SWISS RIBBONS PVT. LTD. & ANR. A

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 99 of 2018)

B

JANUARY 25, 2019

[R. F. NARIMAN AND NAVIN SINHA, JJ.]

Insolvency and Bankruptcy Code, 2016:

Constitutional validity of – Held: Provisions of the Code passes constitutional muster. C

ss. 5(7), 5(8), 5(20), 7(1), 7(4), 7(5), 8 and 9 – Classification between financial creditor and operational creditor – Whether discriminatory, arbitrary, and violative of Art. 14 – Held: Preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors – Thus, there is an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code – Thus, there is no discrimination – Constitution of India – Art. 14. D E

ss. 3, 3(9)(c), 214(e), 60, 65, 75, 7, 8 and 9 – Notice, hearing, and set-off or counterclaim qua financial debts – Triggering of insolvency resolution process by financial creditors and operational creditors – Submission that the difference in the triggering process at behest of financial creditors and operational creditors is discriminatory and arbitrary – Held: A financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due – In view thereof, the differentiation in the triggering of insolvency resolution process by financial creditors u/s. 7 and by operational creditors u/ss. 8 and 9 becomes clear – Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 – Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 – Form I. F G

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A *ss. 21, 24, 28 and 30(2)(b) r/w s. 31 – Operational creditors – Right to vote in the committee of creditors – Plea that operational creditor do not have even a single vote in committee of creditors – Held: Financial creditors are best equipped to assess viability and feasibility of the business of the corporate debtor and evaluate the contents of a resolution plan – On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business – Resolution plan cannot pass muster u/s. 30(2)(b) rw s. 31 unless a minimum payment is made to operational creditors, being not less than liquidation value – Regulation 38 strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors – Thus, the operational creditors are not discriminated against nor Art. 14 has been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulation 38 – Constitution of India – Art. 14.*

E *ss.12A(as amended) and 60 – s. 12A wherein withdrawal of application admitted u/ss 7, 9 or 10, with approval of ninety per cent voting shares of the committee of creditors – s. 12A if violative of Art. 14 – Held: s. 12A is not violative of Art. 14 – ILC Report has explained that as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into – In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy – Also, if the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision u/s. 60 – Insolvency and Bankruptcy (Second Amendment) Act, 2018 – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Reg 30A.*

H *s. 210 – Private Information Utilities – Evidence provided by private information utilities – Plea that Private Information*

Utilities not governed by proper norms and evidence of loan default in records of such utility not conclusive evidence – Held: Regulations 20 and 21 makes it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt and an information utility shall expeditiously undertake the process of authentication and verification of information – Evidence provided by private information utilities is only prima facie evidence of default which is rebuttable by the corporate debtor – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulations 20 and 21

ss. 18, 41, 42 and 28 – Resolution professional – Adjudicatory power, under the Code and the Regulations – Held: It is clear from the Code as well as the Regulations that the resolution professional has no adjudicatory powers – Resolution professional is given administrative as opposed to quasi-judicial powers – Even when the resolution professional is to make a "determination" under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made – Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulations 10, 12, 13, 14, and 35A.

s. 29A(as amended) – Retrospective application – Submission that vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of s. 29A – Held: A statute is not retrospective merely because it affects existing rights or merely because a part of the requisites for its action is drawn from a time antecedent to its passing – Resolution applicant has no vested right for consideration or approval of its resolution plan – By application of s. 29A, no vested right is taken away – Since a resolution applicant who applies u/s. 29A(c) has no vested right to apply for being considered as a resolution applicant, submission cannot be accepted.

A *s. 29A and s.35(1)(f) proviso – s. 29A if restricted to malfeasance – Submission that s. 29A puts a blanket ban on participation of all promoters of corporate debtors, without any mechanism to weed out the unscrupulous as against the efficient manager but who have not been able to pay off their debts due to other reasons – Held: s. 29A not restricted to malfeasance –* B *Legislative purpose which permeates s. 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also.*

s. 29(A)(c) – One year period in s. 29A – Non-performing asset – Plea that u/s. 29A(c), a person's account may be classified C *as a non- performing asset even though he is not a wilful defaulter; and that the period of one year referred in clause (c) is wholly arbitrary and without any basis either in rationality or in law – Held: A person is a defaulter when an installment and/or interest on the principal remains overdue for more than three months, after* D *which, its account is declared NPA – During the period of one year thereafter, this grace period is given to such person to pay off the debt – If a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months, he would be ineligible to become a resolution applicant – This legislative policy* E *cannot be found fault with – Neither can the period of one year be found fault with.*

ss. 29A(j) and 5(24A) – Related party – Plea that persons who may be relatives of erstwhile promoters are debarred from becoming a resolution applicant – Held: Persons who act jointly or in concert with others are connected with the business activity of F *the resolution applicant – Similarly, all the categories of persons mentioned in s. 5(24A) show that such persons must be "connected" with the resolution applicant within the meaning of s. 29A(j) – Thus, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the* G *business activity of the resolution applicant – In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified u/s. 29A(j) – Explanation I clause (ii) to s. 29A(j) makes it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or* H *control of the business of the corporate debtor during the*

implementation of a resolution plan – Thus, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan.

s. 29A – Exemption of micro, small and medium enterprises from s. 29A – Justification of – Held: Justified – Rationale for excluding such industries from the eligibility criteria laid down in ss. 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation – Micro, Small and Medium Enterprises Development Act, 2006 – s. 7.

s. 53 – Distribution of assets – Submission that in the event of liquidation, operational creditors would never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors, thus s. 53(1)(f) discriminatory and arbitrary thus, violative of Art. 14 – Held: s. 53 does not violate Art. 14 – Repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses – This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code – So long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute, Art. 14 does not get infracted – Constitution of India – Art. 14.

Object and reasons for the Code – Explained.

Enactment and working of the Code – Explained.

Companies Act, 2013: s. 412 – Selection of members of tribunal and appellate tribunal – Plea that appointment of members of the NCLT and the NCLAT contrary to Madras Bar Association (III)'s case – s. 412 whereby members of the tribunal and appellate tribunal to be selected, two judicial members of the Selection Committee get outweighed by three bureaucrats – Held: s. 412 has been amended by the Companies Amendment Act, 2017 – Present members of NCLT and NCLAT have been appointed by the Selection Committee, reconstituted in compliance with the direction of this Court.

