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Summary and Conclusions

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7.1. Summary

The post-Independence India witnessed a planned push towards industrialisation which has brought in its wake endemic corporate sickness. When the then-available institutions, arrangements and laws proved ineffective in containing this malady, the government enacted the Sick Industrial Companies (Special Provisions) Act in 1985. This Act was a significant piece of legislation which provided for the establishment of the Board for Industrial and Financial Reconstruction with the mandate to expeditiously resurrect viable sick industrial companies and speedily liquidate non-viable sick industrial companies. The BIFR came into being in January 1987 armed with a lot of powers to realise its objectives.

The BIFR is just one of the many government agencies and authorities that are regulating, supervising and controlling the business and industry in this country. Since the proper functioning or otherwise of these agencies is of great significance to our economy as a whole, it is necessary to evaluate their performance vis-à-vis their avowed objectives. In the United States, performance evaluation of federal government agencies has been made mandatory with the enactment of the Government Performance and Results Act, 1993. If similar measures were to be introduced in our country, it would help improve the functioning of our government agencies and make them more accountable to their various stakeholders.

It is against this backdrop that the present study has been taken up with twin-aims: To examine the feasibility of developing performance measurement
systems for government agencies by taking BIFR as a test-case and to assess the effectiveness of statutory turnaround remedies for corporate sickness.

Thus the study proceeded with the following four objectives:

1. To develop a performance measurement system for the Board for Industrial and Financial Reconstruction;
2. To evaluate the performance of the Board for Industrial and Financial Reconstruction using the measurement system so developed;
3. To investigate the factors, if any, affecting the performance of the Board for Industrial and Financial Reconstruction; and

The following three hypothesis have been put forth to help focus the study:

1. It is feasible to develop a performance measurement system for the Board for Industrial and Financial Reconstruction.
2. The Board for Industrial and Financial Reconstruction has failed to perform in accordance with its objectives.
3. The existing provisions of the Sick Industrial Companies (Special Provisions) have adversely affected the performance of the Board for Industrial and Financial Reconstruction.

The study started with the construction of the organizational structure of the BIFR from the material contained in the SICA. The constitution, jurisdiction, functions, powers and the decision-making process of the BIFR have been described. The turnaround strategies employed by the BIFR have also been enumerated. The data relating to the overall performance of the BIFR has also
been presented. Next, the various aspects relating to the evaluation of organizational performance have been discussed in detail.

After that, a performance measurement system has been developed for the BIFR by following the following steps:

1. Formulation of Purpose
2. Establishment of Performance Objectives
3. Identification of Performance Measures
4. Reporting of Performance Data
5. Summary of Performance Evaluation Results

Thereafter, an examination of the statutory provisions of the SICA has been made to identify the factors affecting the performance of the BIFR.

The conclusions drawn from the evaluation of BIFR's performance and the examination of SICA's provisions are presented in the next section.

7.2. CONCLUSIONS

7.2.1. From the Evaluation of BIFR's Performance

The conclusions drawn from the results of the performance evaluation of BIFR are presented below:

Objective #1: Efficient delivery of services

*Evaluation Results:*

1.1. The number of Benches is not sufficient.
1.2. The Board does not have the requisite expertise.

1.3. The rate of disposal of cases is low.

1.4. The age of pending cases is shocking.

Conclusion:

The delivery of services has been very inefficient.

Objective #2: Timely Detection of sickness

Evaluation Results:

2.1. The number of cases dismissed as not maintainable is quite high.

2.2. The time taken by BIFR for deciding whether a company is sick or not is very long (average: 15 months).

Conclusion:

The detection of sickness has not been timely.

Objective #3: Speedy revival of viable sick industrial companies

Evaluation Results:

3.1. The number of companies revived/under revival is very low.

3.2. The time taken by BIFR for sanctioning schemes u/s 18(4) of SICA is very long (average: 5+ years).

Conclusion:

The revival process is not only very ineffective but also very time-consuming.
Objective #4: Quick winding up of non-viable sick industrial companies

*Evaluation Results:*

4.1. The number of "winding up recommended" cases is not proportionate to the gravity of the sickness.

4.2. The time taken by BIFR for winding up of non-viable sick units is very long (average: 5+ years).

*Conclusion:*

The winding up process is also very ineffective and very time-consuming.

Objective #5: Reduction of industrial sickness

*Evaluation Results:*

5.1. The rate of growth of industrial sickness in post-BIFR period is almost similar to that of the pre-BIFR period.

*Conclusion:*

There is no let up in industrial sickness over the years.

