

WHEN THE WATERFALL RUNS DRY: THE IBC'S BLIND SPOT FOR BRAND VALUE

by

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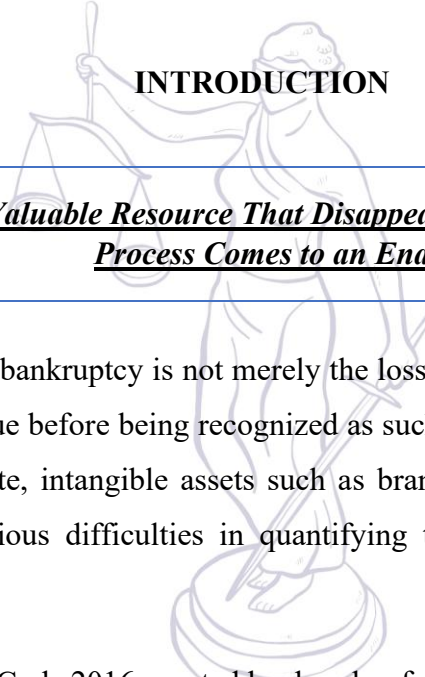
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ABSTRACT

A business can lose its tangible resources, yet it can still be in business; yet the instant it loses its name and its position in the market, its business viability comes under question. Currently, brands are worth more than a mere name. Brands are connected with the idea of trust and reliable reputation as well as the viability in the current economic situation. Unfortunately, branding is not recognized as such by the legal system in the case of insolvency. The Insolvency and Bankruptcy Code Of 2016 is aimed at maximizing the value of the company and helping businesses that can and need to function. The IBC contains provisions concerning the intangible resources, and it does not really provide the actual definition of the effectiveness and power of branding to protect it from losing its position. In this study, the importance of brand value in Indian insolvency law is explored through the doctrinal, empirical and comparative approach. The research examines the provisions of the Indian Bankruptcy Code to see how it incorporates brand value and its effectiveness in insolvency proceedings. The conclusion drawn shows that the IBC can only achieve its goal of maximization of true value if the traditional asset-based valuation methods are replaced by valuation techniques that take into account the significance of brand equity as a key element in the modern value of a business.

Keywords: *Insolvency and Bankruptcy Code, Brand Value, Intangible Assets, Corporate Insolvency Resolution Process, Valuation, Enterprise Value.*

Consider a scenario where two firms become bankrupt. One of them possesses factories worth ₹5,000 crore while the other has a popular brand but limited tangible assets. Which one of these firms is more valuable? Even more relevant, does insolvency law take note of such differences?



INTRODUCTION

Brand Equity: A Valuable Resource That Disappears Before the Liquidation Process Comes to an End

The greatest loss caused by bankruptcy is not merely the loss of a particular asset, but rather that of an asset that loses its value before being recognized as such. Unlike physical assets, which are easy to identify and evaluate, intangible assets such as brand reputation, brand credibility and brand identity presents serious difficulties in quantifying these assets during the insolvency process.

Insolvency and Bankruptcy Code 2016 enacted landmark reforms in the field of insolvency law in India because it shifted focus from business recovery to business resolution and aimed at maximizing value¹. The Bankruptcy Law Reforms Committee (BLRC) made an equal effort in placing emphasis on maintaining commercial viability of current firms. However, modern day enterprises are the ones benefiting more from the intangible resources such as trademarks, reputation and customer loyalty. Even though IBC acknowledges the presence of intangible resources, it still does not create a separate framework for finding the value of a brand as a different notion from goodwill and company value. The lack of the mentioned framework can be seen from the bankruptcy situations of the firms such as Jet Airways, Kingfisher Airlines and Café Coffee Day which did not only face financial troubles but also losses of brand equity due to the closing

¹ The Insolvency and Bankruptcy Code, No. 31 of 2016, sections 18, 25, 29, 36 (India); Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

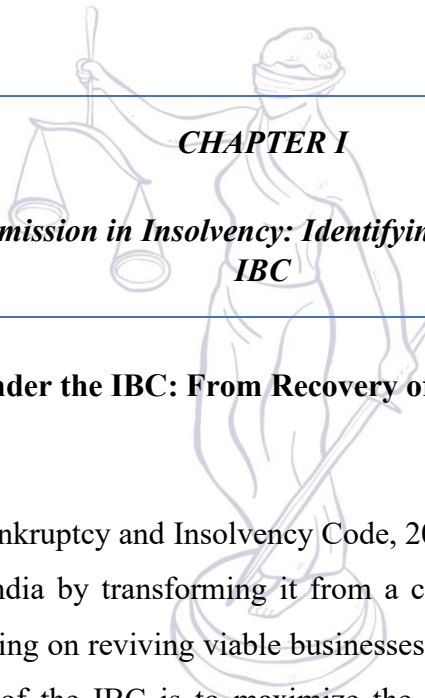
of business activities. The study strives to determine whether the current legislation of IBC provides protection to brand value and investigates the other bankruptcy systems in order to formulate recommendations for improvement of insolvency laws.

