A Note on Fraudulent Trading and Wrongful Trading

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Editor's Note: *An entity may slip into insolvency for multiple reasons. While technological obsolescence, bad business decisions are unavoidable/natural reasons; for a sound business environment, it is incumbent to curb cases of fraud and negligence – where the insolvency was perpetuated knowingly or as a result of lack of due care. Notably, these two aspects may sound synonymous but are different in nature. Insolvency laws across the globe provide for strict action against fraudulent and wrongful trading. Following is an extensive note, encompassing the various aspects of such transactions, laws dealing with them and its impact.*

Introduction

On examination of a Corporate Debtor's transactions during the process of liquidation, the most commonly used types of vulnerable transactions liquidator are Preferential Transactions (Section 43), Undervalued Transactions (Section 45), Transactions to defraud creditors (Section 49) and Extortionate Credit Transactions (Section 50), as provided under the Insolvency and Bankruptcy Code, 2016. However, one of the most potent and efficient tools for holding directors liable for their misconduct under Section 66 is ignored and underused. Section 66 of the Code provides for fraudulent trading under sub-section 1 and wrongful trading under sub-section 2.

The introduction of separate provisions for fraudulent trading and wrongful trading was one of the most significant turning points in the history of insolvency laws in both UK and Indian jurisdictions.

This note examines fraudulent trading and wrongful trading as provided under UK Legislations as well as Section 66 of the Code, while looking into the intent of such provisions and history of director's liability to contribute to assets of a corporate debtor, to highlight its importance and efficiency in being used as a tool to enforce director's liability.

United Kingdom Laws

The concepts of fraudulent trading and wrongful trading in India were derived from the provisions in the UK Insolvency Act 1986. Hence, it is necessary to examine the background and intent with which such provisions were introduced in the UK Laws.

Directors were always protected under the cloak of limited liability and hence, there was a high possibility of 'indifference and lack of concern' on their part, especially in times of financial distress. High monitoring costs and informational asymmetries disallowed creditors from keeping a check on such actions, which when combined with the abuse of limited liability, ultimately led to market failure.

Cork Committee Report

The Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* ("The Cork Report") was of the opinion that the provisions of fraudulent trading under Section 332 of the Companies Act 1948 had significant inadequacies in dealing with irresponsible trading. While there was always a liability imposed on directors who had the intention to defraud creditors, the Committee preferred the inclusion of a provision which held directors liable for mere failure to take steps in minimizing creditor losses on anticipation of insolvency.

Concerned with the lack of protection for unsecured creditors, the Cork committee sought for a "radical extension" in civil liability for directors whose fraudulent, reckless and negligent actions during financial distress, affected the interest of creditors. The Committee wanted a legislation which would ensure company directors to satisfy themselves about the company's ability to discharge its liabilities.

While the Government agreed to tighten the reins on directors' activities in its paper titled "A Revised Framework for Insolvency Law"[63], it did not take up the recommendations of the Cork Report entirely.

Subsequently, provisions were inserted for "fraudulent trading" under Section 213 and "wrongful trading" under section 214 of the Insolvency Act 1986

UK INSOLVENCY ACT 1986

1. Fraudulent Trading- Section 213

Section 213 allows for the court, on the application of the liquidator, to order for any persons to make contributions to the company's assets if were knowingly parties to the fraudulent trading of business with the intention to defraud creditors. The various aspects of this section, as interpreted in judicial decisions are as follows:

1.1. Dishonest Intention

The most relevant component of fraudulent trading is "blind-eye" knowledge. The elements of this type of knowledge were accurately described in the speech of Lord Scott of Foscote, in Manifest Shipping Company Limited v. UniPolaris Company Limited.[64]

"Blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning

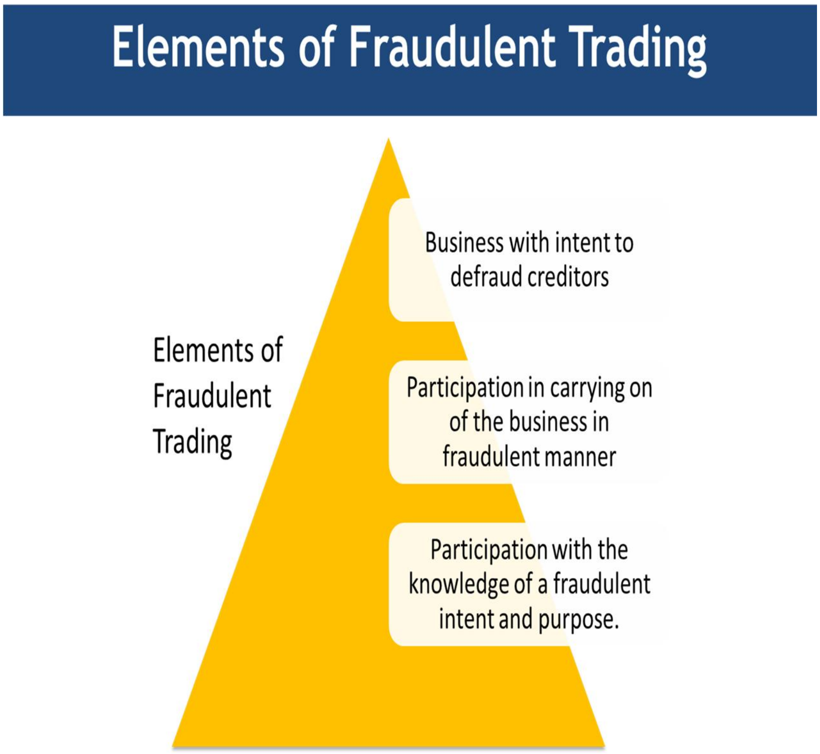

Figure 20: Elements of Fraudulent Trading

[63] Cmnd 9175
[64] [2003] 1 AC 469.

should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."

The Judge held that the pre-requisite for "dishonesty" under Section 213 does not have high thresholds. In *Morris v. Bank of America*, the court held that the extraordinary nature of the transactions and the paucity of the paperwork are a few things that the court checks to conclude dishonesty[65] References to "fraudulent" in the legislation connotes "actual dishonesty involving, according to current notions of fair trading amongst commercial men, real moral blame." In the case of *Morphitis v. Bernasconi*,[66] the court held that dishonesty is incurring company debt by those in charge, with the knowledge that it will not be repaid, or there is a substantial and unreasonable risk of default. The requirement of dishonesty presents the problem of evidence and proof.

1.2. No criminal liability under Section 213

The predecessor provisions of Section 213 were Section 275 of the Companies Act, 1929 and Section 332 of the Companies Act, 1948. These sections combined both compensatory and penal provisions.

The "Blinds' Eye Test":

Conduct regarded as dishonest by the standards of reasonable and honest people will be treated as dishonest, even if the defendant genuinely believed that such conduct would not be so regarded

They were naturally regarded as penal legislation and, as such, were strictly construed so as to give the person charged, the benefit of the doubt.

Morris v. Bank of India:

"outsider" companies can be made liable under section 213, provided that it is established they were "knowingly" parties to the fraudulent trading.

The position is different under the 1986 Act. Section 213 is not a penal provision. It only covers civil liability to pay compensation in cases where the company which traded fraudulently is being wound up. The purpose of Section 213 is to enable the liquidator to recover compensation from those who have knowingly assisted the fraudulent conduct of a company's business.

In the case of *Re Patrick and Lyon Maugham*, it was held that the jurisdiction of the court was confined in civil cases to declaring that past or present directors, including shadow directors of the company, who had carried on its business with intent to defraud creditors, should be personally responsible for all or any of the

[65] [2001] BCLC 771.
[66] [2001] 2 BCLC 1.

debts or other liabilities of the company as the court may direct.

1.3. Corporate knowledge

In *Bank of India v. Christopher Morris*[67], the court analysed the circumstances in which an individual's knowledge of fraud is to be treated as corporate knowledge for the purposes of Section 213. It is not a simple matter of identifying the person who authorised the transaction in accordance with the system of authorisation operated by the company in question. The scheme of delegation of authority might provide only an incomplete picture of what was done and may not be sufficient for attribution of corporate knowledge. The company cannot be liable for the activities of an individual when it itself is the victim of such wrong. Usually, the illegal act of a company officer's is attributable to the company, however, it is not so when a company is making a claim against its directors. The directors owe a duty to the company and the conduct of directors is different from that of the company.

