



IBC RECENT DEVELOPMENTS

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AMENDMENT ORDINANCE

2019- 28/12/2019

Amendment to section 5 :

- In clause 12 proviso to be omitted. (Deals with ICD)
- In clause 15 insertion of the words “and such other debt as may be notified” after the words ”during the insolvency resolution process period” (Definition of Interim Finance)



AMENDMENT ORDINANCE 2019- 28/12/2019

Amendment to section 7: insertion of provisos in subsection (1) before explanation

- Provided for FC referred to in clauses (a) and (b) of sub section 6A of section 21 – to initiate CIRP by joint filing of not less than 100 creditors in the same class or not less than 10% of the total number of creditors in the class, whichever is less

AMENDMENT ORDINANCE 2019- 28/12/2019

Amendment to section 7: insertion of provisos in subsection (1) before explanation

- Provided for FC who are allottees under a real estate project – to initiate CIRP by joint filing of not less than 100 allottees in the same real estate project or not less than 10% of the total number of allottees in the same real estate project, whichever is less.
- Provided also where such an application has been filed by a FC referred to in first and second proviso and has not been admitted by the AA before the commencement of the Insolvency and Bankruptcy amendment Ordinance 2019, such application to be modified to comply with the above provisos as the case may be within 30 days of the commencement of the said Ordinance failing which the application shall be deemed to be withdrawn before its admission

AMENDMENT ORDINANCE 2019- 28/12/2019

Amendment to section 11 (Persons not entitled to make an application): insertion of Explanation II

Nothing in the section shall prevent a CD referred to in (a) to (b) above shall from initiating a CIRP against a CD

AMENDMENT ORDINANCE 2019- 28/12/2019

Section 14 – Two insertions and one substitution

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Insertion of explanation to section 14(1)

“For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period. “

AMENDMENT ORDINANCE 2019- 28/12/2019

Insertion of sub-section 2A after sub-section 2

“Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. “

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In sub-section (3) for clause (a) the following to be substituted
“Such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority”

AMENDMENT ORDINANCE 2019- 28/12/2019

Section 16 – On the commencement of ICD instead of within 14 days of ICD

Section 21(2) – insertion of “or completion of transactions as may be prescribed”

Section 23 – substitution of proviso
“Provided that the resolution professional shall continue to manage the operations of the CD after the expiry of the CIR period until an order approving the resolution plan under section 31(1) or appointing a liquidator under section 34 is passed by the AA”

AMENDMENT ORDINANCE 2019- 28/12/2019

Section 29A—

in clause (c) of second proviso to Explanation I – “or completion of such transactions as may be prescribed” to be inserted”

In clause (j) of second proviso to Explanation I - “or completion of such transactions as may be prescribed” to be inserted”

AMENDMENT ORDINANCE 2019- 28/12/2019

Insertion of section 32A –

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

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- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court

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

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

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

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- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

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- *Explanation.*- For the purposes of this sub-section, it is hereby clarified that,-
 - (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
 - (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

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

AMENDMENT ORDINANCE 2019- 28/12/2019

In section 227 – substitution of the words “examined in the code” with the words “contained in this code”



Insertion of explanation – “For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.”

AMENDMENT ORDINANCE 2019- 28/12/2019

Insertion of the following clauses after section 239 (2) (f):



(fa) the transactions under the second proviso to sub-section (2) of section 21;

(fb) the transactions under the Explanation I to clause (c) of section 29A;

(fc) the transactions under the second proviso to clause (j) of section 29A.

AMENDMENT ORDINANCE 2019- 28/12/2019

Insertion of the following clause after section 240 (2)(i)

-(ia) circumstances in which supply of critical goods or services may be terminated, suspended or interrupted during the period of moratorium under sub-section (2A) of section 14;

Status of homebuyers - Application

Threshold to be satisfied ie not less than 100 allottees or 10% of the allottees in the same real estate project, whichever is less (allottee as defined u/s 2(d) of RERA)

Default to discharge debt is a precondition

Only a joint application by all the home buyers

Application in Form 1 under application to AA rules

Status of homebuyers - Claim

No threshold limit – any amount can be claimed

Application can be filed individually

Claim to be submitted in from CA under the regulation

Proof for existence of debt due can be either records available with an information utility or other relevant documents, including any agreement for sale/letter of allotment/ receipt of payment made, or such other document, evidencing existence of debt.

Section 32 A

Cease the liability of the CD and prevent any action being taken against its property from the date of approval of the Resolution plan by the AA



For any offence committed prior to the commencement of the CIRP



Conditional to there being a change in the management and control of the CD



But liability of the “designated partner” of an LLP, “an officer in default” as per section 60(2) of the Companies Act, 2013, shall continue to be liable for offences committed by the CD as per report or complaint submitted by the investigation authority.

