A STUDY ON WINDING UP UNDER COMPANIES ACT, 2013 AND IBC 2016: ESSAR STEEL CASE

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ABSTRACT

The term "winding up" refers to the procedure through which a business is dissolved and its assets are distributed to its unsecured creditors and stockholders. When a company files a petition to dissolve, its Board of Directors immediately ceases to function, and its powers are transferred to a "liquidator," who then takes charge of the business, gathers its assets, pays its debts, and distributes any remaining proceeds to the company's members according to their respective rights. This paper aims to study Winding Up under the Companies Act 2013 and IBC 2016 and also the provisions under both the acts. The researcher has also taken the case of Essar Steel Ltd to validate the comparison of both the acts in the relevant topic. According to previous findings the IBC broughtcertain changes to the laws related to winding up of companies and this paper gives a blueprint of the current scenario as to how well these laws were implemented and how effective they were to the companies. The court, after hearing the winding-up motion, can dismiss it or make an interim request, based on what it sees as most appropriate. It can also appoint the company's temporary liquidator while the winding up process is finalised. It has the authority to appoint the company's interim liquidator until the winding-up process is finalised. It may even ask to be put out of its misery, whether or whether it pays. It's a way to make sure the company's assets areused to benefit everyone involved. In other contexts, the term "Liquidation" is used to refer to the process of winding.

Keywords: liquidator, petition, winding up, assets

Introduction

Winding Up Defined

As part of the procedure for settling a company's obligations, it may be necessary to "wind it up," or liquidate itsassets. Pennington[1] defines "winding up" or "liquidation" as the process whereby a company's assets are realisedby a liquidator, the company's debts and liabilities are discharged out of the proceeds of realisation, and any excess assets are returned to the company's members or shareholders. If a firm has exhausted all other alternativesfor settling its debts and liabilities to its members and shareholders, it may be forced to wind itself up. A companyis formally dissolved and subsequently ceases to exist once its wind up is complete. There are two main ways a company can be dissolved: either a tribunal or court orders the company to be dissolved due to a petition filed with it, or a resolution is passed at the company's annual meeting requesting dissolution. The corporation continues to exist as such even after its operations have been wound up. As soon as control of the company is passed to a liquidator, the administrative apparatus is reorganised.

Research Objectives

- To study the definition of winding up of a company
- To analyze the various modes available for winding up of a company
- To analyze the Essar Steel Ltd case

Research Questions

- What do you mean by the term Winding Up?
- What are the modes available for Winding Up of a company?
- What were the implications of the Essar Steel Case on this Act

[1] Pennington's Company Law, 5th Edition, Page 839

Research Methodology

Given the manner of research, secondary data will be needed. Secondary data will be collected from variouswebsites, journals and research papers.

Research Limitation

Since this research is based on secondary sources from books, journals and newspapers, primary sources of datahave not been used making it a limitation of this research.

Literature Review

Srijan Anant, Aayushi Mishra (2019)- According to the study, one of the most significant changes made to India's legal system was the IBC. According to the author, the IBC not only strengthens the Indian legal system but also gives India a new identity and international recognition. According to the author, the legislation results in a consolidation of the many bankruptcy laws into a single law. The author has examined the main aspects of the code as well as its legal foundation. The author has also made an effort to analyse how India's macro environment will be affected by the Insolvency and Bankruptcy Code.

Nishith Desai Associates (2019)- The principal effects of IBC on the developing Indian debt market were examined by the researcher. The researchers believe that there are many obstacles in the way of the Code's successful implementation. According to the researcher, the judiciary's constructive interpretation of the law andthe Code's useful revisions have eliminated numerous difficult problems. The regulatory and supervisoryauthority, the Insolvency and Bankruptcy Board of India (IBBI), in the opinion of the researcher, has been aggressively raising awareness. The researcher has examined the significant decisions made throughout the yearand believes that corporate India's intention to turn around loss-making enterprises is very encouraging for the economy and the country.

Javish Valecha & Ankita Anupriya Xalxo (2017)-The researcher acknowledged the fact that the Code is a oneof its kind legislations which will be revamping the whole insolvency and bankruptcy regime in India. The researcher emphasised on the fact that the new law will provide a time bound framework for resolvinginsolvencies. As per the researcher the new framework is comparable to international standards and is drafted ina way that should

enhance ease of doing business ranking but at the same time its success depends on its implementation aspect as to how well it is being implemented.