1.4. Liability of Outsiders

Section 332 of the 1948 Act extended liability beyond past or present directors of the company carrying on its business fraudulently to any persons, including other companies, who were knowingly parties to that fraudulent trading.

In *Morris v. Bank of India*, the court held that "outsider" companies can be made liable under section 213, provided that it is established they were "knowingly" parties to the fraudulent trading. A creditor may also be liable under the section[68] Both types of liability extends beyond the company which actually carried on its business with intent to defraud creditors, to its directors and to "outsiders" who are individuals and corporate third parties who have knowingly been parties to the fraudulent trading in question.

1.5. Defences

In case of *Etivia S.A. & Anor v. Bilta (UK) Limited (in liq)*[69] *the issue* was whether the corporate debtor could bring a claim against the fraudulent directors as it itself had been a party to the illegal acts through its directors and shareholders. The UK Supreme Court held that a director cannot use his dishonesty as a defence.

2. Wrongful Trading- Section 214

Section 214 attaches a personal liability on the director of a company to contribute to the company's assets if:

1. The company has gone into liquidation and
2. The director at that time, knowing or having ought to conclude that there was no reasonable prospect of avoiding liquidation proceedings, did not take steps with a view of minimizing the potential loss to the company's creditors

[67] [2005] EWC AC iv 693.
[68] [2004] 2 BCLC 236.
[69] [2015] UKSC 23.

Section 214 was introduced with the intent to enhance 'transparency and trust' in UK business, with specific focus on expanding the scope of civil liability of directors for their misconduct.

This was also an attempt to prevent directors from externalizing the cost of their company's debts and placing the risk of further trading on the creditors. As opposed to fraudulent trading, the civil liability for wrongful trading was imposed only on "insiders" ie. the directors of the company, including shadow directors.

Section 214 imposes a personal unlimited liability on a director of an insolvency company who is found to have indulged in callous, negligent and reckless continuation of trade during times when they knew or ought to have known that there was no prospect for the company to avoid the liquidation process. The rule under this section is widely used as an important device for the protection of creditors. The directors are assessed against the general knowledge, skill and experience that may be reasonably expected out of a 'reasonably diligent person' acting in the capacity of a director.

This provision seeks to remedy the market failure caused through its compensatory and deterrence aspects, in pursuance of Cork's idea. Although the liability is *ex post* in nature, ie. the liability to compensate is imposed only after the incident takes place, Cork believed in the *ex- ante* benefits in encouraging better management of the assets of a company in financial distress. This provision, however, can be imposed only by a liquidator and only when a company has entered insolvent liquidation. One of the defences available to a director is to show that he took every step possible with the primary purpose to minimize the potential loss that could have been caused to the company's creditors.

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INDIAN PROVISIONS

Companies Act, 1956

Prior to the commencement of the Code, courts used the provisions of Section 542 and section 543 of the Companies Act 1956, where courts have ordered for directors to compensate for the consequences of their wrongful or fraudulent acts in various instances.

It was held in *Official Liquidator, Supreme Bank Ltd v. P.A. Tendolkar* *(1973) 43 Comp Cas382, (1973) 1 SCC 602*:

> *"The director cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so, he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the company due to his neglect even if he is not shown guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company."*

In *Official Liquidator v. Ram Swaroop*[70] charges of misfeasance and fraudulent trading were made out against the party under Section 542 of the Companies Act, 1956. The court held that the directors occupied a fiduciary position and the proceedings under Section 542 can be of civil nature and hence, they were liable to compensate the company.

In *Hypine Carbons Limited v. J.C. Bhatia*[71] the court held that mere failure to initiate legal steps against the debtors of the company would not make the directors liable in the recovery of amounts, unless it was proved that they had fraudulent intentions.

