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Evolution of Indian Insolvency Regime - A Legal Perspective

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1. Introduction

Insolvency and Bankruptcy Code 2016 here in after called IBC 2016 is a dynamic legislation introduced to bring sweeping reforms in the field of insolvency in India. Indian insolvency law is administered by various legislations since 19th century onwards. First time in Roman law, rules related to insolvency evolved in Europe. Later, in 16th century, in England the first statute relating to insolvency was passed. Initially the law is applied to traders only, later it is made applicable to everyone. When the companies started with limited liability, the legislation of bankruptcy started evolving to address the problems of insolvency.

Ancient History of Insolvency Law:

When describing the Historic development of United States Bankruptcy code, Charless Warren called bankruptcy is a gloomy and discouraging subject. Today while the business is globalised Bankruptcy law is playing an important role in bringing equitable justice to the stakeholders who invested their time value of money. The Nations across the globe recognizing the importance of insolvency law as they have chosen market Economy. Insolvency Law is a vivid and important subject of legal frame work of both Market Economies and Economies in transition. A Comprehensive and Flexible Insolvency system gives confidence to both local and foreign investors. Insolvency law is the litmus test for well organized Civil and Company Law systems.

Insolvency Law has its influence on many other branches of law such as Company Law, Banking Law, Contract Law, Security law, Environmental Law and Tort Laws. International insolvency Law has existed for Hundreds of years. One of the earliest examples of international insolvency by decree concerns the Ammanati Bank of Pistoia in Italy which get insolvent in 1302.The bank central administration is in Republic of Pistoia, and its branches spread all over Europe. The assets of this Bank located in many places. Rome branch of Ammanati bank's sudden closure created panic among its creditors. When the local assets were removed from Rome to Pistoia, creditors in Rome sought intervention from Pope Boniface VIII. Debtors were allowed to make payments according to the Law of insolvency at that time. That applicable

Law proved to be inadequate for dealing with the situation beyond Italy's Borders. Principal debtors located in Spain, England, Portugal, Germany, and France is unwilling to pay.

This is the first case world has witnessed that domestic laws of different nations are inadequate to deal with cross-border insolvency issues. In the early Roman agrarian society if a debt remained unpaid for thirty days, the debtor would be taken captive by his creditor. If the debtor is unable to pay further sixty days, the creditor is entitled to put debtor to death. Such an inhuman way of dealing insolvency problems persist in the early days of roman society. Some time the creditor sell debtor into slavery. This is evident in many parts of the world at that time to treat insolvency is a criminal act as such punishment given to debtor is so frighten, the business communities fear of doing business thinking that if they get insolvent they have face consequences of criminal nature.

Such an approach is prevalent in German and Greek societies also. Another rule also existed that a creditor who comes first can grab assets of debtor first. This ancient practice leads to more territorial inclinations in solving insolvency in modern society in the cases of cross-border insolvency. This approach slowdown the development of international insolvency jurisprudence that is aimed at harmonization of different domestic insolvency laws to address cross-border insolvency issues. This is how law of insolvency being treated in the early days of its evolution.

The word credit is derived from Latin word Credere, which means to put ones trust in some one. In the middle ages, execution of assets for the benefit of creditors was commonplace. Nonpaying debtor is treated as fraudulent and sever sanctions were imposed on him. In the early days the Italian proverb *Fallitus ergo fraudator* means bankrupt. The debtor is being treated as crook.

Roman law influenced western European Region insolvency laws. Generally, Bankruptcy Law saw rise with the Napoleon commercial code. In Napoleon times the law is applied to merchants, it become model for other countries Legislations. Seizure, Penalty and Coercion existed in Bankruptcy rules of England in sixteenth and seventeenth century. The act of bankruptcy is treated as crime and the bankrupt was a criminal

In the United States a major Theme was "the transformation of bankruptcy from one of moral failure to one of economic failure" Limited –effect bankruptcy rules were introduced by several states in the late 1700s. This led to freedom from imprisonment to debtors who agreed to cede their nonexempt property to creditors and take a poor debtor's oath. There were debates on slavery, imprisonment for debt, and bankruptcy ultimately leads to abolition of imprisonment for debt and the development of a federal bankruptcy law. These laws laid foundation for developing permanent bankruptcy act of 1898.

The famous chapter 11 of US Bankruptcy code was adopted in 1978 for rescuing large distressed corporations. Since roman times, in parts of Europe a general Moratorium has been used on occasion to protect larger groups of debtors. This is the way International insolvency Jurisprudence evolved right from Roman law to Present UNCITRAL MODEL LAW.

