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Impact of Insolvency and Bankruptcy 2016 on Indian Industries.

The growing world trend and rapid globalisation have led to fast tracking of disposing off the cases related to insolvency, bankruptcy, liquidation etc. It's imperative to study and critically examine how the inception of IBC took place and to also get into the nitty gritty of the said enactment. Many jurists and lawyers are of the opinion that it was about time that something like IBC came into action and it was the need of the hour. But first things first, what is Bankruptcy, Insolvency and why do we need a consolidated code for the same? Another point worthy question that arises is why do we need to modernise the laws for bankruptcy and insolvency; is it because the old laws proved to be redundant?

What is insolvency and Bankruptcy?

The Black's Law Dictionary defines the work "Bankrupt" as the state or condition of a person who is unable to pay its debt as they are or has become, due. The condition of one whose circumstances are such that he is entitled to take the benefit of the federal bankruptcy laws. The term includes a person against whom an involuntary petition has been filed, or who has filed a voluntary petition. The state of insolvency on the other hand is the condition of a person or a business that is insolvent; an inability or lack of means to pay debt. Such a relative condition of persons or entity's assets and liabilities that the former, if all made immediately available, would not be sufficient to discharge the latter.

Under bankruptcy law, the condition of a person or firm that is unable to pay debts as they fall due, or in the usual course of trade or business and financial condition such that businesses or persons debts are greater than aggregate of such debtors' property at a fair value. Hence to have an effective and adequate framework for insolvency and bankruptcy, the Central Government proposed this legislation, entitled 'the Insolvency Bankruptcy code 2015' which was introduced by Ministry of Finance, Mr Arun Jaitley in Lok Sabha on 21.12.2015.

Several pressing concerns with regard to IBC will be answered in this article. We also need to lay emphasis on how this enactment has been a game changer in the Indian market. No longer will the hegemony lie with only the shareholders, and debt holders.IBC has paved way to a power shift into the hands of the creditor. It can be expected that a creditor with a default of a mere 1 lakh, can roll the company into liquidation. Before IBC came into existence it used to take companies approximately 4- 5 years to dissolve its operations.

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The IBC envisages filing of Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") by the Corporate Debtor, Financial Creditor and Operational Creditor. However, in neither of the said proceedings, time frame for filing of CIRP has been provided. It is imperative to point out that the IBC is silent on the time period within which a petition for insolvency resolution is required to be filed. Some landmark cases in the Supreme Court related to IBC will also be examined and hence will facilitate in giving us a clear overview of whether or not the enactment has in anyway been detrimental to the well being of the corporate dealing or if it has indeed been a game changer and has eased the burden as well as quickened the pace of disposing off the cases and whether due to the power shift, it has given an equal authority to the creditor to file for liquidation if he has been a defaulter. Its inception has not been an easy task and a number of obstacles had to be dealt with, especially certain areas of functioning and laws that come in the periphery of bankruptcy.

Underlying Features of the code:

- The code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days .If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.
- The resolution processes will be conducted by licensed insolvency professionals. The insolvency professionals will be members of insolvency professional agencies.IPA will also furnish performance bonds equal to the assets of a company under insolvency resolution.
- Information utilities will be established to collect, collate and disseminate financial informational to facilitate insolvency resolution, which means a transparent form of exchange of information will take place.
- The National Company Law Tribunal will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal will adjudicate insolvency resolution for individuals.
- The insolvency and Bankruptcy board of India will be set up to regulate functioning of IP'S, IPA's, and IU's.
- The increased powers given to the Reserve Bank of India (RBI) to clean up asset quality, and to intervene in banks at an earlier stage when risks build, represents an

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important positive step toward ensuring a healthy banking system in the future as far as IBC is concerned.

