

Critical Analysis of Insolvency and Bankruptcy Code Progression and Improvement in Light of Shifting Epochs

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“There will be interruptions, and I don’t know when they will occur, and I don’t how deep they will occur, I do know they will occur from time to time, and I also know that we’ll come out better on the other end”- Warren Buffet

Introduction

Insolvency and Bankruptcy Code (IBC) in a single legislation which brought a tremendous changes in the other legislation. Insolvency and bankruptcy was scattered in pieces under different legislation wherein it created a loopholes for the defaulter to take a shield and the creditors had to suffer. The Indian insolvency laws up until 2016 were considered very favourable to debtors, but in 2016, deviations were introduced which promoted a rescue culture more favourable to creditors. IBC brought a paradigm shift in the law in the entire insolvency process and bankruptcy system in place. IBC brought a paradigm shift from then existing ‘concept of debtor in possession’ to that of the ‘concept of creditor in control’ system. There were multiple overlapping laws from majorly Companies Act, Sick Industrial and Companies Act (SICA), Recovery of Debts due to Banks or Financial Institutions Act (RDBFI), Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), Partnership law, Individual persons doing business and projects regulatory bodies. This overlapping in the laws was benefitting corporate debtors for prolonging the matters for years together making the creditors helpless. Under each of the legislation there were different adjudicating authorities and forums dealing with financial failure and insolvency of companies and individuals in India creating complication for the creditors as the convenient form suitable to the debtors they used to select to avoid clutches of creditors.

The earlier legislative framework for insolvency and bankruptcy was inadequate, ineffective, and cumbersome for creditors which resulted in excessive delays in resolution of the parties. The legal system and recognized adjudicatory framework did not assisted lenders in effectively and timely manner recovery or restructuring of entire defaulted assets and monies wherein causing undue delay and stress to the credit market in India. Another major problem lied with the overlapping adjudicating authorities which faced jurisdiction concern which was adversely affecting the debt recovery process. The IBC not only consolidate the entire system of insolvency process and bankruptcy structure but also amend the laws relating

to reorganization and corporate insolvency resolution process of corporate persons, partnership firms and individuals in a time bound manner but laying down the systematic appeal procedure under its umbrella. IBC has under its chapters had laid down detailed step by step process in Corporate Insolvency Resolution Process, Corporate Liquidation Process, Fast Track Resolution in which the corporate debtor with assets and income below a level as specified, such class of creditors or such amount of debt and such other category of corporate persons by Central Government, who meet this compliance set by the government can go for fast track resolution process. Voluntary Liquidation process wherein corporate person who intends to liquidate himself voluntarily and importantly under this section that he/she has not committed any default only those persons can initiate voluntary liquidation proceedings. Adjudicating Authority (AA) under code for corporate entities is National Company Law Tribunal (NCLT) and in case of non-corporate entities its Debt Recovery Tribunal (DRT). NCLT and DRT which deals with the entire proceedings of insolvency and bankruptcy matters has to strictly follow the timelines given under IBC dealing with various process under chapters of the code. In the case of Invent Assets Securitisation and Reconstruction Pvt. Ltd¹, The AA, by an order, declined to admit an application on the ground that the financial debt was barred by limitation. The NCLAT reiterated that the period of limitation for filing of an application under sec. 7 would not be extended on the basis of pursuit of a remedy under the SARFAESI Act, 2002 or in a recovery proceeding before the DRT². For each of the process either CIRP, liquidation process or voluntary liquidation process and bankruptcy process or bankruptcy order under all this timelines are specified for each step by step process and the IP, liquidator and Bankruptcy trustees have to completed the process within time mentioned under code.

Development of Insolvency and Bankruptcy in Indian System with major amendments and adaptability for better legal framework to the Indian conditions.

The Government of India in the year 1999, appointed V B Eradi Committee especially to have a look into different aspects and perspective of corporate bankruptcy. The Committee in its report revealed astonishing fact that under the present legislation when a company goes for winding up it takes the matter was 11 years pan-India, and in Eastern Region at average

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¹ Invent Assets Securitisation and Reconstruction Pvt. Ltd. Vs. Xylon Electrotechnic Pvt. Ltd. [CA(AT)(Ins) No. 677/2020].

² <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

25 years to resolve a bankruptcy matters between the parties. The committee also recommended for the having a consolidated body to dealt with the matter and suggested for National Company Law Tribunal (NCLT). The committee's recommendation were taken into consideration and in 2002 the Companies Act, 1956 was amended Companies Act was amended in 2002 but we can see from the past reflection that it was not enforced for next 13 years in India, it got its shape in the year in 2015. In the year 2001, L. N. Mitra Committee (RBI) recommended for having the A comprehensive bankruptcy code but still we saw delay in having the legislations on it timely manner. In 2008, Raghuram Rajan Committee (Govt of India) also recommendations for improvements to credit infrastructure and the insolvency framework but again there was not outcome of this committee.

