FINAL CA

MAY '19

REVISION NOTES

Corporate, Allied (Old) & Economics (New) Laws

Part - IX

THE INSOLVENCY AND BANKRUPTCY CODE, 2016

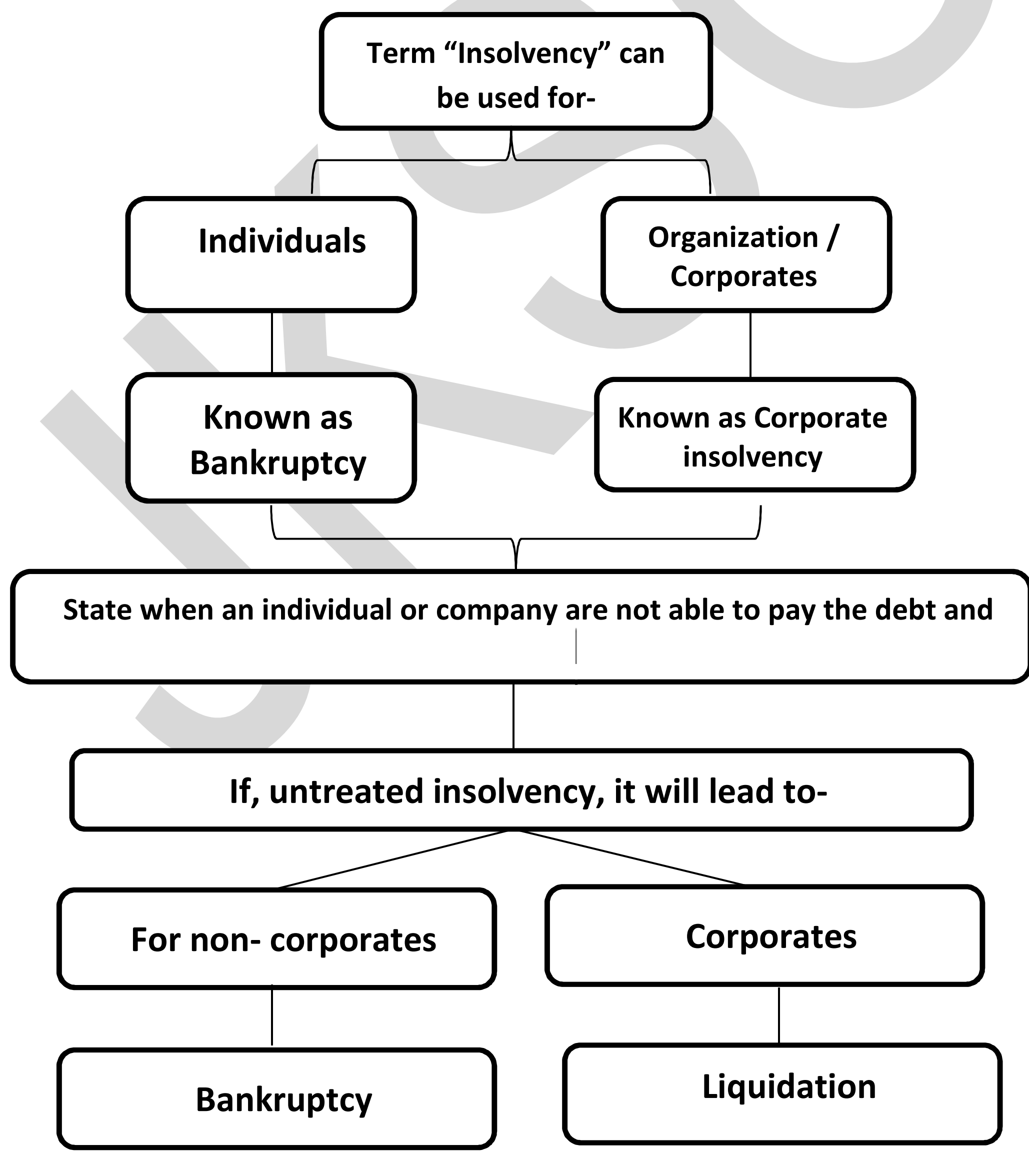
1. INTRODUCTION

The Insolvency and Bankruptcy Code, 2015 was introduced in the Lok Sabha on 21st December, 2015 and referred to the Joint Committee on the Insolvency and Bankruptcy Code, 2016. The Committee had presented its recommendations and a modified Bill based on its suggestions.

Further, the Insolvency and Bankruptcy Code, 2016 was passed by both the Houses of Parliament and notified in May 2016. Being one of the major economic reforms it paves the way focussing on creditor driven insolvency resolution.

Concept of Insolvency and Bankruptcy

- The term insolvency is used for both individuals and organizations. For individuals, it is known as bankruptcy and for corporate it is called corporate insolvency. Both refer to a situation when an individual or company are not able to pay the debt in present or near future and the value of assets held by them are less than liability.
- **Insolvency in this Code is regarded as a "state" where assets are insufficient to meet the liabilities. If untreated insolvency will lead to bankruptcy for non-corporates and liquidation of corporates.**



- While insolvency is a situation which arises due to inability to pay off the debts due to insufficient assets, bankruptcy is a situation wherein application is made to an authority declaring insolvency and seeking to be declared as bankrupt, which will continue until discharge.
- From the above it is evident **that insolvency is a state and bankruptcy** is a conclusion. A bankrupt would be a conclusive insolvent whereas all insolvencies will not lead to bankruptcies. Typically insolvency situations have two options – resolution and recovery or liquidation

Relationship between Bankruptcy, Insolvency & Liquidation

Bankruptcy is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process begins with a petition filed by the debtor, or by the creditors. All of the debtor's assets are measured and evaluated, and the assets may be used to repay a portion of outstanding debt.

In lucid language, if any person or entity is unable to pay off the debts, it owes, to their creditor, on time or as and when they became due and payable, then such person or entity is regarded as "insolvent".

Liquidation is the winding up of a corporation or incorporated entity. There are many entities that can initiate proceedings to cause the Liquidation, those being:-

- The Regulatory Bodies;
- The Directors of a Company;
- The Shareholders of a Company; and
- An Unpaid Creditor of a Company

In nut shell, insolvency is common to both bankruptcy and liquidation. Not being able to pay debts as and when they became due and payable are the leading cause of Liquidations and is the only way that can cause a natural person to become a bankrupt.

Need for a New Law

As per the Ease of Doing Business Report of the World Bank, it takes an average of four to five years in insolvency resolution in India. The main reason behind such delay in the legal process is the existence of overlapping legislations and adjudicating authorities dealing with insolvency of companies and individuals in India.

The Government of India then formulated a plan to refurbish the prevailing bankruptcy laws and replace them with one that will facilitate hassle-free and time-bound for revival and closure of businesses.

- ❖ Presidency Towns
- ❖ Provincial Insolvency
- ❖ Indian Partnership
- ❖ Companies Act, 1956
- ❖ Sick Industries Companies Act, 1985
- ❖ Recovery of debts due to Banks & Financial instutions Act, 1993
- ❖ SARFASI Act, 2002
- ❖ Companies Act, 2013
- ❖ Insolvency & Bankruptcy Code, 2016

The existing framework of law has failed to resolve insolvency situations.

- Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues.
- Business failure – which is a breakdown in the business model of the enterprise, and it, is unable to generate sufficient revenues to meet payments.
- Malfeasance and mismanagement by promoters

Since, the existing laws were not aligned with the market realties and had several problems and were inadequate. There was no single window resolution available and the resolution and jurisdiction was with the multiple agencies with overlapping powers that was leading to delays

and complexities in the process. The Companies Act deals with the corporate insolvency law and the individual insolvency laws were being dealt by a century old two Acts, i.e., The Provincial Towns Insolvency Act and the Presidency Towns Insolvency Act.

- Multiple laws governing Debt resolution and multiple forums
- Parallel proceedings by different parties on the same debtor in different forums and Conflicts between laws and over jurisdictions.
- Asymmetry of information

Objectives: A sound legal framework of bankruptcy law is required for achieving the following objectives:-

- Improved handling of conflicts between creditors and the debtor: It can provide procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.
- Avoid destruction of value: It can also provide flexibility for parties to arrive at the most efficient solution to maximise value during negotiations. The bankruptcy law will create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.
- Drawing the line between malfeasance and business failure: Under a weak insolvency regime, the stereotype of “rich promoters of defaulting entities” generates two strands of thinking:
  (a) The idea that all default involves malfeasance and
  (b) The idea that promoters should be held personally financially responsible for defaults of the firms that they control.
- Clearly allocate losses in macroeconomic downturns: With a sound bankruptcy framework, these losses are clearly allocated to some people. Loss allocation could take place through taxes, inflation, currency depreciation, expropriation, or wage or consumption suppression. These could fall upon foreign creditors, small business owners, savers, workers, owners of financial and non-financial assets, importers, exporters.

The following benefits are expected from the new Law:-

- Asset stripping by promoters is controlled after and before default.
- The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring
- Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring
- All parties know that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics.
- The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.

The Code seeks to provide an effective legal framework for timely resolution of insolvency and bankruptcy which would support development of credit markets and encourage entrepreneurship, and facilitate more investments leading to higher economic growth and development.

Structure of the Code

The Code is structured into 5 parts comprising of 255 sections and 11 Schedules. Each part deals with a distinct aspect of the insolvency resolution process. Part II, Chapters I and II are of particular significance for the students and are discussed in detail hereunder:

Part	Part Content	Chapters and Sections	Chapter / Contents
I	Preliminary	(1-3)	1. Short title, extent & Commencement 2. Application 3. Definitions
II	Insolvency Resolutions and Liquidationfor Corporate Persons	I–VII (4–77)	1. Preliminary (Application & Definitions) 2. Corporate Insolvency Resolution Process 3. Liquidation Process 4. Fast Track Corporate Insolvency Resolution Process 5. Voluntary Liquidation of Corporate Persons 6. Adjudicating Authority for Corporate Persons 7. Offences & Penalties
III	Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms	I – VII (78-187)	1. Preliminary (Application & Definitions) 2. Fresh Start Process 3. Insolvency Resolution Process 4. Bankruptcy Order for Individuals & Partnership Firms 5. Administration & Distribution of the Estate of the Bankrupt 6. Adjudicating Authority 7. Offences & Penalties
IV	Regulation of Insolvency Professionals, Agencies and Information Utilities	I – VII (188–223)	1. The Insolvency and Bankruptcy Board of India 2. Powers & Functions of the Board 3. Insolvency Professional Agencies 4. Insolvency Professionals 5. Information Utilities 6. Inspection & Investigation 7. Finance, Accounts & Audit
V	Miscellaneous	(224 – 255)	Miscellaneous

Extent and Commencement of the Code:

As per section 1 of the Insolvency and Bankruptcy Code, it extends to the whole of India except Part III (Insolvency Resolution and Bankruptcy for Individuals and Partnership Firm) which excludes the state of Jammu and Kashmir.

This Code came into an enforcement on 28th May 2016, however, the Central Government appointed different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

Applicability of the Code

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

(a) Any company incorporated under the Companies Act, 2013 or under any previous law.

(b) Any other company governed by any special act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.

(c) Any Limited Liability Partnership under the LLP Act 2008.
(d) Any other body incorporated under any law for the time being in force, as the Central Government may by notification specify in this behalf.
(e) **Personal guarantors to corporate debtors**
(f) **Partnership firms and proprietorship firms and**
(g) **Individuals, other than persons referred to in clause (e)**

Exceptions: There is an exception to the applicability of the Code that it shall not apply to corporate persons who are regulated financial service providers like Banks, Financial Institutions and Insurance companies.