RESEARCH QUESTIONS

1. Does Insolvency and Bankruptcy Code 2016 indorse brand value as a unique recognizable intangible asset to be protected and valued separately or does it fall under broader terms like goodwill and enterprise value?
2. What is the effect of not having specific norms for identifying and valuing brand value in IBC that has led to demolishing and undervaluing brand value in the Corporate Insolvency Resolution Process and liquidation in the country?
3. What lessons does Indian insolvency process draw from the U.S., UK and German insolvency processes regarding recognizing and valuing brand value and what reforms are required in the IBC law for adopting brand value valuation techniques?

HYPOTHESIS

The Insolvency and Bankruptcy Code of 2016 does not provide for strict legal recognition and valuation methods related to brand value as a separate intangible asset and even with the acknowledgment of the idea of value maximization as a key aim of this legal document. Thus, brand equity gets lost in generic concepts such as goodwill or company value and becomes depreciated during bankruptcy procedures.



CHAPTER I

The Significant Omission in Insolvency: Identifying Brand Value within the IBC

1.1 Value Enhancement under the IBC: From Recovery of Debt to Preservation of Enterprises

The establishment of the Bankruptcy and Insolvency Code, 2016 (IBC) marked a turning point in the insolvency system in India by transforming it from a chaotic recovery-driven system to a resolution mechanism focusing on reviving viable businesses alive². As stated in the preamble of the act, an important goal of the IBC is to maximize the value of resources, along with the encouragement of businessmen, the provision of credit, and the provision of balance among stakeholders.

The strategy reflects international principles regarding insolvency. According to the UNCITRAL Legislative Guide on Insolvency Law, value maximization is a major principle of insolvency.³ While the “World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes”

² The Insolvency and Bankruptcy Code, No. 31 of 2016, Statement of Objects and Reasons, India Code (2016).

³ U.N. Comm'n on Int'l Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, U.N. Sales No. E.05.V.10, pt. 1, 31–35 (2005)

emphasize the importance of a recovery process that preserves and efficiently liquidates all economically viable assets.⁴

1.2 Beyond Physical Assets: The Role of Intangible Assets in Insolvency Proceedings

IBC takes a holistic approach towards the identification of the assets of the corporate debtor. In Section 18, Interim Resolution Professional (IRP) has been assigned the role of taking charge and custody of the assets, whereas Section 25 puts an obligation on the Resolution Professional (RP) to safeguard and secure the assets.⁵

Furthermore, Section 29 requires the creation of an Information Memorandum that enumerates the properties of the debtor whereas Section 36 provides that the liquidation estate comprises both intangible and intellectual assets.⁶ The BLRC anticipated that all asset that could result in generating enterprise value has been acknowledged and maintained in the case of whether it was likely that it would become insolvent.⁷

However, despite this, it is noteworthy that the Insolvency and Bankruptcy Code (IBC) does not specify any provisions on how to identify or evaluate brand value. While intellectual property is included in the insolvency estate, the economic value generated from reputation and customer loyalty is usually not captured. Hence, the value related to the brand is usually captured in vague terms like goodwill or enterprise value.

Category	Legal Recognition under IBC	Economic Importance
Trademark	Recognized as intellectual property	Protects legal identity
Patent/Copyright	Recognized as intellectual property	Protects innovation

⁴ **World Bank**, *Principles for Effective Insolvency and Creditor/Debtor Regimes* princ. C1–C3 (2021).

⁵ The Insolvency and Bankruptcy Code, No. 31 of 2016, sections 18, 25 (India)

⁶ Id. sections 29, 36.