In 2014, Bankruptcy Law Reforms Committee (GOI) which gave a key recommendation relating to replacing existing laws with a single consolidated Insolvency and Bankruptcy Code, which was well noted and resulted into the present Insolvency and Bankruptcy Code, 2016 which is governing the insolvency process and bankruptcy matters with highest resolving cases since its enactment. One of the notable feature of IBC is that it has differentiates between financial creditors and operational creditors which was not there in earlier all legislations. Financial creditors (FC) well define under sec. 5 (7)³, are those whose relationship with the entity is a pure financial contract wherein they may have assisted by providing a loan or a debt security to the corporate debtor. Whereas operational creditors (OC) define under sec. 5 (20)⁴ are the one whose liability from the body comes from a transaction on operations in form of goods or services that he had provided in the course of business or for business purpose. IBC has also embarked the term financial debt under sec. 5 (8)⁵ and operational debt under sec. 5 (21)⁶ which brings the clarity identifying the concept of debt and how they are to be segregated and laying down the process how to claim as per the laid down provisions under the code.

³ Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

⁴ Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

⁵ Financial debt means a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes items referred to in sub-clauses (a) to (i).

⁶ Operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, State Government, or any local authority.

The Supreme Court in *Swiss Ribbons Ltd*⁷, observed that “A perusal of the definition of ‘*financial creditor*’ and ‘*financial debt*’ makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an ‘*operational debt*’ would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.” And, “financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money”. Herein it is noteworthy to determine under the code that financial debt or its operational debt depends on the “intention of the parties”. If the creditor claims ‘interest’ for any delay in any payment does not makes him for that debt as financial debt because in such situations how the transaction happened resulting to pay interest as result of ‘penalty’ but it’s not in form of returns which is essential aspect of financial debt. Also, lending for time value of money does not necessarily involve ‘interest’. In order to qualify to be a financial debt, what matters is that the amount was disbursed against time value of money, whether or not expressed in terms of ‘interest’⁸. Hon’ble NCLT deliberated on the term “operational debt” as contained in IBC, wherein it emphasized on ⁹section 5(21), “operational debt” means: firstly claim in respect of provision of goods or services, including employment; secondly debt in respect of payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government; or any local authority. In the case of *Park Energy Pvt. Ltd*¹⁰, “the NCLAT observed that mere fact of debt being due and payable is not enough to justify the initiation of CIRP at the instance of the FC unless it establishes default on the part of the Corporate Debtor (CD). The onus of proof of default lies on the FC and it must demonstrate that default has occurred on account of failure on the part of CD to discharge its liability¹¹.”

Post the enactment of IBC in 2016, Insolvency and Bankruptcy Board of India (IBBI) was incorporated to entirely dealing with Insolvency and Bankruptcy matters and the board

⁷ *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, (2019) 4 SCC 17.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Park Energy Pvt. Ltd. Vs. Syndicate Bank & Ors.* [CA(AT)(Ins) No. 270/2020].

¹¹ *Ibid.*

has a complete regulation over both the process. IBBI play a key important role governing the IBC code compliance and regulations are followed in the given manner is look after by the Board. IBBI is an independent body for the entire administration and governance of dealing with entire CIRP, Liquidation process and voluntary liquidation process. The IBBI take cares about the eligibility and qualification of Insolvency Professionals (IP), Liquidators and Bankruptcy Trustees. Information Utilities (IU) closely with the IBBI wherein IU works as a depository of financial information which is used by IP and liquidators during the insolvency process. In the same year in 2016, IBBI (Liquidation Process) Regulations was enacted by end of the year in December, 2016. IBBI under this regulation exercise various powers conferred under the IBC, 2016 dealing with sections like 5¹², 33¹³, 34¹⁴, 35¹⁵, 37¹⁶, 38¹⁷, 39¹⁸, 40¹⁹, 41²⁰, 43²¹, 45²², 49²³, 50²⁴, 51²⁵, 52²⁶, 54²⁷, 196²⁸ and 208²⁹ read with section 240³⁰. The regulation with the code had important key points dealing with transactions defrauding creditors by the corporate debtors wherein there were lots of corporate frauds rise in India one of which was by corporate debtors indulging into transactions with sole purpose of defrauding the creditors which is was not their prior in other legislations is dealt well under the code and regulation. Not only IBC had covered it but to prevent such frauds, tighter disclosure norms, personal liability of promoters and proper monitoring by the Reserve Bank of India and its reporting to the MCA and SFIO and investigations by the MCA, SFIO, EOW and Income tax authorities and Reserve Bank of India will deter such frauds³¹. The IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 enable a stakeholder to file a grievance or a complaint against a service provider. Beside this, grievance and complaints

¹² Sec. 5 Definition under IBC, 2016.

¹³ Sec. 33. Initiation of liquidation under IBC, 2016.

¹⁴ Sec. 34. Appointment of liquidator and fee to be paid under IBC, 2016.