Features of the Insolvency and Bankruptcy Code:

The Insolvency and Bankruptcy Code, 2016 has following distinguishing features:-

(i) Comprehensive Law: Insolvency Code is a comprehensive law which envisages and regulates the process of insolvency and bankruptcy of all persons including corporates, partnerships, LLP's and individuals.

(ii) No Multiplicity of Laws: The Code has withered away the multiple laws covering the recovery of debts and insolvency and liquidation process and presents singular platform for all the reliefs relating to recovery of debts and insolvency.

(iii) Low Time Resolution: The Code provides a low time resolution and defines fixed time frames for insolvency resolution of companies and individuals. The process is mandated to be completed within 180 days, extendable to maximum of 90 days. Further, for a speedier process there is provision for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.

(iv) One Window Clearance: It has been drafted to provide one window clearance to the applicant whereby he gets the appropriate relief at the same authority unlike the earlier position of law where in case the company is not able to revive the procedure for winding up and liquidation has to be initiated under separate laws governed by separate authorities.

(v) One Chain of Authority: There is one chain of authority under the Code. It does not even allow the civil courts to interfere with the application pending before the adjudicating authority, thereby reducing the multiplicity of litigations. The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal (DRT) will adjudicate insolvency resolution for individuals.

(vi) Priority to the interests of workman and employees: The Code also protects the interests of workman and employees. It excludes dues payable to workmen under provident fund, pension fund and gratuity fund from the debtor's assets during liquidation.

(vii) New Regulatory Authority: It provides for constitution of a new regulatory authority 'Insolvency and Bankruptcy Board of India' to regulate professionals, agencies and information utilities engaged in resolution of insolvencies of companies, partnership firms and individuals. The Board has already been established and started functioning.

Key Objectives of the Code

The Insolvency and Bankruptcy Code, 2016 is intended to strike the right balance of interests of all stakeholders of the business enterprise so that the corporates and other business entities enjoy availability of credit and at the same time the creditor do not have to bear the losses on account of default. The purpose of enactment of the Insolvency and Bankruptcy Code, 2016 is as follows:

(a) To consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals.
(b) To fix time periods for execution of the law in a time bound manner.
(c) To maximize the value of assets of interested persons.
(d) To promote entrepreneurship
(e) To increase availability of credit.

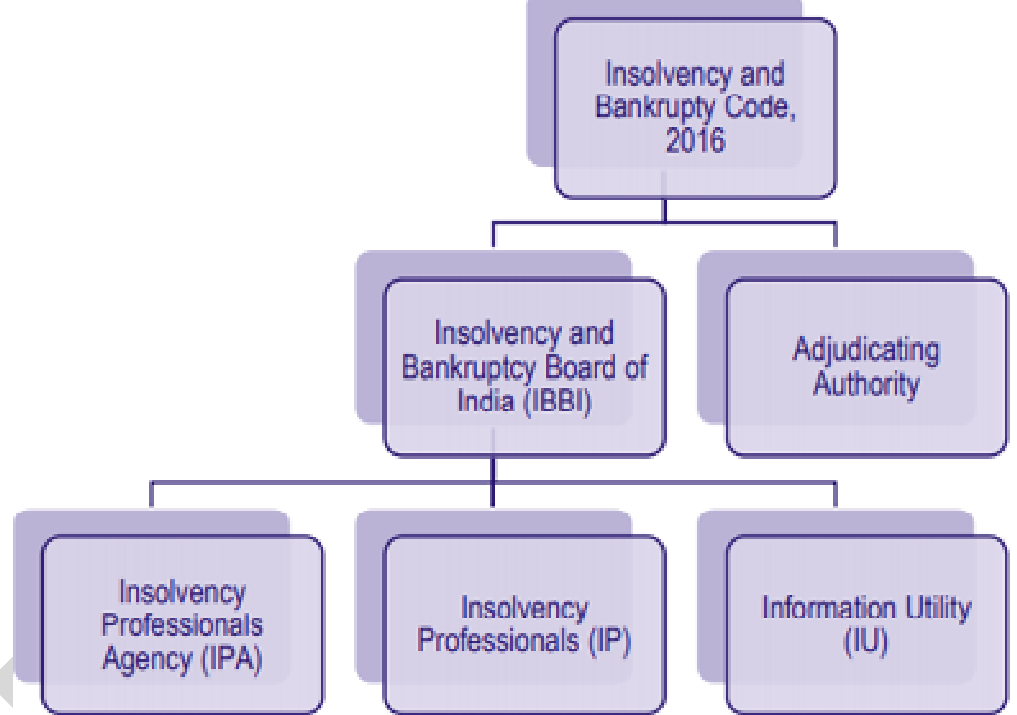
(f) To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

(g) To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law.

Regulatory Mechanism

The Insolvency and Bankruptcy Code, 2016 provides a new regulatory mechanism with an institutional set-up comprising of five pillars:-

- Insolvency and Bankruptcy Board of India
- Insolvency Professional Agencies
- Insolvency Professionals
- Information Utilities
- Adjudicating Authority



1. **Insolvency and Bankruptcy Board of India-**The Code provides for establishment of a Regulator who will oversee these entities and to perform legislative, executive and quasi-judicial functions with respect to the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. The Insolvency and Bankruptcy Board of India was established on October 1, 2016. The head office of the Board is located at New Delhi.
   The Board is a body corporate, having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

   Composition of the Board

   (a) A Chairperson;

   (b) three members from amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex-officio;

   (c) One member to be nominated by the Reserve Bank of India, ex officio ;

   (d) Five other members to be nominated by the Central Government, of whom at least three shall be the whole-time members

2. **Insolvency Professional Agencies-**The Code provides for establishment of insolvency professionals agencies to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations.

Principles governing registration of Insolvency Professional Agency

- to promote the professional development of and regulation of insolvency professionals
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- to promote good professional and ethical conduct amongst insolvency professionals
- to protect the interests of debtors, creditors and such other persons as may be specified
- to promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy processes under this Code

Functions of Insolvency professional agencies (IPA): It will perform three key functions:

Functions of IPA

Regulatory functions

- drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members

Executive functions

- monitoring, inspecting and investigating members on a regular basis
- gathering information on their performance, with the over-arching objective of preventing frivolous behaviour, and
- malfeasance in the conduct of IP duties

Quasi-judicial functions

- addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions

3. **Insolvency Professionals:** The Code provides for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process. The role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. He shall have the power and responsibility to monitor and manage the operations and assets of the enterprise.

In the resolution process, the insolvency professional verifies the claims of the creditors, constitutes a creditors committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

An Insolvency Professional if appointed as a Resolution Professional shall act as a as a neutral trustee of the assets of the organization.

Every insolvency professional shall abide by the following code of conduct:—

- to take reasonable care and diligence while performing his duties;
- to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- to allow the insolvency professional agency to inspect his records;
- to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- to perform his functions in such manner and subject to such conditions as may be specified.

4. **Information Utilities –** The Code envisages creation of information utility to collect, collate, authenticate and disseminate financial information of debtors in centralized electronic databases, at all times.

The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy

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proceedings. The purpose of this is to remove information asymmetry and dependency on the debtor's management for critical information that is needed to swiftly resolve insolvency.

Obligations of Information Utility:

An information utility shall provide such services as may be specified including core services to any person if such person complies with the terms and conditions as may be specified by regulations.

For the purposes of providing core services to any person, every information utility shall—

(a) Create and store financial information in a universally accessible format;

(b) Accept electronic submissions of financial information from persons who are under obligations to submit financial information

(c) Accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;

(d) Meet such minimum service quality standards as may be specified by regulations;

(e) Get the information received from various persons authenticated by all concerned parties before storing such information;

(f) Provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;

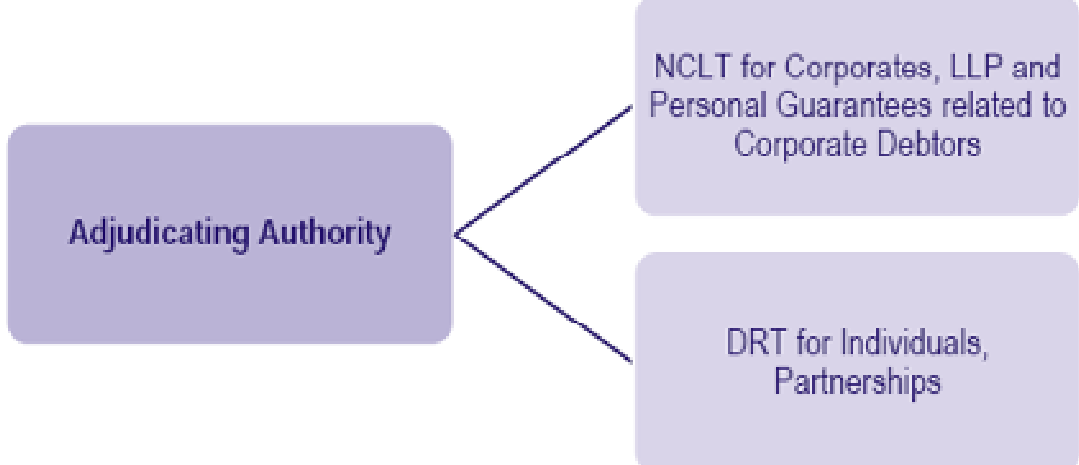
(g) Publish such statistical information as may be specified by regulations;

(h) Have inter-operability with other information utilities.

5. **Adjudicating Authority-**The Adjudicating Authority for corporate insolvency and liquidation is the National Company Law Tribunal (NCLT). Appeals against NCLT orders shall lie with National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India.

The Code has created one chain of authority for adjudication under the Code. Civil Courts have been prohibited to interfere in the matters related with application pending before the Adjudicating Authority. No injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken by the NCLT.

For individuals and other persons, the Adjudicating Authority is the Debt Recovery Tribunal (DRT), appeals lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.



Example : XY & Co., a firm applied to NCLT to be declared insolvent as the firm is not able to pay off debts to his creditors in present and in coming future. State whether the act of the firm is valid as to the filing of application in terms of jurisdiction.

Answer: No, as per the Code, individual & firms in relation to Insolvency matters shall apply to the DRT not to NCLT. Here there is violation of jurisdiction in relation to adjudicating authority.

2. IMPORTANT DEFINITIONS [SECTIONS 3 AND 5]

(1) Claim means a right to payment or right to remedy for breach of contract if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. [Section 3(6)]

(2) Corporate Person means
 (a) A company as defined under section 2(20) of the Companies Act, 2013;
 (b) A Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008; or,
 (c) Any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. [Section 3(7)]

(3) Corporate Debtor means a corporate person who owes a debt to any person. [Section 3(8)]

(4) Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. [Section 3(10)]

(5) Debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. [Section 3(11)]

(6) Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]

(7) Financial information, in relation to a person, means one or more of the following categories of information, namely:—
 (a) Records of the debt of the person;
 (b) Records of liabilities when the person is solvent;
 (c) Records of assets of person over which security interest has been created;
 (d) Records, if any, of instances of default by the person against any debt;
 (e) Records of the balance sheet and cash-flow statements of the person; and
 (f) Such other information as may be specified. [Section 3(13)]

(8) A person includes:-
- an individual
- a Hindu Undivided Family
- a company
- a trust
- a partnership
- A limited liability partnership, and
- any other entity established under a Statute.

And includes a person resident outside India [Section 3(23)]

(9) Secured creditor means a creditor in favour of whom security interest is created; [Section 3(30)]

(10) Security Interest means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. [Section 3(31)]

(11) A transaction includes an agreement or arrangement in writing for transfer of assets, or funds, goods or services, from or to the corporate debtor. [Section 3(33)]

(12) Transfer includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. In case of property- transfer of property means transfer of any property. [Section 3(34)]

(13) Transfer of property means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property; [Section 3(35)].

