INSOLVENCY AND BANKRUPTCY CODE, 2016: EMERGING JURISPRUDENCE, AMBIGUITIES AND PREDICAMENTS

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ABSTRACT

With India's bad loan amount culminating to USD 154 billion and, the moratorium period of 12 major defaulting firms facing resolution proceedings coming to an end, the year 2018 is proving to be a testing one for effectiveness of the Insolvency and Bankruptcy Code, 2016 (Code). The Code was introduced to reorganize and restructure the corporate insolvency process in a time bound manner in India. The fundamental aim of the Code is to revive financial institutions, restructure their debts, and ensure maximisation of the value of their assets. With interpretation of several provisions in question and new amendments introduced, it will be interesting to note how the Adjudicating Authorities have dealt with them. In the past year, various benches of National Company Law Tribunal (NCLT) in the country gave contradicting judgements, and the National Company Law Appellate Tribunal (NCLAT) faced several challenges. This paper, apart from looking into the evolving jurisprudence under the Code, also throws light upon the amendments, highlights the loopholes of the Code, and suggests changes.

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1. EMERGING JURISPRUDENCE UNDER THE CODE

1.1. OVERRIDING EFFECT OF THE CODE

The Code was introduced as an umbrella legislation with the primary motive of restructuring and reorganizing the framework of insolvency resolution laws in the country. It repealed the Sick Industrial Companies Act, 1985 (SICA)[1] and had, as per Section 238 of the Code, immediate overriding effect over any other enactments dealing with insolvency in India. The issue, whether a corporate debtor who is enjoying the benefits of a state enactment,[2] can be subjected to the provisions of the Code, came before the Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank.*[3] Apart from applying the doctrine of repugnancy in the present matter, the apex court highlighted the fact that contours of Section 238 of the Code which is the non-obstante clause are broader than the objective of state legislation.

The NCLAT in the case of *Canara Bank v. Deccan Chronicle Holdings Ltd.,*[4] delved into the issue of whether the moratorium declared under Section 14 of the Code extends to suits and proceedings pending before various High Courts and Supreme Court. The NCLAT set down two broad propositions in answer to this situation. First, the powers of the Supreme Court under Articles 32 and 136 of the Constitution and of High

1 Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016.
2 Maharashtra Relief Undertaking (Special Provisions) Act, 1958, Bombay Act XCVI of 1958.
3 Innoventive Indus. v. ICICI Bank, Company Appeal (AT) No. 156 of 2017.
4 Canara Bank v. Deccan Chronicle Holdings Ltd., Company Appeal (AT) No. 147 of 2017.

Courts under Article 226 cannot be curtailed by any provision of the Code.[5] Second, any suit or proceedings in relation to recovery of assets under the original jurisdiction of Supreme Court and High Courts should be stayed once the moratorium under the Code initiates. Creating hindrances to the reviving processes of corporate defaulters will end up tarnishing the essence of the code if such suits are allowed.

Recently the Bombay High Court pronounced a landmark judgement in the case of *Jotun India Private Ltd. v. Psl Ltd.*,[6] on the jurisdiction to stay proceedings filed by a corporate debtor. It was held that provisions of the Code have an overriding effect over the Companies Act, 2013 (hereafter, referred to as "Companies Act") and the argument that winding-up petitions were already filed before the High Court does not bar the remedy to file fresh proceedings under the Code. The Court referred to the judgement in *Madura Coats*,[7] which had held SICA's primacy over the Companies Act. Now as the Code has replaced SICA, it will enjoy the same relationship with the Companies Act.

1.2. NOTICE TO THE CORPORATE DEBTOR BEFORE ADMITTING APPLICATION BY CREDITORS

A legislation, which is in its nascent stage, has to inevitably sustain the challenges and develop accordingly. The Adjudicating Authority (*i.e.*

5 Aayush Mitraka, *NCLAT Excludes Proceedings under the Constitution from Moratorium*, INDIACORPLAW (Jan. 25, 2018), https://indiacorplaw.in/2017/09/nclat-excludes-proceedings-constitution-moratorium.html.

