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AN ANALYSIS OF INSOLVENCY AND BANKRUPTCY (AMENDMENT) ACT, 2019

Introduction

Prior to the enactment of Insolvency and Bankruptcy Code, 2016 ("**IBC/Code**"), India lacked a consolidated framework for dealing with insolvency process, which caused chaos in the implementation of the same to the creditors. Although IBC was revolutionising, it could not optimize the outcome of its legislative intent. In order to make the insolvency procedure efficient, the Insolvency and Bankruptcy Code (Amendment) Act, 2019 was passed in Rajya Sabha on July 29, 2019 and in Lok Sabha on August 01, 2019 ("**Amendment Act, 2019**"). The amendments are aimed to fill the gaps in the insolvency resolution process and framework. The changes in the insolvency law regime are aimed to ensure timely admission of applications as well as timely completion of the Corporate Insolvency Resolution Process ("**CIRP**"). The Amendment Act, 2019was initiated to meet the original intent of IBC and fix the loopholes which were seen during the past 3 years of the IBC coming into force.

Issues Addressed

The Amendment Act, 2019 majorly addresses the following issues: (i) it gives greater clarity and provides for a strict timeline for concluding the entire insolvency process in 330 days; (ii) it specifies the liquidation value payable to operational creditors in any resolution plan and also gives clarity under the *Explanation* in Section 5 of IBC on allowing comprehensive corporate restructuring through merger, amalgamation and demerger under a resolution plan; and (iii) it also specifies the manner in which the representative of a class of financial creditors should vote in the Committee of Creditors ("**COC"**).

Background and Amendments

- In order to initiate the insolvency process under the Code, a financial creditor may file an application before the National Company Law Tribunal ("**NCLT**"). The Code provides a period of 14 days for NCLT to 'ascertain the existence of default' and admit or reject the application for initiating insolvency proceedings. However, this provision was misunderstood/ misinterpreted and was diluted by judicial pronouncements. The Supreme Court in *J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co.*[1] had concurred with the opinion of the National Company Law Appellate Tribunal ("**NCLAT**") that the time limit of 14-days is directory rather than mandatory in nature, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice. In practice, in many cases, the NCLT would take 3 weeks to a month to ascertain the existence of a default before admitting or rejecting an application. This adversely affected the main purpose of IBC and hence the new amendment provides for stricter rules to be followed wherein time bound resolution will be achieved. As per the new amendment, it is mandatory for the NCLT to pass an order admitting or rejecting the application made by the financial creditor within 14 days from the date of its receipt. In the event of failure to do so, the NCLT is now required to record the

[1]CIVIL APPEAL NO. 8400 of 2017

reasons in writing for the delay in determination of default. This amendment therefore seeks to ensure that the 14days period is only extended in exceptional cases and not as a matter of routine.

- Prior to the amendment, the Code required that CIRP should conclude within a maximum period of 180 days with a one-time extension of 90 days from the commencement date. However, this timeline was not being adhered to. The Amendment Act, 2019 under the provision of Section 12(3) makes it mandatory that the CIRP must be completed within an overall timeline of 330 days from the insolvency commencement date. This 330 days timeline includes all or any extension as well as any litigations and related legal proceedings. Additionally, the Amendment Act, 2019 also considers the on-going matters and states that, in case the 330-days overall timeline has already been breached at the time the Amendment Act, 2019 comes into force, then, there is an additional relaxation period of 90 days.
- Prior to passing of the Amendment Act, 2019, the voting process was complicated as the representative of several financial creditors had to cast his/ her/ their vote in respect of each class of financial creditors as per the instructions received to the extent of voting share. In order to simplify the voting process which involves large number of creditors, the Amendment Act, 2019 states that in certain cases, such as when the financial debt is owed to a class of creditors beyond a specified number, all the financial creditors will be represented on the COC by an authorized representative. These authorized representatives will vote on behalf of such class of financial creditors as per instructions received from them. The Amendment Act, 2019 under the provision of Section 25A (3A) further states that such representative will vote on the basis of the decision taken by a majority i.e. more than 50% of the voting share of the class of financial creditors that they represent. Such majority vote within class of creditors will be counted as 100% vote from that class of creditors in favour or against a voting item.
- Another essential change brought in by the Amendment Act, 2019 is the inter-creditor distribution of payments during the CIRP.
- The Amendment Act, 2019 focuses on value maximization of the assets of the corporate debtor and it clarifies that the COC may decide to liquidate the assets of corporate debtor at any time after the constitution of the COC but before the finalization of resolution plan including any time before preparation of the information memorandum. In cases where there are no credible bidders, this provision can save further devaluation of the assets of the corporate debtor.
- As per the judicial pronouncement in the case of *Essar Steel*[2], the COC could only approve or reject a resolution plan and could not negotiate with the resolution applicant. However, this situation has changed post the amendment. Per the amendment, in addition to liquidation of