(14) Adjudicating Authority, for the purposes of this Part II (Insolvency Resolution and Liquidation for corporate persons), means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. [Section 5(1)]

(15) Corporate applicant means—
- (a) Corporate debtor; or
- (b) A member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
- (c) An individual who is in charge of managing the operations and resources of the corporate debtor; or
- (d) A person who has the control and supervision over the financial affairs of the corporate debtor; [Section 5(5)]

(16) Dispute includes a suit or arbitration proceedings relating to—
- (a) The existence of the amount of debt;
- (b) The quality of goods or service; or
- (c) The breach of a representation or warranty; [Section 5(6)]

(17) Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;[section 5(7)]

(18) Financial position, in relation to any person, means the financial information of a person as on a certain date; [Section 5(9)]

(19) Initiation date means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process; [Section 5(11)]

(20) 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;[Section 5(12)]

(21) Insolvency resolution process period means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;[Section 5(14)]

(22) Liquidation commencement date means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be; [Section 5(17)]

(23) Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;[Section 5(20)]

(24) Related party, in relation to a corporate debtor, means—
- (a) a director or partner or a relative of a director or partner of the corporate debtor
- (b) a key managerial personnel or a relative of a key managerial personnel of the corporate debtor;
- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; [Section 5(24)]

(25) Resolution plan means a plan proposed by **resolution applicant** for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; [Section 5(26)]

(26) Resolution professional, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; [Section 5(27)]

(27) Voting share means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. [Section 5(28)]

3. CORPORATE INSOLVENCY RESOLUTION PROCESS [SECTIONS 4, 6-32]

Provisions related to Insolvency Resolution and Liquidation process for Corporate Persons are covered in Part II of the Code.

Corporate Insolvency Resolution is a process during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival, if any. If the insolvency resolution process fails or financial creditors decide that the business of debtor cannot be carried on in a profitable manner and it should be wound up, the debtor will undergo liquidation process and the assets of the debtor shall be realized and distributed by the liquidator.

The Insolvency Resolution Process provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the existing legal framework under which the primary onus to initiate a re-

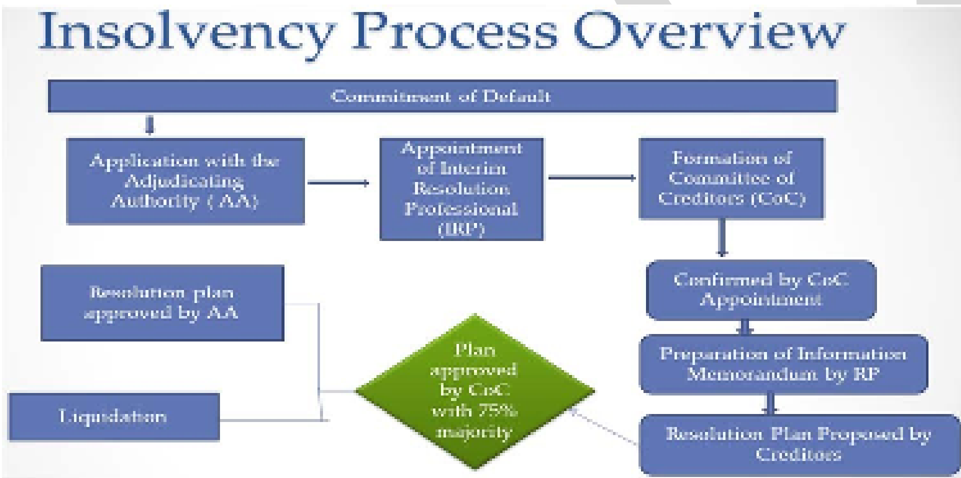
organization process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

The Code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days, extendable by 90 days. It also provides for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.

i. Process Flow

A comprehensive process that covers the gamut of insolvency resolution framework for Corporates and includes processes relating to:-

- Filing of application before NCLT
- Adjudication: Admission or Rejection of application
- Moratorium and Public Announcement
- Appointment of Interim Resolution Professional
- Formation of the Committee of Creditors
- Preparation and approval of the Resolution Plan
- Consequences of non-submission of the Resolution Plan



ii. Application to National Company Law Tribunal Commitment of Default

The process of insolvency is triggered by occurrence of default. As per Section 3 (12) of the Code, default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor.

The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.[Section 4]

Filing of application before NCLT

The corporate insolvency process may be initiated against any defaulting corporate debtor by making an application for corporate insolvency resolution. The application may be made by:-

(a) Financial creditor
(b) Operational creditor
(c) Corporate debtor

Who can make the Application?

Financial Creditor	Operational Creditor	Corporate Debtor
• Any person to whom a financial debt is owed & • Includes a person to whom such debt legally assigned or transferred	• A person to whom an operational debt is owed & • Includes any person to whom such debt legally assigned or transferred	• A corporate person who owes a debt to any person

- Filling of an application by a financial creditor: A financial creditor either itself or along with other financial creditors may lodge an application before the Adjudicating Authority (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.
- Evidence in support of default and name of the Interim resolution professional by financial creditor: The Financial Creditor shall along with the application give evidence in support of the default committed by the corporate debtor. He shall also give the name of the Interim Resolution Professional.
- Filling of an application by an operational creditor: An operational creditor shall on the occurrence of default, shall :
  - o first send a demand notice and a copy of invoice to the corporate debtor.
  - o The corporate debtor shall within a period of ten days of receipt of demand notice notify the operational creditor about the existence of a dispute, if there is any and record of pendency of any suit or arbitration proceedings.
  - o He shall also provide the details of repayment of unpaid operational debt in case the debt has or is being paid.
  - o After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.
- Filing of an application by corporate applicant: Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority. The corporate applicant shall furnish the information relating to books of account and other documents and name of a resolution professional proposed to be appointed as interim resolution professional.
- Persons not entitled to initiate insolvency process: As per Section 11 of the Code the following persons shall not be entitled to initiate the corporate insolvency process:-
  - (a) A corporate debtor already undergoing an insolvency resolution process; or
  - (b) A corporate debtor having completed corporate insolvency resolution process 12 (twelve) months preceding the date of making of the application; or
  - (c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved 12 (twelve) months before the date of making of an application;
  - (d) A corporate debtor in respect of whom a liquidation order has been made.

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor. [Section 11]

Example: State the circumstances when persons are not entitled to make an application to initiate corporate insolvency resolution process.

Suppose a corporate debtor has committed a default and is undergoing a corporate insolvency resolution process. A corporate applicant Mr. X thereof files an application for initiating corporate insolvency resolution process with the Adjudicating Authority, State whether he is entitled to make an application to initiate corporate insolvency resolution process?

Answer: The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process -

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor. [Section 11]

As per the facts, corporate applicant Mr. X is a corporate debtor who is undergoing a corporate insolvency resolution process, he shall not be entitled to make application to initiate corporate insolvency resolution process.

iii. Adjudication: Admission or Rejection of Application

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

The insolvency resolution process shall commence from the date of admission of application by the Adjudicating Authority. It is referred to as the Corporate Insolvency Resolution Date.

The chart below explains the process flow for insolvency resolution process:

Application before NCLT with proof and name of proposed Resolution Professional

Rejection of Application (14 days from the date of receipt of application)

Admission of Application (14 days from the date of receipt of application)

↓

Declaration of moratium and appointment of interim resolution professional (IRP) IRP to be appointed within 14 days from insolvency commencement date

↓

Vesting of powers of Board & Management of affairs by IRP

↓

Collection of all claims and constitution of Committee of Creditors

↓

Appointment of RP and vesting of powers in RP

iv. Moratorium

After the commencement of corporate insolvency resolution a calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period. [Section 14]

Section 14 of the Code provides that the following acts shall be prohibited during the moratorium period:-

(a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. [Section 14]

Example: After commencement of Corporate Insolvency Resolution, NCLT declared Moratorium against the corporate debtor. Within a month of declaration, corporate debtor disposed of his property. State validity of the act of corporate debtor.

Answer: As per section 14 of the Code, any transaction/disposal/ of any assets of Corporate Debtor during the moratorium period which is 180 days from date of commencement of corporate insolvency resolution, is prohibited. So such an act of corporate debtor is not valid.

v. Appointment, Term and Powers of Interim Resolution Professional (IRP)

Appointment of IRP: Adjudicating authority shall appoint an Interim Resolution Professional within 14 days from the commencement date. Section16 of the Code lays down the procedure for appointment of an Interim Resolution Professional.

Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, the resolution professional as proposed in the application shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

Where the application for corporate insolvency resolution process is made by an operational creditor and

(a) No proposal for an interim resolution professional is made. The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.

(b) A proposal for an interim resolution professional is made the proposed resolution professional shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

Period of appointment of IRP: The term of Interim Resolution Professional shall not exceed 30 days from the date of appointment.

Powers of IRP: As Per Section 17 of the Code, the interim resolution professional shall have following powers:-

(a) Management of Affairs: The management of the affairs of the corporate debtor shall vest in the interim resolution professional from the date of his appointment.

(b) Exercise of Power of BoD/ partners: The powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.

(c) Reporting of officers/managers: The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

(d) Instructions to financial institutions: The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

The key roles to be performed by the Interim Resolution Professional are:-

(a) Issuance of public notice of the Corporate Insolvency Resolution process

(b) Collation of claims received

(c) Constitution of the Committee of Creditors

(d) Conduct of the first meeting of the Committee of Creditors

vi. Appointment of Resolution Professional (RP)

The Committee of Creditors in the first meeting by majority vote of not less than 66% of the Voting Share of the Financial Creditors either-

- Resolve to appoint the interim resolution professional as a Resolution Professional, or
- To replace the interim resolution professional by another Resolution Professional.

If the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall direct the interim resolution professional to continue as the

resolution professional until such time as the Board confirms the Appointment of the proposed resolution professional.

Role of a Resolution Professional

The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors.

The thrust of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the Resolution Professional acting as their agent. The following are the key tasks to be performed by a resolution professional:-

(a) Obtaining Valuation of the entity
(b) Preparation of Information Memorandum
(c) Preparation of Resolution plan
(d) Obtaining consent of the Committee of Creditors for the Resolution plan Periodic reporting to the Board

Eligibility of an insolvency Professional to be appointed as a Resolution Professional

As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor:-

(a) He is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company.
(b) He is not a related party of the corporate debtor.
(c) He is not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years.
(d) He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm in the last three financial years.

Fees of Resolution Professional

As per Section 5(13) of the Code, the fees payable to any person acting as a resolution professional and any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern shall be included in the insolvency resolution process costs. It shall have priority over other costs in the event of winding up of the corporate debtor.

Replacement of Resolution Professional

- If a debtor or a creditor is of the opinion that the resolution professional appointed is required to be replaced, he may apply to the Adjudicating Authority for replacement of such professional.
- The Adjudicating Authority within seven days of receipt of the application may make reference to the Board for Replacement of Resolution Professional.
- As per Section 27 of the Code, the Committee of Creditors may replace the insolvency Resolution Professional with another resolution professional by passing a resolution for the same to be approved by a vote of 66% per cent of voting shares of the creditors.
- The Committee of Creditors shall forward the name of the new proposed Insolvency Professional to the Adjudicating Authority, and

- After the confirmation of the proposed insolvency resolution professional by the Board he shall be appointed in the same manner as laid down in Section 16 which deals with the Appointment of IRP.