¹⁵ Sec. 35. Powers and duties of liquidator under IBC, 2016.

¹⁶ Sec. 37. Powers of liquidator to access information under IBC, 2016.

¹⁷ Sec. 38. Consolidation of claims under IBC, 2016.

¹⁸ Sec. 39. Verification of claims under IBC, 2016.

¹⁹ Sec. 40. Admission or rejection of claims under IBC, 2016.

²⁰ Sec. 41. Determination of valuation of claims under IBC, 2016.

²¹ Sec. 43. Preferential transactions and relevant time under IBC, 2016.

²² Sec. 45. Avoidance of undervalued transactions under IBC, 2016.

²³ Sec. 49. Transactions defrauding creditors under IBC, 2016.

²⁴ Sec. 50. Extortionate credit transactions under IBC, 2016.

²⁵ Sec. 51. Orders of Adjudicating Authority in respect of extortionate credit transactions under IBC, 2016.

²⁶ Sec. 52. Secured creditor in liquidation proceedings under IBC, 2016.

²⁷ Sec. 54. Dissolution of corporate debtor under IBC, 2016.

²⁸ Sec. 196. Powers and functions of Board under IBC, 2016.

²⁹ 208. Functions and obligations of insolvency professionals under IBC, 2016.

³⁰ Sec. 240. Power to make regulations under IBC, 2016.

³¹ P. K. Gupta Sanjeev Gupta , (2015),"Corporate frauds in India – perceptions and emerging issues", Journal of Financial Crime, Vol. 22 Iss 1 pp. 79 – 103 also available at <http://dx.doi.org/10.1108/JFC-07-2013-0045>.

are received from the Centralised Public Grievance Redress and Monitoring System (CPGRAMS), Prime Minister's Office, MCA, and other authorities³². Section 69 provides for the punishment of an officer of the corporate debtor or the corporate debtor itself, for carrying transactions defrauding creditors. However, there are primarily three differences between these sections³³.

- a. An application under Section 66 can be made only during the corporate insolvency resolution process or liquidation process, by the resolution professional. However, the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 brought about a change in Section 69 which now allows an application to be filed at any time when such transactions occur.
- b. The consequence of acts committed under Section 66 is the contribution by the director or any person responsible, to the assets of the corporate debtor. There is no criminal liability imposed under this section. However, the consequence under Section 69 is both civil as well as criminal. The punishment under Section 69 shall be either imprisonment for a term which shall not be less than one year but which may extend to five years, or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or both.
- c. One of the defences provided under Section 69 is if the acts mentioned under this section were committed more than 5 years prior to the insolvency commencement date and if it is proved that such acts were committed with no intent to defraud the creditors of the corporate debtor. One of the defences for the transactions provided under Section 66 (1) is if there was no dishonest intention or if due diligence was exercised under Section 66 (2)³⁴.

The similarity between sec 49 and 66 is that both sec 49 and 66(1) include acts which are carried on with the intent to defraud creditors; wherein sec. 49 require the deliberate intention to defraud creditors by entering into such transactions, Sec 66 (2) also punishes negligent acts which affect the interests of the creditors as well and with regard to sec 49 also deals specifically with the corporate debtor itself entering into fraudulent transactions while sec 66 punishes any person responsible (sub-section 1) or director/partner (sub-section 2)

³² <https://www.ibbi.gov.in/resources/reports>.

³³ A NOTE ON FRAUDULENT TRADING AND WRONGFUL TRADING, Vinod Kothari available at <http://vinodkothari.com/wp-content/uploads/2019/06/A-note-of-Fraudulent-and-Unlawful-Trading.pdf>.

³⁴ Ibid.

specifically by imposing personal liability³⁵. All these provisions in dealing with the various transactions from defrauding creditors, undervalued transactions and extortionate credit transactions covered well under the code and regulated by the regulations under the supervision of IBBI which is noteworthy which was not dealt in other legislations.

Corporate Insolvency Resolution Process (CIRP) is precisely dealt under chapter II of the code wherein the provisions specify the persons who can initiate the proceedings and making is clear that under sec. 7 the financial creditor can go ahead with the proceeding, whereas under sec. 8 read with sec. 9 deals with the operational creditors for initiation of corporate insolvency process; and sec. 10 deals with the corporate insolvency resolution process by corporate applicant. The code under its chapter makes a clear indication who are the persons who are eligible to make the application fulfilling the conditions precedent under the code under sec. 11³⁶. The step by step process for the process of CIRP is laid down in the code. In the case of *Lalit Kumar Jain*³⁷ in this case the petitioner, a PG to a CD, challenged insolvency proceedings initiated against him. While staying the said proceeding, the HC of Delhi allowed the proceedings to continue in relation to the CD and the IRP to examine the liability of the petitioner. The notable feature of code as above mentioned is a shift from debtor to creditors, wherein under the code it provides of Committee of Creditors (CoC), which play important role during the entire CIRP from making resolution plan, approval to information memorandum approval. In the case of *M. P. Agarwal*³⁸, the Appellant contended that its settlement proposal of ₹ 650 crore far exceeded the liquidation value of the assets of the CD and hence there was no justification for the CoC to reject the same. The NCLAT observed that it is the settled law that the CoC enjoys primacy in the matter of approval or rejection of resolution plan/settlement proposal and the AA as well as the appellate tribunal would be exceeding its jurisdiction in questioning the commercial wisdom of the CoC. Corporate Insolvency Resolution Process (CIRPs) initiated in October-December 2019, 132 are under liquidation, and 14 have been already settled³⁹. The table below shows the status of cases⁴⁰-