In France a moratorium regarding bill of exchange was put in place in 1870. In Netherlands Moratorium was introduced in legislations that protect debtors from the consequence of specific circumstances. Finally legal rules in Europe relating to insolvency had diverse sources. Within Countries they have independent Autonomy to legislate in matters of private or civil law. There is enormous diversity in the law. The civil code of France is introduced in 1804 in France was to abolish diversity and to introduce uniform law and uniform interpretation of the law.

Indian insolvency law has its origin in England insolvency law, since India is common law country inspired by British legislations. The History of Indian Insolvency law is not very old as Roman law of insolvency. It is mainly based on Bankruptcy law of England. The Law of bankruptcy in England was originally a penal law. In England Bankruptcy law was a social

piece of legislation and was more penal than corrective. In the name of social justice the treatment given to insolvent is fearful. In Australia also the act of insolvency was in force from 1924 to 1960 which given a final touch in 1966.

The primary purpose of Bankruptcy law is to relieve honest debtor from the weight of oppressive indebtedness and allow debtor to start a fresh start in continuing his business pursuit. Otherwise if Bankruptcy code focuses only on penal punishment of debtor, the future of business starts declining. This idea of resolving debtor's business problem and giving support to debtor to start his business on fresh terms without any obligations of past debt, encourage many other players to come in the business domain to start different business operations. Trade and commerce is the key economic engine for any country's growth and development in business. This provides not only employment but also bring equitable justice in the society. In this regard an insolvency regime not only protecting debtor's interests but also making justice to creditors who invest huge money in debtor's business. The aim of modern insolvency is not stop at this point only, but also considers other stakeholders rights also.

Evolution of Indian Insolvency Law:

The first piece of Bankruptcy legislation passed in India is in the year 1828. This paved the way to establishment of insolvency courts in Presidency Towns. Before this creditor find his own ways to solve his problems. Subsequently a more comprehensive Indian insolvency act came in 1848. This is an imperial statue was passed in British Parliament. Before insolvency legislation there were commissioners who looked in to the affairs of insolvency. In 1883 the act empowered the court for making receiving order instead of adjudicating order. This leads to new beginning in the Indian insolvency regime. The supreme courts which functioning in Presidency towns like Bombay, Madras and Calcutta were abolished in that place High courts were started these high courts were given Insolvency jurisdiction. Since then these courts in Presidency Towns start adjudicating insolvency matters in India.

The Presidency Towns insolvency Act 1909 was passed through many changes. In the year 1916 a new section 103 A is added where the insolvent was disqualified to assume or continue in any office or position of a magistrate or local authority so that he may not misuse his power for his own selfish benefits. The law maker's foresighted thinking is visible in this amendment. Before this Act Provincial Insolvency act 1907 was passed and its having many defects. The first Bankruptcy legislation passed in 1828 was applicable to Presidency Towns only. There was no such law for insolvency outside of these towns. However, for the mofussil a slight provision was made in civil procedure code of 1877, according to that provision matters of insolvency were decided. This state of affairs continued for a considerable period of time till 1907. Provincial act of 1920 came in to force in the place of repealed Provincial insolvency act of 1907. Provincial insolvency act further amended in 1926. Presidency Towns Act and Provincial Insolvency Act both stood in the test of Time.

By the time India become Sovereign Country in 1947, both Presidency Town act and Provincial insolvency act are in force. These two acts keep administering insolvency regime in independent sovereign India taking reference from the English Bankruptcy Law.

In Independent India only district court have Original jurisdiction regarding the insolvency matters. Section 3 of the Provincial insolvency act provides the rules for the constitution of insolvency courts. Section 2(b) defines the court as District Court means The Principal civil court of original Jurisdiction in any area outside the local limits for the time being of the presidency towns. Section 3 clearly mentioned that the District court shall be the courts having jurisdiction under this act. The state government has power to invest the courts with insolvency jurisdiction. Proviso says that state government may by notification in the local official Gazette invest any court subordinate to a District court with jurisdiction in any class of cases, and any courts so invested shall within the local limits of its jurisdiction have concurrent jurisdiction

with the district court under this act. Generally there is an original civil court and it is invested with the jurisdiction of disposing insolvency matters. The courts subordinate to the district court are not competent originally to hear and dispose of the insolvency petition till the state government does not invest any court with jurisdiction for these purposes. It may be noted that for other matters such courts having been invested with jurisdiction, will have concurrent jurisdiction on insolvency matters, but so far as appeal is concerned, the district court will be appellate court where appeal can lie from the decision of the subordinate courts. The State Government which may from time to time look at the excess and load of work, may by notification invest the courts with such jurisdiction. This power may be invested either by name or by office. It is sole discretion of the state government.

