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A. BHARAT, ITS CONSTITUTION AND THE LEGISLATIVE FRAMEWORK ON CORPORATE LAWS

1. Bharat, after a long-drawn battle for 'Poorna Swaraj', attained independence from the reign of its foreign rulers and declared itself to be a Sovereign, Democratic, Republic adopting its Constitution on the 26th day of January, 1950.

2. Bound by the laws, rules, regulations, bye-laws and notifications of its foreign rulers, Bharat as early as 1909 and 1920 had its first set of laws on Insolvency and Bankruptcy, commonly known as the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920[1].

3. One of the key features enshrined in the Constitution of Bharat enumerated in List III of the 7th (Seventh) Schedule (Concurrent List)[2] is 'Bankruptcy and Insolvency'[3] i.e., both the Parliament as well as Legislature of the States have been granted powers to make law on the subject. It is not out of context to say, that though Bharat at the time of attaining independence was an Agrarian economy, but the forefathers drafting its Constitution while taking into consideration the existing framework were also certain that, slowly and steadily, the corporate sector would gain dominance in shaping the economy, culture and lifestyle of its Government and the citizens and had accordingly inserted the said provision to be utilized by the respective government of the day to make laws on the issue to ease the undertaking of businesses and to regulate the framework of the corporate sector.

4. The Government of Bharat brought out the first ever consolidated framework, detailing the provisions to be followed by Companies already established or to be established within its territory, inter-alia, inserting provisions towards the general conduct, governance, administration, compliances and penalties for non-compliance(s) of any business establishment (Companies and Certain Other Associations) within its dominion by enacting the Companies Act, 1956.[4] It is pertinent to mention, that the law

[1] These legislations dealt with personal insolvency, having parallel provisions but different jurisdictions.
[2] Refer Article 246 (2) of the Constitution of Bharat, 1950.
[3] Entry 9, List III, 7th Schedule, Constitution of Bharat, 1950.
[4] Act 1 of 1956.

did not have provisions for restructuring the debt or reviving the company in case it was ascertained that the Company was unable to cater to its debt[5] and only provided the route to wind up the affairs of the Company by putting it through the draconian course of liquidation. The jurisdiction in such cases, was vested with the Company Court at the respective High Courts which was the sole adjudicating authority to supervise and monitor the winding up of the Company under its jurisdiction by appointing the Official Liquidator[6] attached with the Ministry of Corporate Affairs, Government of Bharat to forthwith take over the possession of assets and control of the Company and begin the liquidation process under the Act.[7] Such an application for winding up, could have been filed before the Hon'ble Court either by the creditors or by the Company directly along with certain other contributories and the Central government as per the desired circumstances[8].

5. One of the peculiar features of the law of 1956, was that, it provided for the Scheme of Compromise, Arrangements and Reconstructions to be filed directly by the Company in cases where the Company was being wound up/liquidated by any Creditor, Member or the Company itself in ordinary circumstances so as to ensure some kind of revival of such Corporate Person unable to cater to its debt[9]. However, such a scheme was to be proposed by the same management which was unable to ensure a safe financial position of the entity within their control. As a matter of practice, it was observed that such Schemes being proposed to avoid liquidation of Companies, eventually turned out to be sham and a mere eye wash technique in many cases leaving the creditors and stakeholders at great financial risk.

6. With the gradual conversion of the economy of Bharat towards an industrial one, and the ease tendered by the new Company law to enable entities to set up businesses, over a period of time, it was observed that the financial facilities availed by a number of corporate giants turned out to be 'Bad Loans' for financial entities, with little or no assurance (in many cases) that even the principal component of the credit availed by

[5] Refer Section 434 of Companies Act, 1956. Section 433 (As amended by the Companies (Second Amendment) Act, 2002) provides for several grounds for winding up of a Company over and above the one mentioned above.
[6] Refer Section 448 of Companies Act, 1956.
[7] Refer Sections 449 to 462 of Companies Act, 1956.
[8] Refer Section 439 of Companies Act, 1956.
[9] Refer Sections 391 to 395 of Companies Act, 1956.