Quarterly trends of cases	April-Jun 2019	July-Sep 2019	Oct-Dec 2019
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³⁵ Ibid.

³⁶ Sec. 11 Persons not entitled to make application under IBC, 2016.

³⁷ *Lalit Kumar Jain Vs. Union of India, Ministry of Law and Justice & Ors.* [W.P. (C) 4849/2020].

³⁸ *M. P. Agarwal Vs. Shri Lakshmi Cotsyn Ltd. & Anr.* [CA(AT)(Ins) No. 620/2020].

³⁹ <https://www.ibbi.gov.in/resources/reports> available at <https://www.ibbi.gov.in/uploads/resources/1abc8cd7653dbc0024ed9da385e8b710.pdf>.

⁴⁰ Ibid.

Total No. of CIRPs initiated/admitted during the quarter	300	565	562
Total No. of cases in which resolution plan has been approved during the quarter	27	32	30
Total No. of cases withdrawn during the quarter	24	18	5
Total No. of cases settled during the quarter	22	24	14
Total No. of cases under liquidation during the quarter	96	153	132
Category wise distribution (Financial creditor, Operational Creditor, Corporate Debtor) of all the admitted cases in which CIRP has been initiated.	Financial Creditor-129 Operational Creditor- 154 Corporate Debtor-17	Financial Creditor-265 Operational Creditor-291 Corporate Debtor-9	Financial Creditor-245 Operational Creditor-301 Corporate Debtor-16

Going through the reports and resources available on the IBBI we can observe that the cases which have been filed under different sectors ranging from 41.2 % of the cases admitted by NCLT for CIRP manufacturing sector followed by 19% in Real Estate, Renting and Business Activities sector⁴¹. The following table will show the Sector-wise breakup of the total cases admitted by NCLT for CIRP during the quarter⁴²-

Sector*	April-Jun	July-Sep	Oct-Dec
	2019	2019	2019
Extraterritorial organizations and bodies	1	4	3
Agriculture, Hunting and Forestry	9	18	15
Construction	28	64	65
Education	2	1	2
Electricity, Gas And Water Supply	7	23	22
Financial Intermediation	4	6	5
Health And Social Work	3	5	9
Hotels And Restaurants	8	12	12
Manufacturing	125	208	232
Mining and Quarrying	2	5	5
Other Community, Social And Personal Service Activities	4	5	7
Others	4	8	8

⁴¹ Ibid.

⁴² Ibid.

Real Estate, Renting And Business Activities	62	125	109
Transport, Storage And Communications	8	22	12
Wholesale And Retail Trade; Repair Of Motor Vehicles, Motorcycles And Personal And Household Goods	33	59	55
Fishing	0	0	1
Grand Total	300	565	562

Corporate Insolvency Resolution Process (CIRP) without exception, tries to instil discipline amongst the stakeholders to avoid inordinate delays in the insolvency resolution process⁴³. The CIR from the statistics available shows a very high rate of process in India dealing with corporate entities which files for insolvency under the code..

In 2017 there was again key recommendation dealing with voluntary liquidation to bring under IBC leading to the outcome of Insolvency and Bankruptcy Board of India (Voluntary Liquidation) Regulations, 2017. The IBBI Regulation of 2017 gave power to exercise of the powers conferred by secs. 59⁴⁴, 196⁴⁵ and 208⁴⁶ read with section 240⁴⁷ of the IBC, the IBBI was given power to regulate the voluntary liquidation process covered under referred sections. Voluntary liquidation is now majorly dealt under IBC and IBC has a preference in conflict of law between Companies Act, 2013 and IBC, 2016. Due to the regulations major amendment were brought under companies act dealing with provisions of Voluntary liquidations. The process of voluntary liquidation is made clear under the code wherein is says that a corporate person can initiate the process who has not committed any default and the person needs to meet all the requisite requirements laid down by the IBBI following all procedure. Upto September 2019, about 743 of them have completed the process yielding either resolution or liquidation and 498 corporates have commenced voluntary liquidation process⁴⁸. At the end of September 30, 2020, 747 corporate persons initiated voluntary liquidation and the Final reports in respect of 295 voluntary liquidations have been submitted⁴⁹. The below table will show the Commencement of Voluntary Liquidations till September 30, 2020⁵⁰-

⁴³ Ibid.