PERSONAL GUARANTORS OF CORPORATE DEBTORS



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Background

- V.Ramakrishnan Vs State Bank of India
- IBC Working Committee Report published in March 2018
- Section 14 (3) - The provisions of sub-section (1) shall not apply to —
 - (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]
 - (b) a surety in a contract of guarantee to a corporate debtor.

Section 60(2) and 60(4) of the code

Section 60(2) of the code an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal. Where a CIRP or liquidation proceeding is pending.

Section 60(4) - The NCLT shall have the same powers as the DRT.

Application by Debtor – Section 94

- A debtor who commits a default may apply for initiating insolvency resolution process in respect of debts which are not excluded debts to the AA.
- Debtor cannot file if he is
 - An undischarged bankrupt
 - Undergoing a fresh start process
 - Undergoing an insolvency resolution process
 - Undergoing a bankruptcy process.

Excluded Debt – 79(15)



(a) liability to pay fine imposed by a court or tribunal;



(b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;



(c) liability to pay maintenance to any person under any law for the time being in force;



(d) liability in relation to a student loan;



(e) any other debt as may be prescribed;

Application by Creditor - Section 95

- A creditor may apply either by himself, or jointly with other creditors
- A creditor may apply in relation to any partnership debt owed to him for initiating an insolvency resolution process against-
 - (a) any one or more partners of the firm; or
 - (b) the firm.

Application by Creditor - Section 95

The application by the creditor should be accompanied by

- (a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;
- (b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and
- (c) relevant evidence of such default or non-repayment of debt.

Interim Moratorium – Section 97

- An interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application.
- During the interim-moratorium period -
 - (i) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and
 - (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

Appointment of Resolution Professional Section 97

If application is filed by the RP u/s 94 and 95 then the AA will direct the Board within 7 days of the application to confirm that there are no disciplinary proceedings pending against the RP

Otherwise the Board will nominate an RP within 10 days of receiving the direction from the AA.

The AA will provide a copy of the application to the RP

Submission of report by RP – Section 99

The RP shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

The Debtor may be required to prove repayment of the debt to the RP

The RP may seek clarification regarding the application from the debtor or any other person from whom reply should be given within 7 days.

After examination the RP may recommend either acceptance or rejection of the application in his report with reasons

Admission or Rejection of application – Section 100

- AA shall within 14 days of submission of report by RP either admit or reject the application
- On admission on the request of the RP the AA can issue instructions to conduct negotiations between the debtors and creditors for arriving at a repayment plan
- If the application by the debtor or creditor, as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional or that the application was made with the intention to defraud his creditors or the resolution professional, the order under the application shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.

Effect of Admission – Moratorium – Section 100

- Upon admission a moratorium period shall commence in respect of all the debts of the debtor
- The moratorium is only for a period of 180 days and there is no provision to extend it
- During the period of moratorium all the restrictions u/s 85(3) will become operational on the debtor
 - (a) not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;

Effect of Admission – Moratorium – Section 100

- (b) not dispose of or alienate any of his assets;
- (c) inform his business partners that he is undergoing a fresh start process;
- (d) be required to inform prior to entering into any financial or commercial transaction of such value as may be notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process;
- (e) disclose the name under which he enters into business transactions, if it is different from the name in the application admitted under section 84;
- (f) not travel outside India except with the permission of the Adjudicating Authority.

Public notice

- On admission the AA will issue a public notice within 7 days of passing the order inviting claims from the creditors within 21 days.
- The notice should include
 - (a) details of the order admitting the application;
 - (b) particulars of the resolution professional with whom the claims are to be registered; and
 - (c) the last date for submission of claims.

Public notice

- The notice shall be -
 - (a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;
 - (b) affixed in the premises of the Adjudicating Authority; and
 - (c) placed on the website of the Adjudicating Authority.

Claims from creditors – Section 103

(1) The creditors shall register claims with the resolution professional by sending details of the claims by way of electronic communications or through courier, speed post or registered letter.

(2) In addition to the claims referred to in sub-section (1), the creditor shall provide to the resolution professional, personal information and such particulars as may be prescribed.

List of Creditors – Section 104

- The resolution professional shall prepare a list of creditors on the basis of -
 - (a) the information disclosed in the application filed by the debtor under section 94 or 95, as the case may be;
 - (b) claims received by the resolution professional under section 102.
- Within 30 days from the notice

Repayment Plan – Section 105

- The debtor will in consultation with the RP prepare the repayment plan, containing the proposal to the creditors for restructuring of his debts or affairs.
- The repayment plan may authorise or require the resolution professional to –
 - (a) carry on the debtor's business or trade on his behalf or in his name; or
 - (b) realise the assets of the debtor; or
 - (c) administer or dispose of any funds of the debtor.
- The repayment plan shall include the following, namely: -
 - (a) justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;
 - (b) provision for payment of fee to the resolution professional;
 - (c) such other matters as may be specified.