**Overall Conclusion**

In the light of these results, it can be concluded that the following two hypotheses have been verified and proved to be true:

1. It is feasible to develop a performance measurement system for the Board for Industrial and Financial Reconstruction.

2. The Board for Industrial and Financial Reconstruction has failed to perform in accordance with its objectives.
7.2.2. From the Analysis of SICA's Provisions

The conclusions drawn from the analysis of the statutory provisions contained in the Sick Industrial Companies (Special Provisions) Act, 1985, are presented below:

The statutory provisions contained in SICA have actually hindered the BIFR from realising its objectives. Thus it can be concluded that the following hypothesis is verified and proved to be true:

The existing provisions of the Sick Industrial Companies (Special Provisions) have adversely affected the performance of the Board for Industrial and Financial Reconstruction.

7.2.3. From this Study as a Whole

The two conclusions that can be drawn from this study as a whole are that:

1. It is feasible to develop performance measurement systems for statutory regulatory authorities.
2. The statutory turnaround remedies being administered to sick industrial companies by the Board for Industrial and Financial Reconstruction have not been effective in containing corporate sickness.

7.3. Suggestions

Some suggestions for improving the performance of the BIFR are given below:

7.3.1. Strengthening BIFR's expertise

The expertise of the BIFR must be strengthened (i) by stipulating that each Bench of the Board must have at least one Judicial Member and one Technical
Member, and (ii) by selecting as Members of the Board persons with relevant backgrounds like management, law, industrial finance.

7.3.2. Change in identification criteria

Experts are unanimous that the sick industrial company as defined in the SICA is one which is on its death-bed. It is rarely possible to turnaround such a terminal case. If revival efforts were to have a fair chance of success, then the sickness must be identified at an earlier stage. It is therefore necessary to amend the definition of sick industrial company to provide for less stringent identification criteria.

7.3.3. Automatic change of management

Since it is under the existing management that the company has become sick, it is necessary to provide for an automatic change of management of the sick industrial company immediately on its registration by the BIFR. The new management may bring in new ideas, new competence and new integrity. For this purpose, the BIFR may maintain a pool of competent and experienced managers. Or the government may maintain such a pool or Service from which managers may be deputed to the sick company.

7.3.4. Change in “revival-at-any-cost” policy

The present policy of the BIFR placing excessive emphasis on revival-at-any-cost must give way to a stance where the company’s chances of revival are considered dispassionately and realistically and winding up decisions are taken without feelings of guilt or helplessness. It is not necessary to exhaust all measures to revive a company before ordering its winding up. Winding up is not a last-resort option.
Just because an analogy is drawn between a sick person and a sick company, it does not mean that the same analogy should also extend to the way their illnesses are treated. In the case of a human being, the approach is to try all available treatments to cure the patient and if that is not possible, to at least keep him living till death comes in its own course. Only in the rarest of rare cases, euthanasia is resorted to. The same approach cannot be applied to a sick industrial company where a revive-or-keep-alive-at-all-costs policy can be counter-productive. It must be noted that a quick revival is better than a winding-up and a quick winding up is better than a protracted and uncertain revival.

7.3.5. Reducing dependance on OA

The Board must be provided with its own body of experts to carry out the functions that are presently being entrusted to the Operating Agency. This will enable the BIFR to have administrative and supervisory control over the functioning of the OA and also make the OA more accountable to the BIFR.

7.3.6. Limited coercive Powers

At present, any one of the persons who are to provide financial assistance to the sick industrial company under a draft scheme prepared by the Operating Agency may refuse to do so and there is nothing that the BIFR can do about it. It is suggested that in such cases, the BIFR be given limited power to coerce such objectors.

For instance, if the bulk of the institutions and/or persons who are to provide financial assistance to the sick industrial company agree to do so, then the BIFR may be given the power to override the objections of the remaining few and order them to comply with the provisions of the draft scheme.
7.3.7. Streamlining the decision-making process

7.3.7.1. Reducing the decision-making stages

The scrutiny of the references in the Board’s office at the time of their registration by the Board should be streamlined. Once a reference is registered, it should not subsequently be dismissed as not maintainable. In other words, the enquiry presently being conducted under section 16 of the SICA may be dispensed with thereby reducing the decision-making stages.

7.3.7.2. Eliminating the re-entry points

The points of re-entry into the assembly-line of the BIFR must be plugged. If a company fails to revive within the time stipulated under section 17(2) of the Act, then it should not again be given one more chance under section 18(4) of the Act. Such a “failed to revive” case must automatically be recommended for winding up under section 20 of the Act. Similarly, if a company fails to revive even after the implementation of a sanctioned scheme under section 18(4), it should not be given one more chance with a fresh scheme. Instead it should automatically qualify for winding up.

7.3.8. Alternative decision making format

At present, the BIFR follows a sequential decision making format, which is extremely time-consuming. Instead, it is suggested that the BIFR may go for a concurrent decision making format which allows for simultaneous consideration of multiple options. Given below is one such format.

1. BIFR registers the reference of the sick company.
2. Immediately notices must be sent to promoters, workers, creditors, government agencies and all other concerned persons asking them to
appear at the enquiry. They are required to come with their written opinions on the status and prospects of the sick company. The promoters have to explicitly state whether or not they are willing and capable of pumping in more money into the venture. The creditors and others must clearly specify the nature and extent of the financial assistance, if any, that they are willing to provide; and the sacrifices, if any, that they are willing to bear.