Companies would ever be returned back to the financing entity, leading to creation of immense financial burden on the financial institutions.

7. The Government of Bharat, upon working out its logistics and taking into consideration the changing trend of the Economy and the existing financial burden in many cases on Public Sector Banks introduced the Sick Industrial Companies (Special Provisions) Act, 1985[10], inter-alia constituting the Board for Industrial and Financial Reconstruction (BIFR)[11] with a view to secure the timely and speedy detection of sick and potentially sick companies owning industrial undertakings, and the determination of the preventive, ameliorative, remedial and other measures by a Board of experts and their expeditious enforcement thereof.[12].

8. Owing to the Policy adopted by the Government in 1991 (popularly known as the Liberalization, Privatization and Globalization), a number of entities from abroad started looking up to the Bhartian market to establish businesses for which the natural course would have been to avail financial facilities from Bhartian financial institutions (in many cases). However, upon repeated defaults in repayment of the loan availed by such entities, it was realized that the recovery mechanisms for the financial institutions towards Bad Loans and/or Non-Performing Assets, be made more stringent in order to make the financial institutions market ready for the new economy. Accordingly, the Government introduced the Recovery of Debt due to Banks and Financial Institutions Act, 1993[13] as a legislation to curb the Bad Loans and/or Non-Performing Assets by introducing Special Tribunals (Debts Recovery Tribunals and Debts Recovery Appellate Tribunals)[14] to adjudicate matters pertaining to recovery of debts due to banks and financial institutions[15] and provide timely remedy to such institutions already struggling in the regular litigation to recover their dues.

9. In hindsight, with the working of various laws more or less dominant towards the recovery of debts in favour of financial institutions, substantial time was wasted in court

[10] Act 1 of 1986.
[11] Section 4 of Sick Industrial Companies (Special Provisions) Act, 1985.
[12] Refer Statement of Objects & Reasons, the Sick Industrial Companies (Special Provisions) Act, 1985.
[13] Act 51 of 1993.
[14] Refer Sections 3 to 16, Chapter-II, The Recovery of Debt due to Banks & Financial Institutions Act, 1993.
[15] Refer Statement of Objects & Reasons, The Recovery of Debt due to Banks & Financial Institutions Act, 1993.

litigations leading to delay in recovery proceedings, and a time had come to give certain autonomy to financial institutions as well as Non-Banking Financial Corporations to be able to recover their dues with no or minimal judicial interference. Thus, upon the recommendations of an Expert Committee constituted under the aegis of a reputed and renowned Senior Advocate of the Hon'ble Supreme Court of Bharat, the Government introduced the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[16] (SARFAESI), which since its inception proved to be a boon in the recovery sector and was highly in practice over the other legislations governing the rights of financial/non-banking financial corporations to recover their dues from the defaulters (Both individuals and Corporates).

10. Considering the change in the market dynamics and to honor the obligations undertaken by the Government by virtue of being signatory to the UNCITRAL Model Laws on E-Commerce[17] and upon the recommendations of the Expert Committee to review the working of the new Company Law, the Government enacted the Companies Act, 2013[18] replacing the Act of 1956 and inter-alia incorporating several new concepts of companies and businesses, maintenance of data in electronic format, cross border mergers, prescribing women directors for certain companies, granting certain relaxations as against the old law amongst others so as to smoothly incorporate different types of business set ups and promote the ease of doing business for the better growth of the economy. One salient feature of the new 2013 law was that it created provisions for establishment of Special Tribunals[19] to adjudicate and administer the issues/ complexities arising out of the diverse, complicated and challenging functioning of entities.