6 Jotun India Pvt. Ltd. v. Psl Ltd., Company Appeal (AT) No. 572 of 2017 in Company Petition No. 434 of 2015.

7 Modi Rubber Ltd. v. Madura Coats Ltd., C.A. No. 1475 of 2006.

NCLT), while admitting any application under the Code, has to determine whether principles of natural justice are being followed. In the case of *Innoventive Industries Ltd. v. ICICI Bank*,[8] an important issue before the NCLAT was whether a notice is required to be given to the debtor for initiation of insolvency resolution process under the Code and if so, at what stage and for what purpose.

As of yet, there is no specific provision under the Code to provide hearing to the corporate debtor in petition filed by a financial creditor or by operational creditors under Section 7 or Section 9 of the Code respectively. The Adjudicating Authority, which is NCLT, was constituted under Section 408 of the Companies Act, 2013 and Section 420(1) of it mandates NCLT to provide the parties before it, a reasonable opportunity of being heard before passing orders as it thinks fit. By extending this analogy, we may carve out a requirement for providing a hearing to the corporate debtor at the stage of filing of the petition, but this reasoning needed the approval of the judiciary.

Thus, it was held that, it is mandatory for the Adjudicating Authority to follow the principles of natural justice while passing an order under the Code. The NCLAT also cited the judgement of the Calcutta High Court in the matter of *Sri Metaliks Ltd. v. Union of India*,[9] which dealt with same issue. NCLAT expressed the position of law in the following words:

> *Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of natural justice while adjudicating the matter. It also allows the NCLT and NCLAT the power to regulate their*

8 Innoventive Indus. v. ICICI Bank, Company Appeal (AT) No. 156 of 2017.
9 Sri Metaliks Ltd. v. Union of India, W.P. 7144 (W) of 2017.

> *own procedure. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. When the NCLT receives an application under Section 7 of the Code of 2016, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application.*[10]

The NCLAT, hence, held that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case of initiating resolution process.

1.3. TIME LIMITS PRESCRIBED UNDER THE CODE

As per Sections 7 and 8 of the Code, whenever a financial creditor or an operational creditor files an application to initiate a corporate insolvency resolution process the Adjudicating Authority is required to admit or reject the application within a period of 14 days from the receipt of such application. Within this period, the Adjudicating Authority is required to decide upon the evidence furnished by the creditors whether such application is worthy of being admitted or not. The authority while deciding has to take a plethora of evidences and information utilities into account (and not only those furnished by the creditors) to satisfy itself and thus the prescribed time limit does not seem to be enough, rather it seems draconian.

10 *Id.*

In the case of *J.K. Jute Mills Company Limited v. Surendra Trading Company,*[11] the issue was whether the time limit prescribed in the Code for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory. The NCLAT held that the time limits prescribed under Sections 7(5), 9(5), and 10(4) are to prevent delay in hearing and disposal of cases. NCLAT said that the Adjudicating Authority cannot ignore these provisions. But in appropriate cases, for the reasons recorded in writing, it can admit or reject the petition after the period prescribed. It opined that these time limits are directory in nature and not mandatory. It held that "time is essence of the Code and there should be no extension granted by the authority except in cases of exceptional circumstances like in the instant case."

The NCLAT also dealt with other time limits present in the Code:

(i) The provision in Section 7(5) and Section 9(5) provides a period of 7 days to the financial and operational creditor respectively to rectify their application according to the relevant provisions is mandatory, on failure of which the application will be rejected. This period of 7 days is not inclusive of the 14 days prescribed to admit or reject the application.[12]

(ii) The time period (moratorium period) specified under Section 12 of 180 days which can be extended by 90 days is also mandatory in nature. After the expiry of this period the resolution plan has to be approved or the company will be liquidated in manner under Section 33.

11 J.K. Jute Mills v. Surendra Trading Co., Company Appeal (AT) No. 9 of 2017.
12 Bank of India v. Tirupati Infraprojects, C.P No. (IB)-104(PB)/2017.

(iii) Section 64 states that if any application is not disposed by the authority in the prescribed time period the reasons for the same should be recorded and in any case an extension of more than 10 days should not be granted. This extension period was also held to be mandatory.

Further in the case of *Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd*.[13] the question whether Limitation Act, 1963 is applicable to the provisions of the Code was taken into purview.