Report on Repayment Plan – Section 106

- The RP will submit a report on the repayment plan to the AA within 21 days of last date for submission of claims stating whether the following conditions are satisfied –
 - (a) the repayment plan is in compliance with the provisions of any law for the time being in force;
 - (b) the repayment plan has a reasonable prospect of being approved and implemented; and
 - (c) there is a necessity of summoning a meeting of the creditors, if required, to consider the repayment plan
- The report should also state the date of the meeting

Summoning meeting of creditors – Section 107

- The RP should give a minimum of 14 days notice to all the creditors in the list and the notice should include the following –
 - (a) a copy of the repayment plan;
 - (b) a copy of the statement of affairs of the debtor;
 - (c) a copy of the said report of the resolution professional; and
 - (d) forms for proxy voting.

Conduct of meeting of Creditors

- The repayment plan or any modification to the repayment plan shall be approved by a majority of more than three-fourth in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors. Approval of repayment plan by creditors. (section 111)
- In the meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan. (section 108)
- Any change or modification in the repayment plan has to be consented to by the debtor

Conduct of meeting of Creditors

- A creditor shall be entitled to vote at every meeting of the creditors in respect of the repayment plan in accordance with voting share assigned to him, as determined by the RP in the manner specified by the Board.
- A creditor shall not be entitled to vote in respect of a debt for an unliquidated amount.
- A creditor shall not be entitled to vote in a meeting of the creditors if he —
 - (a) is not a creditor mentioned in the list of creditors under section 104; or
 - (b) is an associate of the debtor.

Conduct of meeting of Creditors

- Secured Creditors will be deemed in law to have forfeited their security if they vote in the meeting of creditors
- However the secured creditor can exercise voting rights in respect of the unsecured parts of the debt
- A report of the meeting of the creditors on the repayment plan to be given by the RP to the AA and a copy of the report is to be given to the Debtor and Creditors

Order of AA on repayment plan section 114

- The AA shall pass an order on the basis of the report given by the RP.
- The order may also provide appropriate directions for the implementation of the repayment plan
- The order is binding on the Debtor and creditors
- The RP shall supervise the implantation of the repayment plan and may get appropriate directions from the AA if needed

Repayment plan

- Within 14 days from the completion of the repayment plan, the RP shall forward a notice to that effect to the persons bound by it and also a copy of the repayment plan along with all the receipts made in pursuance of the plan.
- If the repayment plan comes to an end prematurely the RP will submit a report to the AA along with reasons, and the AA may pass an order accordingly
- The debtor or the creditor, whose claims under repayment plan have not been fully satisfied, shall be entitled to apply for a bankruptcy order under Chapter IV

Discharge Order

- On the basis of the repayment plan, the resolution professional shall apply to the Adjudicating Authority for a discharge order in relation to the debts mentioned in the repayment plan and the Adjudicating Authority may pass such discharge order.
- The repayment plan may provide for -
 - (a) early discharge; or
 - (b) discharge on complete implementation of the repayment plan.
- The discharge order shall be forwarded to the Board, for the purpose of recording entries in the register referred to in section 196.



BANKRUPTCY PROCESS

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Application for Bankruptcy

- An application for bankruptcy may be preferred by the Debtor or the Creditors individually or jointly under section 122 or 123 in the following circumstances –
 - (a) where an order has been passed by an Adjudicating Authority under sub-section 4 of section 100; or
 - (b) where an order has been passed by an Adjudicating Authority under sub-section 2 of section 115; or
 - (c) where an order has been passed by an Adjudicating Authority under sub-section 3 of section 118.
- The application for Bankruptcy has to be filed within 3 months from the date of the above orders

Application by Creditor section 123

- Notable point here is an application can be filed by the creditor against the legal heirs of a deceased debtor, as a result of which there is a high possibility of the legal heirs being declared bankrupt.

Effect of Application – Interim Moratorium

- (1) When an application is filed under sections 122 or 123 –
 - (a) an interim-moratorium shall commence on the date of the making of the application on all actions against the properties of the debtor in respect of his debts and such moratorium shall cease to have effect on the bankruptcy commencement date; and
 - (b) during the interim-moratorium period -
 - (i) any pending legal action or legal proceeding against any property of the debtor in respect of any of his debts shall be deemed to have been stayed;
 - (ii) the creditors of the debtor shall not be entitled to initiate any legal action or legal proceedings against any property of the debtor in respect of any of his debts.

Appointment of Bankruptcy trustee Section 125

- If the application under section 122 and 123 proposes an insolvency professional as a bankruptcy trustee then the AA shall follow the due process in directing the Board to confirm the appointment
- If no Bankruptcy trustee is proposed then the AA will direct the Board to nominate a Bankruptcy trustee within 10 days of receiving the direction from the AA.