[2]Company Appeal (AT) (Ins.) Nos. 242, 243, 257, 265, 266, 279, 290, 291, 292, 293, 300, 302-303, 304-305, 332-333, 337, 338, 345, 349, 361, 374, 375, 376, 428, 429, 449, 454, 517, 518, 580, 181 and 551 of 2019

the corporate debtor's assets, it has empowered the COC to commercially consider the manner of distribution of the assets proposed in the resolution plan while deciding its feasibility and viability. Moreover, pursuant to this judicial pronouncement, certain changes with respect to the treatment of financial and operational creditors have also emerged. The Amendment Act, 2019 clarifies that the Resolution Plan should provide for payment of liquidation value to the operational creditors or amount that would be required to be paid if the distribution is done per Section 53, whichever is higher. This amendment supersedes the judgement of the Essar Steel case, which had stipulated that the payments under the Resolution Plan must be equally made to the financial creditors and operational creditors. Furthermore, any distinction on the basis of existing priorities and security interest shall also not be permitted in the resolution plan.

Conclusion

The Amendment Act, 2019 has certainly tried to reconcile the intentions of the legislature with the judicial decisions. It will increase the confidence among the creditors as well the investor community. Judicial review shall be necessary only where there is any unfair value extraction contracting the statutory provisions. The Amendment Act, 2019 also makes the CIRP efficient and straightforward leaving minimal scope for incorrect interpretations by the judiciary. However, the real test will be on how these amended laws are implemented/ interpreted in cases of disputes.

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JAMMU & KASHMIR SPECIAL STATUS - BACKGROUND AND REVOKING OF ARTICLE 370 AND ARTICLE 35A

History in the enactment of Article 370

The then Maharaja of Jammu and Kashmir ("**J&K**") Maharaja Hari Singh had initially decided to remain independent and not be a part of either India or Pakistan. However, after encountering an attack from the Tribesmen from Pakistan, he sought help from India which in turn lead to the Accession of Kashmir to India. The Instrument of Accession ("**IOA**") was signed on October 26, 1947.

Post the IOA, the general idea in the minds of the policy makers was that a plebiscite be conducted post the situation in J&K gets neutralized and that the government of J&K shall be as per the will of the people.

Article 370 was made a part of the Constitution of India on October 17, 1949.

Highlights and Interpretation of the provision

The heading of the provision of Article 370 is 'Temporary provisions with respect to the State of Jammu and Kashmir'. The provision was meant to be a temporary provision as it was for the J&K constituent assembly to decide as to whether it has to be retained and/or modified and/or deleted and until today it was retained.

The Parliament of India had the power to legislate only in the matters relating to the above mentioned three matters. The government of J&K has the authority to frame their own laws and/or modify the laws framed by the Parliament of India as per their own will and decide as to the extent of the applicability of the said law in the state of J&K.

Referring to various High Court and Supreme Court judgments on the nature of the said provision, it was abundantly clear that Article 370 has been interpreted by the courts to be a permanent provision. The Supreme Court in *Sampat Prakash v. The State of Jammu and Kashmir*[3] rejected the argument that Article 370 is a temporary provision. The constitutional bench of the Supreme Court in this case had categorically mentioned that Article 370 never ceased to be operative. Furthermore, in a recent decision in *State Bank of India v. Santosh Gupta & Anr.*[4], the Supreme Court drew a comparison between Article 369 and Article 370 of the Constitution. Paragraph 14 of the said judgment makes it aptly clear that Article 370 unlike Article 369 though having a marginal note of being a temporary provision will cease to be operative only when the President of India by a notification declare this Article to be inoperative and that such notification being passed by the constituent assembly of J&K. In *Kumari Vijayalakshmi Jha v. Union of India & Ors.*[5], a similar relief was prayed for in the form of a Public Interest Litigation, which was dismissed by the Delhi High Court relying on the judgment of Santosh Gupta (supra).

[3]AIR 1970 SC 1118
[4](2017) 2 SCC 538
[5]W.P.(C) 9300/2015

Deletion of Article 370

Deletion of Article 370 requires the President to release a public notification rendering Article 370 inoperative after the same is being recommended to the President by the constituent assembly of J&K.

The constituent assembly of the state of J&K was dissolved on January 26, 1957 and thereafter the state assembly succeeded the constituent assembly.

As per the provisions of the Constitution of J&K, the Governor can send in his recommendation to the President of India so as to abrogate Article 370 and this is what has been used by the President of India to abrogate Article 370 of Constitution of India.

Article 35A

Article 35A derives its existence from Article 370. Article 35A provides that the legislature of the state of J&K can decide the citizenship and permanent residency status of its citizens and also provides for some special rights. One of the main right provided which has been considered to be against the basic structure of the Constitution is the right to own property/land in the state of J&K. Article 35A stems from Article 370 and with Article 370 being abrogated, Article 35A will cease to exist. Article 35A consisted of various provisions which prohibited the transfer of property to non-permanent residents. Since this Article has ceased to exist, the special powers given to the legislature of J&K have been usurped thereby upholding the basic structure of the constitution.

