

**NOTE ON INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) BILL, 2019<sup>1</sup>**

- Passed by Cabinet on 11.12.2019 and a press release is issued subsequent thereto.
- The amendments aim to remove certain difficulties being faced during insolvency resolution process to realize the objects of the code and to further ease doing of business.
- Provisions amended vide the Bill: Section 5(12), 5(15), 7, 11, 14, 16(1), 21(2), 23(1), 29A, 227, 239, 240 in the Insolvency and Bankruptcy Code, 2016.

**IMPACT AS STATED IN PRESS RELEASE**

- ✓ Amendments to the Code to remove bottlenecks, streamline the CIRP and protection of last mile funding will boost investment in financially distressed sectors.
- ✓ Additional thresholds introduced for Financial Creditors represented by an authorized representative due to large numbers in order to prevent frivolous triggering of Corporate Insolvency Resolution Process (CIRP).
- ✓ Ensuring that the substratum of the business of corporate debtor is not lost, and it can continue as a going concern by clarifying that the licenses, permits, concessions, clearances etc. cannot be terminated or suspended or not renewed during the moratorium period.
- ✓ Ring-fencing corporate debtor resolved under the IBC in favour of a successful resolution applicant from criminal proceedings against offences committed by previous management/promoters.
- ❖ New Provision – Section 32A.
- ❖ Proposed amendments are as follows:

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**I. AMENDMENTS TO THE CODE TO REMOVE BOTTLENECKS, STREAMLINE THE CIRP AND PROTECTION OF LAST MILE FUNDING WILL BOOST INVESTMENT IN FINANCIALLY DISTRESSED SECTORS.**

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<sup>1</sup> Disclaimer: The information is derived from information under public domain and the same is subject to actual bill being passed by the parliament.

### **Date of Appointment Of IRP**

1. That the appointment of Insolvency Professional (**IP**), which earlier was within 14 days from the date of order for admission, has been directed to be done simultaneously alongwith the passing of order for admission of application. For this Section 5(12) and section 16 has been amended.

### **Section 5 (12)**

- i. The present Section 5(12) provides:

*“5. Definitions-*

*... (12) “insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.*

*Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority”*

- ii. **Effect of amendment to Section 5 (12)**: By the virtue of the IBC (Second Amendment) Bill, 2019, proviso to the above Section 5(12) has been omitted.

### **Section 16(1)**

- iii. Presently, Section 16(1) requires the Adjudicating Authority to appoint an interim resolution professional within fourteen days from the insolvency commencement date.
- iv. Effect of amendment: the proposed amendment substitutes the phrase “within 14 days from the insolvency commencement date”, with the phrase “on the insolvency commencement date”.
- v. This implies that the IRP, in case appointed by the Adjudicating Authority, would have to be appointed on the date of admission of

the application against the Corporate Debtor. This has been proposed to be done in the light of the fact that now tribunals have a list of IPs available for appointment on the same day as of admission of an IBC Application and therefore the window of appointing IRP in 14 days would now be closed.

- vi. This implies that if the amendment is ratified, appointment of IRP by the Tribunals shall be made on the insolvency commencement date.

## **II. MANAGEMENT TO VEST WITH RESOLUTION PROFESSIONAL AFTER COMPLETION TILL APPROVAL OF RESOLUTION PLAN/LIQUIDATION**

### **Amendment to Section 23(1)**

2. Section 23(1) has been amended to include the management of Corporate Debtor by RP till passing of order by the Tribunal under section 34 for liquidation alongwith management of Corporate Debtor till passing of order by the Tribunal under section 31 i.e. approval of resolution plan.
3. Effect of amendment: The proposed amendment substitutes proviso to sub section (1) of Section 23, and clarifies that until an order for approving/rejecting the resolution plan, or appointment of a liquidator is passed by the Adjudicating Authority, the RP shall continue to manage the Corporate Debtor.