In *Official Liquidator v. Shri DD. Sinha and ors 2015 (2) WLC (Raj) 18,* it was held that:

> The liability under the provisions of sec 543 is in the nature of tortuous liability and quasi-criminal as well and therefore the recovery can be directed to be made from the director, who is held liable for causing loss to the company by his act or omissions, which tantamount to misappropriation, breach of trust, misapplication or retention of monies/ properties of the company.

He should be a director while carrying out an activity that he is otherwise empowered to carry out under the law, but performs it in such a manner that the same is improper and such impropriety has to be wilful so as to cause loss to the company.

Companies Act, 2013

The Companies Act, 2013 provides for directors to exercise their powers in the interests of the company, where a fiduciary duty is established towards the company since they are in charge of its affairs under normal circumstances. When the company enters into the resolution process, the company moves into the control of the Committee of Creditors (CoC). However, this does not absolve the director of his actions committed prior to liquidation. Sections 339, 340 and 341 of the Companies Act 2013 deal with the fraudulent conduct of business.

Figure 21: Ingredients of Wrongful Trading

Section 339 provides that in case any director, manager, officer or any persons knowingly carried on the business with the intent to defraud creditors or for any fraudulent purpose, the Tribunal may order that such persons will be personally responsible, without any limitation of liability, for all or any of the debts or liabilities as the Tribunal may direct. The Tribunal may also make provisions for the

[70] AIR 1997 All 72
[71] (2001) 103 CompCas 422 (HP)

liability of such persons to be a charge on any debt, obligation, mortgage or on any interest in any mortgage or charge on any assets. Sub-section 3 also states that every person who knowingly carries on business in the manner aforesaid shall be liable for action under Section 447.

Section 340 confers powers to the Tribunal to inquire into and further order for the repayment or contribution to the assets by any promoter, director, manager, company liquidator or officer of the company who has misapplied, retained, become liable or accountable for money or property, or has been guilty of misfeasance or breach of trust. Section 340 imposes a criminal liability in cases of breach of trust or misfeasance.

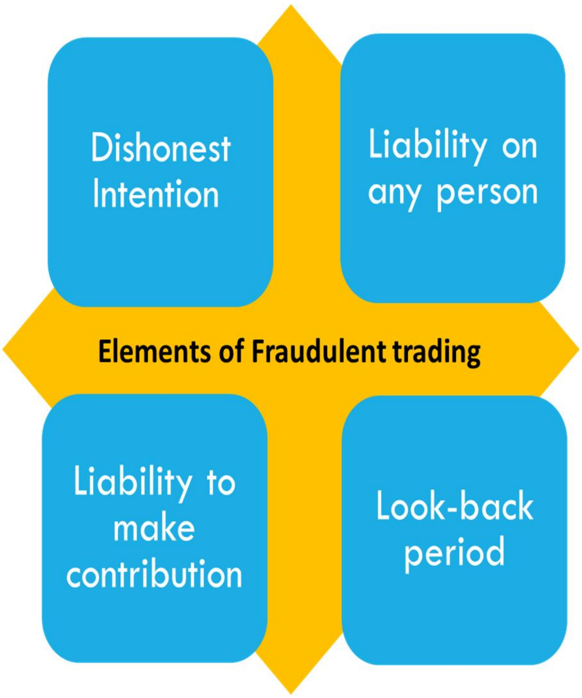
Section 341 extends the liability under Section 339 and 340 to partners and directors who held such positions at the time of the fraudulent transaction.

Since the definition of 'winding up' as per Section 2 (94 A) of the Companies Act, 2013 is applicable to the Code, the Code can be read with Companies Act to impose liabilities on the persons responsible for fraudulent trading.

Insolvency and Bankruptcy Code, 2016

Section 66

The provisions for fraudulent and wrongful trading specifically under the insolvency laws have been adopted from the UK Insolvency Act, 1986. However, wrongful trading and fraudulent trading are provided together under Section 66 of the Code, which is divided into two sub-sections.



1. Section 66 (1)

Section 66 (1) imposes a liability on any persons who were knowingly parties to the carrying on of business with a dishonest intent to defraud creditors, to make contributions to the assets of the corporate debtor as per the order of the Adjudicating Authority.