⁷ Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee: Volume I—Rationale and Design* 5–6 (2015)

Goodwill	Recognized as intangible value	Represents business reputation
Brand Equity	No separate recognition	Represents consumer trust and market power

1.3 The Brand, Trademark and Goodwill Concepts in Resolving Insolvency

Brand value, trademark, and goodwill are all interconnected; however, they all signify different concepts. The Trade Marks Act, 1999 recognizes a trademark as a right that can be assigned or licensed in addition to being transferable, while brand is more than just a mark; it is the total of various components, such as a product's reputation, image, and market presence⁸.

Goodwill is distinct from a brand in that goodwill reflects excess value of the enterprise attributable to reputation and future earnings; although the brand is certain to affect goodwill, they are different concepts and the brand may well have its own worth apart from actual physical assets. The IBC acknowledges intellectual property in insolvency cases but does not provide a distinction between goodwill and the brand. The Code or the IBBI Regulations 2016, does not enable identification or valuation of equity based on the brand during CIRP. As a result, valuable brands may be affiliated with other major headings of evaluation.

1.4 The Unseen Gap in Value: Branding under the IBC

It is clear that when it comes to insolvency matters according to the law set out in the IBC, while intangible assets are considered, the brand value has no special legal status. The Code acknowledges intellectual property rights as a type of asset, but does not differentiate between

⁸ The Trade Marks Act, No. 47 of 1999, sections 37–45 (India); see also Kevin Lane Keller, Strategic Brand Management: Building, Measuring, and Managing Brand Equity 30–32 (5th ed. 2020)

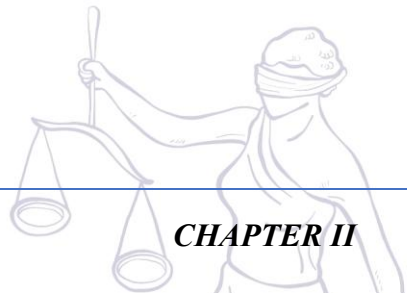
protected rights, for instance, trademarks, and benefits derived from the brand as a business. Consequently, we see the gap between the objective aims set by the IBC to achieve the full value of the assets and its attitude towards one of the most important factors in the value of a company. The influence of brand identification, estimation, and protection leads to dependence on broadly understood concepts like goodwill or enterprise value which proves to be misleading when it comes to the actual worth of a brand.⁹

Table 1: IBC Position

Question	Present IBC Position	Required Reform
Is brand an asset?	Covered indirectly under intangible assets	Recognize brand equity separately
Is brand valuation mandatory?	No	Mandatory valuation for brand-dependent businesses
Is brand preservation required?	General duty to preserve assets	Specific preservation obligations
Is brand disclosed in Information Memorandum?	Not specifically required	Mandatory disclosure

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⁹ Baruch Lev, *Intangibles: Management, Measurement, and Reporting* 17–19 (2001); see also International Financial Reporting Standards Foundation, *IFRS 3 Business Combinations* (2024).



CHAPTER II

Brands Die before Firms: A Practical Study of Brand Value Decrease in Cases of Bankruptcy in India.

2.1 The Paradox of Valuation: The Process of Increasing Assets without Valuing Intangible Assets.

The Insolvency and Bankruptcy Code, 2016 is premised on the principle of maximizing value. However, it is only possible to maximize value when the economically significant assets of a corporate debtor are accurately identified and valued. Although the Insolvency and Bankruptcy Board of India has laid down a structured mechanism of valuation as laid down in Companies (Registered Valuers and Valuation) Rules 2017 and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, valuation of intangibles is still not developed¹⁰.

Referring to the IBC method of measuring the worth of an asset, it is primarily reliant on the three fundamental methods which are the market method, the income method, and the cost method. Indeed, the markets methods may be applicable to valuing intangible assets, but it is not required

¹⁰ The Insolvency and Bankruptcy Code, No. 31 of 2016, pmbl. (India); Companies (Registered Valuers and Valuation) Rules, 2017, Gazette of India, Ministry of Corporate Affairs, G.S.R. 1316(E) (Nov. 18, 2017); Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

for assessing the value of brand equity or intangible assets like customer loyalty or reputation¹¹. As far as the brand is concerned, the processes will include the lapsed worth of the company alone in the instances where the company is mostly recognized by its brand name.

This issue becomes obvious when we look at the company's position on the market before going bankrupt and the outcomes of the bankruptcy proceedings undertaken. The cases of bankruptcies in India demonstrate that famous brands lose much of their value because of the fact that the methods of maintaining their brand value were neglected.

