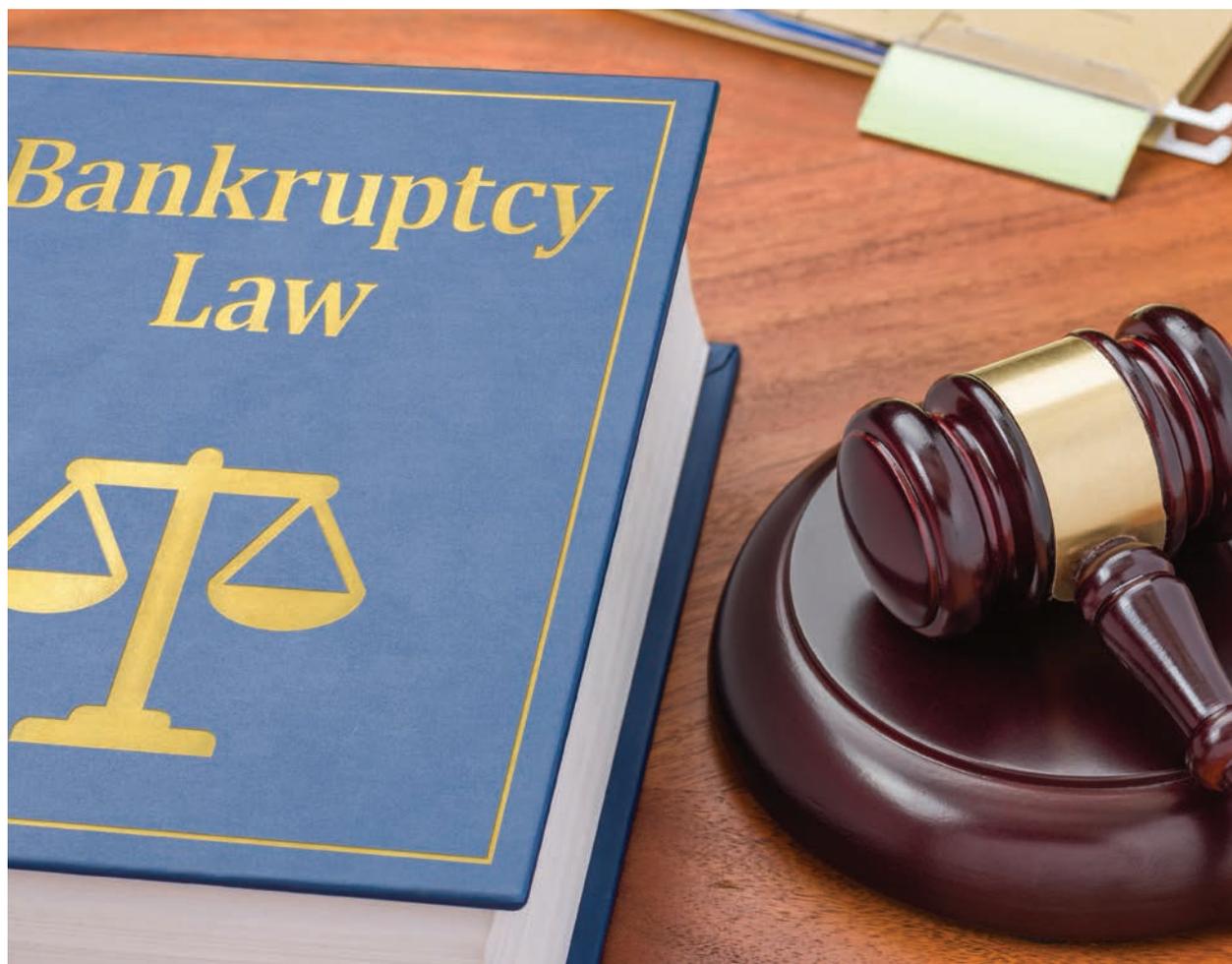


Insolvency and Bankruptcy Code, 2016



Introduction of Insolvency and Bankruptcy Code 2016 is a welcome step and the need of the hour to enhance ease of doing business in India. This Code has been passed by both Houses and got Presidential assent on 28-05-2016 whereby Sick Industries Companies Act, 1985 (SICA) has been repealed, winding up provisions of Companies Act, 2013 have been restructured and laws relating to winding up has been consolidated in a single code. This Code offers a uniform, comprehensive insolvency legislation encompassing all Companies, LLPs, partnerships and individuals. This code will facilitate a formal and time bound insolvency resolution process and liquidation. Read on to know more...



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This code is a special Act and its provisions have overriding effect over other laws. Even the execution of judgement, order under SARFAESI are stayed on commencement of winding up proceedings.

It will boost lengthy winding up process and reduce the time and good exit option in case business could not get success. Many features of

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the Code are good and appreciable. However, there are certain deficiencies in the Code which are being mentioned herein-below, which if removed or rectified, will make this Code become more effective and practicable.