A *Judiciary: NCLAT Bench – Creation of Circuit Benches – Submission that NCLAT Bench has a seat only at New Delhi and is contrary to the judgment in Madras Bar Association (II) case – Held: In view of the assurance by the Attorney General that Circuit Benches would be established soon, issuance of direction to Union of India to set up Circuit Benches of the NCLAT within the stipulated period.*

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Constitution of India: Art. 77 – Submission that the tribunals-NCLT and NCLAT are functioning under the wrong Ministry-Ministry of Corporate Affairs, however, as per the Madras Bar Association(I) case the administrative support for all the tribunals should be from the Ministry of Law and Justice – Held: Rules of business being mandatory in nature and having to be followed, are to be followed by the executive branch of the Government – However, this Court is being bound by the Madras Bar Association(I), the Union of India to follow the judgment, both in letter and spirit.

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D **Disposing of the petitions, the Court**

HELD:

CLASSIFICATION BETWEEN FINANCIAL CREDITOR AND OPERATIONAL CREDITOR NEITHER DISCRIMINATORY, NOR ARBITRARY, NOR VIOLATIVE OF ARTICLE 14

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1.1 Since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation. A legislation can be struck down as being manifestly arbitrary. [Para 20, 21][586-A-C]

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1.2 A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. Money that is borrowed or raised in any of the manners prescribed in Section 5(8) of the Insolvency and Bankruptcy Code, 2016 or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational

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debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. [Para 23][594-B-C]

1.3 A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the Adjudicating Authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the Adjudicating Authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the Adjudicating Authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected. [Para 24][594-D-F]

1.4 It is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services

in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. [Para 27][599-G-H; 600-A-D]

1.5 Financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code. [Para 28][600-F-G]

Shayara Bano v. Union of India **(2017) 9 SCC 1 : [2017] 7 SCR 797;** *Gopal Jha v. The Hon'ble Supreme Court of India* **[2018] 14 SCALE 286;** *Indian Young Lawyers Associations and Ors. v. State of Kerala and Ors.* **2018 (13) SCALE 75;** *Joseph Shine v. Union of India* **2018 (11) SCALE 556;** *K.S. Puttaswamy v. Union of India* **(2019) 1 SCC 1;** *Navtej Singh Johar and Ors. v. Union of India* **(2018) 10 SCC 1;** *Lok Prahari v. State of Uttar Pradesh and Ors.* **(2018) 6 SCC 1 : [2018] 6 SCR 1076;** *Nikesh Tarachand Shah v. Union of India and Ors.* **(2018) 11 SCC 1 : [2017] 12 SCR 358 – referred to.**

NOTICE, HEARING, AND SET-OFF OR COUNTERCLAIM *QUA* FINANCIAL DEBTS.

2.1 It is clear from Section 3 (a) (c) read with Section 214 (e) of the Code that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes clear the other sources which evidence a financial debt. [Paras 31, 32][603-F-H]

2.2 A conjoint reading of Rule 4(3), 11, 34 and 37 of the National Company Law Tribunal Rules, 2016 makes it clear that at the stage of the Adjudicating Authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the Adjudicating Authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. In order to protect the corporate debtor from being dragged into the corporate insolvency resolution process *malafide*, the Code prescribes penalties. Also, punishment is prescribed under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. [Paras 33, 34][606-C, D, G]

2.3 Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way-amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the Adjudicating Authority u/s.60. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of

admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. [Paras 35, 36] [607-B, C, F]

2.4 The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the Solicitor General for this shift in legislative policy. *First* is predictability and certainty. *Secondly*, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it. *Thirdly*, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant. *Fourthly*, the trigger that would lead to liquidation can only be upon failure of the resolution process. [Para 37][610-F-H; 611-A-B]

2.5 Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear. [Para 38][611-H; 612-A-B]

Innoventive Industries Ltd. v. ICICI Bank **(2018) 1 SCC 407 : [2017] 8 SCR 33 - referred to.**

3.1 <u>SECTIONS 21 AND 24 AND ARTICLE 14: OPERATIONAL CREDITORS HAVE NO VOTE IN THE COMMITTEE OF CREDITORS.</u>

Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Once the resolution plan is approved by the committee of creditors and thereafter by the Adjudicating Authority, the said plan is binding on all stakeholders. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report makes this abundantly clear. [Paras 43, 44][620-E-F; 621-E; 622-A-C]

3.2 The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster u/s.30(2)(b) rw Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Regulation 38 strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors. Thus, it cannot be said that the operational creditors are discriminated against or that Article 14 has been infracted either

on the ground of equals being treated unequally or on the ground of manifest arbitrariness. [Paras 46-48][623-C-D; 624-B-C]

SECTION 12A IS NOT VIOLATIVE OF ARTICLE 14

4.1 It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). It is made clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This would be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case. [Para 52][626-E-H]

4.2 The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report. Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. Thus, the Section 12A also passes constitutional muster. [Para 53][627-A-D]

Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors. **SLP (Civil) No. 31557/2018 dated 14.12.2018 - referred to.**

EVIDENCE PROVIDED BY PRIVATE INFORMATION UTILITIES: ONLY *PRIMA FACIE* EVIDENCE OF DEFAULT

5. The Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. The said Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the Attorney General, is only *prima facie* evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail. [Paras 56, 57][628-E; 629-D-E]

RESOLUTION PROFESSIONAL HAS NO ADJUDICATORY POWERS.

6. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim. It is clear from a reading of Regulations 10, 12, 13, 14 and 15 that the resolution professional is given administrative as opposed to quasi–judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made. As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. It is clear from Sections 41 and 42

that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi–judicial in nature, and which can be appealed against to the Adjudicating Authority under Section 42 of the Code. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two–thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority. [Paras 58-61][629-F; 631-C; 632-F; 633-C, E-G]

CONSTITUTIONAL VALIDITY OF SECTION 29A: RETROSPECTIVE APPLICATION

7. A statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. In *ArcelorMittal*'s case, this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan. This being the case, it is clear that no vested right is taken away by application of Section 29A. Since a resolution applicant who applies under Section 29A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail. [Paras 64, 65][640-E-F; 641-B, G]

ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors. **[2018] 13 SCALE 381 - followed.**

Ritesh Agarwal and Anr. v. SEBI and Ors. **(2008) 8 SCC 205 : [2008] 8 SCR 553;** *K.S. Paripoornan v. State of Kerala and Ors.* **(1994) 5 SCC 593 : [1994] 3 Suppl. SCR 405;** *Darshan Singh v. Ram Pal Singh and Anr.* **(1992) Supp 1 SCC 191 : [1990] 3 Suppl. SCR 212;** *Pyare Lal Sharma v. Managing Director and Ors.* **(1989) 3 SCC 448 : [1989] 3 SCR 428;** *P.D. Aggarwal and Ors. v. State of U.P. and Ors.* **(1987) 3 SCC 622 : [1987] 3 SCR 427;** *Govind Das and Ors. v. Income Tax Officer*

and Anr. **(1976) 1 SCC 906 : [1976] 3 SCR 44 - distinguished.**

Chitra Sharma v. Union of India **2018 (9) SCALE 490;** *State Bank's Staff Union (Madras Circle) v. Union of India and Ors.* **(2005) 7 SCC 584 : [2005] 3 Suppl. SCR 200 - referred to.**

SECTION 29A(C) NOT RESTRICTED TO MALFEASANCE

8. There is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Thus, this plea is also rejected. [Para 69][643-D-F]

THE ONE-YEAR PERIOD IN SECTION 29A(C) AND NPAS

9. It is clear that Section 29A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of the RBI, would be a person who though able to pay, does not pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by the RBI. It is clear from clause 4 of the RBI Master Circular that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months,

after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. Prior to this one–year–three–month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the said period is obviously a person who is ailing itself. The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only after this one year period is over as the NPA now gets classified as a doubtful asset. [Paras 70, 71][643-G; 646-A-G]

RELATED PARTY

10.1 Persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29A(j). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person

cannot possibly be disqualified under Section 29A(j). All the categories in Section 29A(j) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and "relative" contained in the definition Sections must be read *noscitur a sociis* with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant. [Para 75][654-F-H; 655-A]

Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. **(1994) 5 SCC 54 : [1994] 1 Suppl. SCR 1 - referred to.**

10.2 It was submitted that the expression "connected person" in Explanation I, clause (ii) to Section 29A(j) cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future. This would be arbitrary as the explanation would then apply to an indeterminate person. This submission cannot be accepted as Explanation I seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan. [Para 76][655-B-D]

EXEMPTION OF MICRO, SMALL, AND MEDIUM ENTERPRISES FROM SECTION 29A

11. Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 classifies enterprises depending upon whether they manufacture or produce goods, or are engaged in providing and rendering services as micro, small, or medium, depending upon certain investments made. The rationale of ILC Report of 2018 for excluding such industries from the eligibility criteria laid down in Section 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but

to liquidation. Following upon the Insolvency Law Committee's Report, Section 240A has been inserted in the Code with retrospective effect from 06.06.2018. It can thus, be seen that when the Code has worked hardship to a class of enterprises, the Committee constituted by the Government, in overseeing the working of the Code, has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240A. This is an important instance of how the executive continues to monitor the application of the Code, and exempts a class of enterprises from the application of some of its provisions in deserving cases. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would also show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them. [Paras 78, 80 and 81][655-F; 657-B-C; 658-C-E]

SECTION 53 OF THE CODE DOES NOT VIOLATE ARTICLE 14.

12. The reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. Repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. Thus, the challenge to s. 53 that it is discriminatory and manifestly arbitrary cannot be accepted. [Para 84][661-B-D]

13.The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so–called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. The working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners. In the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. The figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. [Paras 85, 86][661-E-H; 662-A, E-F]

Madras Bar Association v. Union of India **(2015) 8 SCC 583 : [2014] 10 SCR 1;** *Madras Bar Association v. Union of India* **(2014) 10 SCC 1 : [2014] 10 SCR 1;** *Uttara Foods and Feeds Pvt. Ltd. v. Mona Pharmachem* **2017 (13) SCALE 526;** *Union of India v. R. Gandhi, President, Madras Bar Association* **(2010) 11 SCC 1: [2010] 6 SCR 857;** *Innoventive Industries Ltd. v. ICICI Bank and Anr.* **(2018) 1 SCC 407: [2017] 8 SCR 33;** *Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.* **(2016) 4 SCC 1 : [2016] 11 SCR 419;** *R.K. Garg v. Union of India* **(1981) 4 SCC 675 : [1982] 1 SCR 947;** *Bhavesh D. Parish v. Union of India* **(2000) 5 SCC 471 : [2000] 1 Suppl. SCR 291;** *DG of Foreign Trade v. Kanak Exports* **(2016) 2 SCC 226 : [2015] 15 SCR 287;** *Delhi*

International Airport Limited v. International Lease Finance Corporation and Ors. **(2015) 8 SCC 446 : [2015] 2 SCR 1040 - referred to.**

Lochner v. New York **198 U.S. 45 (1905);** *New State Ice Co. v. Liebman* **285 U.S. 262 (1932);** *Ferguson v. Skrupa* **372 U.S. 726 (1962) - referred to.**

Case Law Reference

[2014] 10 SCR 1	**referred to**	**Para 2**
[2014] 10 SCR 1	**referred to**	**Para 2**
[2017] 7 SCR 797	**referred to**	**Para 2**
2017 (13) SCALE 526	**referred to**	**Para 2**
[2010] 6 SCR 857	**referred to**	**Para 4**
[2017] 8 SCR 33	**referred to**	**Para 4**
[2016] 11 SCR 419	**referred to**	**Para 6**
[1982] 1 SCR 947	**referred to**	**Para 8**
[2000] 1 Suppl. SCR 291	**referred to**	**Para 8**
[2015] 15 SCR 287	**referred to**	**Para 8**
[2015] 2 SCR 1040	**referred to**	**Para 18**
[2018] 14 SCALE 286	**referred to**	**Para 21**
2018 (13) SCALE 75	**referred to**	**Para 21**
2018 (11) SCALE 556	**referred to**	**Para 21**
2019 (1) SCC 1	**referred to**	**Para 21**
(2018) 10 SCC 1	**referred to**	**Para 21**
[2018] 6 SCR 1076	**referred to**	**Para 21**
[2017] 12 SCR 358	**referred to**	**Para 21**
2018 (9) SCALE 490	**referred to**	**Para 63**
[2005] 3 Suppl. SCR 200	**referred to**	**Para 63**
[2018 (13) SCALE 381	**followed**	**Para 64**

[2008] 8 SCR 553	**distinguished**	**Para 65**	A
[1994] 3 Suppl. SCR 405	**distinguished**	**Para 65**	
[1990] 3 Suppl. SCR 212	**distinguished**	**Para 65**	
[1989] 3 SCR 428	**distinguished**	**Para 65**	
[1987] 3 SCR 427	**distinguished**	**Para 65**	B
[1976] 3 SCR 44	**distinguished**	**Para 65**	
[1994] 1 Suppl. SCR 1	**referred to**	**Para 74**	

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 99 of 2018. C

Under Article 32 of the Constitution of India.

