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Group Insolvency in India: - Analyzing the Definition of Group and Need of Redefining

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Abstract

India is the fifth largest economy universally, as per the data of 2023-2024 the country had 26,63,016 registered companies at the end of 2023-2024 financial year. It is pertinent to note that economic growth is somewhere dependent on the smooth working of these companies. Insolvency and Bankruptcy code 2016 aimed at resolving the insolvent companies. India has a very dependent market; companies are dependent for their projects on other companies. Failure of a company impacts others company too. IBC deals with insolvency of the corporate bodies but in case of group insolvency of companies it has no provisions so far. CBIRC report has identified some challenges and a way ahead to deal group insolvency cases. This article will analyze the definition of 'Group' for the purpose of insolvency proceedings. How can it be interpreted and expanded to get the maximum benefit for the companies.

Keywords:- Group Insolvency, Group, CBIRC, IBC

Introduction

A company is a separate juristic person. This law has taken a special place in the company law jurisprudence across the countries. Time and again the courts of developed and developing economies have reiterated the importance of the concept of separate legal entity. Indian jurisprudence on company Law follows the same principle to interpret the Company Law. In the landmark judgment of solomon v. Solomon A company Ltd which recognized the separate legal personality of a company by the House of Lords (UK) is a basis of the said principle. In Tata Engineering & Locomotive Co.Ltd v. State of Bihar the Supreme court of India reiterated the Solomon principle and held that a company who has been incorporated under the Law of the Land has its own legal identity and has its own liabilities, assets and powers. By this principle separate legal existence is not just created between the company and its members but also between the corporate bodies who are working together, or they are part of a single company.[2]

Following this rule the courts have hesitated in diverting themselves from the rule and in exceptional circumstances have lifted the corporate veil of a company. Through judicial pronouncements and parliamentary actions in some cases the veil can by lifted, however it has been seen that it is kept as a special circumstance. Insolvency and Bankruptcy Law are recent development in Indian jurisprudence which is trying to deal with the resolution of the sick companies. However, in India typical dependance has been seen in companies where they are interdependent in their working, assets and liabilities. India nearly has 356 successful conglomerates and other small conglomerates[3]. When a company fails, it is treated as a separate entity and insolvency resolution process is brought against the company under Insolvency and Bankruptcy Code 2016, (hereinafter called IBC). But where the company is interlinked then there is a possibility that not the only company gets affected but the company in group gets affected by the insolvent state. To carry out the insolvency proceedings for the separate entity of same group would result in asset minimization, unnecessary time consumption, delayed and ineffective execution of the order etc. IBC does envisage the rules for the same and hence it becomes difficult for the tribunals to carry out group insolvency in symmetry and homogenously across the jurisdictions. To accept the application of group insolvency it becomes the discretion of the tribunal to accept the application on case-to-case basis. In famous case of insolvency of multiples Videocon companies[i4], the parties applied to court to hear the Insolvency application of the companies by single Adjudication Authority hereinafter referred as AA) to save the time, cost and to avoid conflicting orders. The application

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[2] Poorna Poovamma K.M & Abhishek Wadhawan, Introducing of the group insolvency regime in India: Identifying the challenges and proposing the solution, nliulaw review, available at https://nliulawreview.nliu.ac.in/wp-content/uploads/2022/01/Volume-X-Issue-I-270-299.pdf

[3] Ambition Box, available at https://www.ambitionbox.com/conglomerate-companies-in-india

[4] *Venugopal N. Dhoot v. State Bank of India, 2018 SCC OnLine NCLT 29551*.

was allowed. But this trend has not been seen by every AA wherein some of the NCLTs have denied proceeding in group insolvency. This paper will briefly deal with the problem of group insolvency and the need for a developed and mature Law.

When group insolvency proceedings are taken up by NCLT there can be different type of requests that have been observed like transferring the proceedings to single AA, to appoint single resolution professional to the insolvency procedure, to different companies of single holding company[5]. In landmark judgment of NCLT it was ordered to consolidate the assets of 13 companies that are managed by common directors, was holding common assets.[6] Similarly in yet another landmark case the AA ordered appointment of single resolution professional for the group of companies.