### **Interim Finance**

4. The Section 5(15) has amended to expand definition of Interim finance. The present Section 5(15) provided that:  

*“15. “interim finance” means any financial debt raised by the resolution professional during the insolvency resolution process period.”*
5. Effect of amendment: The amendment proposed inserts the phrase *“and such other debt as may be notified”*. This implies that a provision

giving scope of introducing new class/categories of Interim Finance may be added.

**Corporate Debtor permitted to file Application under IBC against another Corporate Debtor**

6. Presently, Section 11 of the IBC provides the classes of persons who are barred from making application for initiation of CIRP against the Corporate Debtor. A new explanation has been proposed to be inserted in Section 11 in this regard.

Effect of amendment: The proposed amendment clarifies that a corporate debtor, against whom CIRP proceedings are pending, would not be barred from making an application for initiating CIRP proceedings against another corporate debtor in the capacity of a financial or an operational creditor.

**Exemption under Section 29A to be extended to other transactions as may be prescribed**

7. Section 29A specifies the class of the resolution applicants who are ineligible to propose a resolution plan before the Committee of Creditors.

**8. Amendment to Section 29A**

“....

*In section 29A of the principal Act,—*

*(i) in clause (c), in the second proviso, in the Explanation I, after the words, "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted;*

*(ii) in clause (j), in Explanation I, in the second proviso, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.*

....”

Effect of amendment: The proposed amendment inserts the phrase “or completion of such transactions as may be prescribed” after the words “convertible into equity shares”.

Thus, scope of adding additional conditions/grounds for determining the eligibility of the resolution applicant is provided for.

### **Amendment to Section 239**

9. Section 239 deals with power of the Central Government to make rules respectively. The proposed amendment to this provision adds sub-clauses (fa), (fb) and (fc) after clause (f) to Sub-Section 2 of Section 239.
10. Effect of amendment: It aims to empower the Central Govt. to notify certain transactions covered under second proviso of Section 21(2); and certain transactions covered under Section 29A under the purview of Section 239.

### **III. FINANCIAL SERVICE PROVIDERS**

11. Section 227 of the Code deals with power of the Central Government to notify financial service providers etc.
12. Effect of amendment: The proposed amendment substitutes the phrase “*examined in this code*” in Section 227 for the words “*contained in this code*”. Further, a new explanation is also proposed to be inserted in the provision, which provides scope of conducting the insolvency and liquidation proceedings with certain modifications in respect of the financial service providers. Such modifications may be prescribed separately.

### **IV. THRESHOLD INTRODUCED FOR LARGE NUMBER OF FINANCIAL CREDITORS TO PREVENT FRIVOLOUS TRIGGERING OF CIRP**

#### **Amendment to Section 7**

13. The present Section 7 provides for initiation of the CIRP process against a Corporate Debtor by a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor. Presently, there is no threshold specified to the number of financial creditors that may be represented by a person/financial creditor/ authorized representative. Further the application of the amended provisions have been made to the Applications which have not been admitted by the Tribunal.

Effect of Amendment

14. Three proviso has been inserted, the first proviso provides for a minimum number of creditors under same class as defined under section 21 (6A) who are eligible to file application under IBC, i.e. **not less than 100 of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.**
15. **Further**, the second proviso provides for a minimum number of creditors in same real estate project who are eligible to file application under IBC, i.e. **not less than 100 of such allottees in the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less.**
16. Furthermore the third proviso provides that in case any application for initiation CIRP under Section 7 against a corporate debtor, filed by a financial creditor has not been admitted by the Adjudicating Authority before the commencement of this bill, the same shall be modified to comply with the requirements of the amended provision within 30 days of the passing of this bill, otherwise such application shall be deemed to be withdrawn before admission.
- V. **ENSURING THAT THE SUBSTRATUM OF THE BUSINESS OF CORPORATE DEBTOR IS NOT LOST, AND IT CAN CONTINUE AS A GOING CONCERN BY CLARIFYING THAT THE LICENSES, PERMITS, CONCESSIONS, CLEARANCES ETC. CANNOT BE TERMINATED OR SUSPENDED OR NOT RENEWED DURING THE MORATORIUM PERIOD.**

## **Essential Goods And Services, Payment Of Dues During Cirp And Interim Finance**

### **Amendment to Section 14**

17. That the moratorium under Section 14 has been amended to clarify supply of essential goods and services to include licenses, permits, registration, quota, concession, clearances, such rights etc. given by the Central Govt./any authority etc. and further it has been mandated that the same is subject to payment of dues in respect of supply of goods and services covered under moratorium.