- The limitation of the state laws was in a way, a direct impact of IBC.
- A newfound inception of the insolvency and bankruptcy board of India came into existence through the channel of IBC.
- One peculiar aspect of the code is that the National Company Law Tribunal (NCLT) cannot approve a resolution plan unless it is satisfied that the plan is fully compliant with existing laws (although it is not clear how this is supposed to tie in with the overriding nature of the code).
- This act takes precedent over the DRT and SARFEASI ACT in insolvency related issues.
- IBC has specified a time bound process of 180 days with an extension period of 90 days after the appointment of Resolution Professional.

Although India has taken initiatives in improving its position in both the World Bank's ease of doing business and also the World Economic Forum's Competitive Index, India still performs poorly on the time taken for debt resolution not only in comparison with the developed G7 countries but also in comparison with other BRICS countries.In the current scenario, NPA's of Indian Banks stand at INR 9.99 trillion being one of the biggest challenges faced by the Indian Economy. The implementation of IBC has brought in to main objectives which need to be considered; firstly, time bound process and efficient resolution and secondly, maximize the value of recovery of stressed assets.
Certain moratoriums in other peripheral enactments would now be looked after by the said code. One of the major boons IBC has given is its time restricted resolution process, thereby fast tracking its functioning etc.What we have gathered so far is that due to the growing trend and a fast paced working of the society, it has led to this act.

NPA and its folly:

Banks give loans and advances to borrowers. Based on the performance of the loan, it may be categorized as:

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(i) A standard asset (a loan where the borrower is making regular repayments),

Or (ii) a non-performing asset.

NPAs are loans and advances where the borrower has stopped making interest or principal repayments for over 90 days.

Further, recently there have also been frauds of high magnitude that have contributed to rising NPAs. Although the size of frauds relative to the total volume of NPAs is relatively small, these frauds have been increasing, and there have been no instances of high profile fraudsters being penalised.

The measures taken to resolve and prevent NPAs can broadly be classified into two kinds – first, regulatory means of resolving NPAs per various laws (like the Insolvency and Bankruptcy Code), and second, remedial measures for banks prescribed and regulated by the RBI for internal restructuring of stressed assets.

The Insolvency and Bankruptcy Code (IBC) was enacted in May 2016 to provide a time-bound 180-day recovery process for insolvent accounts. Under the IBC, the creditors of these insolvent accounts, presided over by an insolvency professional, decide whether to restructure the loan, or to sell the defaulter's assets to recover the outstanding amount. If a timely decision is not arrived at, the defaulter's assets are liquidated. Proceedings under the IBC are adjudicated by the Debt Recovery Tribunal for personal insolvencies, and the National Company Law Tribunal (NCLT) for corporate insolvencies. 701 cases have been registered so far and 176 cases have been resolved as of March 2018 under the IBC.

What led to the rise in NPAs?

Some of the factors leading to the increased occurrence of NPAs are external, such as decreases in global commodity prices leading to slower exports. Some are more intrinsic to the Indian banking sector.

A lot of the loans currently classified as NPAs originated in the mid-2000s, at a time when the economy was booming and business outlook was very positive. Large corporations were granted loans for projects based on extrapolation of their recent growth and performance. With loans being available more easily than before, corporations grew highly leveraged, implying that most financing was through external borrowings rather than internal promoter equity. But as economic growth stagnated following the global financial crisis of 2008, the repayment capability of these corporations decreased. This contributed to what is now known as India's Twin

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Balance Sheet problem, where both the banking sector (that gives loans) and the corporate sector (that takes and has to repay these loans) have come under financial stress.

When the project for which the loan was taken started underperforming, borrowers lost their capability of paying back the bank. The banks at this time took to the practice of 'ever greening', where fresh loans were given to some promoters to enable them to pay off their interest.

Noteworthy Provisions of the Insolvency and Bankruptcy Code 2016.

Who can initiate corporate insolvency?

a) Chapter ii section 6 provides for:

Persons who may initiate corporate insolvency resolution process.

Where any corporate debtor commits a default, a financial creditor, corporate creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under the chapter.