WITH

Writ Petition (C) Nos. 115, 100, 459, 598, 775, 822, 849, 1221 of 2018, D

Writ Petition (C) No. 37 of 2019 and S.L.P.(C) No. 28623 of 2018.

K. K. Venugopal, Attorney General for India, Tushar Mehta, SG, Mrs. Madhvi Diwan, Vikramjit Banerjee, ASGs, Shyam Diwan, Rakesh Dwivedi, Sajan Poovayya, C.U. Singh, Mukul Rohatgi, K.V. Viswanathan, E Chetan Sharma, Sr. Advs., R. Balasubramanian, Ms. Hari Priya, Ms. Shraddha Deshmukh, Ms. Charanya Lakshmikumaran, Ms. Chinmayee Chandra, Mrs. Anil Katiyar, A.K. Sharma, Parag P. Tripathi, Bishwajit Dubey, Spandan Biswal, Ms. Srideepa Bhattacharyya, Manpreet Lamba, Aditya Marwah, Prafful Goyal, Kanu Agarwal, Ms. Swarupama Chaturvedi, B.N. Dubey, Ms. Misha, Siddhant Kant, Ms. Srishti Khare, Ms. Jasveen Kaur, S.S. Shroff, M/s. Cyril Amarchand Mangaldas, Ananga Bhattacharyya, Rohit Rao N., Kiran Kumar Kondaparthi, M/s Veritas Legis, Milank Chaudhary, Sarojanand Jha, Ashly Cherian, S.K. Raza, Parveen Kumar, Rajesh Singh, O.P. Gaggar, Aditya Gaggar, Suresh K., Ms. Suruchi Aggarwal, G R.R. Gupta, Ms. Ankita Prakash, Ms. Sindhu T.P., M/s Indian Law, Raghav Bansal (for M/s. Parekh & Co.), Dr. Vinod Kumar Tewari, A.K. Shukla, Vivek Tiwari, Vinay Rai, Pramod Tiwari, Kanwal Chaudhary, Jasbir Singh Malik, Udit Gupta, Digant Kakkad, Vishwas Shah, Masoom Shah, Pulkit Deora (for M/s. Udit Kishan And Associates), H

A Arvind Kumar Gupta, Ms. Henna George, Ms. Purti Marwaha, Ms. V.S. Lakshmi, A.V. Balan, Chandrashekhar A. Chakalabbi, S.K. Pandey, Anshul Raj, Awanish Kumar, M/s. Dharmaprabhas Law Associates, Pragya Ohri, Abhirup Dasgupta, Ishaan Duggal, Mohit D.Ram, Sanjay Kapur, Ms. Megha Karnwal, Bharath Gangadharan, Ms. Shubhra Kapur, Ms. Madhumita Bhattacharjee, Ms. Srija Choudhury, Rajendra Barot, Vivek Shetty, Ms. Liz Mathew, Jahan A. Chokshi, Ms. Sansriti, Eklavya Dwivedi, Navneet R., Raghav Mehrotra, Vipin Kumar Jai, Vipul Jai, Shailly Dinkar, Hitesh Kr. Sharma, Rajesh Singh, Rajendra Beniwal, Rajesh P., Vishal Thakur, Arvind Kumar Shukla, Alok Shukla, N.P. Gaur, Hardik Luthra, Kunal Yadav, Nihal Ahmad, Ms. Reetu Sharma, Ms. Neena Shukla, Atul Sharma, Arveena Sharma, Ashu Kansal, Ms. Varsha Banerjee, Karan Batura, Ms. Stuti Vats, Manmayi Sharma, T. V. S. Raghavendra Sreyas, M/s Gayatri Gulati, M/s Sneh Dhillon, Rajesh Kumar-I, Anant Gautam, Ms. Shruti Vats, Ms. Khushboo Aggarwal, Anmol Mehta, Ms. Diksha Rai, Ms. Palak Mahajan, Ishan Bisht, Vishrov Mukherjee, Pukhrambam Ramesh Kumar, Ameya Vikram Mishra, Ms. Catherine Ayallore, Priyadarshi Banerjee, Pratibhanu Singh Kharola, Ms. Priyanka M.P., K. Amrit Kumar Sharma, Vigro Mukherjee, Nitin P., Meka Venkata Rama Krishna, P.S. Sudheer, Rishi Maheshwari, Ms. Anne Mathew, Bharat Sood, Ms. Shruti Jose, Mahesh Agarwal, Himanshu Satija, Jay Zaveri, Anshuman Srivastava, Sikhil Suri, Rishi Agrawala, Karan Luthra, Ms. Devika Mohan, Raghav Shankar, Simranjeet Singh, Ms. Aastha Mehta, Divyang Chandiramani, Vrinda Bhandari, Ravi Raghunath, Dhananjay B. Ray, Mukunda Rao, Venkataraman Rao, Soumik Ghosal, Rajesh Kumaram, Ms. Neeha Nagpal, Ms. Devanshi Singh, Arshit Anand, Gunjan Adhwani, Ms. Shally Bhasin, Nishant Rao, Rajesh Kumar, E. C. Agrawala, Puneet Singh Bindra, Ms. Simran Jeet, Saad M. Shervani, Abhishek Singh, Jamal Anand, Ytharth Kumar, Vanshdeep Dalmia, Pranaya Goyal, Abhishek Sharma, Yash Badkur, Harshvardhan Jha, Yugandhara Pawar Jha, Ms. Mayuri Shukla, Abhishek Chaoudhary, Ms. Divya Roy, Lakshyajit Singh Bagdwal, Sarvesh Bisaria, Ashish Azad, Parkash Chandra Sharma, Mrs. S. Usha Reddy, Balaji Srinivasan, Alok Kumar, Ms. Somya Yadava, Ms. Jagriti Mahajan, Siddhant Tripathi, Ms. Prarthna Dogra, Ms. Snigdha Singh, Ramesh Thakur, Mahesh K. Chaudhary, Ms. Kusum Lata, Naresh Kaushik, Vardhman Kaushik, Manoj Joshi, Omung Raj Gupta, D. Singh, Ms. Rebbeca Dats, Rahul Sharma, Siddhant Manral, Mrs. Lalita Kaushik, Keshav Gupta, Ms. Ana Bansal, Anil Kumar, Devanshu