Example: Mr. Z was continuing as Interim resolution professional (IRP) in XY company. The committee of creditors by majority vote of financial creditors proposed to appoint Mr. Final as Resolution professional (RP) of the XY & Co. The said proposal was confirmed by the Board after the 10 days. State whether Mr. Final is appointed as Resolution professional.
Answer: No, as per the Code, if Board does not confirm the proposed name as RP within 10 days of receipt of proposal, the Adjudicating authority shall direct IRP to continue as RP for such time as the Board would have confirmed for the appointment of Proposed RP.

vii. Public Announcement

Interim Resolution Professional shall make the Public Announcement immediately after his appointment. "Immediately" here means not more than three days from the date of appointment of the Interim Resolution Professional.
As per Section 15 of the Code, public announcement shall include the following:-

(a) Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
(b) Name of the authority with which the corporate debtor is incorporated or registered.
(c) Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
(d) Penalties for false or misleading Claims.
(e) The last date for the submission of the claims.
(f) The date on which the Corporate Insolvency Resolution Process ends.

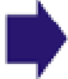
The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

viii. Committee of Creditors

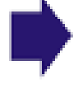
After the collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, the interim resolution professional shall constitute a committee of creditors.
The composition of the committee shall be as follows:-

1. **Where Financial Creditors exist:** The Committee of creditors shall comprise of all financial creditors of a corporate debtor. The Resolution Professional shall identify the financial creditors and constitutes a creditors committee. The resolution professional shall conduct all the meetings of the Committee of Creditors.
   After the constitution of committee of creditors, the interim resolution professional is required to file a report certifying the constitution of the committee to the Adjudicating Authority. The report shall be filed on or before the expiry of thirty days from the date of appointment of the interim resolution professional.
2. **Where Financial Creditors don't exist:** As per Regulation 16 of the Insolvency and Bankruptcy (Insolvency Resolution) Regulations, 2016, where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be formed comprising of following members:-
   (a) 18 largest operational creditors by value.
   (b) 1 representative elected by all workmen
   (c) 1 representative elected by all employees.
   Where the number of operational creditors is less than 18, the committee shall include all such operational creditors.

The IRP shall collect all the claims of creditors against the Corporate debtor



Determine financial position of Corporate debtor



Constitute the Committee of creditors

Composition of CoC

- All financial creditors
- Related parties of corporate debtor CANNOT form part of CoC

Voting in the Meeting

All the decisions of the committee of creditors shall be taken by vote of minimum seventy five percent of the voting share of the financial creditors. The voting share is determined based on the value of the debt of the creditor in proportion to the total debt.

Where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

First Meeting of Creditors

- The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- The committee of creditors in the first meeting may by a majority vote of not less than 66% per cent. Of the voting share of the financial creditors, either resolves to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Notice of the Meeting

The resolution professional shall give notice of each meeting of the committee of creditors to:-

(a) Members of Committee of creditors;

(b) Members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

The Operational Creditors do not have right to vote in the meeting of Committee of Creditors, however, they may attend the meetings of Committee of Creditors.

Further, as defined in section 5(24) of the Code, a Related Party to whom a Corporate Debtor owes a financial debt shall not have any right of Representation, Participation or Voting in a meeting of the Committee of Creditors.

Quorum for the Meeting

- A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means.
- If the requisite quorum for committee of creditors is not fulfilled the meeting cannot be held and the meeting shall automatically stand adjourned at the same time and place on the next day.
- The adjourned meeting shall quorate with the members of the committee attending the meeting.

Example: Committee of creditors approved the resolution plan with respect to the management of affairs of the company by more than 50% of voting share of the financial

creditors. State whether decision given on the resolution plan is binding on the corporate debtors and all its creditors?

Answer: No, as per the Code, the resolution plan shall be approved by the committee of creditors by vote of not less than 75% of voting share of the financial creditors. Resolution plan was not passed by majority.

ix. Resolution Plan (Section 22- 31)

A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency.

Formulation of Resolution Plan

- The Resolution Professional shall prepare an Information Memorandum which shall contain information for preparing resolution plan.
- Resolution Professional shall provide access of the following to a Resolution applicant in order to prepare the Resolution Plan:
  - o Financial position of corporate debtor
  - o Information required by applicant for resolution plan
  - o Other matters pertaining to corporate debtor
- Resolution Professional shall examine the Resolution Plan and submit the same to Committee of Creditors for its approval.

Submission of Resolution Plan

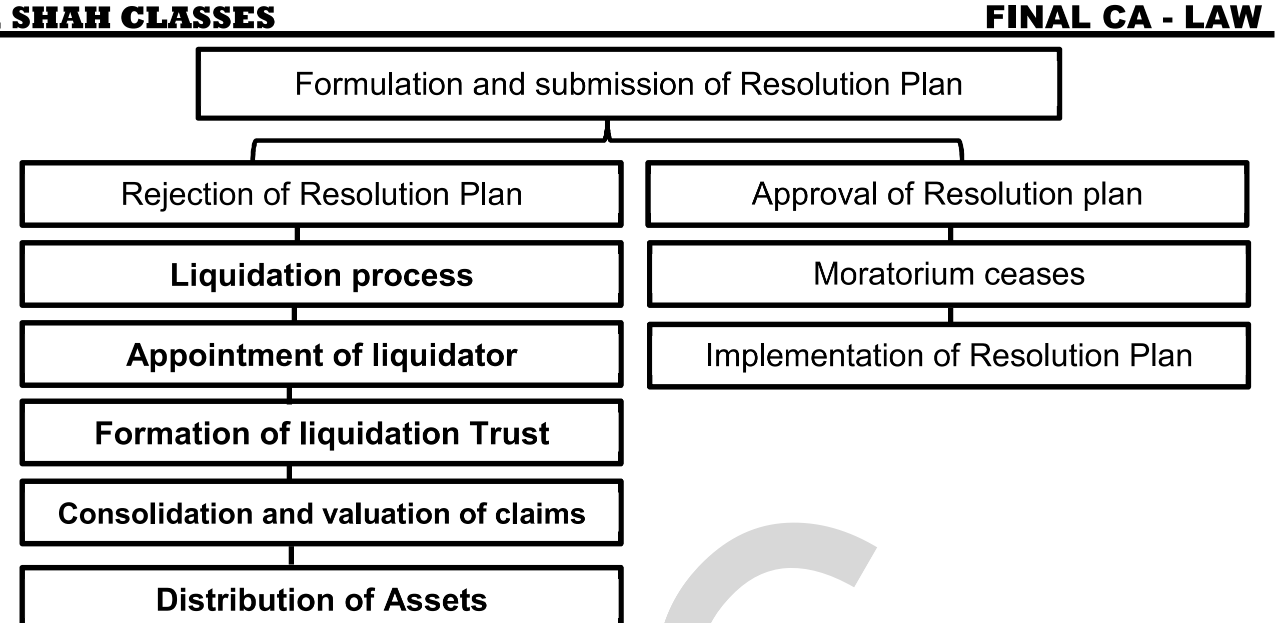
- **The committee of creditors may approve a resolution plan by a vote of not less than 66% per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:**

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code Ord. 7of (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under 2017. section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section."

- The creditors committee considers proposals for the revival of the debtor and must decide whether to proceed with a revival plan or liquidation within a period of 180 days (subject to a one-time extension by 90 days). Anyone can submit a revival proposal, but it must necessarily provide for payment of operational debts to the extent of the liquidation waterfall.
- Subsequently, the Resolution Professional shall submit the Resolution Plan as approved by Committee of Creditors to the Adjudicating Authority.



Appeal against Approval of Resolution Plan

As per Section 61(3) of the Code, an appeal against an order of Adjudicating Authority for approving the resolution plan may be filed on the following grounds:-

(a) The approved resolution plan is in contravention of the provisions of any law for the time being in force.

(b) There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period.

(c) The debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board.

(d) The insolvency resolution process costs have not been provided for repayment in priority to all other debts.

(e) The resolution plan does not comply with any other criteria specified by the Board.

x. Consequences of non-submission of a Resolution Plan

When the Resolution Plan is not filed within 180 days of the Commencement date or such other extended period the Adjudicating Authority may pass orders for the liquidation of the corporate debtor.

xi. Order of Liquidation

As per Section 33 of the Code, the Adjudicating Authority may order for liquidation of the Corporate Debtor in the following cases:-

a) Where before the expiry of the Insolvency Resolution Process or within 180 days of the initiation of Insolvency Resolution, the Adjudicating Authority does not receive the Resolution Plan.

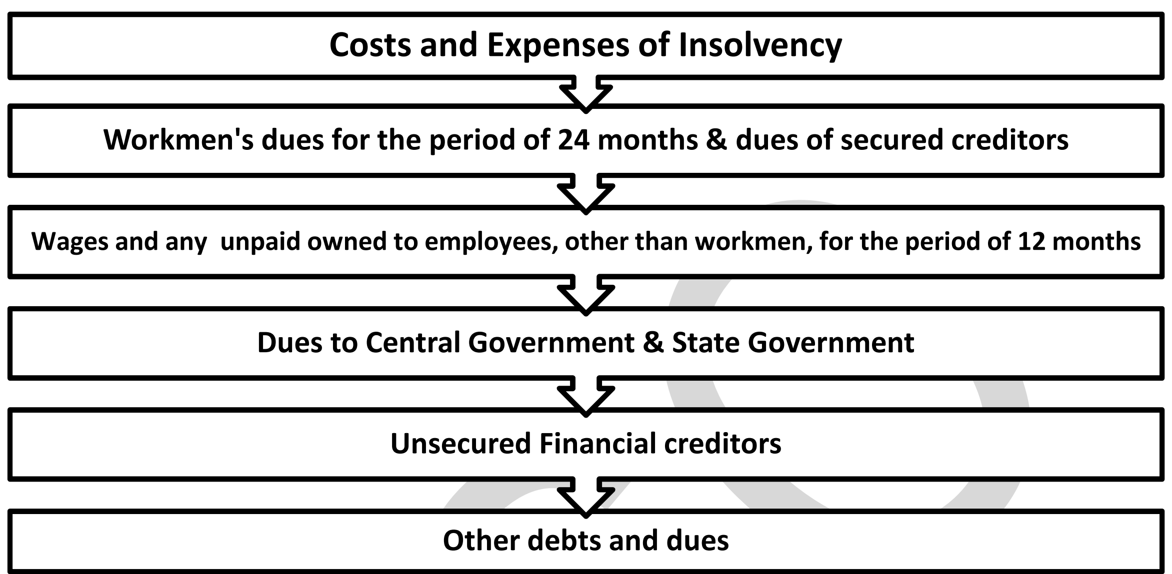
b) If the Committee of Creditors before the expiry of the resolution process intimate the Adjudicating Authority of their decision that they have passed an order for liquidation of the Corporate Debtor.

c) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtors, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order

Once the Adjudicating Authority passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.

xii. Priority of Claims

The Code has significantly changed the priority waterfall for distribution of liquidation proceeds. It may be as follows:



The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

  (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

  (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

  (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

  (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

4. FAST TRACK INSOLVENCY RESOLUTION FOR CORPORATE PERSONS

A fast track insolvency resolution, as the name suggests, is a process wherein the insolvency resolution process shall be completed in an expeditious manner i.e., with 90 (ninety) days from the insolvency commencement date. The provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 shall, mutatis mutandis, apply to the conduct of a fast track corporate insolvency resolution process.

Who may apply?

An application under this category can be made by any corporate debtor falling under any of the below mentioned category:-

(a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or

(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

(c) such other category of corporate persons as may be notified by the Central Government.

Time period for completion of fast track corporate insolvency resolution process

The fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.