So it basically means that where a corporate debtor has defaulted in paying a debt that has become due and payable but not repaid the corporate insolvency resolution process may be initiated in the manner as provided in the section .Early recognition of financial distress is very important for timely resolution of insolvency. Financial creditors are those creditors to whom a financial debt is owed. The corporate debtor can initiate the insolvency resolution process once it has defaulted on a debt. Operational creditors are also permitted to initiate the insolvency resolution process. This will bring the law in line with international practices, which permit unsecured creditors to file for the initiation of insolvency resolution proceedings.

b) Sternness of section 29A of the insolvency and Bankruptcy Code.

One of the primary objectives of the Insolvency and Bankruptcy Code, 2016 is to facilitate the adoption of a resolution plan for the corporate debtor. The resolution plan is to serve as a benefit to not only the creditors but also to the already stressed corporate debtor. Originally, section 5(25) of the Code defined a resolution applicant as any person who submits a resolution plan to the resolution professional and section 5(26) defined a resolution plan as a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern. The said definition of the resolution applicant did not prescribe any specific criteria or qualification, due to

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which any party including the promoters of the corporate debtor or any related party could propose a resolution plan. This scheme of things was, thereafter, criticized on the basis that the wide scope permitted by the Code served as a loophole for recalcitrant (uncooperative) promoters to gain a back door entry to the management of the corporate debtor.

With a view to curb the said loophole, the Government brought forth the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 and later the Insolvency and Bankruptcy Code (Amendment) Act, 2018 wherein section 29A was inserted into the Code. Section 29A laid down a broad range of disqualifications for a person to be an eligible resolution applicant. Further, section 5(25) has been amended to read that a resolution applicant is one who submits a resolution plan to the resolution professional upon an invitation made under section 25(2)(h). Section 25(2) (h) was amended to the effect that the resolution professional invite resolution plans from such applicants who fulfil the criteria laid down by the resolution professional with the approval of the committee of creditors keeping in consideration the complexity and the scale of business of the corporate debtor.

Therefore, a prospective resolution applicant in order to be eligible to submit a resolution plan shall not only meet the criteria laid down by the resolution professional under section 25(2)(h) but shall also not fall under any of the categories laid down by section 29A for disqualification. The NCLT, Delhi dealt also with the provisions of Section 255 of IBC to say that the said provision has amended various Sections of the Companies Act, 2013. However, Section 433 of the Companies Act, 2013 remain unamended.

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CHANGES BROUGHT IN BY 2018 ORDINANCE.

I) Homebuyers – As Financial creditors.

The 2018 Ordinance has revised the meaning of 'money related obligation' to incorporate sums raised from 'allottees' in regard of a land venture (as characterized under the Real Estate (Regulations and Development) Act, 2016 (RERA)).

In like manner, homebuyers will presently be qualified for a seat on the committee of creditors (CoC) of the corporate debtor person. Notwithstanding, given the expansive number of homebuyers for an undertaking, they will be treated as a class of creditors and be spoken to in the CoC by an 'approved delegate' to be named by the National Company Law Tribunal (NCLT).

It is significant that Section 18 of RERA bears allotters the privilege to Demand a discount of the whole sum progressed by the allottee (alongside interest at the recommended rate); or be paid advance (by the advertiser/designer) for each long stretch of deferral till possession is given over. In bankruptcy procedures, all things considered, the allottees (even where they have not pulled back from the agreement) may document their cases for the whole development sum and accumulated premium. In such cases, it should be considered if, by virtue of documenting of such cases (for example for the development paid), the allotters would be deemed to have call off the deal from the undertaking and if their case against the corporate account holder can be constrained to fiscal cases just(for example the development sum and interest).Some milestone decisions given by the incomparable court allowing help to home purchasers is – Supertech, ‚Jaypee Infratech, Amrapali- the SC has observed that it couldn't care less if the organization is dead, broke or bankrupt, these defaulting organizations will start the refund as soon as it had rolled in.