1.1. Dishonest intention

The provision only applies when the person 'knowingly' carries out fraudulent activities. In *Grantham v. R,* it was held that it is not necessary that the person accused must believe that there is no reasonable prospect of ever paying the creditor, but it is sufficient to show that he believed that the debt could not be paid when it became due or shortly thereafter. A person would knowingly be a party to the business of a company having been carried on with intent to defraud creditors if (a) at the time when debts were incurred by the company he had no good reason for thinking that funds would be available to pay those debts when they became due or shortly thereafter and (b) there was dishonesty involving real moral blame according to current notions of fair trading.

1.2. Liability on any person

The phrase 'any persons' suggest that 'outsiders' can also be liable for fraudulent trading, as long as they had a dishonest intention of fraudulently carrying on such trade. The provision is not only restricted to 'insiders' like employees, directors or partners. It is wide enough to include fraud on behalf of third parties like other corporate persons and creditors.

1.3. Liability to make contribution

The court has the power to demand contribution to the assets of the corporate debtor, from the defrauding party. The party would be personally responsible, without any limitation of liability, for the losses cause due to their fraudulent trading.

1.4. Look back period

One examination of the transactions of a corporate debtor, the liquidator of the company has the power to "claw back" and hold directors responsible for their actions even pre liquidation. Directors can be held liable for their actions usually within the 'look-back period'. While a look- back period is specifically provided for undervalued transactions, one of the biggest advantage of using fraudulent trading as a tool is that there is no specified look- back period under section 66.

Keeping in mind the maxims, "*once a fraud, always a fraud*" and "*fraud vitiates every transaction into which it enters,* the primary reason of not having a look back period is that if any person has acted intentionally or dishonestly against the interest of creditors, he should not be allowed to get away by using the defence of lapse of time.

2. Section 66 (2):

Section 66 (2) imposes a liability on partners or directors of the Corporate Debtor if:

– The director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of the corporate insolvency resolution process of the Company and

– The director/ partner failed to exercise due diligence in minimizing the potential losses to be incurred

2.1. Due diligence

The primary purpose of Section 66(2) is to ensure that directors take action at the instant onset of any financial distress, with sufficient due diligence. Hence, directors can be punished under this section even if they did not have a dishonest intention, but acted negligently and recklessly, hence exposing the company to further risk due to such actions. While Section 66 (2) provides for a broad spectrum of actions a director could possibility take to mitigate losses, the Adjudicating Authority would ascertain whether the director has acted as a reasonable competent director would, based on the special skills he is required to possess.

The directors cannot plead ignorance or lack of knowledge under Section 66 (2). The directors have a twofold duty to ensure that the interests of the stakeholders are secured and to ensure that the company does not incur any further debts during the twilight period. Directors must also make an active effort in the rehabilitation and revival of the company.

2.2. Twilight period

Twilight zone is the period between the time when the director knew or ought to have known that there was no reasonable possibility of avoiding the commencement of resolution of the company, till the time the company actually enters into resolution. During such period, an additional responsibility is added onto the directors to exercise due diligence, where he must act in a way to minimise the losses or potential losses to creditors of the Company.

Directors must be wary of the possible effects their actions might have in reducing the value of the assets of the company. The decisions taken in the twilight period by the directors could adversely impact the outcome of the insolvency provisions and hence, directors must not be negligent while taking decisions or performing acts on behalf of the company. There is a shift in the end result to be achieved by the actions of the directors, from maximising the interest of the shareholders to protecting the interest of the creditors.

2.3. Knowledge for wrongful trading

The offence is constituted when a director or partner knowingly incurs debt on behalf of the company without any reasonable or probable ground of paying off such debt. Recklessness or unreasonableness is sufficient to establish the offence. The directors cannot plead ignorance or lack of knowledge under Section 66 (2).

2.4. Liability on 'Insiders'

Section 66 (2) imposes a liability only on the director or partner of a company. It has a lower threshold for imposing liability, than clause (1), due to the specific fiduciary duty of the director towards the company. Directors are given immense powers in the management of the company and hence they must not misuse their position of authority. They must not misappropriate the assets of the company or subordinate the interests of the company or shareholders for their personal interests.