2.2 Jet Airways: A Global Airline Brand Grounded

Jet Airways (India) Ltd.'s case exemplifies a unique situation of loss of intangibles under the IBC. During its heyday, Jet Airways was the top private carrier in India, operating with a fleet of over 120 aircraft and a strong brand identity both domestically and internationally.

The commencement of CIRP proceedings in 2019 led to the firm shutting down operations and losing customer confidence and market standing. The acceptance of the resolution plan by the Jalan-Kalrock consortium by the NCLT has an adverse effect upon the brand reputation and equity of Jet Airways since the lengthy insolvency process took a toll¹².

The research finds that the value of the brand in services industry is dependent on the uninterrupted running of the business. The tangible assets can be located during the bankruptcy procedure easily, however consumer trust and reputation may suffer due to halting of the business process. The absence of any legal obligation to keep the brand identity during the CIRP resulted in the loss of intangible values that were positively useful for Jet Airways in the past.

¹¹ Companies (Registered Valuers and Valuation) Rules, 2017, rule 8; Insolvency and Bankruptcy Board of India, Valuation Standards for Registered Valuers (2020); see also International Valuation Standards Council, International Valuation Standards 2022 91–105 (2022).

¹² *Jet Airways (India) Ltd. v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 707 of 2020 (NCLAT); see also *Jalan Fritsch Consortium v. Jet Airways (India) Ltd.*, Company Appeal (AT) (Insolvency) No. 423 of 2021 (NCLAT).

2.3 Kingfisher Airlines: A Well-known Brand Becomes a Ruined Business

Kingfisher Airlines is a complete example of loss of brand value. In the time-go by, Kingfisher Airlines was a prestige brand and made its mark in market through its branding and marketing initiatives. But due to financial problems, and subsequent closure of flights, Kingfisher Airlines does not have any value in the market anymore.

In assessing the value of Kingfisher Airlines for liquidation purposes, the valuation is based on the value of tangible assets such as aircraft or receivables. Although the company was once a well-known brand, now it has little or no value¹³.

It makes evident the distinction between what being recorded in the accounts signifies and what the realization of the value happens during the insolvency. A brand can have very high value during its normal operation but once the confidence of the consumers is lost, the brand needs to put a lot of effort to realize its value.

2.4 Café Coffee Day: The Deterioration of Customer Loyalty as an Insolvency Cost

The issues of Coffee Day Enterprises Ltd., the owner of Café Coffee Day ("CCD") emphasize the significance of the customer relationship and the brand image in the consumer sector. CCD had one of the most popular coffee retail chains in India with more than 1,700 cafés across the country at the time of its peak. But it started experiencing financial difficulties that impacted its operational activities and restructuring process.¹⁴

While property can be transferred during bankruptcy proceedings, reputation and customer loyalty cannot be transferred as soon as a business fails. The CCD case illustrates the impact of not being able to quantify welcome assets such as customer loyalty and reputation and, hence, leading to asset undervaluation.

¹³ *State Bank of India v. Kingfisher Airlines Ltd.*, Company Petition No. 185 of 2016 (NCLT Bengaluru); see also Kingfisher Airlines liquidation proceedings under the Insolvency and Bankruptcy Code, No. 31 of 2016.

¹⁴ Coffee Day Enterprises Ltd., Annual Report 2018–19; see also Coffee Day Enterprises Ltd. disclosures filed with the Bombay Stock Exchange.

2.5 Reliance Capital: The Impact of Intangible Assets in Bankruptcy Proceedings

Reliance Capital's example provides a different angle of view on insolvency processes in financial sectors. Financial companies are not like producers of goods and other consumer products since they have certain licenses provided by regulatory authorities and connections with clients and regulators that facilitate their operations.

The case gained special attention in the media due to the analysis of the financial assets and businesses of the company conducted by many potential acquirers of its financial assets..¹⁵ Nevertheless, appraising intangible assets deemed to be critical for the business remains difficult in the context of the current IBC.

Table 2: Impact of Bankruptcy Processes on Brands of Particular Companies in India

Company	Sector	Pre-Insolvency Brand Position	Insolvency Development	Impact on Brand Value
Jet Airways (India) Limited	Aviation	One of the biggest private airlines in India with more than 120 aircraft at its apex and substantial domestic and international brand recognition.	Entered into Corporate Insolvency Resolution Process (CIRP) in 2019 after stopping its operations. The proposal of Jalan-Kalrock Consortium for resolution got approval but did not see any implementation.	Long period of suspension in operations led to a decline in consumer confidence, presence on the routes and identity in the market. Brand worth of the airline which was dependent on operations and trust of customers fell down significantly during insolvency.

