INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

DISCLAIMER

 ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

 ISSN: 2582-6433

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

 ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

 ISSN: 2582-6433

A STUDY ON THE SCOPE OF INSOLVENCY PROCEEDINGS OF THE INDIVIDUAL AND PARTNERSHIP FIRM WITHIN IBC,2016

AUTHORED BY- ANJALI KUMARI
BBA LLB(Hons), Law College Dehradun, Uttaranchal university, Dehradun
CO—AUTHOR- PROF. DR. ANIL DIXIT, Associate Professor,
Law College Dehradun Faculty of Uttarancal University, Dehradun

ABSTRACT

The enforcement of the Insolvency and Bankruptcy Code, 2016 was done to fulfill majorly two important aims as, firstly by providing a timely response to the insolvency proceedings and secondly drafting a singular comprehensive structure for insolvency and bankruptcy of different entities within the bracket of single legislation to avoid confusion. This same has been primarily highlighted in the Banking Law Reform Committee, 2014.On the recommendation of the committee The Insolvency and Bankruptcy Code, (Act 31of 2016) was successfully enacted on May 28, 2016. This article will deal here with individual insolvency resolution, why it was a good idea to include it to the Code, what is the structure for insolvency proceedings of the individual and partnership firm, current trends and practices.

Keywords – IBC, Personal Insolvency, Partnership firm insolvency, Fresh start.

INTRODUCTION

As a result of the code's enforcement, a system for dealing with business bankruptcy has been operational for some time. The credit market was strengthened as a result of the legislation's enactment, which guaranteed creditors' repayment of their loans. The legislation's primary goal is to help ailing businesses recover. Providing a structured mechanism for the insolvency of the company is just one of the primary goals addressed in the code. But the code's noteworthy feature is that it covers possibilities outside of company insolvency resolution that necessitate different treatment than the corporate sector, rather than just the extent to which companies are involved. Section III of the Code, which addresses Individual Insolvency, points out towards different provisions for different entities although it was never put into effect even though it was originally in the code. Official notice of the provisions pertaining to the insolvency and bankruptcy of

 ISSN: 2582-6433

personal guarantors, particularly people and partnership firms, was given on November 15, 2019, and they went into effect on December 1, 2019. As a result of the code's enforcement, a system for dealing with business bankruptcy has been operational for some time. The credit market was strengthened as a result of the legislation's enactment, which guaranteed creditors' repayment of their loans. The legislation's primary goal is to help ailing businesses recover. Providing a structured mechanism for the insolvency of the company is just one of the primary goals addressed in the code. But the code's noteworthy feature is that it covers possibilities outside of company insolvency resolution that necessitate different treatment than the corporate sector, rather than just the extent to which companies are involved. Section III of the Code, which addresses Individual Insolvency, points out towards different provisions for different entities although it was never put into effect even though it was originally in the code. Official notice of the provisions pertaining to the insolvency and bankruptcy of personal guarantors, particularly people and partnership firms, was given on November 15, 2019, and they went into effect on December 1, 2019. This article will deal Here with individual insolvency resolution, why it was a good idea to include it to the Code, what is the structure for insolvency proceedings of the individual and partnership firm, current trends and practices.

The Banking Law Reform Committee in its report had made clear the intention to formulate individual insolvency as a separate branch. This can be seen from the goal set up by the committee. These goals were-

- The committee stressed on the formulation of personal insolvency laws to deal with the financial affairs of an individual. They suggested negotiation as a part of the formulation to safeguard both creditors as well the debtor from the rigours of lengthy court procedures.
- The guarantee for discharging the insolvent debtor. The committee focused on the discharge of the individual on his fair participation in proceedings. It will also serve as a method to build trust and entrepreneurship culture.
- The procedure of the insolvency must be fairly balanced neither of the contending parties should gain unfair advantages out of it.