The following was held by the NCLAT:

> *[t]he Limitation Act, 1963 is not applicable for initiation of Corporate Insolvency Resolution Process but the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay. The Adjudicating Authority may give opportunity to the Applicant to explain the delay.*[14]

1.4. 'DISPUTE' UNDER THE CODE

Under Section 8 of the Code an operational creditor can, on an occurrence of default, deliver a demand notice to the corporate debtor for the payment of the debt. The corporate debtor under sub-section 2 is required to, within a period of 10 days, either repay the debt or bring to the notice of the creditor about an existence of a 'dispute'. The term 'dispute' has been defined under Section 5(6) of the Code as including a suit or arbitration proceedings relating to: (a) the existence of the amount of debt;

13 Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd., Company Appeal (AT) No. 47 of 2017.
14 *Id.*

(b) the quality of goods or service; or (c) the breach of a representation or warranty.

The debtor can resist the initiation of a corporate resolution process to start against itself by proving the existence of a dispute. Various benches of NCLT gave diverse opinions on what is a dispute and what all it should entail.

Finally, NCLAT in the case of *Kirusa Software Private Ltd. v. Mobilox Innovations Private Ltd,*[15] deliberated upon the definition of the term dispute. NCLAT held that "the definition of dispute is inclusive and not exhaustive. It was also held that it is necessary for the court to observe the circumstances of such a dispute. A genuine notice of dispute sent, in reply of the demand notice, to the creditor would suffice the successful demonstration of a dispute on the part of the debtor." The judgement also gives instances of what all can constitute a dispute.

A 'dispute' under Sections 8 and 9 of the Code would include any proceeding initiated or pending before a labour court, consumer courts, tribunal, mediation, or conciliation *etc.* This would also include an action taken by the corporate debtor replying to a notice of demand under the CPC, Sales of Goods Act or an action regarding the quality of goods by the creditor. The dispute must be free from any *mala fides* on part of the

15 Kirusa Software Pvt. Ltd. v. Mobilox Innovations, Company Appeal (AT) No. 06 of 2017.

debtor. Also, the necessity of the existence of dispute being prior suit or an arbitration proceeding was done away with.[16]

In a recent judgement of *Ksheeraabd Constructions Pvt. Ltd. v. Vijay Nirman Company Pvt. Ltd.*,[17] the NCLAT held that pending arbitration proceedings under Section 34, Arbitration and Conciliation Act, 1996 do not constitute a dispute under the Code.

It is necessary that the Adjudicating Authority demarcate strict parameters to decide whether a dispute has to be considered for obtaining benefits under the Code as there still remain enough ambiguities and grey areas.

The job to decide subjectively in each case, the bona fides of a dispute, would in the long run may be burdensome and detrimental to the speedy process that the Code promises to deliver. Also, such a stand would result in repercussions such as financial institutions raising formal notices for every possible dispute just to ensure that they do not suffer, if a creditor with *mala fide* intention seeks to initiate a process against them under the Code. The judgement rendered by NCLAT in *Kirusa* case[18] was appealed in the SC which held that the requirement of a dispute to be bona fide for the purposes of the Code does not hold ground. Further the SC

16 *See* VDS Plastic Pvt. Ltd. v. Pal Mohan Elec., C.P.(IB) No.37(ND)/2017.
17 Ksheeraabd Constructions v. Vijay Nirman Co., Company Appeal (AT) No.167 of 2017.
18 Mobilox Innovations v. Kirusa Software Pvt. Ltd., 2017 S.C.C. OnLine S.C. 1154.

also held that the terms "existence of a dispute" and "pendency of a suit or arbitration proceeding" under Section 8(2) are to be read disjunctively.[19]

1.5. STATUS OF PURCHASERS OF RESIDENTIAL PROPERTY

Another crucial issue was the status of residential property buyers under the code. The position of homebuyers under the provisions of the code has now been finally crystallised. It was absolutely necessary that the legislature come up with an amendment or an ordinance determining the same. The resolved situation can be analysed through case laws. In *Pawan Dubey v. J.B.K. Developers Pvt. Ltd.*,[20] the NCLAT held that homebuyers did not fall into the category of financial and operational creditors and therefore, they do not possess the right to initiate corporate insolvency process against the defaulting contract builders. The same was also held by the NCLT Bench in New Delhi in the case of *Mukesh Kumar v. AMR Infrastructure*,[21] when they denied *locus standi* to the Homebuyers' group.