Conclusion

The intention of the current government in abrogating Article 370 and Article 35A is a huge step and the challenges that shall be tagged along with it have to be dealt by the government in a diligent manner. The main challenge that the government may face is maintaining conducive law and order in the state of J&K. Moreover, the Petitions have also been moved to the Supreme Court of India to challenge this revocation of special status of Jammu and Kashmir. It is to the Apex Court to decide on the merits of the notification pertaining to the removal of Article 370. This move shall have a significant impact on the geo-political, culture and socio-economic conditions of J&K.

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Companies (Amendment) Act, 2019- Tightening of CSR norms

The Parliament on 26th July 2019 passed the Companies (Amendment) Act, 2019 has brought in amendments with respect to the Corporate Social Responsibility ("**CSR**") spending, where the Companies have to mandatorily maintain the unutilized amount in a special account. The amendment states that any amount which is unspent for an ongoing project shall be transferred to a special account opened by the company in any scheduled bank as 'Unspent Corporate Social Responsibility Account' within 30 days form the end of the Financial Year and such amount deposited in the said account shall be spent by the Company to fulfill their CSR Obligations within a period of three (3) years from the date of such transfer in the special account. In a scenario wherein, the Company fails to spend the amount transferred in the 'Unspent Corporate Social Responsibility Account', within three (3) financial years, the fund shall be transferred to a fund specified under Schedule VII of the Companies Act, 2013. The Company also has to mandatorily specify reasons in its Annual Report as to non-spending of the CSR funds unless the unspent amount related to the ongoing project is transferred to the Fund specified under Schedule VII.
[For Details, please refer - http://www.mca.gov.in/Ministry/pdf/AMENDMENTACT_01082019.pdf]

Arbitration and Conciliation (Amendment) Act, 2019

The Arbitration and Conciliation (Amendment) Act, 2019 was passed by the Lok Sabha on 9th August 2019 post receiving the assent of the Rajya Sabha. The said amendments aim to establish an independent body named Arbitration Council of India ("**ACI**") with a view to promote the Alternative Dispute Resolution in India (that is Arbitration, Mediation and Conciliation). Furthermore, the said amendments propose for a change in the composition and appointment of the arbitrators. In the erstwhile Act, the Parties were free to appoint their arbitrators and only in case of disagreement, they would approach the High Courts or Supreme Court, however per the amendments, the Supreme Court and High Courts shall have the power to designate, arbitral institutions, which have been graded by the ACI.
[For Details, please refer -http://egazette.nic.in/WriteReadData/2019/210414.pdf]

Right to Information (Amendment) Act, 2019

The Right to Information (Amendment) Act, 2019 has been introduced to make certain changes with respect to the terms and conditions of appointment of the Chief Information Commissioner ("**CIC"**) of the Centre and Information Commissioners in States. Earlier, the Right to Information Act, 2005 stated that the CIC and other ICs (appointed at the Central and State level) will hold office for a term of five years. However, now the amended Act removes the abovementioned provision and states that the Central Government shall notify the term of the Chief Information Commissioner and Information Commissioners.
[For Details, please refer - https://pib.gov.in/newsite/PrintRelease.aspx?relid=192088]

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Protection of Children from Sexual Offences (Amendment) Act, 2019

The Parliament passed the Protection of Children from Sexual Offences (Amendment) Act, 2019 has made the punishment more stringent as compared to the previous act regarding sexual crimes against Children. This new amendment has also levied fines and imprisonment in order to curb child pornography and also provides stringent punishment for storing and distributing pornographic material involving a child or using any child for pornographic purposes. Furthermore, the said Act apart from amending the punishments for various offences also provides for death penalty for aggravated sexual assault on children to create deterrent effect. Act.
[For details, please refer - http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/POSCO-intro-E-18719.pdf]

Consumer Protection Act, 2019

More than three decades old Consumer Protection Act, 1986 is now being replaced by the new act. The Consumer Protection Act, 2019has defined six Consumer Rights which has been incorporated to protect the interest of the consumers. The said act has also proposed to form an Authority called Central Consumer Protection Authority ("**CCPA**") which shall be set up the Central Government in order to promote, protect and enforce the rights of consumers. Furthermore, the Amendment Act, 2019 has also proposed to set up Consumer Disputes Redressal Commission ("**CDRC**") which shall be set up at the district, state, and national levels. The said Act provides specific situations wherein the Consumer can file and complain against CDRC. Additionally, the Amendment Act, 2019 also envisages simplified dispute resolution process and includes a provision for Mediation as well as e-filing of cases.
[For details, please refer -https://consumeraffairs.nic.in/sites/default/files/CP%20Act%202019.pdf]

Jaguar Land Rover landmark case against Chinese Company Jiangling Motors.

Luxury Carmaker Jaguar Land Rover, part of Tata Motors Ltd won a case against a Chinese Company Jiangling Motors. Beijing Chaoyang District Court ruled that five unique features Range Rover Evoque were copied directly in the Landwind X7 built by Jiangling Motors which led to widespread consumer confusion. The Court ruled that all manufacturing, marketing, and sales must be stopped with an immediate effect and Jaguar Land Rover be provided compensation. This indicates clear protection to the Company as well as consumers so that they are not misled or confused.

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