and does not involve any question of repugnancy under Art. 254(1).”\textsuperscript{403}

The court further held that “they fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-s. (3) of s. 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-s. (3) of s. 5 of the Act which is a law made by the State Legislature is void under Art. 254(1)”. The question of repugnancy under Art. 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Art. 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other.\textsuperscript{404} If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante clause in Art. 246(1) read with the opening words “Subject to” in Art. 246(3).

In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression “a law made by Parliament which Parliament is competent to enact” in Art. 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with

\begin{itemize}
\item \textsuperscript{401} M/S. INNOVENTIVE INDUSTRIES LTD vs. ICICI BANK; available at:<https://indiankanoon.org/doc/181931435/> accessed on 12\textsuperscript{th} august,2017
\item \textsuperscript{402} Stock Motor Plough Ltd. v. Forsyth [(1932) 48 CLR 128, 147]
\item \textsuperscript{403} M/S. INNOVENTIVE INDUSTRIES LTD vs. ICICI BANK; available at:<https://indiankanoon.org/doc/181931435/> accessed on 12\textsuperscript{th} august,2017
\item \textsuperscript{404} Ibid.
\end{itemize}
respect to subjects included in List III as well as “List I”. But if Art. 254(1) is read as a whole, it will be seen that it is expressly made subject to cl. (2) which makes reference to repugnancy in the field of Concurrent List—in other words, if cl. (2) is to be the guide in the determination of scope of cl. (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Art. 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law. Art. 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualified the said exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and law made by the State shall, to the extent of such repugnancy, be void.

In Vijay Kumar Sharma & Ors. Etc v. State Of Karnataka, this Court held that the Karnataka Contract Carriages (Acquisition) Act, 1976 enacted under Entry 42 of List III was not repugnant to the Motor Vehicles Act, 1988 enacted under Entry 35 of the same List. In so holding, Sawant, J. laid down:

“Thus the Karnataka Act and the MV Act, 1988 deal with two different subject matters. As stated earlier the Karnataka Act is enacted by the State Legislature for acquisition of contract carriages under Entry 42 of the Concurrent List read with Article 31 of the Constitution to give effect to the provisions of Articles 39(b) and (c) thereof. The MV Act 1988 on the other hand is enacted by the Parliament under Entry 35 of the Concurrent List to regulate the operation of the motor vehicles. The objects and the subject matters of the two enactments are materially different. Hence the provisions of Article 254 do not come into play in the present case and hence there is no question of repugnancy between the two legislations.”

Applying the aforesaid rules to the facts of the present case, the Supreme Court said that “the State statute in question is the Maharashtra Act. On the other hand, the Insolvency and Bankruptcy Code, 2016 is made by the union Parliament. It is an established law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein. A Code is complete and that marks the distinction between a Code and an ordinary enactment. There can be no doubt, therefore,

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405 Ibid.
406 Ibid.
407 (1990) 2 SCC 562
that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as under:

9. Bankruptcy and insolvency”

On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

Therefore it is clear from this, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional.

Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a way that it won’t be possible to proceed with the insolvency resolution process as contained in the Code. Further, the non-obstinate clause mentioned in Section 4 of the Maharashtra Act can’t in an way be held to apply to the Central enactment, in the light of the fact that as a matter of constitutional law, the later Central enactment being offensive to the earlier State enactment by virtue
of Article 254 (1), would work to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. In addition to this, Section 238 of the Code reads as under:

Sec. 238. Provisions of this Code to override other laws.-

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.” It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, the Supreme Court was of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code. Dr. Singhvi, learned Senior Advocate, who appeared on behalf of the appellants, however, argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the minute the notification under the said Act comes to an end. The notification under the Maharashtra Act would continue for a year at a time and can extend up to 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was formed, to be very precise was, to bring defaulter companies back to commercially viable entity or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year unto 15 years, the whole scheme and object of the Code would be set at naught.

Undeterred by this, Dr. Singhvi, however, argued that since the suspension of the debt took place from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code. It is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, the apex court was of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of Dr. Singhvi, viz. that under the MRA, it was because the creditors did not disburse the amounts there under that the appellant was not able to pay its dues. the Supreme Court was of the view
that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

Under Article V entitled “Representations and Warranties”, clause 20(t) states as follows:

“(t) NATURE OF OBLIGATIONS.

The obligations under this Agreement and the other Restructuring Documents constitute direct, unconditional and general obligations of the Borrower and the Reconstituted Facilities, rank at least pari passu as to priority of payment to all other unsubordinated indebtedness of the Borrower other than any priority established under applicable law.”

Finally the Supreme Court held that the obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before the apex court that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, the honourable court was of the view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

The appeals were accordingly dismissed by the Supreme Court.