⁴⁴ Sec. 59. Voluntary liquidation of corporate persons under IBC, 2016.

⁴⁵ Supra footnote 29.

⁴⁶ Supra footnote 30.

⁴⁷ Supra footnote 31.

⁴⁸ Data as on September 30, 2019, published in IBBI Quarterly Newsletter for the quarter July-September, 2019.

⁴⁹ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

⁵⁰ Ibid.

Period	Liquidations at the beginning	Liquidations Commenced	Liquidation closed by		Liquidations at the end of period
			Withdrawal	Final Reports Submitted	
2017 – 18	0	184	0	11	173
2018 – 19	173	229	7	98	297
Apr – Jun, 2019	297	53	0	24	326
Jul – Sep, 2019	326	61	0	37	350
Oct – Dec, 2019	350	66	0	23	393
Jan – Mar, 2020	393	89	1	36	445
Apr – Jun, 2020	445	10	0	24	431
Jul – Sep, 2020	431	55	0	42	444
Total	NA	747	8	295	444

In January 2020, IBBI (Liquidation Process) Regulation, 2016 was amended for smooth liquidation process without conflicts and complications according to the new changes in insolvency matter. In the case of *Invest Asset Securitisations & Reconstruction Pvt. Ltd.*⁵¹, “The liquidator filed an application seeking closure of liquidation process in accordance with regulation 45(3)(a) of the Liquidation Regulations on the premise that the CD was sold as a going concern. The AA, while dismissing the application as misconceived, inter alia, observed: (a) A company being, a juridical person with perpetual succession, cannot be sold. It can only be dissolved; (b) Selling of company in liquidation is unknown to law and beyond the discretion given to IBBI under section 240 (2) (y) of the Code; (c) Regulation 45(3) is repugnant to the mandate under section 54; and (d) Tribunals cannot test the vires of the parent legislation, as it is the creature of the said statute, but they are competent to test the vires of subordinate / delegated legislation”⁵². The status of liquidation process as on September 30, 2020 is presented in Table below⁵³-

⁵¹ *Invest Asset Securitisations & Reconstruction Pvt. Ltd. Vs. M/s. Mohan Gems & Jewels Pvt. Ltd.* [I.A. 1490/2020 in CP(IB) No. 590(PB)/2018].

⁵² <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

⁵³ <https://www.ibbi.gov.in/resources/reports>.

Status of Liquidation	Number
Initiated	1025*
Final Report submitted#	132
Closed by Dissolution	77
Closed by Going Concern Sale	4
Compromise / Arrangement	1
Ongoing	893
>Two years	160
> One year ≤ Two years	370
> 270 days ≤ One year	149
> 180 days ≤ 270 days	122
> 90 days ≤ 180 days	28
≤ 90 days	64

As per the reports on the IBBI news reports till June 2020, 69 liquidation processes were closed by dissolution / going concern sale; 6 Corporate debtors were gone for dissolution and during the period of July to September, 2020, 7 more liquidation processes were closed reaching the total number of dissolutions / sold as going concern to 82⁵⁴ liquidation process under the code.

In February 2020, on the Report of the Insolvency Law Committee (GOI), provided recommendations in respect of Corporate Insolvency Resolution Process and Liquidation based on experience gained from implementation of Code since the 2016 resulting into Corporate Insolvency Resolution Process. In March 2020, Amendment to Sec, 5⁵⁵, 7⁵⁶, 11⁵⁷, 14⁵⁸, 16⁵⁹, 21⁶⁰, 23⁶¹, 29A⁶², 227⁶³, 239⁶⁴ & 240⁶⁵. Inserted sec. 32 A⁶⁶. Repealed order 16

⁵⁴ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

⁵⁵ Sec 5 (12) part was Omitted by Act No. 1 of 2020, sec.2 (w.e.f. 28-12-2019). Before omission it stood as “Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority”; which was Ins. by Act No. 26 of 2018, sec. 3 (w.e.f. 6-6-2018).

⁵⁶ Sec. 7 provision were inserted to for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less.

⁵⁷ Sec. 11 were added with 2 explanations. Dealing with a corporate debtor includes a corporate applicant in respect of such corporate debtor and shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

⁵⁸ Sec. 11 was inserted with explanation dealing with For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period; and inserted new sub-sec. 2A Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a

going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. Sub-sec 3 clause (a) was substituted with such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

⁵⁹ Sec. 16(1) was substituted dealing with appointment and tenure of Interim Resolution Professional, the Adjudicating Authority shall appoint an interim resolution professional [on the insolvency commencement date.

⁶⁰ Sec. 21 provision in part was inserted [or completion of such transactions as may be prescribed], prior to the insolvency commencement date.]

⁶¹ Sec. 23 provision was substituted with Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.]