Bankruptcy Order – section 126

- Within 14 days of appointing the bankruptcy trustee, the AA will pass a Bankruptcy order which will be in effect till the debtor is discharged u/s 138
- The Adjudicating Authority shall provide the following documents to bankrupt, creditors and the bankruptcy trustee within seven days of the passing of the bankruptcy order, namely: -
 - (a) a copy of the application for bankruptcy; and
 - (b) a copy of the bankruptcy order.

Effect of Bankruptcy order – Section 128

- On passing the bankruptcy order u/s 126:
 - (a) the estate of the bankrupt shall vest in the bankruptcy trustee as provided in section 154;
 - (b) the estate of the bankrupt shall be divided among his creditors;
 - (c) subject to provisions of sub-section (2), a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not—
 - (i) initiate any action against the property of the bankrupt in respect of such debt; or
 - (ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.

Public Notice – Section 130

- (1) The Adjudicating Authority shall
 - (a) send notices within ten days of the bankruptcy commencement date, to the creditors mentioned in -
 - (i) the statement of affairs submitted by the bankrupt under section 129; or
 - (ii) the application for bankruptcy submitted by the bankrupt under section 122.
 - (b) issue a public notice inviting claims from creditors.

The Public notice may be affixed on the premises of the AA and also on the website of the AA.

Registration of Claims and Preparation of list of Creditors and Meeting of creditors -Sections 131, 132 and 133

- Registration of claim shall be made with the BT within 7 days of publication of notice after which the BT shall make a list of creditors within 14 days therefrom
- The BT will summon a meeting of the creditors with 21 days from the BCD and will convene and chair the meeting therein.
- The quorum for the meeting shall be decided by the BT
- The voting rights of the creditors shall be assigned by the BT in the manner specified by the Board.

Administration and Distribution of the Estate – Section 136

- The administration and distribution of the estate of the bankrupt shall be in accordance with Chapter V sections 149 to 178
- The completion of administration and distribution of the estate shall be overseen by the committee of creditors to which the BT shall provide a report upon completion in accordance with Chapter V of the Code.

Discharge order – Section 138

- The bankruptcy trustee shall apply to the Adjudicating Authority for a discharge order –
- (a) on the expiry of one year from the bankruptcy commencement date; or
- (b) within seven days of the approval of the committee of creditors of the completion of administration of the estates of the bankrupt under section 137, where such approval is obtained prior to the period mentioned in clause (a).

Effect of Discharge order

- The discharge order under sub-section (2) of section 138 shall release the bankrupt from all the bankruptcy debts:
- Provided that a discharge shall not –
 - (a) affect the functions of the bankruptcy trustee; or
 - (b) affect the operation of the provision
 - (c) release the bankrupt from any debt incurred by means of fraud or breach of trust to which he was a party; or
 - (d) discharge the bankrupt from any excluded debt.

Disqualifications of Bankrupt Section 140

- In addition to any disqualification under any other law for the time being in force, a bankrupt from the Bankruptcy commencement date shall be disqualified from—
 - (a) being appointed or acting as a trustee or representative in respect of any trust, estate or settlement;
 - (b) being appointed or acting as a public servant;
 - (c) being elected to any public office where the appointment to such office is by election; and
 - (d) being elected or sitting or voting as a member of any local authority. UNTIL
 - (a) the bankruptcy order against him is modified or recalled under section 142; or
 - (b) he is discharged under section 138.

Restrictions on Bankrupt – Section 141

- A bankrupt, from the bankruptcy commencement date, shall, –
 - (a) not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;
 - (b) without the previous sanction of the bankruptcy trustee, be prohibited from creating any charge on his estate or taking any further debt;
 - (c) be required to inform his business partners that he is undergoing a bankruptcy process;
 - (d) prior to entering into any financial or commercial transaction of such value as may be prescribed, either individually or jointly, inform all the parties involved in such transaction that he is undergoing a bankruptcy process;
 - (e) without the previous sanction of the Adjudicating Authority, be incompetent to maintain any legal action or proceedings in relation to the bankruptcy debts; and
 - (f) not be permitted to travel overseas without the permission of the Adjudicating Authority.

Priority of payment of debts – section 178

- (a) *firstly*, the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full;
- (b) *secondly*, -
 - (i) the workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date; and
 - (ii) debts owed to secured creditors
- (c) *thirdly*, wages and any unpaid dues owed to employees, other than workmen, of the bankrupt for the period of twelve months preceding the bankruptcy commencement date;
- (d) *fourthly*, any amount due to the Central Government and the State Government including the amount to be received on account of 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 bankruptcy commencement date;
- (e) *lastly*, all other debts and dues owed by the bankrupt including unsecured debts.

THANK YOU

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