Extension: The Adjudicating Authority may extend time period for fast track corporate insolvency resolution process. The aggrieved may make an application to the Adjudicating Authority and it is satisfied that the fast track corporate insolvency resolution process cannot be completed within a period of ninety days, it may, by order; extend the duration of such process to a further period which shall not be exceeding forty-five days. The extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.

5. VOLUNTARY LIQUIDATION OF CORPORATE PERSONS [SECTION 59]

(1) Person who may initiate voluntary liquidation proceeding: A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of this Chapter V of Part II of the Code.

(2) The voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by the Board.

(3) Conditions of initiation of voluntary liquidation proceedings: Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

- (a) a declaration from majority of the directors of the company verified by an affidavit stating that—
  - (i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
  - (ii) the company is not being liquidated to defraud any person;
- (b) the declaration given above shall be accompanied with the following documents, namely:—
  - (i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
  - (ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;
- (c) within four weeks of a declaration, there shall be—
  - (i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
  - (ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles, or

(iii) on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

(4) Notification to Registrar of company and the Board: The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

(5) Commencement of liquidation proceeding: The voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution.

(6) Application of provisions of this Code: The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.

(7) Application to adjudicating authority on complete wound up of the corporate person: Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.

(8) Passing of an order of dissolution: The Adjudicating Authority shall on an application filed by the liquidator, pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(9) Forward of copy of order: A copy of an order shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered.

JKSC

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2017

1. In section 25 of the principal Act, in sub-section (2), for clause (h), the following clause shall be substituted, namely: —

"(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.".

2. After section 29 of the principal Act, the following section shall be inserted, namely: —

"29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) Is an undercharged insolvent;

(b) Is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

(d) Has been convicted for any offence punishable with imprisonment for two years or more;

(e) Is disqualified to act as a director under the Companies Act, 2013;

(f) Is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

(h) Has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;

(i) Has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation. — For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of this Explanation shall apply to—

(A) a scheduled bank; or

(B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or

(C) an Alternate Investment Fund registered with the Securities and Exchange Board of India.".

3. In section 35 of the principal Act, in sub-section (1), in clause (f), the following proviso shall be inserted, namely: —

"Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.".

4. After section 235 of the principal Act, the following section shall be inserted, namely: —

"235A. If any person contravenes any of the provisions of this Code or the rules or regulations made thereunder for which no penalty or punishment is provided in this Code, such person shall be punishable with fine which shall not be less than one lakh rupees but which may extend to two crore rupees.".

JKSC

THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

1. STRUCTURE

The Act is divided into six chapters and 42 sections: -

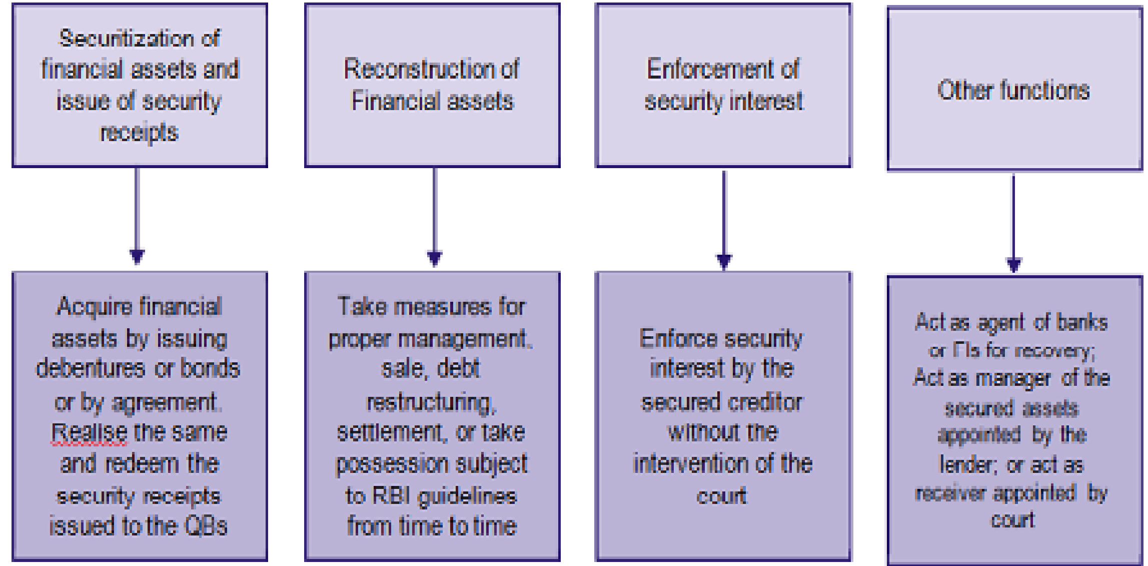
Chapters	Matters	Sections
I	Preliminary	1 – 2
II	Regulation of securitisation and reconstruction of financial assets of banks and financial institutions	3 – 12A
III	Enforcement of security interest	13 – 19
IV	Central registry	20 – 26A
IV A	Registration by secured creditors and other creditors	26B – 26E
V	Offences and penalties	27 – 30
VI	Miscellaneous	37 – 42

2. IMPORTANT CONCEPTS

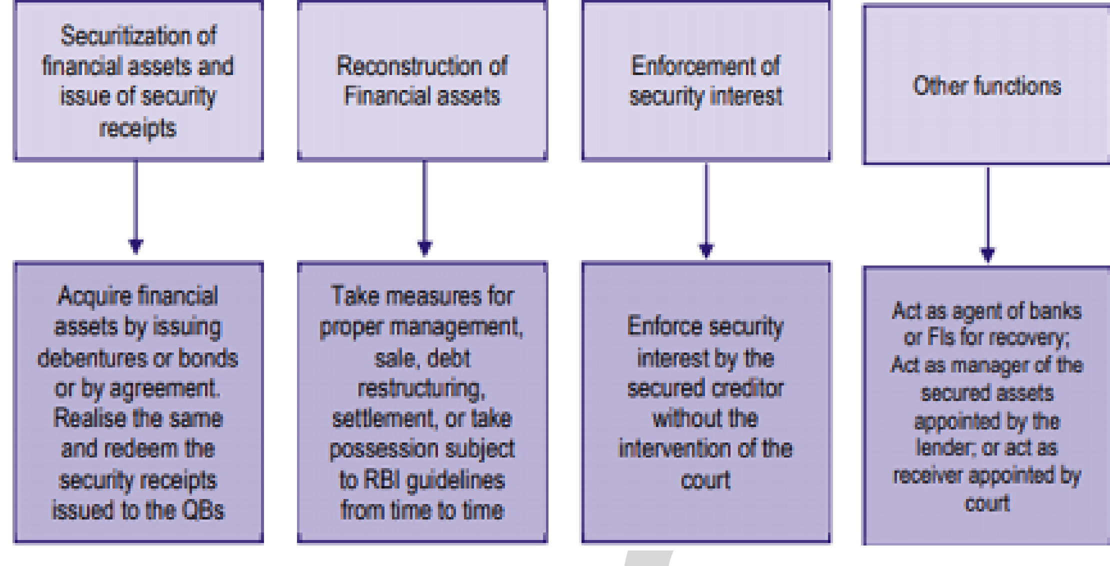
The Act introduced multiple new concepts and infrastructures to support ease of recovery actions such as:

- Formation of Securitisation or reconstruction companies
- Recovery without interference of courts
- Framework for revival or reconstruction of the borrowers' business
- Central registry
- Qualified buyers
- Security receipts

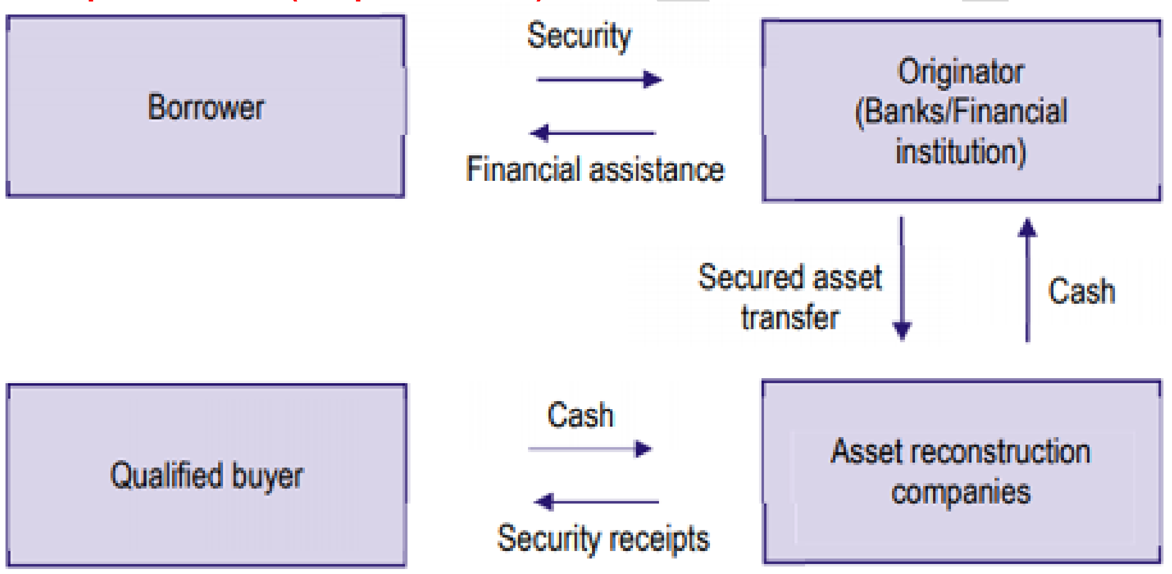
3. ROLE OF THE ACT



4. FUNCTIONING OF ARC IN A NUT SHELL



Alternative presentation (simpler version):



5. DEFINITIONS

Some key definitions are explained below:

- **"Asset reconstruction"** means acquisition by any securitisation company (SC) or reconstruction company (RC) of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance **[Section 2(b)].**

- The term **"financial assistance"** means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution; **[Section 2(k)]**
- The purpose of acquisition by securitisation company (SC) or reconstruction company (RC) is to realise such assets and not to stay invested by becoming the shareholders of the company. However it has the right to take over the management of the business, subject to RBI's guidelines from time to time. Such realised amount should be held and applied towards redemption of investments and payment of returns assured to the QIBs

- **"Asset reconstruction company (ARC)"** means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both. **[Section 2(ba)]**

  An ARC is not a banking company although it is regulated by RBI. Such company cannot carry out any other business other than securitisation or reconstruction.

- **"Borrower"** means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities. **[Section 2(f)]**

- **"Default"** means:
  (a) non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non- performing asset in the books of account of the secured creditor; or
  (b) non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities. **[Section 2(j)]**

  Conditions for calling default under this act is:
  - debt or any other amount- The amount due should be in the nature of debt.
  - Secured creditor- An unsecured creditor doesn't have recourse to this act
  - Classification of NPA- A stressed asset which is yet to be classified as NPA cannot be resolved through this act.
  - For non-payment of debenture or bonds to be called default, a notice of 90 days is a pre-requisite by the debenture trustee or beneficiary of the security

- **"Debt"** shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and includes—
  (a) Unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;
  (b) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset; [Section 2(ha)]

- **"Financial asset"** means debt or receivables and includes-
  (i) A claim to any debt or receivables or part thereof, whether secured or unsecured; or
  (ii) Any debt or receivables secured by, mortgage of, or charge on, immovable property; or
  (iii) A mortgage, charge, hypothecation or pledge of movable property; or
  (iv) Any right or interest in the security, whether full or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

(va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or

(vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset;

(vi) any financial assistance; **[Section 2(l)]**

An asset which is not a financial asset cannot be securitised, acquired or transferred under this Act.