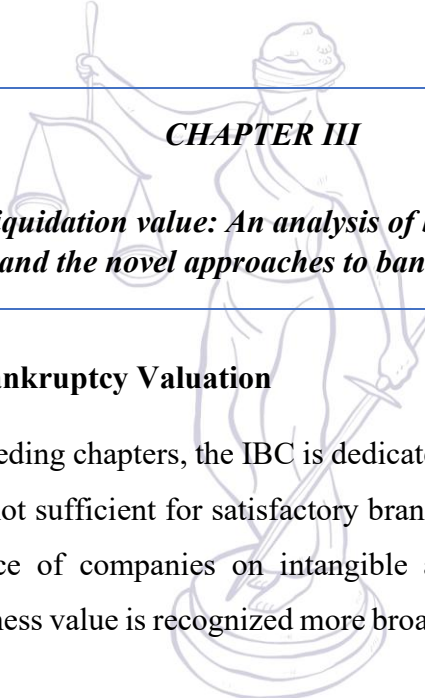
¹⁵ *Reliance Capital Ltd. v. Securities and Exchange Board of India*, Company Appeal (AT) (Insolvency) proceedings under the Insolvency and Bankruptcy Code, No. 31 of 2016; Insolvency and Bankruptcy Board of India, Reliance Capital Ltd. CIRP documents.

Kingfisher Airlines Ltd.	Aviation	Reputed as a luxury airline brand linked to premium services and high brand visibility.	Faced financial failure and entered into liquidation as a result of ceasing operations.	Brand recognition which seemed good at the time was lost as a result of cessation of airline services. The brand demonstrated how service brands cannot leverage brand equity since the airline failed to generate revenue due to the closure of services.
Coffee Day Enterprises Ltd. (Café Coffee Day)	Food & Beverage / Retail	Café Coffee Day was one of the most prominent chains of coffee shops in India, with over 1700 outlets in its prime state of operations.	Faced difficulties in financial aspects due to repayment issues and restructuring processes.	Declining operations affected how customers thought of the brand and the brand itself. This illustrates that market reputation and customer loyalty can deteriorate if business operations are disrupted in the time of financial distress.
Reliance Capital Ltd.	Financial Services	This is one of the leading financial service groups who has a well-established customer base and diverse	The company entered into CIRP as per the provisions of IBC in 2021. During the resolution process, there were multiple bids received from	The insolvency process raised issues in understanding how to evaluate the intangible value of a brand, customer relationships, and

		business verticals.	different financial institutions.	institutional goodwill independently from the traditional approach to valuations.
Videocon Industries Ltd.	Consumer Electronics	An Indian electronics firm, having solid stake in the market of televisions, appliances and consumer products.	Initiated Corporate Insolvency Resolution Process in 2018. Now, approved the resolution as per Twin Star Technologies' plan.	The valuation of brand in consumer business has been taken into account while valuing the overall business. However, measures have not been taken to protect branding at the time of insolvency resolution.



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CHAPTER III

Moving beyond liquidation value: An analysis of brand value preservation and the novel approaches to bankruptcy

3.1 A New Approach to Bankruptcy Valuation

As demonstrated in the preceding chapters, the IBC is dedicated to achieving value maximization, yet its existing platform is not sufficient for satisfactory brand valuation during bankruptcy. Due to the increased dependence of companies on intangible assets, a new wave of insolvency legislation ensures that business value is recognized more broadly than just as holdings or financial liabilities.

3.2 United States Case: Protecting Brand Value Through Chapter 11

The United States Bankruptcy Code establishes one of the most extensive systems of protecting intangible assets in events of insolvency. While the IBC focuses primarily on asset-centered approach in insolvency cases, Chapter 11 of bankruptcy law is aimed at reconditioning debtors through the continuity of their business¹⁶.

3.3 UK: Culture of Rescue and Preservation of Going-Concern Value

¹⁶ 11 U.S.C. 1101–1174 (2018); see also Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Text, Cases, and Problems* 520–25 (8th ed. 2020).

The UK has embraced an insolvency philosophy that emphasizes rescue, allowing for the use of tools such as administration as laid out in the Insolvency Act 1986. The goal of administration is to keep the business alive and maintain the highest possible returns for the creditors compared with liquidation. Insolvency regulations in the UK put a lot of emphasis on running the business as a going concern rather than selling a particular asset. This way of doing business has benefits since the intangible nature of the business can help preserve its intellectual property like goodwill and customer base.