These were the guiding principles behind the formulation of the individual and partnership firm insolvency proceedings.[1]

[1] Renuka Sane, 'The way forward for personal insolvency in the Indian Insolvency and Bankruptcy Code' (NIPFP, 24 January 2019) available at: https://www.nipfp.org.in/media/medialibrary/2019/02/WP_251_2019.pdf (Visited on May 20 2024).

 ISSN: 2582-6433

WHY PERSONAL INSOLVENCY LAWS ARE REQUIRED.

Individual proprietorships and partnership businesses are important for the economy of India as they are responsible for a significant share of India's gross domestic product (GDP) and labor, either directly or indirectly. In the context of the Make in India initiative, government programs such as Start-Up India have acknowledged the significance of these businesses to the Indian economy and are seeking to provide them with significant support. For the Individual Insolvency Resolution mechanism that is codified in the Code to be effective, this purpose must serve as its foundation. Through the implementation of a settlement process and the allocation of the debtor's minimum assets for subsistence, it is expected that the debtor's interests will be protected and that creditors will be prevented from causing him harm. By shielding individuals from the repercussions of honest business failure, it ought to create an environment that is conducive to entrepreneurial endeavors.[i] [i] Furthermore, it should increase the availability of loans by ensuring that creditors receive higher returns on their investments. In addition, in contrast to the current system, the framework that is being proposed would include a strategy for addressing disputes that include personal guarantors within the framework. In light of the fact that a settlement procedure is currently in place for corporate guarantors, this would be of great assistance in bridging the gap for Personal.

DEVELOPMENT IN PERSONAL INSOLVENCY LAWS IN INDIA

The primitive society always considered debt as a moral obligation, they were equated to theft and treason and were liable for harsh punishment like slavery, imprisonment even whrn the non repayment was without the fault of the individual. However with the advent of time insolvency of the individual entity were brought within the scope of civil laws,when there were no malice intention. Prior laws were confined till the collection of the loan amount.

Legislation concerning personal insolvency was enacted during the time that the British Raj that had been in force till the enactment of this code. The Provincial Insolvency Act of 1920, which applies to the designated provinces of British India, and the Presidency Towns Insolvency Act of 1909, specifically applied to Madras, Bombay, and Calcutta, were the two pieces of legislation that constituted t legal framework in India for individual insolvency policies even after independence. However, these statutes have been an exceptionally uncommon choice for dealing with personal bankruptcies during the course of the investigation. Both the Securitization and

 ISSN: 2582-6433

Reconstruction of Financial Assets and Enforcement of Security Act, 2002 (hereafter referred to as the "SARFAESI Act") and the Negotiable Instruments Act, 1881 have been applied in order to initiate the official recovery procedure. Ever since it was first put into effect in 1881, Section 138 of the Negotiable Instruments Act has been an extremely important component of credit recovery. This act provides for the criminalization of the act of dishonoring a cheque, which was considered harsh on the borrower for defaulting on their loan. Lenders especially in the home mortgage industry in India had been depended on this clause more and more since it was first introduced because they did not have any other viable alternatives accessible to them at the time.[ii] Non-banking financial corporations continue to concentrate their efforts on pursuing loans for individuals through this particular market. As a result of the SARFAESI Act of 2002, financial institutions and banks now have the ability to seize collateral without the intervention of the legal system. It functioned as a method for recovering debt that were not being repaid as agreed upon.Even in present due tothe increased use of Section 138, the courts are currently experiencing an excessive amount of work, which results in the handling of property and mortgage processes in an inefficient manner and with delays. Iii When it comes to the SARFAESI Act, the only entities that are permitted to employ it are banks and other financial institutions. Over the course of its existence, its efficiency has gradually diminished. By 2013, the amount of cases that were recovered by the SARFAESI Act has decreased to 22%, whereas in 2008, 61% of cases were recovered. IV As a result of this, both of these choices were no longer relevant.

INSOLVENCY PROCEEDINGS FOR INDIVIDUAL UNDER THE CODE, 2016

The provisions of the Code that pertain to the resolution of insolvency and bankruptcy proceedings are addressed in Part III. These regulations will apply to both individuals and partnership firms. As a means of simplifying the process, this part provides three distinct categories of individuals who who fall within the ambit of the code.

