Insolvency and Bankruptcy Code (Amendment Ordinance), 2020

What is the issue?

- The Insolvency and Bankruptcy Code (Amendment Ordinance), 2020 has come into force and is effective from June 5, 2020. Click here to know more on suspension of IBC.
- The ordinance inserting Section 10A in the Insolvency and Bankruptcy Code (IBC), 2016 has opened itself up to a legal challenge.

What is the government's rationale?

- The COVID-19-led lockdown has caused much disruption to businesses.
- This may lead to default on debts pushing such companies into insolvency.
- Therefore, it was felt that suspending Sections 7, 9 and 10 of the IBC would be the right course of action.

What are the key amendments?

- The Ordinance provides for two amendments:
    1. the introduction of a Section 10A, suspending initiation of proceedings under the Code
    2. the introduction of Section 66(3) suspending the application of wrongful trading provisions under the Code when Section 10A is applicable
- The IBC provides for initiation of corporate insolvency resolution process (CIRP) of a corporate debtor.
- Section 10A provides that no such application for CIRP initiation under Sections 7, 9 and 10 of the IBC could be filed, for any default arising on or after 25th March 2020.
- This will be applicable for a period of 6 months or such further period, not exceeding one year from this period, as may be notified.
- The suspension period is thus from March 25 to September 25, 2020 unless extended for another 6 months, in which case it would be till March 25, 2021.
- Section 10A shall not apply to any default committed under the said Sections before March 25.

What is the concern now?

- In clear terms, Section 10A prevents an application from being filed for initiation of a CIRP occurring during the **suspension period**.
- But the proviso (attached condition) to the section states that no application for CIRP shall **ever be filed** against a corporate debtor for any default occurring during the suspension period.
- While the main Section 10A suspends such applications for a limited period, the proviso enlarges the scope.
- The proviso provides complete amnesty under the IBC for 'any default occurring during such period'.
- The role of a proviso in a statute is to restrict the application of the main provision under exceptional circumstances.
- However, the proviso here expands the substantive provision in the main section.
- Further, if the main provision is unclear, a proviso may be given to explain its true meaning.
- In this case, the main provision appears clear, and the proviso is disputable.
- The proviso therefore does not appear to be legally tenable.
- Creditors can still approach courts, and banks/Financial Institutions can still approach Debt Recovery Tribunals.
- So the protection given by this proviso seems illusory.
- Also, Section 10A suspends provisions of Section 10 of the IBC that enables voluntary insolvency resolution.
- This is difficult to understand because such voluntary insolvency resolution should have been made easier for companies now facing distress.
- Also, the ordinance appears to consider every default occurring during the suspension period to be a consequence of the COVID-19 pandemic.
- There could be cases where defaults were imminent due to other reasons as well.
- Now all these will also enjoy the protection offered.

What could have been done?

- The ordinance should have protected only such defaults which occur as a direct consequence of the pandemic or the lockdown.
- It should have left this determination to the National Company Law Tribunal.
- Also, a company defaulting on its payment obligations on March 24 (a day before the lockdown started) would not be provided any relief.
- But a company defaulting on or immediately after March 25 due to similar reasons will get relief.
- In the absence of definition of a COVID-19 default, the suspension of IBC becomes arbitrary.

Source: The Hindu