An unavoidable hiccup in the way of a homebuyer.

Although the act has come as a relief, if not instant for a homebuyer, it’s still unclear whether he is a secured or an unsecured financial creditor and the provision doesn’t really give clarity as to when the homebuyer becomes a secure creditor or an unsecured creditor. The biggest roadblock in the way of a homebuyer is the fiasco of a

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third party interest. Many homebuyers have booked flats by taking loans from the banks.

The general practice these banks follow while giving loans is that they enter into a tripartite agreement with both the homebuyer and the developer.
By entering into such loan -cum -tripartite agreements with the banks, the homebuyers are actually creating third party interests in favor of the banks and are actually subrogating his rights in favor of the banks.

In one such case with similar situation, NCLT Allahabad [Ajay Walia V. M/s. Sunworld Residency Private Limited, CP (IB) 11/ALD/2018] held that the homebuyer who has subrogated his rights in favor of banks cannot be treated as a financial creditor.

The homebuyers need to be wary of the fact that if they will enter into such tripartite loan agreements while booking a flat, they no longer will be treated as financial creditors and it would adversely affect their rights to initiate a corporate insolvency process against the developer.

Many homebuyers are continuing to pay EMIs for the loans they took from the bank for their flat. This aspect of creating third-party interests in favor of the bank and continuing to pay EMI's for the flats whose possession they have not really gotten well and certainly requires a further scrutiny in the Courts of law in the background of the amended Code.

Furthermore, it has yet to be seen how effective the participation of the homebuyers in the committee of creditors would be and their contribution in assessing and approving resolution plans.

We also know that this may be amended sooner rather than later but as of now it's stagnant and of no help to the homebuyer in its entirety. Given the nature of this enterprise it may not really come as a relief because of the unclear provision of the act which needs to be dealt with soon.

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2. Moratorium Not to Apply to Guarantors.

The 2018 Ordinance has clarified that the moratorium (an order of stay, or ban) imposed by the NCLT under Section 14(1) (at the time of admission of an insolvency application) will not apply to guarantee contracts in relation to the corporate debtor's debt.

3. Additionally, Section 61(3) of the IBC has been amended to ensure that the NCLT (which has jurisdiction over the insolvency resolution of the corporate debtor) will also have jurisdiction over the insolvency resolution of the corporate guarantor (irrespective of the jurisdiction (within India) where the corporate guarantor may have been incorporated in). This provision previously only covered personal guarantors.

4. Lowering of Committee of Creditors Voting Thresholds.

Previously, all decisions of the CoC needed to be approved by 75% of the voting share of the CoC members. This threshold has now been lowered to 51% except for the following requirements:

- 90% approval for withdrawal of an insolvency application post admission by the NCLT (dealt with in more detail below).
- 66% approval for resolutions:

(i) Approving extension of the corporate insolvency process beyond 180 days;

(ii) Relating to matters listed out under Section 28 of the IBC;

(iii) Approving a resolution plan; and

(iv) Replacing a resolution professional.

5. Post Admission Withdrawal

Following the Supreme Court's decisions to permit withdrawal of insolvency proceedings post admission (by using its inherent powers under Section 142 of the Constitution of India) on a case specific basis, the 2018 Ordinance has introduced Section 12A permitting the NCLT to now allow insolvency proceedings to be

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withdrawn provided it has the consent of 90% of the voting share of the CoC members. Certain additional conditions (for withdrawal) have also been prescribed under the regulations.

I. Has the impact been positive on the banks?

The government believes that the Insolvency and Bankruptcy Code has started to show positive results as there is improvement in Non-performing Assets (NPAs) problem that the most banks, especially the public sector banks, are facing. Attributing the success to IBC, it has been seen that the decline in NPA's and improvement in the recoveries is partly because of the resolutions that have taken place under the new IBC and partly because the promoters of the defaulting companies have been barred to participate in the bidding of their own firms.