1) Personal guarantor of a corporate debtor;
2) Partnership firm;
3) An individual or sole proprietorship.

Individual and business insolvency and liquidation are addressed in detail in Part III of the Insolvency Code, 2016. However unlike the insolvency proceedings of corporation where the Adjudicating Authority is National Company Law Tribunal (herein referred as NCLT) and the appellate authority being National Company Law Appellate Tribunal (herein referred as NCLAT),

 ISSN: 2582-6433

the Adjudicating Authority for the proceedings of individual insolvency would be dealt by the Debt Recovery Tribunal (DRT) whereas the Debt Recovery Appellate Tribunal (DRAT) will handle appeals.

Part III of the Code stipulates three procedures for resolution of personal insolvency on default of a threshold amount of 1000 rupee minimum
The debtor can apply through an application if the individual have the monthly income of less than Rs. 5,000 and a debt amount not exceeding Rs. 35,000.

The debtor can by himself or through the Resolution professional can file the application for the insolvency proceedings to the Adjudicating Authority if following conditions are met by the debtor

1) The debtor has a gross annual income that does not exceds sixty thousand rupees.
2) The debtor's assets total does not beyond exceed twenty thousand rupees,
3) The aggregate amount of the debts that are eligible does not exceed thirty-five thousand rupees.
4) The debtor is not a bankrupt individual, rather who has been discharged from the earlier bankruptcy proceedings.
5) Regardless of whether or not the residential property in question is subject to any liabilities, the debtor does not possess any residential property.
6) There are no continuing processes against the debtor that involve a fresh start, insolvency resolution, or bankruptcy.
7) The debtor has not been subject to any fresh start order under this particular Chapter within the preceding twelve months, beginning from the date on which the fresh start application was submitted.

The code also provides for te waiver of the debt of the debtor in case debtors who are eligible for a full debt waiver, do not have a housing unit, have an annual income of less than Rs.60,000, assets of less than Rs.20,000, and debts of less than Rs.35,000 are all included in the Code.

The code specifies two step procedure for the insolvency proceedings of the individual and partnership firm:

- Fresh Start
- Liquidation

 ISSN: 2582-6433

Before the application for the fresh start which can be made by the debtor and the creditor can in the pre-initiation round negotiate with the terms.

STEP 1- Fresh Start

If a debtor can't make their payments as agreed, they can apply for a fresh start to have their qualifying debts forgiven. People who owe money or their debt resolution agent can start the process of applying for insolvency resolution. The IBBI has to make sure that the person submitting the application is not currently facing any disciplinary action when it comes from settlement experts working on behalf of creditors or debtors. There are seven days from the date the Board got the application to do the verification work. The IBBI will also choose a resolution professional within ten days of getting an application from either the creditor or the debtor if that application is sent in without a resolution professional. In this case, the Board will make sure that the settlement expert that was suggested is not facing any kind of punishment. The settlement specialist will look over the application in less than ten days after the meeting is set up. The resolution expert will write a report after the settlement process is over. It is the main purpose of the report to explain the reasons behind the choice of whether to accept or reject the applicant. A copy of this report should be given to both the creditor and the debtor in question before it is sent to the body in charge of settling disputes. The report will be used by the person making the decision to decide whether to accept the application or not. In just seven days after the decision is made by the adjudicating body, the creditors must be given a copy of the settlement professional's report, the application for bankruptcy, and the order itself. The DRT will announce the moratorium time as soon as they have passed the order that starts the restructuring process. During the moratorium, no legal actions or processes that are already going on can be held up. Furthermore, the creditor lacks the power to take any further legal action against the bankrupt. When two or more people work together, they have to agree on the moratorium time. A final list of eligible creditors must be made by the resolution professional and given to the adjudicating body at least seven days before the end of the moratorium period. This is something that needs to be done. When the moratorium time is over, the person in charge of the case has to issue a discharge order. This frees the debtor from the debts that meet the criteria for discharge.