2.5. Civil liability of contribution

Claims for wrongful trading also include the secret profits or benefits that the directors may have earned in breach of their duties. The civil liability claims are for the purpose of benefitting the corporate debtor and not the creditors. However, the creditors benefit out of it indirectly.

2.6. Cases where directors are not responsible

A director may avoid civil liability by proving that he had taken every step with a view to minimising the potential loss to the company's creditors as he ought to have taken.

3. Difference Between 66 (1) And (2)

Section 66 (1) imposes a liability on any person including outsiders, while section 66 (2) imposes a liability only on the director or partner of a company. Under Section 66, sub-section 1 of deals with fraudulent trading in the time period when the business is functioning normally, while sub- section 2 deals specifically with the duties of a director in the twilight period. Although not specifically differentiated, Section 66 (1) deals with fraudulent trading since there is a mandatory requirement of knowledge, while section 66 (2), deals with wrongful trading since it includes an element of negligence.

4. What follows Section 66?

Section 67 specifically deals with proceedings under Section 66, where the Adjudicating Authority may provide for the liability of any person responsible, to be a charge on any debt or obligation due from the corporate debtor to him and make further directions which may be necessary for the enforcement of any such charge mentioned under this section. Sub-section 2 also allows for the Adjudicating Authority to direct that the debt or part of debt owed to the defrauded creditor shall rank in the order of priority of payment under Section 53 after all other debts owed by the Corporate Debtor.

In cases where the Code is read with the Companies Act 2013, criminal liability can be imposed as well.

5. Comparison of Section 66 with Section 49 and Section 69 of the Code

Section 49 of the Code deals with undervalued transactions entered into with the purpose of defrauding and affecting the interests of creditors, while Section 69 provides for punishment for transactions defrauding creditors.

The similarity between **Section 49** and Section 66 is that both Section 49 and Section 66(1) include acts which are carried on with the intent to defraud creditors. However, while Section 49 requires the deliberate intention to defraud creditors by entering into such transactions, sub- section 2 of Section 66 also punishes negligent acts which affect the interests of the creditors as well. Section 49 also deals specifically with the corporate debtor itself entering into fraudulent transactions while Section 66 punishes any person responsible (sub-section 1) or director/partner (sub-section 2) specifically by imposing personal liability.

Section 69 provides for the punishment of an officer of the corporate debtor or the corporate debtor itself, for carrying transactions defrauding creditors. However, there are primarily three differences between these sections:

a. An application under Section 66 can be made only during the corporate insolvency resolution process or liquidation process, by the resolution professional. However, the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 brought about a change in Section 69 which now allows an application to be filed at any time when such transactions occur.

b. The consequence of acts committed under Section 66 is the contribution by the director or any person responsible, to the assets of the corporate debtor. There is no criminal liability imposed under this section. However, the consequence under Section 69 is both civil as well as criminal. The punishment under Section 69 shall be either imprisonment for a term which shall not be less than one year but which may extend to five years, or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or both.

c. One of the defences provided under Section 69 is if the acts mentioned under this section were committed more than 5 years prior to the insolvency commencement date and if it is proved that such acts were committed with no intent to defraud the creditors of the corporate debtor. One of the defences for the transactions provided under Section 66 (1) is if there was no dishonest intention or if due diligence was exercised under Section 66 (2).

Difference between Fraudulent Trading and Wrongful Trading

Basis of Distinction	Fraudulent Trading	Wrongful Trading
Persons who can be held liable for the offence	Outsiders and insiders can both be held liable.	Only insiders i.e. directors or partners can be held liable.
Type of Liability	The offence attracts criminal liability as well as civil liability since it involves fraud.	The offence attracts only civil liability since it is primarily due to lack of due diligence.
Requirement of Intention	The presence of dishonest intention is mandatory for defrauding creditors.	It includes acts done recklessly or negligently which might affect the creditors liabilities.