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Sajlan, Deepak Joshi, Aakash Lamba, T. Mahipal, Sahil Monga, Utkarsh Maria, Nakul Gandhi, M/s. Karanjawala & Co., Ashish Rana, Harshit Garg, Senthil Jagadeesan, M. P. Vinod, Sandeep Sudhakar Deshmukh, Vinod Sharma, Nikhil Jain, Rajiv Shankar Dvivedi, Anupam Lal Das, Mohit D. Ram, Aakarsh Kamra, Ms. Usha Nandini. V, Ms. Pallavi Pratap, Mayank Pandey, Shantanu Sagar, Anurag Kishore, Som Raj Choudhury, Abhishek Agarwal, Sudarsh Menon, Ms. Meera Mathur, Arun Aggarwal, Advs. for the appearing parties.

The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ["**Insolvency Code**" or "**Code**"]. Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

2. Shri Mukul Rohatgi, learned Senior Advocate, appearing in Writ Petition (Civil) No. 99 of 2018, has first and foremost argued that the members of the National Company Law Tribunal ["**NCLT**"] and certain members of the National Company Law Appellate Tribunal ["**NCLAT**"], apart from the President, have been appointed contrary to this Court's judgment in **Madras Bar Association v. Union of India**, (2015) 8 SCC 583 ["**Madras Bar Association (III)**"], and that therefore, this being so, all orders that are passed by such members, being passed contrary to the judgment of this Court in the aforesaid case, ought to be set aside. In any case, even assuming that the *de facto* doctrine would apply to save such orders, it is clear that such members ought to be restrained from passing any orders in future. In any case, until a properly constituted committee, in accordance with the aforesaid judgment, reappoints them, they ought not to be allowed to function. He also argued that the administrative support for all tribunals should be from the Ministry of Law and Justice. However, even today, NCLT and NCLAT are functioning under the Ministry of Corporate Affairs. This again needs to be corrected immediately. A further technical violation also exists in that if the powers of the High Court are taken away, the NCLAT, as an appellate forum, should have the same convenience and expediency as existed prior to appeals going to the NCLAT. Since the NCLAT, as an appellate court, has a seat only at New Delhi, this would render the remedy inefficacious inasmuch as persons would have to travel from Tamil Nadu, Calcutta, and Bombay to New Delhi, whereas earlier, they

A could have approached the respective High Courts in their States. This again is directly contrary to **Madras Bar Association v. Union of India**, (2014) 10 SCC 1 ["**Madras Bar Association (II)**"], and to paragraph 123 in particular. Apart from the aforesaid technical objection, Shri Rohatgi assailed the legislative scheme that is contained in Section 7 of the Code, stating that there is no real difference between financial B creditors and operational creditors. According to him, both types of creditors would give either money in terms of loans or money's worth in terms of goods and services. Thus, there is no intelligible differentia between the two types of creditors, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, and if that is C not possible, then ultimately, liquidation. Relying upon **Shayara Bano v. Union of India**, (2017) 9 SCC 1 ["**Shayara Bano**"], he argued that such classification will not only be discriminatory, but also manifestly arbitrary, as under Sections 8 and 9 of the Code, an operational debtor is not only given notice of default, but is entitled to dispute the genuineness of the claim. In the case of a financial debtor, on the other hand, no D notice is given and the financial debtor is not entitled to dispute the claim of the financial creditor. It is enough that a default as defined occurs, after which, even if the claim is disputed and even if there be a set-off and counterclaim, yet, the Code gets triggered at the behest of a financial creditor, without the corporate debtor being able to justify the fact that a E genuine dispute is raised, which ought to be left for adjudication before ordinary courts and/or tribunals. Shri Rohatgi then argued that assuming that a valid distinction exists between financial and operational creditors, there is hostile discrimination against operational creditors. First and foremost, unless they amount to 10% of the aggregate of the amount of debt owed, they have no voice in the committee of creditors. In any F case, Sections 21 and 24 of the Code are discriminatory and manifestly arbitrary in that operational creditors do not have even a single vote in the committee of creditors which has very important functions to perform in the resolution process of corporate debtors. Shri Rohatgi then went on to assail the establishment of information utilities that are set up under G the Code. According to him, under Section 210 of the Code, there can be private information utilities whose sole object would be to make a profit. Further, the said information utility is not only to collect financial data, but also to check whether a default has or has not occurred. Certification of such agency cannot substitute for adjudication. Thus, the certificate of an information utility is in the nature of a preliminary H

decree issued without any hearing and without any process of adjudication. Shri Rohatgi next argued that Section 12A of the Code is contrary to the directions of this Court in its order in **Uttara Foods and Feeds Pvt. Ltd. v. Mona Pharmachem**, Civil Appeal No. 18520/2017 [decided on 13.11.2017], and that instead of following the said order, Section 12A now derails the settlement process by requiring the approval of at least ninety per cent of the voting share of the committee of creditors. Unbridled and uncanalized power is given to the committee of creditors to reject legitimate settlements entered into between creditors and the corporate debtors. Shri Rohatgi then argued that the resolution professional, having been given powers of adjudication under the Code and Regulations, grant of adjudicatory power to a non-judicial authority is violative of basic aspects of dispensation of justice and access to justice. Lastly, a four-fold attack was raised against Section 29A, in particular, clause (c) thereof. First and foremost, Shri Rohatgi stated that the vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29A. Section 29A, in any case, is contrary to the object sought to be achieved by the Code, in particular, speedy disposal of the resolution process as it will inevitably lead to challenges before the Adjudicating Authority and Appellate Authority, which will slow down and delay the insolvency resolution process. In particular, so far as Section 29A(c) is concerned, a blanket ban on participation of all promoters of corporate debtors, without any mechanism to weed out those who are unscrupulous and have brought the company to the ground, as against persons who are efficient managers, but who have not been able to pay their debts due to various other reasons, would not only be manifestly arbitrary, but also be treating unequals as equals. Also, according to Shri Rohatgi, maximization of value of assets is an important goal to be achieved in the resolution process. Section 29A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing the object of maximization of value of assets. Another argument that was made was that under Section 29A(c), a person's account may be classified as a non-performing asset ["**NPA**"] in accordance with the guidelines of the Reserve Bank of India ["**RBI**"], despite him not being a wilful defaulter. Also, the period of one year referred to in clause (c) is again wholly arbitrary and without any basis either in rationality or in law. Shri Rohatgi then trained his gun on Section 29A(j), and stated that

persons who may be related parties in the sense that they may be relatives of the erstwhile promoters are also debarred, despite the fact that they may have no business connection with the erstwhile promoters who have been rendered ineligible by Section 29A.