The same view was also upheld by the SC in an order dated 15th September, 2017.[22] However this stance was criticised as there was no reasonable classification in excluding homebuyers from the category of operational creditors. The NCLAT had held this on the basis of the distinction between immovable property and 'goods' and 'services'

19 R. Jawahar Lal at al., *SC Decodes "Dispute" under the Insolvency and Bankruptcy Code*, INDIACORPLAW, https://indiacorplaw.in/2017/09/supreme-court-deCodes-dispute-insolvency-bankruptcy-Code.html. (last visited Jan. 17, 2018).
20 Pawan Dubey v. J.B.K. Developers, Company Appeal (AT) No.40 of 2017.
21 Mukesh Kumar v. AMR Infra., Company Appeal (AT) No. 50 of 2017.
22 Pawan Dubey v. J.B.K. Developers, Civil Appeal no. 11197 of 2017.

recognized under the Code. In the case of *Nikhil Mehta & Sons v. AMR Infrastructure,*[23] the NCLAT had held that homebuyers with assured returns were financial creditors for filing benefits under the Code but no recognition was given to more common category of homebuyers *i.e.*, those without any agreement of assured returns.

Also, when an insolvency process is initiated against the defaulting builders, the homebuyers will be barred to claim their dues in any other forum as the moratorium period would start. Thus, the homebuyers would be left with no remediless.

All these controversies surfaced again when insolvency proceedings were initiated against the Jaypee Infratech Ltd. where the homebuyers moved the SC for its intervention to stop the proceedings.[24] The SC, in an order dated 10th January 2017, observed that,"they wanted to protect the rights of the homebuyers and they cannot be made to run from forum to forum." Thus, a case law defining the rights of homebuyers is a necessity. A big question, hence, lingered before the legislators about the rights of a third class of creditors under the Code. Earlier, on 16th august the IBBI had introduced the Form F through amendments[25] to the Code for creditors other than financial and operational creditors to file for their claims with the Insolvency Resolution Professionals. The situation was finally resolved with the coming of the Insolvency and Bankruptcy Code

23 Nikhil Mehta & Sons v. AMR Infra., Company Appeal (AT) No. 07 of 2017.
24 Chitra Sharma v. Union of India, Writ Petition (Civil) No.744/2017.
25 Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Insolvency & Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

(Second Amendment) Act, 2018,[26] which placed homebuyers on a similar footing as financial creditors for the purposes of the code.

1.6. SIMULTANEOUS PROCEEDINGS AGAINST GUARANTORS AND PRINCIPAL DEBTORS

One of the most contentious issues eclipsing the Code is the status of guarantors and principal debtors. In an interesting judgement passed by the Hon'ble Bombay High Court in *Lacchman Joharimal v. Bapu Khandu and Tukaram Khandoji*,[27] the Court had held that "the very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case, the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."[28]

It is a well-established principle that liabilities of the principal debtor and the guarantor are co-extensive in nature[29] and not alternative,[30] unless contracted to the contrary. However, there is a lack of clarity in provisions of the Code regarding this which gave rise to conflicting judgments. In *Sanjeev Shriya v. State Bank of India*,[31] the Allahabad High

26 Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018.
27 Lacchman Joharimal v. Bapu Khandu, (1869) 6 Bom. H.C.R. 241.
28 Rishi Thakur, *Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code and The Dilemma Surrounding Guarantee*, LIVELAW, http://www.livelaw.in/corporate-insolvency-resolution-process-insolvency-bankruptcy-Code-dilemma-surrounding-guarantee/ (last visited Feb. 7, 2018).
29 Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, § 128.
30 Indus. Inv. Bank v. Bishwanath Jhunjhunwala, (2009) 9 SCC 478.
31 Sanjeev Shriya v. State Bank of India, Company Appeal (AT) No.30825 of 2017.

Court had held that the liability of the personal guarantor will arise only after crystallisation of the principal debtor's debt, which will only take place when the NCLT approves the resolution plan or passes an order for the liquidation of the corporate debtor. In the case of *Axis Bank Ltd. v. Edu Smart Services Ltd.*,[32] it was held that the invocation of a corporate guarantee when the moratorium period against the debtor has initiated is bad in law. Hence, there was a clear deflection from the recognized concept of a co-extensive relationship between principal debtor and its guarantor.