In the Modern Insolvency regime the story of insolvency is not confined to conflict of debt between creditor and debtor. Continuous reforms in International insolvency made modern insolvency regime to look further and broaden the perception of insolvency while treating the insolvency problems. This is not an exception in case of Indian insolvency. India also started amending its old insolvency laws according to the changes in International regime. Only difference is India is quite careful in bringing reforms in Individual Insolvency, Corporate insolvency and Insolvency of enterprise groups. Unlike Roman times that the world treated insolvency as crime, Present approach is entirely changed, instead insolvency is being perceived as new opportunity for expanding business and bringing change in business strategy. This type of modern approach not only brings opportunities but also inviting new challenges that needs to be faced by International community inevitably. Cross-border insolvency is such challenge the world need to address since we chosen market economy and the world is largely dependent on each economic potential.

Coming back to Modern Insolvency regime in India after independence, there was no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies Act 1985. The recovery of debt due to banks and financial institutions Act 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002 and Companies Act 2013. These statues provide creation of multiple fora such as Board of Industrial and Financial reconstruction (BIFR), Debt Recovery tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts, Individual Bankruptcy and insolvency is dealt with under Presidency towns insolvency act, 1909, and the provincial insolvency act, 1920 is dealt by the courts.

The Above Indian insolvency regime for insolvency is inadequate, ineffective, and result in undue delays in Resolution. Therefore the New Insolvency and bankruptcy code emerged under India's new reform process in Corporate Laws. .

The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons, partnership firms and individuals respectively for resolution of insolvency and liquidation. The code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India for regulation of insolvency professionals, insolvency professional agencies and information utilities. Insolvency professionals assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the code. Information utilities collect the data related to financial information and authenticate and disseminate financial information to facilitate such proceedings. The code also proposes to establish a fund to be called insolvency and bankruptcy fund of India.

The main Objective of Insolvency and bankruptcy code is to consolidate and amend 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 priority of payments of government dues and to establish an insolvency and bankruptcy fund in matters connected therewith or incidental thereto.

An effective legal frame work for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. This will also improve ease of doing business, and facilitate more investments leading to higher economic growth and employment and development.

In August 22, 2014, Bankruptcy Law Reform Committee was set up by the Department of Economic Affairs, Ministry of Finance , under the chairmanship of Dr.T. K Viswanatha,(Former Secretarygeneral , Lok Sabha and former Union Law Secretary) by an office order to study the corporate bankruptcy legal frame work in India and submit a report to the Government for reforming the system.

IBC-2016 applies to the following in relation to their Insolvency, Liquidation, Voluntary liquidation or bankruptcy as the case may be.

1. Any company incorporated under the Companies Act, 2013 or under any previous company law or any other special Act
2. Any limited liability partnership(LLP) incorporated under the Limited Liability Partnership Act.
3. Such other body incorporated under any law for the time being in force, as the central government may specify by a notification.
4. Partnership and individual Firms. Previously, Corporate Insolvency proceedings were dealt with by companies Act 2013. CHANGES IN COMPANIES ACT 2013 , POST COMMENCEMENT OF IBC:
5. Companies Act 2013 has been amended by the Eighth Schedule of Insolvency and Bankruptcy Code, 2016.
6. Winding up means winding up under the companies act and liquidation under IBC,2016
7. Creditor has no right to initiate winding up under the Companies Act 2013.
8. A creditor can initiate insolvency proceedings only before NCLT under IBC. The scope of default is wide under IBC than Companies Act 2013.
9. Voluntary winding up incorporated in the bankruptcy code as section 59 and thus the reference of section 304 which now stands deleted, has been substituted with Section 59 of the bankruptcy code.

Companies Act 2013 primarily recognizes the insolvency professions as registered under the code who can now be the sole people to be appointed for any winding up or liquidation proceedings either under Companies Act 2013 and Insolvency code.

2. Conclusion

There is no doubt in concluding that the IBC STANDS as biggest reform in the History of Indian Corporate Law. So far THE JOURNEY OF IBC is very short, the INSOLVENCY Jurisprudence is yet to evolve in its full capacity. The Supreme Court of India is giving all efforts to settle the Jurisprudence of insolvency in India.

So far adjudication is confine to corporate insolvency, soon it can be extended to Partnership firms and individuals. At present NCLT is Adjudicating Authority of Corporate insolvency.DRT is supposed to be the adjudicating Authority for Partnership firms as well as Individuals. Indian Insolvency needs to travel long way, to incorporate Comprehensive provisions for dealing cross-Border insolvency issues.

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