Josiah Wamwere-Njoroge (2017)- This paper infers that IBC is more efficient and promising in comparison with bankruptcy laws of the United Kingdom and France by using various indices to check. He inferred that consideration for any good insolvency and bankruptcy regime is such that it should able to balance between the rights of the creditors (both secured and unsecured) and the debtors. The researcher found that insolvency and bankruptcy proceedings in India is relatively expensive and it prevents the relevant stakeholders for using the system for their own selfish interests.

Akshaya Kamalnath(2019)-The researcher examines that in 2016, The Insolvency and Bankruptcy Code ("IBC") was introduced with the prime object as tool for efficient restructuring and rescue. The IBC model was constituted with some commendable infrastructure like dedicated company law tribunals, a dedicated regulator and strict timelines. During its operation within the period of two years, it has exposed a few problems like resistance by directors to initiate the IBC process and lose control of company. The 'Modified Revlon Duty' wasdeveloped to incentivize the promoter to review the company instead of retaining the control of directors at the time of liquidation.

Modes for Winding Up

Winding up under the Companies Act 2013

- Winding up by tribunal
- Voluntary winding up

Winding up by tribunal

A petition to the NCLT can begin the process of winding down a firm. Only the NCLT will accept a petition forwinding up. Since going out of business is a last resort, there needs to be good justification for it. The petition forwinding up proceedings can be withdrawn if the court determines that there is no valid basis for doing so.[2]

[2] Supra note at 1

The Tribunal has the authority to dissolve a company if certain conditions are met.

The Tribunal may order the liquidation of a firm under Section 271 if:

- Company is unable to pay its debts
- If the firm's shareholders have requested in a special resolution that the company be dissolved by the Tribunal; If the corporation has engaged in activities that threaten India's national security, international peace and stability, or public safety.
- If the Tribunal has issued a Chapter XIX winding-up order;
- If the tribunal rules that the company's affairs have been conducted fraudulently, that it was formed for afraudulent or unlawful purpose, or that the persons involved in the formation have engaged in misfeasanceor misconduct in connection with those matters, then the Registrar or any other person authorised by theCentral Government by notification under this Act may apply to have the company dissolved.
- If the company has not submitted its annual reports or financial statements to the Registrar for the five most recent fiscal years;
- If the court decides that the company's dissolution is fair and just[3]

Lack of ability to pay debts

According to Section 271(1) of the 2013 Companies Act, if a creditor to whom a company owes an amount greater than Rs. 1 lakh served a notice at the company's registered office by registered mail or another means requiring the company to pay the due amount and the company failed to pay the sum within 21 days or if any execution or other process issued by decree of court or order in creditor's favour is returned unsatisfied in wholeor in part or if the tribunal is not satisfied.[4]

The petition for winding up can be given under Section 272 of the Companies Act, 2013 by:

- The company; or Any creditor or creditors, including any contingent or prospective

[3] Supra note at 1
[4] Supra note at 1

creditor or creditors;or

- Any contributory; or
- All or any of the above three specified parties; or
- The Registrar; or
- Any person authorised by Central Government in this behalf;
- By the Central Government or State Government in case of Company acting against the interest ofsovereignty and integrity of India.[5]

Section 274 of the Companies Act, 2013 states that a petition for winding up of a company may be filed by a person other than the company, and that the court may give the company notice of 30 days, which may be extended for another 30 days under certain conditions.

Voluntary Winding Up

In this scenario, the firm and the shareholders work out their differences in a formal meeting rather than taking the case to court. The company appoints an official liquidator to oversee its business. The date of the general meeting resolution to dissolve the company voluntarily is the starting point for the dissolution process. As per Article 304[6]:

- If a company's general meeting approves a resolution mandating the business be wound up voluntarily after its term, if any, set forth in its articles expires or upon the occurrence of any circumstance for which the company's articles provide for dissolution;
- If the corporation adopts a specific resolution, it may choose to voluntarily dissolve.[7]

[5] Supra note at 1
[6] Section 304 (1), the Companies Act, 2013
[7] ibid

WINDING UP VARIATIONS SINCE THE 2016 INSOLVENCY AND BANKRUPTCY CODE

The term "winding up" now has a slightly different meaning under the Companies Act of 2013 and the Insolvencyand Bankruptcy Code of 2016, respectively. The winding up by Tribunal procedure has taken the place of the winding-up methods covered in section 270 of the 2013 Companies Act. If a corporation has breached India's sovereignty, integrity, security, friendly relations with foreign governments, public order, decency, or morality, or if the tribunal is mentally ill, it may be wound up by the tribunal in response to a petition filed under Section 272. Replaced is Section 271, which discusses the conditions under which a business may be dissolved by Tribunal.[8]

Following is the winding-up procedure under the new court:

The proper company registrar must receive a declaration confirming the company's legitimacy and ability to payits debts.