Recoveries are also picking up because those debtors who fear that they are likely to cross the red line are paying up in anticipation that IBC process may start. Because once the IBC process starts, Section 29A comes into force. The unintended consequence of Section 29A is that potential defaulters would not want to be potential defaulters.

As a consequence of resolutions through IBC, and fear of Section 29A, the PSU banks are now expecting to recover loans worth Rs 1, 80,000 Crore in the current financial year compared to Rs 74,562 Crore in the last financial year.

The total bad loans in the system were estimated to be above Rs 12 lakh Crore. According to rating agency India Ratings, around 45 per cent of total bad loans of Rs 10.2 lakh Crore pertaining to the top 500 debt heavy corporate is said to have been likely to be resolved by the end of 2018 under the IBC, while the balance is to be resolved largely during 2019. The agency further expects Rs 4.2 lakh of the total stressed debt to become sustainable as the outcome of the resolution process by the end of 2019.

Insolvency and bankruptcy code 2016 was enacted because the earlier legislations were lopsided and favored the corporate debtors resulting into huge outstanding debts to banks and financial institutions. Say for example, according to section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, the protection also extended to the guarantors and therefore, creditors could not proceed against the

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guarantors if the debtor company was declared 'sick' under the said Act. The IBC further facilitates the resolution of corporate bankruptcy in a time bound manner. Whereas the other laws of bankruptcy and liquidation under Companies Act, 2013 or SARFAESI Act, 2002 merely introduced the term 'creditor' or 'debt', without any classification thereof, the IBC on the other hand has introduced new and distinct concepts of Financial Creditor and Operational Creditor where the banks and final institutions come under the first category.

Therefore, going by the definitions of Financial Creditor and Operational Creditor as given in the IBC, the debts also fall into two categories. They are financial debt and operational debt. Before proceeding with the applications under the provisions of the Code, the Tribunal first determines whether the debt falls within the definition of Financial Creditor or Operational Creditor as provided under the IBC.

CHANGES THAT BANKS REQUIRE.

Banks and non-banking finance companies (NBFCs) have sought multiple amendments to the IBC. These include exempting corporate debtors from bankruptcy proceedings under the ambit of the Insolvency Code in cases where banks have already initiated proceedings under the SARFAESI Act and also in cases where final order and recovery certificates have been issued by the debt recovery tribunals (DRT) in favour of banks and financial institutions.

Bankers fear that if a bankruptcy proceeding is initiated against a defaulter company, a moratorium of 270 days would kick in as per the provisions of the IBC, while the proceedings under the debt recovery tribunal and SARFAESI Act remain suspended, thereby hampering the recovery and rehabilitation of such companies.NBFCs have written to the government that they should be treated as financial creditors and be given voting rights in approving a resolution plan for a defaulter company. At present, Section 14(1)(c) of IBC clearly provides that during the insolvency resolution process, as defined in the code, the code takes precedence over the DRT and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act. Another demand of banks is that loan haircuts taken by

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them should not be treated as profit, ensuring that no preference is given to government departments under moratorium.

Landmark Judgments of the Supreme Court.

a) Macquarie Bank Limited v. Shilpi Cable Technologies Limited (Supreme Court) 2017.

The said appeal raised two imperative questions:

I. Whether in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory?

— A fair construction of Section 9(3)(c), in consonance with the object sought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.

ii. Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?

— "Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression."

b) Mobilox Innovations Private Limited v. Kirusa Software Private Limited 2017.

What are the requisite elements necessary to trigger the code?