3. Shri K.V. Viswanathan, learned Senior Advocate, appearing in Writ Petition No.822 of 2018, strongly supported Shri Rohatgi and argued the same points with great clarity and with various nuances of his own, which will be reflected in our judgment. Followed by Shri Viswanathan, Shri A.K. Gupta, Shri Pulkit Deora, Shri Devanshu Sajlan and Shri Deepak Joshi also made submissions with particular regard to discrimination against operational creditors.

4. As against these submissions, Shri K.K. Venugopal, the learned Attorney General for India, and Shri Tushar Mehta, learned Solicitor General for India, appearing for the Union of India, and Shri Rakesh Dwivedi, learned Senior Advocate, appearing for the Reserve Bank of India, countered all the aforesaid submissions. They argued with reference to our judgments and Committee Reports that till the Insolvency Code was enacted, the regime of previous legislation had failed to maximize the value of stressed assets and had focused on reviving the corporate debtor with the same erstwhile management. All these legislations had failed, as a result of which, the Code was enacted to reorganize insolvency resolution of corporate debtors in a time bound manner to maximize the value of assets of such person. They further argued that there is a paradigm shift from the erstwhile management of a corporate debtor being in possession of stressed assets to creditors who now assume control from the erstwhile management and are able to approve resolution plans of other better and more efficient managers, which would not only be in the interest of the corporate debtor itself but in the interest of all stakeholders, namely, all creditors, workers, and shareholders other than shareholdings of the erstwhile management. They referred to the Statement of Objects and Reasons, the Preamble, and various provisions of the Code, and to the Rules and Regulations made thereunder, to buttress their submissions. In particular, they referred to judgments which mandated a judicial hands-off when it came to laws relating to economic regulation. They argued that the legislature must get the maximum free play in the joints to experiment and come up with solutions to problems that have seemed intractable earlier. In particular, in combating the individual points made by the learned counsel appearing

on behalf of the petitioners, they argued that none of the members of the NCLT or the NCLAT had been appointed contrary to the judgments of this Court in **Union of India v. R. Gandhi, President, Madras Bar Association** (2010) 11 SCC 1 ["**Madras Bar Association (I)**"] and **Madras Bar Association (III)** (supra). They referred to affidavits filed before this Court to show that all such members had been appointed by a Committee consisting of two Supreme Court Judges and two bureaucrats, in conformity with the aforesaid judgments. When it came to classification between financial and operational creditors, they argued that the differentiation between the two types of creditors occurs from the nature of the contracts entered into with them. Financial contracts involve large sums of money given by fewer persons, whereas operational creditors are much larger in number and the quantum of dues is generally small. Financial creditors have specified repayment schedules and agreements which entitle such creditors to recall the loan in totality on defaults being made, which the operational creditors do not have. Further, financial creditors are, from the start, involved with the assessment of viability of corporate debtors and are, therefore, better equipped to engage in restructuring of loans as well as reorganization of the corporate debtor's business in the event of financial stress. All these differentiae are not only intelligible, but directly relate to the objects sought to be achieved by the Code. Insofar as Section 7, relatable to financial creditors, and Sections 8 and 9, which relate to operational creditors are concerned, it is a fallacy to say that no notice is issued to the financial debtor on defaults made, as financial debtors are fully aware of the loan structure and the defaults that have been made. Further, this Court's judgment in **Innoventive Industries Ltd. v. ICICI Bank and Anr.**, (2018) 1 SCC 407 ["**Innoventive Industries**"] has made it clear that under Section 7(5) of the Code, the Adjudicating Authority, in being "satisfied" that there is a default, has to issue notice to the corporate debtor, hear the corporate debtor, and then adjudicate upon the same. The reason why disputes raised by financial debtors are not gone into at the stage of triggering the Code is because the evidence of financial debts are contained in the documents of information utilities, banks, and financial institutions. Disputes which may be raised can be raised at the stage of filing of claims once the resolution process is underway. Also, by the very nature of financial debts, set-off and counterclaims by financial debtors are very rare and, in any case, wholly independent of the loan that has been granted to them. Insofar as operational creditors having

A no vote in the committee of creditors is concerned, this is because operational creditors are typically interested only in getting payment for supply of goods or services made by them, whereas financial creditors are typically involved in seeing that the entirety of their loan gets repaid, for which they are better equipped to go into the viability of corporate enterprises, both at the stage of grant of the loan and at the stage of B default. Also, the interests of operational creditors, when a resolution plan is to be approved, are well looked-after as the minimum that the operational creditors are to be paid is the liquidation value of assets. Apart from this, their interests are to be placed at par with the interests of financial creditors, and if this is not done, then the Adjudicating C Authority intervenes to reject or modify resolution plans until the same is done. In the 80 cases that have been resolved since the Code has come into force, figures were also shown to this Court to indicate that not only are the operational creditors paid before the financial creditors under the resolution plan, but that the initial recovery of what is owed to them is slightly higher than what is owed to financial creditors. Insofar as D Section 12A is concerned, they argued that once an application by a creditor is admitted by the Adjudicating Authority, the proceeding becomes a proceeding in rem and is no longer an individual proceeding but a collective proceeding. This being the case, it is important that when a resolution process is to begin and a committee of creditors is formed, it E is that committee that is best equipped to deal with applications for withdrawal or settlement after admission of an insolvency petition. Ninety per cent of such creditors have been given this task as once the proceeding is in rem, to halt such proceeding, which is for the benefit of all creditors generally, can only be if all or most of them agree to the same. They argued that the resolution professional has no adjudicatory F powers under the Code or the Regulations, but is only to collate information. Even when he exercises his discretion to exercise his best judgment in certain situations, he does so administratively, and is subject to an adjudicatory body overseeing the same. When it comes to Section 29A of the Code, they argued that Section 29A does not disturb any G vested or existing rights, as a resolution applicant does not have any vested or existing rights that can be disturbed, as has been held in **ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors.**, Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018] ["**ArcelorMittal**"]. Further, merely because this Section relies on antecedent facts for its application, does not mean that it is retrospective. H