But in the case of *IDBI Bank Ltd. v. BCC Estate Pvt. Ltd.*[33], the NCLT, Ahmedabad stated that the respondent guarantor in the present case would not escape liability on ground that the insolvency resolution proceedings were already started against the principal debtor and the simultaneous initiation of proceedings against it were inconsistent.

Hence it should be understood that as the focal objective of the Code is not recovery but revival and rejuvenation of the company in distress, and the guarantees provided under it must be treated in accordance with such intent. Especially after the ordinance was introduced in 2017,[34] the stance has gained more clarity. Now all the provisions of the Code apply to guarantors as well. Further Section 60(2) expressly allows simultaneous proceedings against both. This justifies the stance taken by NCLT Ahmedabad.[35]

32 Axis Bank Ltd. v. Edu Smart Services Ltd., IB- 102(PB)/2017.
33 IDBI Bank Ltd. v. BCC Estate Pvt. Ltd., C.P. (I.B) No. 80/7/NCLT/AHM/2017.
34 Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017.
35 *Id.*

On a different note, the NCLAT in *Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd.*,[36] held that, only properties of the corporate debtor will come under the purview of Section 14 of the Code and not the properties of promoters or the guarantors. Hence, the proceedings for recovery of amount against the guarantors of the company can be continued despite the pending Insolvency Resolution process against the principal debtor.

After observing the stance of adjudicating authorities on various provisions of the new Code in light of different aspects, let us examine some pertinent issues in the Code.

2. CONTINUING PROBLEMS WITH THE CODE

2.1. PROCEEDINGS UNDER THE SARFAESI AND DRT ACT

Section 14(1)(c) of the Code gives power to NCLT to override any proceedings under SARFAESI Act, 2002,[37] and DRT Act, 1993.[38] In case of transfer of proceedings to the Code, where final order is about to be given or recovery certificates are issued under the DRT Act, 1993, and where banks and financial institutions have already initiated proceedings against the corporate debtor under the SARFAESI Act, 2002, such a transfer would further delay the proceedings as a moratorium period of 270 (180 plus 90) days will start. This will hamper the recovery

36 Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd., Company Appeal (AT) No.129 of 2017.
37 Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002.
38 Recovery of Debts Due to Banks and Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993.

proceedings of the bank as they have initiated proceedings under the SARFAESI as there was no chance for the corporate debtor to revive. If it is a case under the DRT Act, the stage of final order or issuing of recovery certificates mean that the company is beyond repair. If at such a moment moratorium period kicks in suspending any existing actions, it will give control to the promoters of the corporate debtor which can cause irreparable loss to its assets eventually causing loss to the claims of the banks and the financial institutions.

Any proceeding under both the statutes usually takes 2 to 3 years to complete. The creditor will only face inconvenience if the moratorium under Section 14 starts at final stages of the existing action. Again, this goes against the very objectives of the Code which is to revive the corporate debtor and if there is no possibility of such a scenario then the rights of the creditors to recover should not be hampered if they have sought relief under other provisions.

2.2. LIQUIDATION VALUE AND FAIR VALUE

The IBBI regulations[39] give a detailed process of the Insolvency resolution process for the corporate persons. Rule 35 of the regulations defines 'liquidation value' as, "the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date." Rule 36 requires the submission of an information memorandum by the resolution professional which should,

39 Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

according to sub-clauses (j) and (k) of clause 2, contain the liquidation value.

The problem with the use of liquidation value is that, it prejudices the buyers when the financial institutions' assets are being sold. The prospective buyers would bid at a very small price above the liquidation value accruing losses to the lenders or the creditors. The liquidation value is an imaginary value. It is the total worth of a company's physical assets when it goes out of business.

It is highly disproportionate when compared with the market value of the assets that are held as security by the creditors or the enterprise value. Enterprise Value (EV) is a measure of a company's total value. It can be thought of as the effective cost of buying a company or the theoretical price of a target company.[40]

However, sole dependence on the liquidation value in the Code has consequently influenced the resolution professionals to make it as a basis for the resolution plan. This goes against the very objectives of the Code. When any financial debtor or operational debtor files under Section 7 of the Code for an insolvency resolution process on a default of say rupees one lakh and fifty thousand, the valuation of the financial institution will be on the assumption that, the financial institution is going to liquidate on account of this default, whereas this valuation should be on the market value of the company.