Section 9(1) contains the conditions precedent for triggering the Code insofar as an operational creditor is concerned. The requisite elements necessary to trigger the Code are:

I. occurrence of a default;

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ii. Delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and

iii. the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

—The confirmation from a financial institution that there is no payment of an unpaid operational debt by the corporate debtor is an important piece of information that needs to be placed before the adjudicating authority, under Section 9 of the Code, but given the fact that the adjudicating authority has not dismissed the application on this ground and that the appellant has raised this ground only at the appellate stage, we are of the view that the application cannot be dismissed at the threshold for want of this certificate alone.

c) **Alchemist Asset Reconstruction Company Limited v. M/s Hotel Gaudavan Private Limited.**

An arbitration proceeding cannot be started after imposition of moratorium and that that the effect of Section 14(1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is non est (Non est factum is a defense in contract law that allows a signing party to escape performance of an agreement which is fundamentally different from what he or she intended to execute or sign) in law.

d) **Nikhil Mehta & Sons &Ors. v. M/s AMR Infrastructure Ltd.**

(NCLT DELHI), C.P NO (ISB)-03(PB)/2017, decided on 23.01.2017.

In this case the NCLT has ruled that a purchaser of real estate, under an 'Assured-Return' plan, would be considered as Financial Creditor for the purposes of IBC and is, therefore, entitled to initiate corporate insolvency process against the builder, in case of non payment of such Assured/Committed return' and non delivery of unit.NCLAT further went on to rule that the debt in this case was disbursed against the consideration for the time value of money which is the primary ingredient that is required to be satisfied in order for an arrangement to qualify as Financial Debt and for the lender to qualify as a Financial Creditor' under the scheme of IBC.

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e) K.S. Rangasamy v. State Bank of India 2018.

It was observed that if the corporate debtor is ready to pay the total amount with interest as the requirement deems then it will be open to the financial creditor to settle the dispute. If the Resolution Applicant proposes lesser amount and more time than the amount and time proposed by the appellant. In such case, it will be also open to the concerned person to move before an appropriate forum to make the settlement absolute. If the offer of the promoters is better than the resolution plan, leeway has been provided to approach the appropriate forum to get the settlement recorded.

f) Indian Overseas Bank & Ors. v. Kamineni Steel & Power India Private Limited

The Hyderabad bench of the NCLT, in an insolvency petition against Kamineni Steel & Power India, allowed a resolution plan approved by 66.67% of its committee of creditors. The Hyderabad NCLT said in its order that Section 30 (4) does not say whether such percentage is out of the total voting share of the financial creditors or those present during meetings of the CoC. "Since IBC is a new code and still evolving, the above percentage has to be read with various circulars issued by the Reserve Bank of India" it observed. The National Company Law Appellate Tribunal (NCLAT) has struck down an order passed by the bankruptcy court that approved a resolution plan for Kamineni Steel & Power despite the fact that it failed to receive the mandatory 75 per cent vote share, a pre-requite according to the Insolvency and Bankruptcy Code (IBC) to get the plan endorsed by the court.

g) JK Jute Mills and co vs. Surendra Trading co 2017

Petition was filed against inability to pay dues, Relief by way of status quo was granted, and an appeal was filed against the order of NCLT. The point of contention remained whether appeal would be allowed. It was held that the object behind the time period prescribed under code is to prevent the delay in hearing the disposal of the cases.NCLT could not ignore the provisions of the code. But in appropriate cases, for the reasons to be recorded in writing it should be admitted or rejected, the petition after the time period prescribed under section 7 or section 9 or section 9 or section 10.Such provisions is in procedural in nature, a tool of aid in expeditious dispensation of justice ad is directory. The time was the essence of the code and all the

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stakeholders, including the Adjudicating authority had unnecessarily adjourned the case from time to time, which was against the essence of the code. Application was defective and not admitted within the specified time. Even if it was presumed that additional time was to be granted to the operational creditor, the defects had not been removed within time. Hence, appeal was hereby allowed and directed to the adjudicating authority to reject the petition.

h) Jagmohan Bajaj v Shivam Fragrances Ltd 2018.