Also, Section 29A subserves a very important object of the Code, which is to see that undesirable persons who are mentioned in all its clauses are rendered ineligible to submit resolution plans so that such persons may not come into the management of stressed corporate debtors. They also argued that Section 29A is not aimed at only persons who have committed acts of malfeasance, but also persons who are otherwise unfit to be put in the saddle of the management of the corporate debtor, such as undischarged insolvents and persons who have been removed as directors under Section 164 of the Companies Act, 2013 (for not filing financial statements or annual returns for any continuous period of 3 financial years, for example). They further argued that a period of one year is sufficient period within which a person, whose account has been declared NPA, should clear its dues. They referred to the RBI Regulations dealing with NPAs and stated that even before a person's account is declared NPA, a long rope is given for such person to clear off its debts. It is only when it does not do so, that its account is declared NPA in the first instance. Also, once the said guidelines are perused, it is clear that an account, which has been NPA for one year, is declared as substandard asset and it is for this reason that the one year period is given in Section 29A(c), which is based on reason, and is not arbitrary.

5. Shri C.U. Singh, appearing on behalf of the Asset Reconstruction Company of India Limited, referred to the pre-existing state of legislation before the Code was enacted, and referred in detail to how all such legislations had failed to produce the necessary results. He also relied upon extracts from the Insolvency Act, 1986 of the United Kingdom to buttress his point that worldwide, Insolvency Acts have moved away from mere liquidation so as to first concentrate on reconstruction of corporate debtors. Also, according to him, Section 29A is not a Section aimed at malfeasance; it is aimed at rendering ineligible persons who are undesirable in the widest sense of the term, i.e., persons who are unfit to take over the management of a corporate debtor.

PROLOGUE: THE PRE-EXISTING STATE OF THE LAW

6. Having heard the rival contentions, it is important to first clear the air on what was the background which led to the enactment of the Insolvency Code. The erstwhile regime which led to the enactment of the Insolvency Code was discussed by the Bankruptcy Law Reforms Committee ["**BLRC**"] in its Report dated 04.11.2015 as follows:

A "The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts. Given the conflicts between creditors and debtors in the resolution of insolvency as described in Section 3.2.2, the chances for consistency and efficiency in resolution are low when rights are
B separately defined. It is problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction.
C In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there must be a single
D forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving
E at an outcome, and increases the vulnerability to appeals of the outcome.

The uncertainty that these problems give rise to shows up in case law on matters of insolvency and bankruptcy in India. Judicial precedent is set by "case law" which helps flesh out the statutory
F laws. These may also, in some cases, pronounce new substantive law where the statute and precedent are silent. (Ravi, 2015) reviews judgments of the High Courts on BIFR cases, the DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. The judgments
G reviewed are those after June 2002 when the SARFAESI Act came into effect. It is illustrative of both debtor and creditor led process of corporate insolvency, and reveals a matrix of fragmented and contrary outcomes, rather than coherent and consistent, being set as precedents.

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In such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor. World Bank (2014) reports that the average time to resolve insolvency is four years in India, compared to 0.8 years in Singapore and 1 year in London. Sengupta and Sharma, 2015 compare the number of new cases that file for corporate insolvency in the U.K., which has a robust insolvency law, to the status of cases registered at the BIFR under SICA, 1985, as well as those filed for liquidation under Companies Act, 1956. They compare this with the number of cases files in the UK, and find a significantly higher turnover in the cases that are filed and cleared through the insolvency process in the UK. If we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing.

This calls for a deeper redesign of the entire resolution process, rather than working on strengthening any single piece of it. India is not unusual in requiring this. In all countries, bankruptcy laws undergo significant changes over the period of two decades or more. For example, the insolvency resolution framework in the UK is the Insolvency Act of 1986, which was substantially modified with the Insolvency Act of 2000, and the Enterprise Act of 2002. The first Act for bankruptcy resolution in the US that lasted for a significant time was the Bankruptcy Act of 1889. This was followed by the Act of 1938, the Reform Act of 1978, the Act of 1984, the Act of 1994, a related consumer protection Act of 2005. Singapore proposed a bankruptcy reform in 2013, while there are significant changes that are being proposed in the US and the Italian bankruptcy framework this year in 2015. Several of these are structural reforms with fundamental implications on resolving insolvency…."

The BLRC went on to state:

"[…..] India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy.

A This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India."

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"Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an B organization afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets C suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, D delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's (Financial Sector Legislative Reforms Commission) treatment of the failure of financial firms. The most important objective in designing a legal framework for E dealing with firm failure is the need for speed."

The pre-existing scenario has been noticed in some of our judgments. In **Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.**, (2016) 4 SCC 1, this Court found:

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"**40.**……The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, G 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. <u>These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further pointed out that effectiveness of the Sick</u>

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Industrial Companies (Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (See Paras 5.8, 5.9 and 5.15 of the Report.) Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself."

(emphasis supplied)

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"**43.**……In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV.14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011-2012 was Rs 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least."

Similarly, in **Innoventive Industries** (supra), this Court found:

"**13.** One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the

A object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia."

Further, this Court in **ArcelorMittal** (supra) observed:

"**62.** Previous legislation, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which made provision for rehabilitation of sick companies and repayment of loans availed by them, were found to have completely failed. This was taken note of by our judgment in *Madras Petrochem Ltd.* v. *Board for Industrial and Financial Reconstruction*, (2016) 4 SCC 1……"

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"**63.** These two enactments were followed by the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. As has been noted hereinabove, amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate."