⁶² Sec. 29 A was inserted with 'related party' in the explanation.

⁶³ Sec. 227 had substitution of words in section and insertion of explanation clause in the sec. For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed

⁶⁴ Sec. 239 insertion of sub-sec (2) clause (fa) the transactions under the second proviso to sub-sec (2) of sec 21;

⁶⁵ supra

⁶⁶ 32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation. - For the purposes of this sub-section, it is hereby clarified that, -

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as

of 2019. In light of the pandemic of Covid -19 which impacted entire world and it also affected the economic conditions across the globe. As the conditions impacted the entire corporate sectors wherein there were scope for increasing rate of cases which would have affected corporate debtors where financial as well as operational creditors would have rushed for the default resulting in insolvency process and bankruptcy suits with the NCLT. In June, 2020, promulgated by the President taking into consideration the Covid -19 pandemic which affected business, financial market and economy drastically which happen on the basis of contingency and identifying the reason beyond anyone control. This ordinance specified the date to bring certainty about the entire insolvency and bankruptcy process. From 25th March, 2020 entire nation was lockdown so that covid -19 could be combated bring the halt for the process under IBC. This ordinance inserted sec. 10 A⁶⁷ which provided relief to corporate debtors as it provided for suspension of CIRP during this pandemic. Covid – 19 was unforeseeable and during this crises government also issued Moratorium to the debtors covered under sec. 14 for CIRP and sec. 101 to initiate insolvency resolution process. Under the code Moratorium period of 180 days which is further extendable up to 270 days. In the case of *Phoenix ARC Private Limited Trustee of Phoenix Trust FY 16-18*⁶⁸, “the AA directed the RP to adjust the payment of EMIs during the moratorium against the claim and admit the remaining amount. The NCLAT, by majority, dismissed the appeal with an observation that it was premature. One Technical Member, however, took a view that during the currency of moratorium, the sanctity of maintaining the integrity of the assets of the CD is a sine qua non for the CIRP. He observed: “In view of the blanket prohibition mandated by Section 14 after the initiation of CIRP it stands to reason that any change in the conditions of assets from what existed on the date of initiation of CIRP is not permitted in the normal course. The section 14 also does not give any authority to the RP or AA to accord any preferential treatment to any

may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.]

⁶⁷ Sec. 10A. Suspension of Initiation of corporate insolvency resolution process.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

⁶⁸ *Phoenix ARC Private Limited Trustee of Phoenix Trust FY 16-18 Vs. Kotak Mahindra Prime Limited & Anr.* [CA(AT)(Ins) No. 749/2019].

creditor.” If one creditor is given preferential treatment, it would lead to the collapse of the waterfall mechanism under the Code⁶⁹.

In *Canara Bank*⁷⁰ decision given by NCLAT wherein application was filed by Canara Bank u/Sec. 7 of the Code against Deccan Chronicle Holdings Limited who was “the Corporate Debtor”, admitted by the Hon’ble Hyderabad bench of NCLT, declaring Moratorium under Section 14 of the Code. However, the Appellant was not content with the order of moratorium pronounced as it specifically excluded proceeding before HC and SC from the purview of Moratorium. Appellant submitted that the Adjudicating Authority cannot exclude any court from the purview of Moratorium for the purpose of recovery of amount or execution of any judgement or decree, including the proceeding, if any, pending before the Hon’ble High Courts and Hon’ble Supreme Court of India against a ‘corporate debtor’. Section 14(1) (a) does not exclude any Court, including the Hon’ble HC or Hon’ble SC of India⁷¹. In this case when the question arise relating to moratorium which is completely dealt under IBC but here we can see wherever the right of a person is infringed he can go to the Hon’ble SC that has power under Article 32 and Hon’ble HC under Article 226 of Constitution of India which cannot be curtailed by any provision of an Act or a Court was made clear by the court⁷². NCLT being a quasi-judicial body specifically dealing with insolvency and bankruptcy matters formed under an Act of Parliament, cannot override the constitutional powers resting with the Apex judiciary of the country.

In the case of *Atin Arora*⁷³, the NCLT, “Kolkata Bench admitted a section 7 application for initiation of CIRP against a CD. The petitioner, who is a director of the CD, filed an application for recall of the order inter alia on the ground that the said Bench did not have jurisdiction to entertain the application and the Bench at Cuttack has jurisdiction as the CD is located in Odisha. The NCLT, Kolkata Bench declined to recall the order, by the impugned order, stating that it had jurisdiction when section 7 application was filed. The petitioner challenged the impugned order. The respondent challenged the jurisdiction of the HC in deciding the matter when an appellate authority already exists under the Code. The HC of Calcutta observed: *“There are no limits, fetters or restrictions placed on this power of superintendence and for all purposes, the HC as the custodian of justice within the territorial*

⁶⁹ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

⁷⁰ *Canara Bank vs. Deccan Chronicle Holdings Limited*. 2017.