Step 2 – Liquiation

As long as the implied moratorium time doesn't happen during the insolvency proceedings, everything will stay the same for a new start for an individual or partnership firm. The settlement specialist will then send a public notice to the creditors telling them they have seven days to file a

 ISSN: 2582-6433

claim after the order is made. For this message to be published, it must be in a newspaper that has editions in both English and one other language. The notice must be posted on the building of the deciding body and on the website of the governing body that is in charge of deciding. Creditors must use electronic mail, courier services, speed post, or registered mail to make claims official. Once the debtor gets demands for repayment from creditors, they will work closely with a settlement professional to come up with a way to pay back the debt. It is important that the draft include a plan that has been given to creditors to reorganise bills. After finishing the draft of the payback plan, the settlement professional has twenty days from the last day for claims to be sent in to send the report to the adjudicating body. Before the repayment plan can be put into action, it needs to be approved by the debtors. The goal of calling a meeting of the Committee of the Creditors is to reach this goal. At least 75% of the creditors must agree to the payback plan in order for it to be legitimate. Someone is in charge of settling the disagreement and must make a report based on the meeting minutes of the creditors. This report must then be given to the group that is in charge of making decisions. The body in charge of making decisions will use the information in this report to decide whether to accept the repayment plan or not. In the event that the agreed upon repayment plan comes into action, both the creditors and the debtors will be legally required to follow its terms. It is very important that the settlement professionals keep an eye on how the repayment plan is carried out and make sure that tasks are done on time. Following the completion of the repayment plan and full payment of the debts, the settlement specialist will ask the governing body to cancel the debts. You can file for a bankruptcy order either after the insolvency settlement process is over or while it is still being finished.[2]

CONSTITUTIONALITY OF THE PROVISION

In the case of Dilip B Jiwrajka v. Union of India & Ors, Writ Petition (Civil) No. 1281 of 2021 alongwith connected matters[3] (2023 INSC 1018), several petition under Article.32 of the COI were filed as with regards that the provision contained in section 95-100 of the IBC,2016 which specifically deals with insolvency proceedings of the individual and partnership firm along with the personal guarantor as enforced through second amendment.

Contention of the Applicant

[2] MS Sahoo, 'Individual Insolvency: The Next Big Thing', (Insolvency and Bankruptcy Board of India)< available at: https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Apr/NewsLeter%20Jan-%20March.,%202019_2019-04-27%2017:47:25.pdf {Visited on 1 May 2024).
[3] (2023 INSC 1018).

 ISSN: 2582-6433

- That the contents of the section are in violation with the principle of natural justice and are unfair and arbitrary in nature. They provide unlimited power to the Resolution Professional to enquire with the debtor, where the RP also indulges with the personal life of the debtor thereby violating the right of privacy of the debtor.
- Another contention that was raised by the petitioners were that there is no rational nexus behind establishing different procedures for corporation and individuals.
- The petitioner also raised the point that the implementation of interim moratorium hampers the interest of the debtors.

Observation by the Court

This case led before three judge bench, who collectively observed that the provision of the code is constitutionally valid and rejected the contents of the petitioners. They first observed that the role of resolution professional with regards to corporate insolvency resolution proceedings (CIRP) is a lot more different than what is stated in the Part III of the code with regard to the Insolvency of individual and partnership firm. In CIRP RP takes over the business of corporate debtor whereas in the other case the Role of RP is limited to assisting the tribunals.

The court then observed that moratorium under section 96 of the code is implemented just to protect the debtor from claims in different tribunals.

With regards to the infringement of the debtor right of natural justice. The Hon'ble court observed that the provision states that in case of any grievance the debtor has right to approach the tribunal with his claims.

Further with respect to the contention of different treatment of the corporation and individual by the code, for the court observed that the threshold limit for the both entities are different and this is done for betterment of the parties involved in it so that the tribunal doesn't get overworked and timely resolution plan can approved.