Example: Value of an unsecured land in the balance sheet of the borrower cannot be acquired by an ARC by way of issuing security receipts.

- "Non-performing asset (NPA)" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,
  (a) In case such bank or financial institution is administered or regulated by an authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
  (b) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank. [Section 2(o)]

- "Qualified buyer" means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund or pension fund or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulations made thereunder, any category of non-institutional investors as may be specified by the Reserve Bank under sub-section (1) of section 7 or any other body corporate as may be specified by the Board; [Section 2(u)] An ARC cannot raise funds from investors which is not a qualified buyer (QB) as defined above.

  For example, a manufacturing company looking to invest surplus cash by investing in the ARC, or a Public sector unit, or a strategic investor who wish to acquire the assets of the borrower company etc.

- "Securitisation" means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise [Section 2(z)];

  The process of securitisation helps the ARC to acquire financial assets like Loans from banks due to which the ARC shall be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

- "Secured creditor" means-
  - (a) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
  - (b) Debenture trustee appointed by any bank or financial institution; or
  - (c) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
  - (d) Debenture trustee registered with the Board appointed by any company for secured debt securities; or
  - (e) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance [section 2 (zd)]

- "Security interest" means right, title and interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—
  - (a) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

  - (b) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset [Section 2(zf)];

    A creditor shall not be called as secured creditor unless its interest over the assets of the debtor or borrower is covered under the above definition. Refer section 31 (Provisions of this Act not to apply in certain cases) for specific exclusions of rights that shall not be treated as security interest.

6. REGULATION OF SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS OF BANKS AND FINANCIAL INSTITUTIONS

This part of the Act is covered in chapter II of the Act, comprising of Sections 3 – 12. This chapter provides for regulation of securitisation and reconstruction of financial assets of banks and financial institutions.

(I) Registration of ARCs (Section 3)

- **Commencement of business of securitisation or asset reconstruction:** Such a company can commence or carry on the business of securitisation or asset reconstruction only after obtaining a certificate of registration granted under this section and having the net owned fund of not less than one hundred crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify.

  However, the term "net owned fund" is not defined in the Act and hence we have to refer to the definition of "net owned fund" as mentioned in the explanation to Section 45I of the Reserve Bank of India Act.

- **Conditions:** The Reserve Bank may, for the purpose of considering to grant its approval for the application for registration of an ARC to commence or carry on the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such ARC, or otherwise, that the following conditions are fulfilled, namely:-
  - (a) That the ARC has not incurred losses in any of the three preceding financial years;
  - (b) That such ARC has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons;
  - (c) That the directors of ARC have adequate professional experience in matters related to finance, securitisation and reconstruction;
  - (d) That any of its directors has not been convicted of any offence involving moral turpitude;
  - (e) That a sponsor of an ARC is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;
  - (f) That ARC has complied with or is in a position to comply with prudential norms specified by the Reserve Bank.
  - (g) That ARC has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.
- **Issue of certificate of registration to ARC:** A certificate of registration is thereafter granted to the ARC to commence or carry on business of securitisation or asset reconstruction, and it must be noted that the Reserve Bank may also prescribe any other conditions, which it may consider, fit to impose. In case the Reserve Bank is of the opinion that the above conditions are not satisfied then it may reject the application, after the applicant is given a reasonable opportunity of being heard.
- **Requirement of prior approval of RBI :** Once a company is registered as an ARC, it must obtain prior approval of the Reserve Bank for the following purposes:-
  - (a) Any substantial change in its management, including appointment of any director managing director or chief executive officer
  - (b) Change of location of its registered office
  - (c) Change in its name
- **Decision of RBI shall be final & binding:** The decision of the Reserve Bank, whether the change in management of an ARC is a substantial change in its management or not, shall be final and binding. The expression "substantial change in management" means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.

(II) Cancellation of certificate of registration (Section 4)

- The Reserve Bank may cancel a certificate of registration granted to an ARC, if such company-
  - (i) Ceases to carry on the business of securitisation or asset reconstruction; or
  - (ii) Ceases to receive or hold any investment from a qualified buyer; or
  - (iii) Has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or

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- (iv) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub- section (3) of section 3; or
- (v) Fails to-
  - (a) Comply with any direction issued by the Reserve Bank under the provisions of this Act; or
  - (b) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or
  - (c) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
  - (d) obtain prior approval of the Reserve Bank required under sub-section (6) of section 3:

- Before cancelling a certificate of registration on the ground that the ARC has failed to comply with the provisions of clause (c) or has failed to fulfil any of the conditions referred to in clause (d) or sub-clause (iv) of clause (e), the Reserve Bank, unless it is of the opinion that the delay in cancelling the certificate of registration granted under sub-section (4) of section 3 shall be prejudicial to the public interest or the interests of the investors or the ARC, shall give an opportunity to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfilment of such conditions.
- Appeal to an order of cancellation: In case the ARC is aggrieved by the order of cancellation of certificate of registration by the Reserve Bank, then it may prefer an appeal, within a period of thirty days from the date on which such order of cancellation is communicated to it, to the Central Government (Secretary, Ministry of Finance, and Government of India). The Central Government must also give such company a reasonable opportunity of being heard before rejecting the appeal.
- It must be noted that an ARC, which is holding investments of qualified buyers and whose application for grant of certificate of registration has been rejected or certificate of registration has been cancelled shall, notwithstanding such rejection or cancellation be deemed to be an ARC until it repays the entire investments held by it (together with interest, if any) within such period as specified by the Reserve Bank.

(III) Acquisition of rights or interest in financial assets (Section 5)

- Acquiring of financial assets of any bank or financial institution: Notwithstanding anything contained in any agreement or any other law for the time being in force, any ARC may acquire financial assets of any bank or financial institution-
  - (i) By issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or
  - (ii) By entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.
- Any document executed by any bank or financial institution as mentioned above, in favour of the ARC acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899.

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.
Such exemption is provided in order to encourage banks or FIs to resolve nonperforming assets (NPA) issues by offloading it to ARCs.

- Debenture as we commonly known, is an acknowledgement of debt. Bond also refers to the same nature of instrument as a debenture. Both of them acknowledge a debt and hence an obligation to pay.

- **In case where bank or financial institution is a lender in relation to any financial assets acquired by the ARC:** Then such ARC shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to the subject financial assets.
  If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets.

- All contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the ARC, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of ARC, as the case may be.

- If, on the date of acquisition of financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the ARC, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the ARC, as the case may be.

- On acquisition of financial assets , the ARC, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the ARC in such pending suit, appeal or other proceedings

(IV) Transfer of pending applications to any one of Debts Recovery Tribunals in certain cases (Section 5A)

- If any financial asset, of a borrower acquired by an ARC, comprise of secured debts or more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals, the ARC may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

- On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.

- Notwithstanding anything contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any order passed by the Appellate Tribunal under sub-section (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

- Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall, accordingly, apply to such execution.

(V) Notice to obligor and discharge of obligation of such obligor (Section 6)

- The bank or financial institution may give a notice of acquisition of financial assets by any ARC to the concerned obligor and any other concerned person and to the concerned registering authority.

- The obligor shall make payment to the concerned ARC in discharge of any of the obligations in relation to the financial asset specified in the notice

(VI) Issue of security by raising of receipts or funds by ARC (Section 7)

- Any ARC, may, after acquisition of any financial asset under section 5(1), offer security receipts to qualified buyers (or such other category of investors including non-institutional investors as may be specified by the Reserve Bank in consultation with the Board, from time to time) for subscription in accordance with the provisions of those Acts.

- An ARC may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme

(VII) Exemption from registration of security receipt (Section 8)

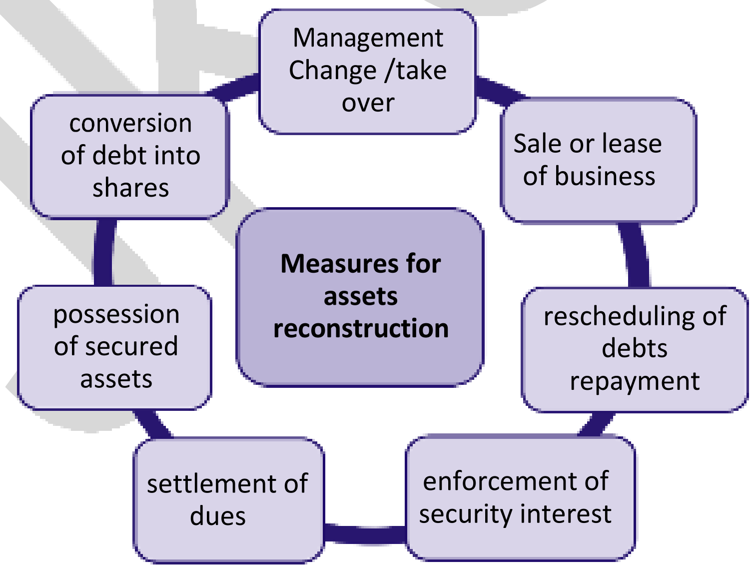
- any security receipt issued by the ARC and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument, or any transfer of security receipts, shall not require compulsory registration under section 17 of the Registration Act, 1908.

(VIII) Measures for assets reconstruction (Section 9)

- **AN ARC may, provide for any one or more of the following measures, for the purposes of asset reconstruction-**
  a) the proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower;
  b) the sale or lease of a part or whole of the business of the borrower;
  c) rescheduling of payment of debts payable by the borrower;
  d) enforcement of security interest in accordance with the provisions of this Act;
  e) settlement of dues payable by the borrower;
  f) taking possession of secured assets in accordance with the provisions of this Act;
  g) conversion of any portion of debt into shares of a borrower company:

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

- The Reserve Bank shall, for the purposes as given above, determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.
- The asset reconstruction company shall take measures in accordance with policies and directions of the Reserve Bank determined under section 9(2).



(IX) Other functions of ARC (Section 10)

- **Any ARC may-**
  (a) **act as an agent** for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties;
  (b) **act as a manager** referred to section 13(4)(c) on such fee as may be mutually agreed upon between the parties;
  (c) **act as receiver** if appointed by any court or tribunal

Provided that no ARC shall act as a manager if acting as such gives rise to any pecuniary liability.

- No ARC which has been granted a certificate of registration section 3(4), shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction.

  Provided that an ARC which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.

- For the purposes of this section, ARC does not include its subsidiary.

(X) Resolution of disputes (Section 11)

Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely,

(a) The bank, or
(b) Financial institution, or
(c) ARC or
(d) Qualified buyer,

Such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996, as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

(XI) Power of Reserve Bank to determine policy and issue directions (Section 12)

- In the public interest, Reserve bank may determine the policy and give directions to any ARC in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the ARC.

- Without prejudice to the generality as above, the Reserve bank may give directions to any ARC in particular as to:
  (a) The type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;
  (b) The aggregate value of financial assets which may be acquired by any securitisation company or reconstruction company.
  (c) The fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company;
  (d) Transfer of security receipts issued to qualified buyers

(XII) Power of Reserve Bank to Call for Statements and information (Section 12 A)

The Reserve Bank may direct ARC to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation company or reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purpose of this Act.

(XIII) Power of Reserve Bank to carry out audit and inspection (Section 12 B)

- The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

- It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection.

- Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order—
  - (a) Remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or
  - (b) Appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company:

  Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.

- It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to the affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

7. ENFORCEMENT OF SECURITY INTEREST

Provisions dealing with enforcement of security interest are contained in Chapter III of the Act, comprising of Sections 13 – 19.