11. That even prior to the enactment of the Companies Act, 2013, it was highly debated that the laws existing in Bharat did not provide for any mechanism through which a Corporate Person unable to cater to its debt, could be subject to such mechanism to enable its revival and rehabilitation unlike the concepts prevalent in the West. The government in this regard, from time to time, had been constituting committees and

[16] Act 54 of 2002.
[17] Adopted on June, 12, 1996 (Additional Article 5 bis adopted in 1998).
[18] Act 18 of 2013.
[19] Refer Sections 408 and 410, The Companies Act, 2013.

taking opinions from various stakeholders for a proper mechanism to be put in place to ensure that the defects, shortcomings and lacunae present in the laws governing debt restructuring could be made more creditor friendly as the mechanisms provided under the Companies Act, 1956 did not yield much result and the Special Laws (SICA) could not perform to its expectations due to various technical jargons, approvals at different levels, court interference, etc.

12. Thus, it was realized that Bharat too like other countries must put in place a detailed legislation through which a Corporate Person undergoing a financial turmoil be given the opportunity to be revived by an independent player in the market and as a result reduce the financial burden on the financial institutions already struggling to recover their dues. Therefore, the Government enacted the Insolvency & Bankruptcy Code, 2016[20] (Code), thereby consolidating, amending and repealing all the earlier laws in this aspect, giving rights to 3 (Three) class of Applicants (Financial Creditors, Operational Creditors and the Corporate Debtor itself)[21] to respectively move applications for initiation of Corporate Insolvency Resolution Process (CIRP) and provide for a time bound process to resolve such Corporate Debtor before choosing the draconian route to liquidation. The new law inter-alia also provided for Insolvency Resolution Processes for Individual Guarantors & Corporate Guarantors[22], MSME Sector[23], Fast Track Corporate Insolvency Resolution Process[24] and provisions for Voluntary Liquidation[25], Liquidation[26], etc. to safeguard the interest of both the Corporate Debtor/ Person as well as the Financial Institutions holding exposures against such entities. The Code also created the Insolvency and Bankruptcy Board of Bharat as the regulator of Insolvency Professionals and Insolvency Professional Entities engaged in the Corporate Insolvency Resolution Process of the Corporate Debtor and made the National Company Law Tribunal as the adjudicating authority to monitor and supervise the processes under the Code.

B. THE BHARATIYA MARKET AND ISSUES INCIDENTAL THERETO

[20] Act 31 of 2016.
[21] Refer Sections 7 to 10, Chapter II, Part II, The Insolvency & Bankruptcy Code, 2016.
[22] Refer Sections 94 to 120, Chapter III, Part III, The Insolvency & Bankruptcy Code, 2016.
[23] Refer Sections 54A to 54P, Chapter III A, Part II, The Insolvency & Bankruptcy Code, 2016.
[24] Refer Sections 55 to 58, Chapter IV, Part II, The Insolvency & Bankruptcy Code, 2016.
[25] Refer Section 59, Chapter V, Part II, The Insolvency & Bankruptcy Code, 2016.
[26] Refer Sections 33 to 54, Chapter III, Part II, The Insolvency & Bankruptcy Code, 2016.

13. The late 90's era witnessed the development of wide and varied number of businesses and birth of new market concepts and strategies ranging from Builders and Realtors flashing glossy brochures to IT Companies solving the technical glitches over phone calls and E-Mails, from introduction of private radio stations to new producers and directors producing another daily soap and from private companies inviting investments by selling shares in the market to heightened export & import.

14. As a matter of fact, these new businesses in order to establish a strong base in Bharat, inter-alia, depended upon financial facilities availed by them through mortgaging properties, seeking master facility in the name of entity by signing off the counter guarantees by the Directors to placing requests for issuance of Bank Guarantees, etc. The financial entities extending such facilities were keen to disburse the loans and advances to meet out their quarterly/ annual targets as a result of which the financial institutions (Both Banking & Non-Banking) became exposed to a huge quantum of public lending.