- i. Effect of addition of explanation to Section 14 (1): An explanation has been added in the proposed amended Sec. 14(1) to clarify prohibition of non-renewal, termination, suspension of licenses, permits, registration, quota, concession, clearances or such similar rights granted by the Central or the State Government or a local authority to the corporate debtor, under moratorium period. However, a precondition has been imposed that there should not be any default on the part of the corporate debtor during moratorium in respect of payment of the current dues arising of the use or continuation of such licenses/rights.
- ii. Effect of insertion of Sub-Section 2A in Section 14: A new sub-section 2A has been proposed to be added, that subject to payment of dues arising from supply of essential goods and services during the moratorium period, there shall be prohibition on termination, suspension, interruption of certain goods and services which are critical to preserve the value of the corporate debtor, and to run it as a going concern.
- iii. Furthermore, Sec. 14(3)(a) has been proposed to be substituted by: *“(a) such transactions, agreements or other arrangements as may be notified by the Central government in calculation with any financial sector regulator or any other authority.”*

### **Amendment to Section 240**

18. The proposed amendment to Section 240 is in the light of the amendment of Section 14, wherein supply of critical goods and services as deemed fit by the RP in order to preserve and protect value of the Corporate Debtor and run it as a going concern, during the period of moratorium is not to be interrupted.
19. Effect of amendment: Accordingly, the Board will now have power to make regulations for circumstances in which supply of critical goods and services may be terminated/ interrupted during moratorium.

**VI. RING-FENCING CORPORATE DEBTOR RESOLVED UNDER THE IBC IN FAVOUR OF A SUCCESSFUL RESOLUTION APPLICANT FROM CRIMINAL PROCEEDINGS AGAINST OFFENCES COMMITTED BY PREVIOUS MANAGEMENT/PROMOTERS. CEASING OF LIABILITY OF CORPORATE DEBTOR**

**Insertion of Section 32a**

20. After Section 32, a new provision i.e. Section 32A is proposed to be added, so as to provide for ceasing of a liability of a corporate debtor for an offence committed prior to commencement of the CIRP under circumstances as provided thereunder.

**New Inserted Section 32**

“....

*After section 32 of the principal Act, the following section shall be inserted, namely:—*

*"32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—*

*(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*



*(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:*

*Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:*

*Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.*

*(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—*

*(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*

*(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.*

*"Explanation.—For the purposes of this sub-section, it is hereby clarified that,—*

*(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;*

*(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.*

*(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."*

....”

#### Effect of Amendment

21. That on approval of resolution plan, in case of new management of the Corporate Debtor, the Corporate Debtor shall cease to have liability for an offence committed prior to commencement of CIRP.
  22. The exemption against corporate debtor however is not applicable to the new management in case of their abetment/conspiracy of commission offence by the said management, if any.
  23. No action can be taken against the property of the corporate debtor covered under the approved resolution plan/sale under liquidation for such an offence committed prior to commencement of CIRP.
  24. The exemption against the property of corporate however is not applicable to the new management/purchaser(s) in case of their in case of abetment/conspiracy of commission offence by the said management, if any.
  25. However the corporate debtor and the new management shall provide assistance for investigations/under provisions of applicable laws etc.
- ❖ Although the new provision i.e. Section 32A stipulates that the Corporate Debtor would be discharged of the prosecution from the date of approval of resolution plan by the Adjudicating Authority, but there is no clarity with regard to the date of enforcement of the provision itself.

**RRG and Associates**