(I) Enforcement of security interest (Section 13)

- Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

- **Where borrower makes a default payment of debt:** Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13.

Provided that—

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;

- **Notice prescribing the details of the debts:** This notice shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. The procedure for the service of the notice is prescribed in the Security Interests (Enforcement) Rules.
- **Objection or rejection to the borrower on the notice:** If, on receipt of the notice , the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within 15 days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:
- **No right to borrower to prefer an application:** Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts recovery Tribunal under section 17 or the Court of District Judge under section 17A.
- **Borrower fails to discharge his liability:** if the borrower fails to discharge his liability in full within the above specified period, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:-

  (a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

  (b) Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

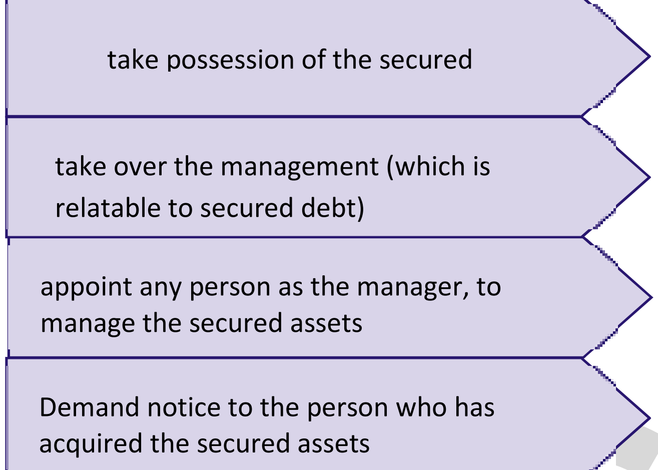
  Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

  Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

  (c) Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

  (d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

- **Modes of enforcement of security**



- **Discharge from payment:** Any payment made by any person referred to in section 5(4)(d) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

- **Right with respect to the immovable property:** Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale [sub-section (5A)]
  Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13. [Sub-section (5B)]
  The provisions of section 9 of the Banking Regulation Act, 1949 shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A). [Sub-section (5C)]

- **Right related to transfer of secured assets by the secured creditor:** Any transfer of secured asset after taking possession thereof or takeover of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

- **Recovery of expenses from the borrower:** Where any action has been taken against a borrower, all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied-
  (a) Firstly, in payment of such costs, charges and expenses and
  (b) Secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

- **Payment of dues of the secured creditors:** Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—
  (a) The secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and
  (b) In case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this subsection, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

- **Joint Financing:** Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. [Section 13(9)]. But in case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (Corresponding section 326 of the Companies Act, 2013).

- **Secured creditors may retain the sale proceeds of his secured assets:** Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (Corresponding section 325 of the Companies Act, 2013), may retain the sale-proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A (Corresponding section 326 of the Companies Act, 2013) of that Act:

- **Role of liquidator with respect to workmen dues:** Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (Corresponding section 326 of the Companies Act, 2013) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:

- **In case of deposits of amount of workmen dues by secured creditor:** Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

- **Furnishing of undertaking by secured creditor:** Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

- **Explanation-** For the purposes of this sub-section,-
  (a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;
  (b) "Amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

- **Filing of an application by secured creditor:** Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

- **Rights of secured creditors in relation to secured assets:** Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clause (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

- The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

- **No transfer of secured assets by borrower:** No borrower shall, after receipt of notice, transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

(II) Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset (Section 14)

The secured creditor may, for the purpose of taking possession or control of secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him--

(a) Take possession of such asset and documents relating thereto; and

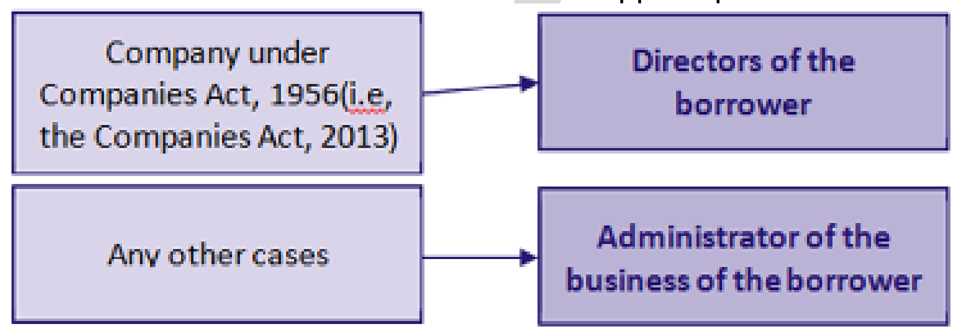
(b) Forward such asset and documents to the secured creditor
within a period of thirty days from the date of application.
Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

(III) Manner and effect of takeover of management (Section 15)

- Appointment of persons by secured creditors: When the management of business of a borrower is taken over by an ARC under section 9(a) or, by a secured creditor under section 13(4)(b) as the case may be, the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit-
  (a) in a case in which the borrower is a company under the Companies Act, 1956, to be the directors of that borrower in accordance with the provisions of that Act; or
  (b) in any other case, to be the administrator of the business of the borrower Manner and effect of takeover of management

Manner and effect of takeover of management

In case where borrower is a : Appoint persons as:



- **On publication notice:** All persons holding office as directors of the company (if the borrower is a company) and in any other case, all persons holding any office having power of superintendence, direction and control of the business of the borrower immediately before the publication of the above notice, shall be deemed to have vacated their offices.

- **When any contract of management shall be deemed to be terminated:** Any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the above notice, shall be deemed to be terminated. The directors or the administrators appointed under this section shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the business of the borrower is, or appears to be, entitled and all the property and effects of the business of the borrower shall be deemed to be in the custody of the directors or administrators, as the case may be, as from the date of the publication of the above notice.

- **Exercise of the powers of the person so appointed for the borrowers:** All directors appointed in accordance with the above notice shall, for all purposes, be the directors of the company of the borrower and such directors or the administrators (if the borrower is other than a company) appointed under section 15, shall only be entitled to exercise all the powers of the directors or as the case may be, of the persons exercising powers of superintendence, direction and control, of the business of the borrower whether such powers are derived from the memorandum or articles of association of the company of the borrower or from any other source.

- **Management of borrower taken by the secured creditor:** Where the management of the business of a borrower, being a company as defined in the Companies Act, 1956 (i.e., the Companies Act, 2013), is taken over by the secured creditor, then, notwithstanding anything contained, such borrower- in the said Act or in the memorandum or articles of association of such company-
  (a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
  (b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;
  (c) no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

- **Obligation of secured creditor:** The secured creditor is under an obligation to restore the management of the business of the borrower, on realisation of his debt in full, in case of takeover of the management of the business of a borrower by such secured creditor.
- Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower.

(IV) No compensation to directors for loss of office (Section 16)

Irrespective of anything contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office or for the premature termination under this Act. However any such managing director or any other director or manager or any such person in charge of management has the right to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

(V) Application against measures to recover secured debts (Section 17)

- **Filing of an application:** Any person (including borrower), aggrieved by any of the measures given in section 13(4) taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

  Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

  Explanation: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

- **Jurisdiction :** An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—
  (a) the cause of action, wholly or in part, arises;
  (b) where the secured asset is located; or
  (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

- **Measures taken shall be in compliance:** The Debts Recovery Tribunal shall consider whether any of the measures referred to in section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.
- If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in section 13(4), taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—
  (a) declare the recourse to any one or more measures referred to in section 13(4) taken by the secured creditor as invalid; and
  (b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub- section (1), as the case may be; and
  (c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

- **Remedies opted by the securities creditor:** If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.
  Where—
  i. any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—
     a. has expired or stood determined; or
     b. is contrary to section 65A of the Transfer of Property Act, 1882; or
     c. is contrary to terms of mortgage; or
     d. is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and
  ii. the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub- clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

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- **Time limit for disposal of an application:** Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

  Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

- **Order by the appellate tribunal for expeditious disposal of the pending application:** If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

- Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

(VI) Making of application to Court of District Judge in certain cases (Section 17A)

In the case of a borrower residing in the State of Jammu and Kashmir, the application under section 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.

Explanation: It is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons shall not entitle the person (including borrower) to make an application to the Court of District Judge under this section.

(VII) Appeal to Appellate Tribunal (Section 18)

- **Appeal to an order of DRT:** Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be
  Prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.
  Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower;

- **Condition for the appeal:** Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred above.

- **Dispose of appeal as per the RDDBFI Act, 1993:** Save as otherwise provided in this Act, the Debts Recovery Tribunal under section 17 or the Appellate Tribunal under section 18 shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act(RDDBFI), 1993 and rules made thereunder.

(VIII) Validation of fees levied (Section 18A)

Any fee levied and collected for preferring an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, shall be deemed always to have been levied and collected in accordance with law as if the amendments made to sections 17 and 18 of this Act by sections 10 and 12 of the said Act were in force at all material times.

(IX) Appeal to High Court in certain cases (Section 18B)

- **Any borrower residing in the State of Jammu and Kashmir and aggrieved by any order made by the Court of District Judge under section 17A-**
  - ✓ may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge.
- **Requirement for preferring an appeal:** No appeal shall be preferred unless the borrower has deposited, with the Jammu and Kashmir High Court, fifty per cent. Of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less. Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. Of the debt referred here.

(X) Right to lodge a caveat (Section 18C)

- **Filing of a caveat:** Where an application or an appeal is expected to be made or has been made under section 17(1) or section 17A or section 18(1) or section 18B,
  (a) the secured creditor, or
  (b) any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal,
  may lodge a caveat in respect thereof.
- **Notice of caveat: Where a caveat has been lodged -**
  (a) the secured creditor by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made .
  (b) any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made
- **Notice on the caveator by adjudicating authority:** Where after a caveat has been lodged, any application or appeal is filed before the Tribunal or the court of District Judge or the Appellate Tribunal or the High Court, as the case may be, the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

- **Furnishing of copy of application and documents:** Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.
- **Validity of period of caveat :** Where a caveat has been lodged, such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal has been made before the expiry of the period.

(XI) Right of borrower to receive compensation and costs in certain cases (Section 19)

- If the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder, and
- directs the secured creditors to return such secured assets to concerned borrowers or any other aggrieved person, who has filed the application under section 17 or section 17A or appeal under section 18 or section 18A, as the case may be,
- the borrower or such other person shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.

8. CENTRAL REGISTRY

The provisions related to Central Registry is contained in chapter IV of the Act. It covers sections 20 to 26 of the Act.

(I) Central Registry (Section 20)

- **Setup of Central Registry:** The Central Government may, by notification, set up or cause to be set up from such date as it may specify in such notification, a registry to be known as the Central Registry with its own seal for the purposes of registration of transaction of securitisation and reconstruction of financial assets and creation of security interest under this Act.
  The head office of the Central Registry shall be at such place as the Central Government may specify and for the purpose of facilitating registration of transactions referred above, there may be established at such other places as the Central Government may think fit, branch offices of the Central Registry.

- **Central Government notifies territorial jurisdiction of the Central Registry:** The Central Government may, by notification, define the territorial limits within which an office of the Central Registry may exercise its functions.
  The provisions of this Act pertaining to the Central Registry shall be in addition to and not in derogation of any of the provisions contained in the Registration Act, 1908, the Companies Act, 1956 (i.e. Companies Act, 2013), the Merchant Shipping Act, 1958, the Patents Act, 1970, the Motor Vehicles Act, 1988 and the Designs Act, 2000 or any other law requiring registration of charges and shall not affect the priority of charges or validity thereof under those Acts or laws.
  Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) is a Government of India Company licensed under section 8 of the Companies Act, 2013 with Govt. of India having a shareholding of

51% by the Central Government and select Public Sector Banks and the National Housing Bank also being shareholders of the Company.
The object of the company is to maintain and operate a Registration System for the purpose of registration of transactions of securitisation, asset reconstruction of financial assets and creation of security interest over property, as envisaged in the SARFAESI Act.