It was contested on the initiation of corporate insolvency resolution process by financial creditor-Admission of petition in respect of non repayment of financial assistance. Ground of pendency of application under sections 241 and 242 of the companies' act 2013 before Tribunal was raised in appeal whether IBC having Overriding effect on any other law as mandated under section 238.IBC is a special law having overriding effect on any other law as mandated, therefore statutory process could not be made subservient to adjudication of an application under sections 241 and 242 of the companies act 2013, thus appeal filed by shareholder of the corporate debtor against admission of petition under section 7 was dismissed. Financial creditor granted financial assistance to corporate debtor, but the corporate debtor had committed default in repayment of the financial assistance. It was held that the shareholders had neither disputed the factum owing the debt to the financial creditor nor assailed the order of admission of the petition under section 7 on the ground that the debt was not payable. Statutory right of the financial creditor satisfying requirement of section 7 to trigger insolvency resolution process could not be made subservient to adjudication of an application under sections 241 and 242 of the companies act 2013.Hence the appeal was dismissed.

i) Innoventive industries Ltd v ICICI Bank ltd 2017

This case was used to refer in the Jagmohan Bajaj v Shivam Fragrances Ltd.It was contested on initiation of corporate insolvency resolution process by financial creditor. All liabilities were suspended as per notifications of the state government. It was held that the corporate debtor 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

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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. Hence the Tribunal rightly admitted the application initiation of corporate insolvency resolution process.

j) Cheran Properties Ltd. vs. Kasturi and sons Ltd & Ors. Civil Appeal 10025/2017 decided on 24.04.2018

The court held that since the award postulates a transmission of share to the Claimant, the directions contained in the award can be enforced only by moving the tribunal for rectification in the manner contemplated in law.

k) Alchemist Asset Reconstruction Company Limited v. M/s Hotel Gaudavan Private Limited &Ors (SC) Civil Appeal no 16929 of 2017

The Supreme Court held that an arbitration proceeding cannot be started after imposition of moratorium. Further, it was held that the effect of Section 14(1)(a) of the IBC is that the arbitration that has been instituted after the aforesaid moratorium is non est. in law.

l) Brilliant Alloys Private vs. Mr. S. Rajagopal &Ors, Special Leave to Appeal (C) No(s)-31557/2018 decided on 14.12.2018.

In this case an application was filed by the Resolution Professional of the corporate debtor before NCLT for withdrawal of CIRP on the ground that all claims of operation and financial creditors of the corporate debtor are settled.However,the application for withdrawal was filed under Section 60 (5) of the IBC instead of Section 12A because the settlement happened after the issue of invitation for expression of interest under regulation 36A of CIRP Regulation.NCLT Chennai dismissed the application on the ground that since regulation 30A imposes condition for withdrawal application that it has to be filed before invitation for expression of interest; NCLT cannot pass an order allowing the withdrawal ignoring the conditional clause.

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m) Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and others (SC), Civil Appeal No.8400 of 2017 decided on September 19, 2017.

At the outset, the Supreme Court held that the mandate of sub-section (5) of section 9 or sub section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory. It was further held that provision f removing the defects in an application within seven days is directory and not mandatory in nature. The court clarified that while interpreting the provisions to be directory in nature, if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days.

n) Sandeep Kumar Gupta resolution Professional v Stewarts & Lloyds of India Ltd. &Anr. Company Appeal (AT) (Insolvency) No.263 of 2017 decided on 28.02.2018.

The NCLAT ruled that Resolution Professional's performance did not amount to misconduct, but as the Adjudicating Authority was not satisfied with the performance of the RP, it was well within its jurisdiction to engage another person as RP or Liquidator.

o) Rajputana Properties Pvt.Ltd. v. UltraTech cement Ltd & Ors Civil Appeal no 10998 of 2018.