Deficiencies in the Code

1. Fresh Start Process for individuals as defined in Part III of the Code.

This is an insolvency process of a debtor (individual) whereby he is declared as insolvent (means not able to pay his debts) and ultimately declared as bankrupt. This practice is more prevalent in United States (US) as in US, personal laws are strict and in case of default there are penal provisions of imprisonment and heavy penalties. In order to save themselves, they resort to become insolvent under US Bankruptcy Laws whereby they are being discharged of their liabilities. The Bankruptcy and Insolvency Code, 2016 has introduced the concept of Fresh Start Process whereby an individual by complying with the procedure given in the Code, can be adjudged insolvent and can be discharged of his liabilities. By adopting the procedures, the person concerned gets many benefits like moratorium period whereby all the legal cases and proceedings are stayed and no fresh proceedings can be initiated till the conclusion of process and ultimately if he is unable to pay the qualifying debt, he is discharged of all his liabilities including the penal provisions of law, as may be applicable in India in case of default. But the conditions specified in Section 80(2) of the Code seem to be impracticable and not understandable.

The extracts of Section 80(2) are as under:

80(2) A debtor may apply, either personally or through a resolution professional, for a fresh start under this Chapter in respect of his qualifying debts to the Adjudicating Authority if—

- (a) *the gross annual income of the debtor does not exceed sixty thousand rupees;*
- (b) *the aggregate value of the assets of the debtor does not exceed twenty thousand rupees;*
- (c) *the aggregate value of the qualifying debts does not exceed thirty-five thousand rupees;*
- (d) *he is not an undischarged bankrupt;*
- (e) *he does not own a dwelling unit, irrespective of whether it is encumbered or not;*

- (f) *a fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and*
- (g) *no previous fresh start order under this Chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start.*

In the present scenario if the person who fulfills the criteria mentioned hereinabove has no need to go for insolvency as he is already living under poverty line and seems to be virtual bankrupt and in the circumstances no creditor would like to pursue liquidation proceedings.

2. It is surprising that the Code has specified time frame work for resolution process, fast track process, giving of notice, confirmation of creditors etc. as mentioned hereinabove, but the Code is silent in how much time the Liquidator will complete its process of liquidation. There is also no time frame within which the Liquidator will report final verdict to Adjudicating Authority. The Code specifies time of 180 days which may extend to 270 days for resolution process but when Liquidator is appointed, no such time frame is given within which he has to complete his job. The Govt. should review this point and appropriate amendment be made in the code.
3. There should be provision for declaring the corporate debtor who are unable to pay its debts as bankrupt and consequently its directors and promoters should be disqualified to act as directors and some restrictions as the Government deems fit and proper may be imposed.

In case of individual bankruptcy, the Section 140 and 141 defines *disqualifications of*

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bankrupt like not (a) being appointed or acting as a trustee or representative in respect of any trust, estate or settlement; (b) being appointed or acting as a public servant; (c) being elected or sitting to any public office where the appointment of such office is by election (d) being elected or sitting or voting as a member of any local authority; (e) shall not act as a director or any company directly or indirectly take part in formation, promotion or management of a company; (f) prohibited from creating any charge on his estate or taking any further debt; (g) required to inform his business partners and to all concerned before entering into financial or commercial transaction of such value as may be prescribed; (h) incompetent to maintain any legal action or proceedings in relation to the bankruptcy debt; and (i) not permitted to travel overseas without the permission of the Adjudicating Authority.

The above disqualifications are social stigma and life blur on the bankrupt and his social image is badly affected. The prestigious persons do not want any such stigma on his character, hence would not like to be bankrupt, and would always try to pay the creditors even out of his personal assets. The said disqualifications are applicable, unless exempted by the Adjudicating Authority and cease to have effect on annulment of the bankruptcy order or the passing of a discharge order.

The Code has not prescribed any disqualification for corporate debtor (Companies and LLPs and/or their Directors, Partners), in case the Corporate debtor becomes bankrupt or insolvent. The Government should consider introduction of some of the disqualifications for corporate debtors and its directors, promoters in case the corporate debtor become insolvent or bankrupt and not able to pay its debts like mentioned hereinabove in case of individual bankruptcy.

4. There is no such framework for corporate debtors whose cases are already registered with High Court or SICA or other agencies where Liquidator has already been appointed, for transfer or for shifting of such cases under new Code, no such option is given in the Code. For example, in case where Liquidator has been

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It would be appropriate that the Government reviews the Code and make suitable amendments to remove certain deficiencies mentioned in this article. Overall, the introduction of Insolvency and Bankruptcy Code 2016 is a good step in right direction. It will not only facilitate ease of doing business in India but will also boost the confidence of lender, foreign companies and creditors at large.

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appointed and case is pending for last 5 years or so, then the corporate debtor should have option to appoint resolution professional or insolvency agency and transfer the case to him so that the process can be completed in time bound period.

5. In case of individual/partnership firm, the minimum default is ₹1000/- and in case of corporate debtor it is ₹100,000/- which is too low, hence there are chances of it being misused and leading to multiplicity of litigations. The Government should review these limits.

Conclusion

It would be appropriate that the Government reviews the Code and make suitable amendments to remove certain deficiencies mentioned above. Overall, the introduction of Insolvency and Bankruptcy Code 2016 is a good step in right direction. It will not only facilitate ease of doing business in India but will also boost the confidence of lender, foreign companies and creditors at large. ■