15. With the increase in population, leading to Bharat being ranked as the second most populous country, and the new concept of having small and affordable homes, the sect of population belonging to the middle and the upper middle-class strata of the society, felt attracted to a number of projects launched by Builders/ Realtors, inter-alia promising guaranteed possession in a short span of time and luring the public by launching slogans such as "Book your Dream Home Now!!", "Aaj Nivesh Karo, Kal Ghar Banao", "Kya aap rent pe rehte hai?", "Kabhi Apna Ghar Socha Hai?" etc.

16. Simultaneously, a series of financial institutions and housing finance companies were set up in Bharat, which led to the increased avidity amongst such institutions to outrun the competitors, leading to these institutions now financing individual home/unit buyer at cut throat rates of interest through mortgaging the un-built property, virtually on papers. The situation was so much so, that 3rd party agencies of financial institutions (which have failed in the recent past) started remaining present at the site of properties being built by the builders/realtors and ensured that the prospective customer not only books the unit in the property but in many cases avails the financial facility to buy such a house/unit from a common financial institution in the name and garb of such financial

institution having already verified the credibility and the durability of the under constructed project.

17. With the passage of time, the situation became worse, to the extent that out of every 10 builders/realtors having proposed to build a project, 6 of them turned out to be non-compliant in payment of their Equated Monthly Installments (EMI) and in certain cases siphoning off the entire funds lent to them for building the project, in their personal accounts and, abandoning the project's construction at a slab and base stage, compelling certain banks, financial institutions, Housing Finance Companies and NBFC's to launch a series of litigation to procure the lent money to such builders/ realtors. The most affected of the act, were the individual home/unit buyers as they were defrauded of the amount invested out of their hard-earned money, however, the obligations towards payment of EMI's to the banks against the financial facilities availed qua the home/unit booked remained intact, with them never getting the possession of the said home/unit.

18. The Government of Bharat on 8th November, 2016, in order to curb the menace of the corruption and black money, banned the two most prominent denominations in its currency system which accounted for around 86% of the Bharat's circulating cash authorized by the Reserve Bank of Bharat (Commonly known as Demonetization) and declared to print new currencies inter-alia issuing directions to be followed to return back the legitimate cash any individual possessed, post the announcement. Such a move of the Government was appreciated by some and criticized by many, and as a result of which, the market stability of certain few genuine builders/realtors slipped from their actual positions, leading to genuine difficulty and financial crisis to meet out their commitments to the market.

C. THE CODE AND ITS APPLICATION

19. The Code commenced with the National Company Law Tribunal (NCLT) benches being overloaded with Applications/ Petitions against the Corporate Debtor in red, by the financial institutions leading to commencement of Corporate Insolvency Resolution Process (CIRP) against some of the big names in the market, few relevant examples of which are KAYPEE INFRATECH LIMITED, SATYAPRAKASH ASSOCIATES

LIMITED AND AMBAPALI BUILDERS. Out of these, the most successful resolution was of the Ambapali case, wherein the Hon'ble Supreme Court of Bharat went to the extent of directing the State Tower Constructions Corporation (STCC) to build the entire project being floated by Ambapali builders and appointing a Senior Advocate as the Court Commissioner to supervise the entire process and execute necessary sale deeds in favour of the distressed home buyers.

20. There came a time, when the legislative intent behind drafting the Code was questioned by many for reasons of it having an overriding effect on other laws governing the recovery procedures for the time being in force leading to the Code being further challenged of being violative of the Constitution of Bharat.

21. During the time of the provisions of the Code being subject to judicial review, what came to be known as a landmark judgment governing the rights and remedies of the individual home/ unit buyer was the judgment passed by the Hon'ble Apex Court of Bharat in the Pioneer Urban matter[27], wherein the individual home/unit buyer was accredited with the right of being a financial creditor in terms of the Code for reasons of the money invested by such homebuyer to have the commercial effect of borrowing.