After the voluntary liquidation is approved and the liquidator is appointed, a special resolution must be passedwithin 4 weeks.

Additionally, a newspaper announcement must be published within 5 days, the ROC must be notified within 7days, estimates of the company's assets and liabilities must be provided to a corporate person within 45 days, uncalled capital must be realised, the amount realised must be distributed to shareholders within 6 months, and afinal report must be submitted within 4 weeks.[9]

Case Study: Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others[10]

Background of the Case

The historic ruling allows ArcelorMittal and Nippon Steel to assume control of financially struggling Essar Steel.ArcelorMittal, a multinational steel corporation, had its offer to acquire

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[8] Supra note at 1 and Companies Act, 2013

[9] Supra note at 1

[10] Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others, (2020) 8 SCC 531

Essar Steel approved by India's NationalCompany Law Tribunal in March 2019. Arcelor Mittal's proposed resolution was accepted by the Committee of Creditors (CoC).

Under the terms of the resolution plan, ArcelorMittal would pay its financial creditors an upfront cash sum of 42,000 crore and invest 8,000 crore in capital over the course of the following few years. Nonetheless, the offer was lacking in significant ways that would appeal to Essar Steel's operating creditors. The National Company Law Appellate Tribunal (NCLAT) confirmed the CoC's plan but revised the financial distribution plan by adjuring an equal recovery strategy for all creditors, including operational & financial creditors. To adumbrate, the Apex Court upheld the primacy of the Committee of Creditors constituting the financial creditors of the insolvent enterprises over the payment of claims.

The NCLAT ruling that had equalised the treatment of Essar Steel's operational and financial creditors had beenoverturned by the Supreme Court. In their petition to the Supreme Court, the financial creditors claimed that theNational Company Law Appellant Tribunal's ruling went beyond what was allowed by the IBC. Also, they refused to give Standard Chartered the same treatment as other financial creditors on the grounds that secured creditors had the first claim to the money. Since the Supreme Court upheld the Committee of Creditors' authorityto distribute monies, a key legal uncertainty has been cleared away.

Issues Involved in the Case

In this instance, the central question was whether both Resolution Applicants were ineligible to submitresolution plans due to their violations of Section 29A of the Code.

Judgement of the case

A resolution plan, which may involve discriminatory payment to various classes of creditors, may be negotiated and approved by the Committee of Creditors under the Insolvency and Bankruptcy Code (IBC).This decision was upheld by the Supreme Court.

The Supreme Court no longer requires insolvency and bankruptcy matters to be resolved within 330 days.In cases where the resolution plan is close to being finalised, the bench allowed for some leeway.

It is up to the adjudicating authority, which has been granted discretion by the Supreme Court,

to determine if extra time is needed to reach a resolution.

No court has any authority under "residual equity jurisdiction" to review the merits of a decision made bythe Committee of Creditors. In other words, the courts will have no say over the Committee of Creditors'business judgments.

The Supreme Court ruled that applying the equality principle in a situation where people are being treateddifferently would be counterproductive to the goal of the IBC, which is to dispose of troubled assets. Whether a creditor is financial or operational, secured or unsecured, there is a way to treat them fairly.

As part of the insolvency plan, the Court affirmed the priority of financial creditors over operational creditors for the distribution of funds.

Impact of the Judgement

The banks will get back around Rs. 42,000, or 85%, compared to the average recovery of Rs. There would be animprovement in banks' capital adequacy as a result of this.

The 330-day limit's elimination will speed up the resolution process, fulfilling the code's overall goal.

Legal disagreements between operational creditors and the financial rapid resolution procedure are expected tosubside as a result of the ruling. Investors who were wary of the country's bankruptcy process will be drawn in.

Conclusion

According to the Justice Eradi Committee Report, 473 winding up cases had been waiting for more than 25 yearsin 1999, and according to data compiled by the Department of Financial Services, 1479 winding up cases had been ongoing for more than 20 years in 2015. To address India's bad debt problem, the Insolvency and BankruptcyCode, 2016 was enacted to mandate the timely settlement of debts. It was recognised that the method for intentionally ending up under the Companies Act, 1956 was time-consuming and lacked a clearly specified eligibility of a liquidator, thus the government proposed New Regulations to facilitate the process of purposeful winding up. Experts and corporations alike applaud the Code's mandate that they

be appointed as Liquidators. Businesses and limited liability companies have an optimal framework in the Code and Regulations. While the process is mostly unchanged from the previous administration, the beginning of the winding down phase has been altered.

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