⁷¹ *Ibid.*

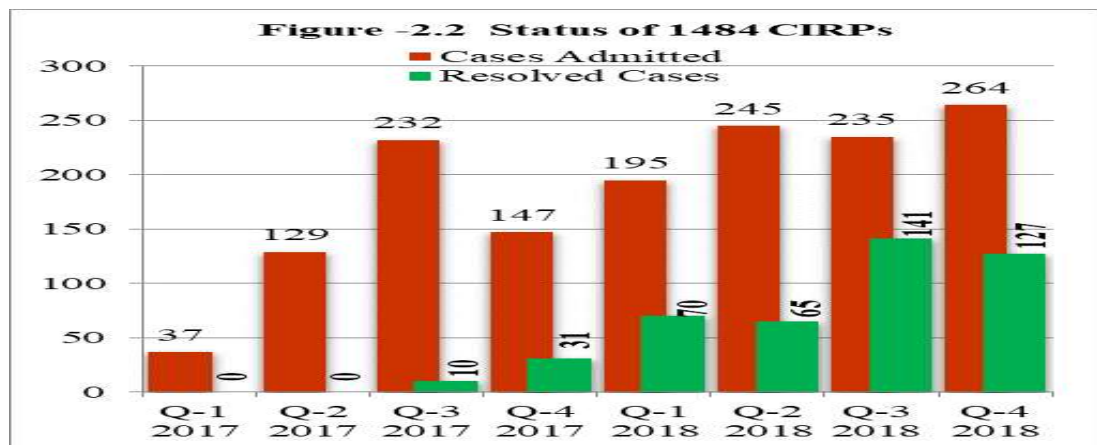
⁷² *Ibid.*

⁷³ *Atin Arora Vs. Oriental Bank of Commerce* [C.O. No. 3894/2019 with CAN 12340/2019].

limits of its jurisdiction was armed with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the subordinate Courts or Tribunals.”

It held that there is no bar on the HC to entertain an application under Article 227 of the Constitution of India, when a challenge is made to an order, which is otherwise amenable to be challenged by way of an appeal before the appellate forum if there is a patent error or miscarriage of justice apparent from the record. While noting that the Cuttack Bench of NCLT has exclusive jurisdiction to decide the matter, the HC set aside the orders of the NCLT, Kolkata Bench and directed it to transfer the proceedings to the NCLT, Cuttack Bench”⁷⁴.

NCLT had done a commendable progress in resolving the disputes between parties from the very inception of the code. Three years into operation, the regime under the Insolvency and Bankruptcy Code (IBC) boasts of a strong ecosystem, comprising the Adjudicating Authority, the IBBI, three insolvency professional agencies, 11 registered valuer organisations and 2,374 registered valuers⁷ and 2,911 insolvency professionals (as on December 31, 2019)⁷⁵. The following figure will show the noteworthy work of the code with the cases dealt by NCLT- Sector-wise distribution of cases admitted⁷⁶-



The above figure shows that the IBC was able to resolve the cases in timely and efficiently as for the purpose it was enacted. The code efficiently dealt with all matter under its purview. During the covid -19 pandemic situation also the working was suggested to be online

⁷⁴ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf> accessed in February, 2021.

⁷⁵ <https://www.ibbi.gov.in/resources/reports> details available at <https://www.ibbi.gov.in/uploads/resources/1abc8cd7653dbc0024ed9da385e8b710.pdf>.

⁷⁶ www.ibbi.gov.in

adapting the new normal of life which was laid down in case of *M/s Marathe Hospitality*⁷⁷. The petitioner led an appeal before the NCLAT. However, the NCLAT closed its functioning as one of its employees was suffering from COVID19. The Supreme Court observed that the doors of justice cannot be closed and that NCLAT should and out a way for online hearing in such a situation, it requested the NCLAT to start hearing the matter on interim stay, immediately on reopening⁷⁸. Prior to implementation of measures to tackle the Covid-19 impact, resolution of stressed assets under the IBC had registered commendable performance; since inception, till March 2020, 221 CIRPs had yielded resolution, with financial creditors realizing `1.77 lakh crore, 45.96% of their admitted claims and likewise, 1,025 CIRPs resulted in liquidations, releasing precious locked resources that could be channelized for improving economic growth⁷⁹. The rise in corporate insolvencies in the wake of the Covid-19 crisis in India is presently not visible due to immediate preventive action taken by the government, but there is a need to be prepared to tackle a possible rise in insolvencies once this hibernation is over in India: it has limited options for out-of-court insolvency resolution in the form of the RBI's prudential framework for resolution of stressed assets and informal understanding between a debtor and creditor⁸⁰. The G30, an independent global body of economic and financial leaders drawn from various spheres, provides a blueprint for the "why, when, and how" of the interventions that policy-makers can make for "reviving and restructuring the corporate sector post-Covid"⁸¹. The report recommends four types of interventions suitable to these firm categories: (a) better target credit to support firms which need it the most, (b) encourage equity or equity-like investments in viable firms, (c) put in place restructuring and bankruptcy procedures which ensure speedy exchange of debt for equity, restructuring of loan terms etc., and (d) over the long term, prepare for future pandemic business interruptions through government backed insurance⁸². The government needs to take the initiative to save the economic and businesses from recovering from the unforeseen and uncertain pandemic consequences which affected the country.