22. Soon thereafter, the National Company Law Tribunals across Bharat witnessed a number of Petitions/ Applications being filed under the Code, qua initiation of CIRP against the builders/ realtors who happened to avail huge investments from these creditors and had kept them waiting since time immemorial to be granted possession of their booked units/homes.

23. Consequently, the National Company Law Tribunal benches started taking cognizance of the defaults being made by the Builders/ Realtors and initiated the CIRP against several such defaulters for being non-compliant in honoring their obligations under the Contractual terms and obligations executed/undertaken qua different home/unit buyers. In quite a few cases, it was observed that the moment the NCLT benches issued notice to such builders/defaulters, the debt due and payable by them were settled in favor of home/unit buyers. In some cases, the Builders/ Realtors went to the extent of settling

[27] 2019 SCC OnLine SC 1005

the debt after initiation of CIRP and getting the same quashed by filing appeals before the National Company Law Appellate Tribunal[28].

24. One of the drawbacks of such a right being vested upon the individual home/unit buyers was observed when certain unnecessary litigations were filed against a few genuine builders/ realtors in the market who were already struggling to cope up with the loss faced due to demonetization to the extent of such Builders/ Realtors losing onto their business developed through hard work, patience, persistence and perseverance and the same also resulted loss of livelihood of many of its employees and associates in cases of non-revival of such Corporate Debtor. Another drawback of such a right was observed when individual home/unit buyers started to initiate litigations before the NCLT benches merely to ensure recovery of their stuck money thereby defeating the purpose of creation of the Code and the respective Tribunal.

25. Accordingly, being aggrieved of the decision of the Hon'ble Apex Court of Bharat and its implications thereof, the Association of Builders along with certain other class of builders/ realtors having organized themselves into an unregistered Association, cumulatively approached the Hon'ble Finance Minister requesting to modify the law for the benefit of the builders/ realtors and towards the appropriate growth of the economy.

D. THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2019 AND THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2020

26. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated by the President of Bharat on the 28th day of December, 2019 inter-alia making certain key amendments to the existing Code, the most important of which was the amendment to Section 7 of the Code, through which it regulated the rights of individual home/unit buyers towards initiation of CIRP against the Corporate Debtor by fixing a minimum threshold of 100 or 10% of real estate allottees (whichever is lesser) in the same project

[28] Refer Sections 61 and 65, The Insolvency & Bankruptcy Code, 2016.

to approach the National Company Law Tribunals as co-applicants for initiation of the CIRP process. . The operative portion of the Ordinance is reproduced herein below:

……

"Provided further that for financial creditors who are allotees under a real-estate project, an application for initiating corporate insolvency resolution process against the Corporate Debtor shall be filed jointly by not less than 100 of the such allotees under the same real estate project or not less than 10 percent of the total number of such allotees under the same real estate project, whichever is less."

"Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in first or second provisos and has not been admitted by the adjudicating authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 such applications shall be modified to comply with the requirements with the first or the second provisos as the case may be within 30 days of commencement of the said ordinance, failing which the application shall be deemed to be withdrawn before its admission."

27. The passing of the Ordinance was criticized by a number of real estate allottees whose applications were pending adjudication at various stages before the National Company Law Tribunal benches and immediately a group of such individual home/ unit buyers/ real estate allottees approached the Hon'ble Apex Court of Bharat through a Writ Petition (Civil) bearing No. XX of 2020, challenging the vires of the Ordinance as being violative of Article 14 of the Constitution of Bharat. The Hon'ble Apex Court upon hearing the submissions of parties to the petitions inter-alia directed status quo to be maintained upon the applications pending adjudication before the respective benches and posted the matter for final hearing.