Defining the Term "Group"

It becomes pertinent to understand and explain the term "Group". Group has not been defined under IBC or Companies Act 2013; however, the Income Tax Act defines Group under section 286(9)(e). that defines as a parent entity and all other entities which must prepare a consolidated financial statement. The definition given under UNCITRAL legislative guide emphasizes control and ownership. Two or more enterprises will be interconnected if one of them is in control of the others, which means that one has the power to decide directly or indirectly operational and financial policies.[7] Under the report of the working group of IBBI the report was submitted in 2019 which has advised to implement the group insolvency in phases. The report has submitted a little diverted view on the definition of corporate group. 'Corporate group' be defined to include holding, subsidiary and associate companies"[8] , also the working group has recommended to consider the application on the discretion of the adjudicating authority to include the companies which are essentially interlinked. It will maximize the asset value of the companies. UNCITRAL guide takes one way to describe the group that is control and ownership, but the report gives a less inclusive definition for group insolvencies. Control and significant ownership are to be defined by the legislature or it will have same interpretation as of the Companies Act 2013 and Competition Act 2002. If the interpretation of the said definitions is taken from the existing Indian laws, then control is defined under section 2(27) of the companies act 2013, which includes the right to appoint majority of the director's control by the appointment of management etc. and signification ownership is defined as 26 % of voting power in a company. But the definition of control and significant ownership in the modal law is little different. The researcher tried to find plausible instances where the company is not associated but still can be considered by the tribunal for group insolvency. Common asset use by different companies, corporate guarantee given to companies etc. the report of the working group has given more space to the increased number of litigations by including the proviso to the definition. Judicial approached and discretionary power has to be exercised in a very judicially prudent manner as to not include every application for group insolvency but only limited to value maximization of the entities. In a landmark judgment of Cox and Kings the apex court has tried to define the term group companies. It describes as more of a theoretical definition with no quantitative measures to identify the companies as corporate group. The intention of working together is primarily emphasized. So, if we go by the definition if two or more companies are working for one project and they are linked together for the project but not linked in terms of the shareholding and control then also on failure of the project which might substantially affect the companies will attract the litigation as a corporate group. The nexus behind this is that the creditors are the same and hence initiating the litigation separately would not be a very timely and cost-effective mechanism. [9]

However, the report does not really appreciate any substantive change in the Legal provisions as it will negate the settled principal of separate legal entity. Procedural directives have been given like making group Coc which would coordinate the information between the corporate debtors. Group resolution professional, group valuation plan etc.

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[5] *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd, 2019 SCC OnLine NCLAT 592*
[6] *State Bank of India v. Videocon Industries Ltd. & Ors M.A 1306/ 2018 & Ors. in CP No. 02/2018 & Ors- decision dated 08.08.2019.*
[7] Article 2 (C) of UNCITRAL Model Law on Enterprise Group Insolvency
[8] Insolvency and Bankruptcy Board of India (n 12) 25.
[9] Yadu Krishna, A Letter to Legislators of the Incumbent Group Insolvency Regime: Defining Corporate Group and Lessons from Cox and Kings, available at https://www.irccl.in/post/a-letter-to-legislators-of-the-incumbent-group-insolvency-regime-defining-corporate-group-and-lesso

The report does not recommend appointing a resolution professional for all the group entities. That means the initiation of the insolvency will take place separately. It might cause a different time for initiating the insolvency procedure. Single professionals will be appointed by the group CoC, but the author's concern is that it will delay the appointment of the professional as the application of insolvency will have different times and CoC will also be formulated at considerable time gap. [10]It will decrease asset maximization. Group insolvency should purposefully be mandated where it is needed and that must be decided on the aspect of value maximization. The tribunal should use judicial discretion in deciding whether group insolvency is requisite for the asset maximization or not.

Conclusion

The definition of the group for the group insolvency procedure should be inclusive of all the possible scenario of the all the enterprises which are connected not only directly like associate, subsidiary or conglomerate but also the enterprises which are dependent otherwise. The effect of insolvency may affect the other enterprise in business, and it will increase the valuation of the assets of both the companies, group insolvency will ensure speedy recovery of the sick companies and will ensure the successful insolvency procedure. The procedural and legislative amendments are the prime need for the economic growth of the sick companies' dependent on each other. The single resolution professional is to be appointed as soon as the insolvency application is admitted. NCLT shall appoint a professional considering the needs of the group. However, the entities may choose to apply for not considering themselves in group and seek to appoint individual insolvency professional for itself.

[10] Barucha & Partners, Group Insolvency- The need of the hour, available at https://www.lexology.com/library/detail.aspx?g=87578ef4-6368-462a-b30a-17c4bd82672d