⁷⁷ *M/s Marathe Hospitality Vs. Mahesh Surekha & Ors.* [SLP (C) No. 8139/2020].

⁷⁸ <https://www.ibbi.gov.in/publication> further available at <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf> accessed in February, 2021.

⁷⁹ <https://www.newindianexpress.com/opinions/2021/jan/15/revoked-ibcsuspension-to-resolve-stressed-assets-2250366.html>.

⁸⁰ <https://theguardian.com/reviewing-insolvency-law-in-the-wake-of-covid-19/>.

⁸¹ <https://www.thehindubusinessline.com/opinion/rescuing-businesses-to-save-livelihoods/article33570053.ece>.

⁸² Ibid.

In *Saurabh Jain & Anr*⁸³, the petitioners, in pursuance of the order in WP(s) (Civil) No(s). 679/2020, submitted a representation to MoF, which responded that it has issued an advisory on August 26, 2020 to public sector banks for formalizing policy and SOP regarding initiation of insolvency resolution process against PGs so that filing of insolvency applications in appropriate cases is made fully operationalized. On being satisfied of the response to the representation⁸⁴. Vijay Kumar⁸⁵ in this case, The AA, by an order, permitted to set off certain amount to be paid by the Aircel Companies to the Airtel Companies. The RP challenged the said order. Two respondents submitted that the right of a party to apply set off is a well-known concept in accounting and that such right has been recognized for more than a century in the context of Insolvency /liquidation under Companies Act, Presidency Insolvency Act, and Provincial Insolvency Act. Another respondent opposed it being in violation of moratorium imposed under the Code and prejudicial to the interest of secured creditors. The NCLAT observed that the accounting conventions cannot supersede any express provisions in the specific law on the subject. Accordingly, it set aside the impugned order and directed the respondents to pay the amount whatever has been set off by them to the Aircel Entities⁸⁶. In the case of *Sandip Kumar Bajaj & Anr*⁸⁷, “the petitioners challenged the show cause notice issued by State Bank of India calling upon the petitioners to show cause as to why their names should not be included in the list of willful defaulters as per RBI Guidelines. They are the erstwhile promoters/directors/ guarantors of a CD, which is undergoing CIRP since March 17, 2020. They contended that by reason of moratorium in respect of the CD, the proceedings under the RBI Guidelines should be stayed. The HC of Calcutta held that section 14(3) (b), that the prohibits institution or continuation of suits and other proceedings against the CD, does not extend to a surety⁸⁸. IBC has streamline the insolvency and bankruptcy process under its umbrella by having Adjudicatory Authority which is NCLT, NCLAT and but also the High Courts and finally the Apex Court i.e. Supreme Court who numerous landmark judgment on various provisions and aspects of IBC settling the norms for the process and also clarified the role of government and their Agencies which are going through Corporate insolvency proceedings under the code. IBBI has played a

⁸³ Saurabh Jain & Anr. Vs. Union of India & Ors. [WP (Civil) No. 976/2020].

⁸⁴ <https://www.ibbi.gov.in/publication>.

⁸⁵ Vijay Kumar V. Iyer Vs. Bharti Airtel and Ors. [CA(AT)(Ins) No. 530 & 700/2019].

⁸⁶ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

⁸⁷ Sandip Kumar Bajaj & Anr. Vs. State Bank of India & Anr. [I.A. No. G.A. 1/2020 in W.P.O. 236/2020].

⁸⁸ <https://www.ibbi.gov.in/uploads/publication/411436dab58c1265aacb015b6b43a215.pdf>.

crucial role in the governance of the insolvency and bankruptcy process keeping a tab on the functioning as per the code and regulations from time to time from its inception.

Conclusion

Insolvency and bankruptcy code with the IBBI regulations has placed a system on insolvency process and bankruptcy matter in one consolidated form under one legislation and has served the purpose for which it was enacted. The Adjudication authorities has played a commendable progress in resolving the disputes with the time frame set under the code. As above discussed with the tables the percentage of settling the process under each process has gave the relief to the parties in the timely manner laid down under the code. Covid -19 has gave the relief for the parties in the pandemic due to the ordinance passed by the government but this need to further need to provide some remedies to the business which will be dragged to the courts once the period of ordinance lapsed polling of cases with the adjudicating authorities. IBC has adapted the changes had was amended several times as per the requirement of the times keeping pace with the global scenario into consideration. IBC has able to serve the object for which it was brought dealing matter under single legislation all matter of insolvency and bankruptcy in India.