3 On the day of the enquiry, the BIFR will hear the submissions of the various parties. If the promoters show willingness and capacity to inject a reasonable sum of additional money into the company or if the creditors and others show a sufficiently reasonable response to provide financial assistance and/or bear sacrifices, then the BIFR may order the Operating Agency to prepare, within a specified time, a revival scheme within the parameters of such additional investment, financial assistance and sacrifices. At the same time, the BIFR may also order that notices be published inviting proposals for the purchase of the company as a going concern or for takeover of its management or for amalgamating it with an existing profitable company.

4 On the next date(s) of hearing, the BIFR may pass any one of the following orders:

4.1. If the promoters have not come forward to invest additional money or if none or very few of the creditors have offered to provide financial assistance and/or bear sacrifices, and if no worthwhile offers have come for purchase or takeover or amalgamation of the company, the BIFR may pass an order of winding up.

4.2. If the Operating Agency expresses its inability to prepare a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if no worthwhile offers have come for purchase or takeover or amalgamation of the company, the BIFR may pass an order of winding up.
4.3. If the Operating Agency expresses its inability to prepare a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if worthwhile offers have come for purchase or takeover or amalgamation of the company, then the BIFR may, after hearing all the parties, give its consent to the purchase or takeover or amalgamation, or pass an order of winding up.

4.4. If the Operating Agency prepares a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if no worthwhile offers have come for purchase or takeover or amalgamation of the company, then the BIFR may, after hearing all the parties, sanction the revival scheme prepared by the Operating Agency for implementation.

4.5. If the Operating Agency prepares a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if worthwhile offers have also come for purchase or takeover or amalgamation of the company, then the BIFR may, after hearing all the parties, give its consent to the purchase or takeover or amalgamation, or sanction the revival scheme prepared by the Operating Agency for implementation.

A simplified version of this alternative decision-making format has been depicted as a flow-chart in Chart 7.1.
Chart 7.1 - Alternative Decision Making Format

- Registration of reference by BIFR
- Notices sent to concerned parties

Enquiry: Day 1
Responses of parties received
OA ordered to prepare revival scheme
Notices for sale or takeover or amalgamation

- No offers of financial assistance
  - No offers for purchase or takeover
  - or amalgamation
  - Enquiry: Day 2 to 4
  - Hear parties
  - Order winding up

- OA unable to prepare scheme
  - No offers for purchase or takeover
  - or amalgamation
  - Enquiry: Day 2 to 4
  - Hear parties
  - Order winding up

- OA unable to prepare scheme
  - Some offers for purchase or takeover
  - or amalgamation
  - Enquiry: Day 2 to 4
  - Hear parties, Give consent to
  - sale or takeover or amalgamation
  - Or, order winding up

- OA prepares revival scheme
  - No offers for purchase or takeover
  - or amalgamation
  - Enquiry: Day 2 to 4
  - Hear parties
  - Sanction revival scheme

- OA prepares revival scheme
  - Some offers for purchase or takeover
  - or amalgamation
  - Enquiry: Day 2 to 4
  - Hear parties, Give consent to
  - sale or takeover or amalgamation
  - Or, sanction revival scheme
In the last week of August, 2001, the Government introduced the Companies (Amendment) Bill, 2001 (Bill No. 80 of 2001) and the Sick Industrial Companies (Special Provisions) Repeal Bill, 2001 (Bill No. 81 of 2001) in the Lok Sabha.

The first Bill seeks to set up a National Company Law Tribunal (NCLT) in which will be consolidated all the powers and jurisdictions currently being exercised by the Company Law Boards, the Board for Industrial and Financial Reconstruction, the Appellate Authority for Industrial and Financial Reconstruction as well as the High Courts in respect of company matters. Accordingly, all the provisions now contained in SICA have been virtually replicated in this Bill. This Bill has been referred to and is now pending before the Department-Related Parliamentary Standing Committee on Home Affairs for examination and report.

The second Bill is a consequential enactment seeking to repeal the SICA.

The suggestions made in this chapter are equally applicable to the proposed National Company Law Tribunal in relation to its proposed role as a dispenser of statutory turnaround remedies since it is going to be governed (as things stand today) by statutory provisions almost similar to the ones contained in the SICA.

7.4. Recommendations

This study has shown that it is feasible to develop performance measurement systems for the Board for Industrial and Financial Reconstruction in particular and statutory regulatory authorities in general and that such systems are effective in highlighting the gaps in organizational performance. But it has been a very modest attempt.

Future researchers may not only take up other government and non-governmental organizations for similar studies but also attempt to develop better methodological tools and performance measures. The effectiveness of statutory turnaround remedies can also be studied from the viewpoint of the
“patients” – by collecting primary data from the sick companies which have actually received the BIFR “treatment.”