The Supreme Court upheld the order passed by the NCLAT that approval of the NCLT is not a mere requirement/formality. Even though the NCLT is not permitted to alter the terms of the plan, the ultimate authority to approve or reject a plan vests with NCLT and fort that it should consider the following aspects: (i) whether the plan complies with the requirements of Section 30(2)? (ii) Whether the plan is fair and equitable or there is any unjust discrimination not envisaged in law? (iii) Whether the plan adheres to the object of the code i.e. maximizes the value of assets and balances the interests of all the stakeholders? Only if the aforesaid questions are answered in

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satisfactory, the plan is confirmed, if not the NCLT may deny its confirmation.

p) Shah Bros Ispat Pvt. Ltd v. P. Mohan raj & Ors. 2018 SCC Online NCLAT 415 decided on 31.07.2018.

The NCLAT held that Section 138 of the N.I Act is a penal provision which empowers the court of competent jurisdiction to pass order of imprisonment of fine, which cannot be held to be proceeding of any judgment, decree of money claim. It was further concluded that imposition of fine cannot be held to be a money claim or recovery against the corporate debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the directors, they cannot come within the purview of Section 14 of the I &B Code, 2016. Hence no criminal proceedings are covered under Section 14 of the IBC.

q) Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited Civil Appeal No. 9597 of 2018 decided on 23.10.2018

In this case the NCLAT without discussing the merits of the case and also without stated how the amount was payable, given wielded threat to the Appellant by giving a one chance, 'to settle the claim, failing which this Appellate Tribunal may pass appropriate orders on merit'.

The Supreme Court relied on the decision in Mobilox case and held that while examining an application under Section 9 of the Act, the Adjudicating Authority will have to determine (i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh, (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute. With these observations the NCLAT order was set aside.

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The way forward.

Some point worthy merits of this act are that, most loans that land up for in insolvency proceedings are likely to have already been restructured by the banks in the past. The fact that repayment has failed even after such restructuring, raise serious questions on the credit-worthiness of the loaners. Hence, barring promoters of such companies is only logical.

Thus, the ordinance creates the scope for disqualifying an existing promoter or including a rank outsider into the bidding process. Certain drawbacks of this act are The Insolvency and Bankruptcy Board of India (IBBI) is the regulator, which was set up under the IBC.But several advisory committees of the IBBI, entrusted with corporate insolvency & liquidation, are chaired by several top corporate leaders. This could be tricky for the credibility of IBC and the recent ordinance may be misused to defeat the very objective of penalizing the errant promoter.

Banks will only lose more, if these designs help in side-tracking loan recovery and aid influential people to purchase distressed assets at low prices. One of the major hurdles being faced in speedy resolution of the CIRP cases is inadequate infrastructure at NCLT, procedural inefficiencies and legal hurdles. Nearly 6,000 petitions have been filed under IBC at NCLT until now.

To address this there are only 11 NCLT benches across the country which are catering to these petitions as well as other cases. Over the next couple of years we expect a cascading effect of financial stress on the vendors of some of these large Insolvent companies and business groups.

There have been several pressing concerns and eyebrows raised with regard to IBC. The most important one being the appointment of certain corporate leaders as the members of board committee of IBBI, this has been criticised thoroughly and questions have been raised with regard to the credibility of the functioning of the board as well the implementation of the said code.

There have been talks on whether the board would be able to maintain transparency and discretion when it comes to assessing a case and whether or not there would be a

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scope of some kind of misuse and manhandling of a case. One may wonder if the committee members would be unbiased and would function in a non partisan manner.

However it cannot be denied and it certainly is praise worthy that the code has raised immense hope of faster recovery, lesser defaults and a stronger lending and investment sector in India. Furthermore this code has also facilitated in a turnaround or turn over, operation of creditors (whether secure or unsecured).This act has limited the regulatory aspect, yet has broadened the scope of how insolvency and bankruptcy could be consolidated in one statute, providing immense relief to aggrieved parties like the bank sufferers and it has impacted the NPA sector tremendously where in the return of the money has taken place at a praiseworthy scale. This will most likely go down in history as Mr. Arun Jaitley's legacy.