40 *What is Enterprise Value?*, CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/knowledge/valuation/what-is-enterprise-value-ev (last visited Dec. 30, 2017).

The Government has, thus, introduced the concept of *fair value*. Fair value is the estimated realizable value of the assets on the starting date of insolvency proceedings. The amended rules for the insolvency resolution process for corporate persons have made it mandatory for resolution professionals to ascertain "fair value" apart from the liquidation value. This will ensure the banks to estimate the market price of the financial institution facing resolution process.[41]

2.3. STATUS OF PROMOTERS BEFORE AND AFTER THE AMENDMENT, 2017

In general parlance, a promoter is any individual syndicate, association, partnership, or a company which takes all the necessary steps to create and mould a company and set it going. In India, the promoter(s) and principals are usually persons who, in forming the company, secure for themselves the management of the company being formed or are persons who convert their own private business into a limited company, public or private and secure for themselves a more or less controlling interest in the company's management.[42]

41 E.T. Bureau, *Fixing Fair Value of Bankrupt Company under IBC Mandatory Now*, THE ECON. TIMES, https://economictimes.indiatimes.com/news/economy/policy/fixing-fair-value-of-bankrupt-company-under-ibc-mandatory-now/articleshow/62829070.cms (last visited Feb. 2, 2018).

42 *See* A. RAMAIYA, GUIDE TO THE COMPANIES ACT 351 (12th ed.).

The new amendment[43] introduced Section 29A to the Code which debars the following categories of persons from participating in the auction of assets of a company during bankruptcy proceedings:

(i) A wilful defaulter that is a person who is associated with Non-Performing Assets, or is a habitual non-compliant;

(ii) A person who is a promoter, given that, he would be eligible to participate if he repays all the overdue amounts and discharges all his liabilities regarding NPAs before the submission of the resolution plan.

This was done by the Government in order to, address the growing concern that promoters may obtain a backdoor entry to auction proceedings of their own companies and thus have a chance to control their own firms at a steep discount. The amendment, however, is criticised because even honest promoters will be barred from participating. Further, this would also result in reduction of competition in the bidding process as there is already difficulty in finding buyers for distressed assets in India.[44]

The amendment also debars a guarantor of a corporate defaulter, from applying for the resolution plan as well. This also includes a guarantor who has honoured his guarantee, but the resolution proceedings have been initiated due to some other debts of the corporate debtor. However, barring even such guarantors further reduces the market base of the distressed assets of the company.

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43 Insolvency and Bankruptcy Code (Amendment) Act, 2017, No. 8, Acts of Parliament, 2018.

44 Business FP Staff, *Insolvency and Bankruptcy Code Amendment: Promoters of SMEs may get Chance to Bid for Stressed Companies*, FIRSTPOST, http://www.firstpost.com/business/insolvency-and-bankruptcy-Code-amendment-promoters-of-smes-may-get-chance-to-bid-for-stressed-companies-4269823.html (last visited Feb. 2, 2018).

3. CONCLUSION

The expense of hiring the resolution professional has been a growing concern for small corporate houses that are currently facing Insolvency proceedings. Resolution professionals in actual practise need teams of versatile people who can handle different facets of the debtor's business. Hence, an already bankrupt company would further face turmoil investing in such professionals. Also, this would further reduce the amount which the creditors will get at the time of liquidation if the resolution process fails.

The nuances and faults in technicalities of the Code still prevail and are needed to be dealt with. These are still the learning times for an evolving India. The decision to establish Information Utilities is also a big step ahead in resolving these issues. Information Utilities will have a comprehensive database encompassing all significant details about financial and operational creditors which will help the courts in envisaging and analysing the dispute almost immediately. In a welcome step, all creditors were asked by Reserve Bank of India, in December 2017, to share information about their assets and to adhere with the provisions of IBBI (Information Utilities) Regulations, 2017.

Several cases like the PNB bank fraud, and Vijay Mallya's default and subsequent absconding are still lurking and haunting us and are acting as a reminder of how inevitable an efficient framework of insolvency, bankruptcy and recovery laws is for a growing economic giant like India. However, the sense of urgency and awareness in the present government

consoles us that measures will be taken to bridge the gaps and plug the loopholes.