Another benefit is that the UK system is skilled in various assessments. Institutions such as the Royal Institution of Chartered Surveyors (RICS) and the International Valuation Standards Council (IVSC) give guidance on methods of estimating intangible resources.

3.4 Germany: Systematic Methodology for Valuation and Recognition of Intangible Assets

The main focus of Germany's bankruptcy law, in light of the Insolvency Act (Insolvenzordnung), is rehabilitating viable companies and examining the value of their physical assets. The guiding principles of insolvency in Germany are conformist as regards the treatment of intangible assets within an entity's business value chain.

The German methodology allows for distinguishing various categories of intangible value in accordance with the German commercial law (HGB) as well as according to the universal methods of valuation.

3.5 Modifications to the IBC: Introduction of a Brand-Oriented Insolvency Framework

(a) Recognizing Brand Value as an Intangible Asset: It is recommended that section 36 of the IBC, which provides the definition of liquidation assets, should directly mention brand value and brand reputation as identifiable intangible assets that are not included in goodwill. This will allow for the consideration of brand value separately from other assets in the course of CIRP or liquidation.

(b) Obligation to Conduct Brand Valuation: The IBBI (Insolvency Process for Corporate Debtors) Regulations, 2016 should require the valuation of significant intangible assets when companies benefit a lot from consumer recognition or intellectual property or brand/business reputation. It is also reasonable to include the brand valuation procedure based on the internationally recognized standards such as ISO 10668:2010 (Brand Valuation) in the valuation practice of insolvency cases.

(c) Accountability for Preservation of Assets in CIRP: It should be made a requirement for a Resolution Professional to safeguard the identity of a brand by means of ensuring the licenses remain intact, the relationship with customers is preserved, and the market position of the enterprise is not compromised.

(d) Disclosure of Information in the Information Memorandum Regulation 36 shall provide for the disclosure of certain intangible property including:

- trademarks that are registered;
- brand portfolio;
- customer database;
- license agreements;
- Brand contribution to the overall value of the enterprise.

Indian Journal of Contemporary **CONCLUSION** Legal and Social Issues

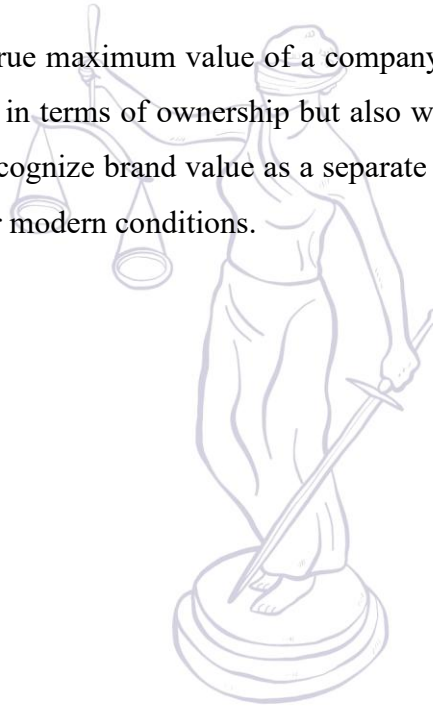
A business may be able to withstand the loss of its assets, but it cannot bear the loss of its identity. In today's economy, brands mean more than names. They are signals of consumer trust and market reputation. Unfortunately, this important issue is not addressed in the current insolvency laws of India.

The research proves that the Insolvency and Bankruptcy Code, 2016 (IBC) acknowledges intangible assets but has no mechanism to value and protect brand equity separately from goodwill.

The examples of Jet Airways, Kingfisher Airlines, Café Coffee Day, and Reliance Capital illustrate that brand equity is often reduced due to operational problems, loss of consumer confidence, and lack of any preservation strategy.

The comparative analysis of insolvency frameworks in three countries, the United States, the United Kingdom, and Germany, points to the trend wherein current insolvency practices focus primarily on protecting the going-concern value rather than only liquidating the assets. The Indian jurisprudence may adopt some of these practices and establish brand valuation approaches, impose strict disclosure norms, and set preservation obligations during the CIRP process.

In conclusion, gaining the true maximum value of a company under the IBC should involve not only what the company has in terms of ownership but also what makes this company a valuable asset as it is important to recognize brand value as a separate intangible asset in order to create a bankruptcy procedure fit for modern conditions.



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