(II) Integration of registration systems with Central Registry (Section 20A)

- The Central Government may, for the purpose of providing a Central database, in consultation with State Governments or other authorities operating registration system for recording rights over any property or creation, modification or satisfaction of any security interest on such property, integrate the registration records of such registration systems with the records of Central Registry established under section 20, in such manner as may be prescribed.

- The Central Government shall after integration of records of various registration systems referred with the Central Registry, by notification, declare the date of integration of registration systems and the date from which such integrated records shall be available; and with effect from such date, security interests over properties which are registered under any registration system referred shall be deemed to be registered with the Central Registry for the purposes of this Act

(III) Delegation of powers (Section 20B)

The Central Government may, by notification, delegate its powers and functions under this Chapter, in relation to establishment, operations and regulation of the Central Registry to the Reserve Bank, subject to such terms and conditions as may be prescribed.

(IV) Central Registrar (Section 21)

- The Central Government may, by notification, appoint a person for the purpose of registration of transactions relating to securitisation, reconstruction of financial assets and security interest created over properties, who shall be known as the Central Registrar.
- The Central Government may appoint such other officers with such designations as it thinks fit for the purpose of discharging, under the superintendence and direction of the Central Registrar, such functions of the Central Registrar under this Act as he may, from time to time, authorise them to discharge.

(V) Register of securitisation, reconstruction and security interest transactions (Section 22)

- A record called the Central Register shall be kept at the head office of the Central Registry for entering the particulars of the transactions relating to-
  (a) Securitisation of financial assets;
  (b) Reconstruction of financial assets;
  (c) Creation of security interest
- The Central Registrar can keep the records wholly or partly in computer, floppies, diskettes or in any other electronic form subject to the prescribed safeguards. Records kept in these form shall also form a part of the Central Register. The register shall be kept under the control and management of the Central Registrar.

(VI) Filing of transactions of securitisation, reconstruction and creation of security Interest (Section 23)

- The particulars of every transaction of securitisation, asset reconstruction or creation of security interest shall be filed, with the Central Registrar in the prescribed manner and on payment of the prescribed fees,. [Section 23(1)]

  Provided that the Central Government may, by notification, require registration of all transactions of securitisation, or asset reconstruction or creation of security interest which are subsisting on or before the date of establishment of the Central Registry under section 20(1) within such period and on payment of such fees as may be prescribed.

- The Central Government may, by notification, require the registration of transaction relating to different types of security interest created on different kinds of property with the Central Registry [Section 23(2)]

- The Central Government may, by rules, prescribe forms for registration for different types of security interest under this section and fee to be charged for such registration.

(VII) Modification of security interest registered under this Act (Section 24)

Whenever the terms or conditions, or the extent or operation, of any security interest registered under this Chapter, are, or is, modified it shall be the duty of the ARC to send to the Central Registrar, the particulars of such modification.

(VIII) ARC or secured creditor to report satisfaction of security interest (Section 25)

- The ARC or the secured creditor as the case may be, shall give intimation to the Central Registrar of the payment or satisfaction in full, of any security interest relating to the ARC or the secured creditor and requiring registration under this Chapter, within thirty days from the date of such payment or satisfaction.
- On receipt on intimation, the Central Government shall order that a memorandum of satisfaction shall be entered in the Central Registry.

(IX) Right to inspect particulars of securitisation, reconstruction and security interest transactions (Section 26)

The particulars of securitisation or reconstruction or security interest entered in the Central Register of such transactions kept under section 22 shall be open during the business hours for inspection by any person on payment of such fee as may be prescribed.

9. RECTIFICATION BY CENTRAL GOVERNMENT IN MATTERS OF REGISTRATION, MODIFICATION AND SATISFACTION ETC. (SECTION 26A)

- The Central Government, on being satisfied-
  - **(a)** **that the omission to file with the Registrar the particulars** of any transaction of securitisation, asset reconstruction or security interest or modification or satisfaction of such transaction or; the omission or mis-statement of any particular with respect to any such transaction or modification or with respect to any satisfaction or other entry made in pursuance of section 23 or section 24 or section 25 of the principal Act was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors; or

(b) **that on other grounds, it is just and equitable to grant relief,** may, on the application of a secured creditor or securitisation company or reconstruction company or any other person interested on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for filing of the particulars of the transaction for registration or modification or satisfaction shall be extended or, as the case may require, the omission or mis-statement shall be rectified.

- Where the Central Government extends the time for the registration of transaction of security interest or securitisation or asset reconstruction or modification or satisfaction thereof, the order shall not prejudice any rights acquired in respect of the property concerned or financial asset before the transaction is actually registered."

10. REGISTRATION BY SECURED CREDITORS AND OTHER CREDITORS

The government has introduced new provisions in the form of Chapter IVA in order to encourage registration of security interest by the secured creditors, which shall facilitate uniformity, completeness and transparency in the status of security interest of the creditors over the borrower's assets.

(I) Registration by secured creditors and other creditors (Section 26B)

- The Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in clause (zd) of section 2(1), for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower.

- From the date of notification, any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.

- However A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.

- Every authority or officer of the Central Government or any State Government or local authority, entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, shall file with the Central Registry such attachment order with particulars of the assesse and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.

- Also If any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.

(II) Effect of the registration of transactions, etc. (Section 26C)

- any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry.
- Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim:

  Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

(III) Right of enforcement of securities (Section 26D)

- No secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.

(IV) Priority to secured creditors (Section 26E)

- After the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

- However such priority shall be subject to the provisions of the Insolvency and Bankruptcy Code, 2016, where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower.

11. OFFENCES AND PENALTIES

This chapter V of the Act provides of the offences and the penalties for the commission of default in filing of particulars of every transaction of securitisation, asset reconstruction or creation of security interest with Central registry. This chapter covers section 27 to 30 of the Act.

(I) Penalties (Section 27)

If a default is made-

(a) in filing under section 23, the particulars of every transaction of any securitisation or asset reconstruction or security interest created by an ARC or secured creditors; or

(b) in sending under section 24, the particulars of the modification referred to in that section; or

(c) in giving intimation under section 25,

Then, every company and every officer of the company or the secured creditors and every officer of the secured creditor who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

Provided that provisions of this section shall be deemed to have been omitted from the date of coming into force of the provisions of this Chapter and section 23 as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016

(II) Offences (Section 29)

- If any person-

- ✓ contravenes or
- ✓ attempts to contravene or
- ✓ abets the contravention of the provisions of this Act or of any rules made thereunder,

he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(III) Cognizance of offence (Section 30)

- No court shall take cognizance of any offence punishable under section 27 in relation to non- compliance with the provisions of section 23, section 24 or section 25 or under section 28 or section 29 or any other provisions of the Act, except upon a complaint in writing made by an officer of the Central Registry or an officer of the Reserve Bank, generally or specially authorised in writing in this behalf by the Central Registrar or, as the case may be, the Reserve Bank.
- No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(IV) Power of adjudicating authority to Impose penalty (Section 30A)

- Where any asset reconstruction company or any person fails to comply with any direction issued by the Reserve Bank under this Act the adjudicating authority may, by an order, impose on such company or person in default, a penalty not exceeding one crore rupees or twice the amount involved in such failure where such amount is quantifiable, whichever is more, and where such failure is a continuing one, a further penalty which may extend to one lakh rupees for every day, after the first, during which such failure continues.
- The adjudicating authority shall serve a notice on the asset reconstruction company or the person in default requiring such company or person to show cause why the amount specified in the notice should not be imposed as a penalty and a reasonable opportunity of being heard shall be given to such person.
- Any penalty imposed under this section shall be payable within a period of thirty days from the date of issue of notice, failure of which adjudicating authority shall cancel its registration.
- No complaint shall be filed against any person in default in any court pertaining to any failure under sub-section (1) in respect of which any penalty has been imposed and recovered by the Reserve Bank under this section.
- Where any complaint has been filed against a person in default in the court having jurisdiction no proceeding for imposition of penalty against that person shall be taken under this section.
- "Adjudicating authority" means such officer or a committee of officers of the Reserve Bank, designated as such from time to time, by notification, by the Central Board of Reserve Bank.
- "person in default" means the asset reconstruction company or any person which has committed any failure, contravention or default under this Act and any person in charge of such company or such other person, as the case may be, shall be liable to be proceeded against and punished under section 33 for such failure or contravention or default committed by such company or person.

(V) Appeal against penalties (Section 30B)

- A person in default, aggrieved by an order passed in section 30A(4), may, within a period of thirty days from the date on which such order is passed, prefer an appeal to the Appellate Authority.
- Appellate Authority may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that there was sufficient cause for not filing it within such period.

(VI) Appellate Authority (Section 30C)

- The Central Board of Reserve Bank may designate such officer or committee of officers as it deems fit to exercise the power of Appellate Authority.
- The Appellate Authority shall have power to pass such order as it deems fit after providing a reasonable opportunity of being heard to the person in default.
- The Appellate Authority may, by an order stay the enforcement of the order passed by the adjudicating authority under section 30A, subject to such terms and conditions, as it deems fit.
- Where the person in default fails to comply with the terms and conditions imposed by order without reasonable cause, the Appellate Authority may dismiss the appeal

(VII) Recovery of penalties (Section 30D)

Any penalty imposed under section 30A shall be recovered as a "recoverable sum" and shall be payable within a period of thirty days from the date on which notice demanding payment of the recoverable sum is served upon the person in default and, in the case of failure of payment by such person within such period, the Reserve Bank may recover the sum as per the section.

12. MISCELLANEOUS

Chapter VI of the Act comprises of miscellaneous provisions dealt under sections 31-42 of the Act.

(I) Provisions of this Act not to apply in certain cases (Section 31)

- The situations in which the provisions of this Act do not apply are as follows:-
  - (a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;
  - (b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;
  - (c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;
  - (d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;
  - (e) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;
  - (f) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub- section (1) of section 60 of the Code of Civil Procedure, 1908;
  - (g) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
  - (h) any security interest created in agricultural land;
  - (i) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon

(II) Provisions of the Act not to apply in some cases (Section 31A)

- The Central Government may, by notification in the public interest, direct that any of the provisions of this Act,-
  - a. shall not apply to such class or classes of banks or financial institutions; or
  - b. shall apply to the class or classes of banks or financial institutions with such exceptions, modifications and adaptations, as may be specified in the notification.

- A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.
- In reckoning any such period of thirty days as is referred to in sub-section (2), no account shall be taken of any period during which the House referred to in sub-section (2) is prorogued or adjourned for more than four consecutive days.
- The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament

(III) Protection of action taken in good faith (Section 32)

- No suit, prosecution or other legal proceedings shall lie against the Reserve Bank or the Central Registry or any secured creditor or any of its officers for anything done or omitted to be done in good faith under this Act.

(IV) Offences by companies (Section 33)

- Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company, for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished in accordance with the provisions of the Act.
- But if such person is able to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, then section 33 does not apply to such person.
- It must also be noted that, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished in accordance with the provisions of the Act.
- For the purposes of section 33:-
  (a) "Company" means anybody corporate and includes a firm or other association of individuals; and
  (b) "Director", in relation to a firm, means a partner in the firm.

(V) Civil Court not to have jurisdiction (Section 34)

- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

(VI) The provisions of this Act to override other laws (Section 35)

- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

(VII) Application of other laws not barred (Section 37)

- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 2013, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force.