28. In the interim, the Government of Bharat passed the Insolvency and Bankruptcy Code (Amendment) Act, 2020 amending several provisions of the Code and negating the effect of the Ordinance and notifying the same in the official Gazette of Bharat before the expiry of the Ordinance. The relevant portion pertaining to the rights of the real

estate allotees/ home buyers as amended by the Ordinance was verbatim in the amendment as well. The relevant portion of the Amendment Act, 2020 qua the real estate allotees is reproduced herein below:

……

"Provided further that for financial creditors who are allotees under a real-estate project, an application for initiating corporate insolvency resolution process against the Corporate Debtor shall be filed jointly by not less than 100 of the such allotees under the same real estate project or not less than 10 percent of the total number of such allotees under the same real estate project, whichever is less."

"Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in first or second provisos and has not been admitted by the adjudicating authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 such applications shall be modified to comply with the requirements with the first or the second provisos as the case may be within 30 days of commencement of the said amendment, failing which the application shall be deemed to be withdrawn before its admission."

E. THE CHALLENGE TO THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2020

29. Aggrieved of the actions of the Government, Manu Bhai Sharma, a real estate allottee along with several other such allotees approached the Hon'ble Apex Court of Bharat, through a Writ Petition (Civil) bearing No. 11 of 2020 inter-alia challenging the said amendment to be violative of the Constitution of Bharat, raising the following grounds for consideration by the Court:

a. That the impugned amendment clearly falls foul of the mandates of Articles 14, 19(1)(g) and 21 of the Constitution of Bharat, 1950.
b. That the impugned amendment creates a hostile discrimination between the Homebuyers as financial creditors, and other financial creditors.

c. That the impugned amendment creates a class within a class, thus frowned upon by the law.
d. That the impugned amendment casts an obligation upon the already suffering home buyer to find 100 or 10% more sufferers like him in order to approach the Tribunal.
e. That as there exists no platform for the procurement of information of the other allottees of the Project, it is impracticable to approach the NCLT to a certain extent.
f. That the impugned amendment discriminates between a class of financial creditors with the Operational Creditors (having lesser right as compared to a Financial Creditor by virtue of the Code).
g. That more than 51,000 litigations would be affected Pan Bharat (filed by such real estate allotees against the Corporate Debtor) further deteriorating their rights, should the impugned amendment be allowed to continue.

30. A copy of the said Petition was also served upon the Ld. Additional Solicitor General of Bharat, who was served through the Union Law Agency to appear and defend the interest of the government. The Ld. Additional Solicitor General vehemently defended the impugned amendment as being fully lawful and justified within the four corners of law by submitting before the Hon'ble Court that ***'as when the legislature grants a right, the same legislature also holds the authority to regulate the exercise of such a right***' and justified the move of the government by further submitting that ***'the real estate allottees have the right to seek appropriate redressal of their grievances before the Real Estate Tribunals constituted under the RERA, 2016[29] and as such individual complaints for redressal of individual grievances cannot set the Code in motion'***.

31. The Hon'ble Apex Court upon hearing the submissions, requested the presence of the Ld. Attorney General for Bharat along with the Ld. Additional Solicitor General to be able to take the Hon'ble Court upon the submissions advanced by the Petitioner and submit their counter submissions thereof, furthermore directing both the parties to be ready with their final arguments, by filing their written submissions before the Hon'ble Court at least 5 days prior and exchanging the copy of pleadings amongst themselves at least 24 hours prior, to the next date of hearing.

[29] The Real Estate (Regulation and Development) Act, 2016, Act No. 16 of 2016.

32. The matter has been listed for final arguments from 25-27th March, 2022.[30][31]

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- The Participants are at liberty to raise more issues than enumerated in the present moot propositions or add sub-issues, as the case maybe.

- The Laws of Union of Bharat are in Pari Materia with that of the Union of India and must be interpreted in its true sense and spirit.

- The events and the characters depicted in the moot court proposition are purely a work of fiction and hypothetical. Any similarity to actual persons living or dead is purely coincidental.
- This Moot Problem is purely intended for the Moot Court Competition and educational purposes amongst law students.

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