Comparison Between UK And Indian Laws

Basis of Distinction	Fraudulent Trading	Wrongful Trading
Provision of fraudulent and wrongful trading	UK Insolvency Law has separate provisions for fraudulent trading andwrongful trading.	The Indian Code provides for both offences under Section 66.
Imposition of criminal liability	UKInsolvency Lawallowsfor the imposition of criminal liability for both fraudulent and wrongfultrading	The Code does not have such a provision. Criminal liability provisions is only specified under the Companies Act, 2013..
Explanation of the thresholds required under the law	The laws have defined thresholds for imposing liability.	The recent laws still do not specify the thresholds for 'dishonesty' and 'negligence'for the purpose of the Code

Corporate knowledge	There are specified circumstances under which the acts of the individual will be attributed to the corporate debtor.	The issue is not settled in India
Initiation of proceedings	The proceedings are initiated by the liquidator.	The proceedings are initiated by the Re process)
Breach of duties	The offender violates the notion of fair trade	The offender fails to take due-diligence and does notfulfill fiduciary duties.

Suggestions

The Insolvency Committee, Singapore, is of the view that creditors and contributories should also be able to apply for relief under the insolvency trading provisions, if they obtain the consent of the relevant insolvency office-holder, or the leave of the court. This is because, in insolvent liquidations or other analogous insolvency procedures, the sums recovered are property of the company and are applied for the benefit of all its creditors as opposed to a single creditor or contributory. Under the Code, an application under Section 66 can be made only by the resolution professional which is restrictive and should be done away with.

The thresholds for liability for wrongful and fraudulent trading are not fixed. It is difficult to determine the liability as it a subjective matter. Proceedings might fail due to uncertainty of liability and difficulty in establishing it. Moreover, the cost of such proceedings might deter resolution professionals from using this remedy as such costs are charged on the assets of the company when it is in an already compromising state.

Conclusion

The inclusion of provisions for fraudulent trading and wrongful trading was one of the most noteworthy change in the history of insolvency laws. However, section 66 is still an under-used remedy under the Code. It is the duty of the liquidator or the resolution professional to get the highest value of the assets and satisfy the claims of the creditors. In such a case, transactions which have put the company at an economically weaker position, like fraudulent trading or wrongful trading, must be reversed. The board of directors although suspended at the commencement of insolvency process, should not be let go off freely as it was their fiduciary duty to act in the best interests of the company and its stake holders.

While the aspect of criminal liability of directors for their fraudulent acts was always present under Companies Act, 2013, it was not helpful during the process of liquidation since there was no way of recuperating the losses caused to the corporate debtor and its creditors. Most directors were either dishonest or indifferent in their actions inspite of knowing that their acts might affect the value of the company or even increase its liability towards creditors, especially if done in the twilight period. This was because directors used the cloak of limited liability to get away with the actions that might have affected the functioning of the company risking liquidation, or even exposed the company into further losses. Section 66 not only brings about a huge shift by making the liability of a director unlimited but also provides for a new dimension of imposing civil liability, where the losses caused by the misconduct and negligence of creditors can be made up by their contribution.

Unlike the tools used for other types of transactions provided under the Code, there is no specified look-back period for fraudulent trading under section 66. Hence the resolution professional is allowed to "claw back" without any limitation of time and correct all the wrongs done by insiders or outsiders at any point of time since they became directors of the company.

Hence, realising the advantages and intention of bringing such provisions into the Insolvency Code, 2016, Section 66 must be used more commonly to ensure that the losses cause to the creditors are recovered in the event of liquidation and that the directors who caused such losses are made personally liable to make up for such losses.

One perspective that remains unanswered is through the perspective of sick industries. The right of voluntary initiation of the resolution process was available even before the commencement of the Code. However, the Sick Industries Companies Act, 1985 (SICA) was repeatedly abused by promoters who enjoyed the unending moratorium and protection provided under SICA, while remaining in possession of the assets of the company. Directors have a duty to take steps with due diligence to minimise losses and one such step might be the initiation of Corporate Insolvency Resolution Process under section 10. Hence, can the existence of sick industries or a reference thereunder be used as a defence for Section 66? This question still remains.