JUDICIAL HANDS-OFF *QUA* ECONOMIC LEGISLATION

F 7. In the United States, at one point of time, Justice Stephen Field's dissents of the 19th Century were translated into majority opinions in the early 20th Century. This was referred to as the Lochner era, in which the U.S. Supreme Court, over a period of 40 years, consistently struck down legislation which was economic in nature as such legislation did not, according to the Court, square with property rights. As a result, a large number of minimum wage laws, maximum hours of work in factories laws, child labour laws, etc. were struck down. The result, as is well known, is that President Roosevelt initiated a court-packing plan in which he sought to get authorization from Congress to appoint additional judges to the Supreme Court, who would have then overruled the Lochner line H of precedents. As it turned out, that became unnecessary as Justice

Roberts switched his vote so that a 5:4 majority from 1937 onwards upheld economic legislation. It is important to note that the dissents of Justice Holmes and Justice Brandeis now became the law. Justice Holmes had, in his dissent in **Lochner v. New York**, 198 U.S. 45 (1905), stated:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts,* 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States,* 193 U. S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker,* 187 U. S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy,* 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*
>
> It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon

A the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is
B accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been
C understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a
D first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."[1]

Similarly, in **New State Ice Co. v. Liebman**, 285 U.S. 262 (1932), Justice Brandeis echoed Justice Holmes as follows:

E "The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in
F part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot
G believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

H [1] **Lochner v. New York**, 198 U.S. 45, 75-76 (1905).

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[2]

The Lochner doctrine was finally buried in **Ferguson v. Skrupa**, 372 U.S. 726 (1962), where the Supreme Court held:

"Both the District Court in the present case and the Pennsylvania court in *Stone* adopted the philosophy of *Adams v. Tanner,* and cases like it, that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and, by so doing, violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner, the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York,* 198 U. S. 45 (1905), outlawing "yellow dog" contracts, *Coppage v. Kansas,* 236 U. S. 1 (1915), setting minimum wages for women, *Adkins v. Children's Hospital,* 261 U. S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected

[2] **New State Ice Co. v. Liebman**, 285 U.S. 262, 310-311 (1932).

A to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,

> "I think the proper course is to recognize that a state Legislature
B can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.
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And, in an earlier case, he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good' [*Adkins v. Children's Hospital*, 261 U. S. 525, 567, 570 (1923) (dissenting opinion)].

D The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative
E bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned… with the wisdom, need, or appropriateness of the legislation. [*Olsen v. Nebraska ex rel. Western Reference & Bond Assn*., 313 U. S. 236, 246 (1941)]"

F Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to, "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure" [*Sproles v. Binford*, 286 U.S. 374, 388 (1932)]. It is now settled
G that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law" [*Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co*.,
H 335 U.S. 525, 536 (1949)].

In the face of our abandonment of the use of the "vague contours" [*Adkins v. Children's Hospital*, 261 U. S. 525, 535 (1923)] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams v. Tanner* is as mistaken as would be adherence to *Adkins v. Children's Hospital,* overruled by *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 (1937). Not only has the philosophy of *Adams* been abandoned, but also this Court, almost 15 years ago, expressly pointed to another opinion of this Court as having "clearly undermined" *Adams.* [*Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co*., 335 U.S. 525 (1949)]. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," [*Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, 423 (1923)] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" [*Williamson v. Lee Optical Co*., 348 U.S. 483, 488 (1955)]. Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us, but with the body constituted to pass laws for the State of Kansas.

Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act - advice

A which a nonlawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellee thinks it ought to be under the Kansas Constitution."[3]

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(emphasis supplied)

8. In this country, this Court in **R.K. Garg v. Union of India,** (1981) 4 SCC 675 has held:

C "**8.** Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution

D through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation

E than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:

> "In the utilities, tax and economic regulation cases, there are

F good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability

G to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

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[3] **Ferguson v. Skrupa**, 372 U.S. 726, 728-733 (1962).

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The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture* v. *Central Roig Refining Company* [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

(emphasis supplied)

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19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be

offered for unearthing black money. Those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the tax department are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in Munn v. Illinois [94 US 13] , namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies". The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theater Company v. City of Chicago [57 L Ed 730 : 228 US 61 (1912)] :

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere error of government are not subject to our judicial review."

It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilized for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld."

(emphasis supplied)

Likewise, in **Bhavesh D. Parish v. Union of India,** (2000) 5 SCC 471, this Court held:

"**26.** The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organized system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalization of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all."

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A "**30.** Before we conclude there is another matter which we must advert to. It has been brought to our notice that Section 45-S of the Act has been challenged in various High Courts and a few of them have granted the stay of provisions of Section 45-S. When considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. Merely because a statute comes up for examination and some arguable point is raised, which persuades the courts to consider the controversy, the legislative will should not normally be put under suspension pending such consideration. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation, unless the same is set aside after final hearing and, therefore, the tendency to grant stay of legislation relating to economic reform, at the interim stage, cannot be understood. The system of checks and balances has to be utilized in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself."

(emphasis supplied)

In **DG of Foreign Trade v. Kanak Exports,** (2016) 2 SCC 226, this Court has held:

"**109.** Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In *Balco Employees' Union* v. *Union of India* [*Balco Employees' Union* v. *Union of India*, (2002) 2 SCC 333], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do

not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature……"

It is with this background, factual and legal, that the constitutional validity of the Insolvency and Bankruptcy Code, 2016 has to be viewed.

THE RAISON D'ÊTRE FOR THE INSOLVENCY AND BANKRUPTCY CODE

9. The Statement of Objects and Reasons for the Code have been referred to in **Innoventive Industries** (supra) which states:

"**12.** ……The Statement of Objects and Reasons of the Code reads as under:

"*Statement of Objects and Reasons*.—There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. *The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation*.

2. *The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the*

A *priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing*

B *Business, and facilitate more investments leading to higher economic growth and development*.

3. The Code seeks to provide for designating NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation

C and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information

D utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in

E the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

F **4.** The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial

G Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives."

(emphasis in original)

H

10. The Preamble of the Code states as follows: A

> "An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests B of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

11. As is discernible, the Preamble gives an insight into what is C sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in D turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial E institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by F an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a G last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [*See* **ArcelorMittal** (supra) at paragraph 83, footnote 3].

H

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

APPOINTMENT OF MEMBERS OF THE NCLT AND THE NCLAT NOT CONTRARY TO THIS COURT'S JUDGMENTS.

13. Shri Rohatgi has argued that contrary to the judgments in **Madras Bar Association (I)** (supra) and **Madras Bar Association (III)** (supra), Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two Judicial Members of the Selection Committee get outweighed by three bureaucrats.

14. On 03.01.2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:

> "**412. Selection of Members of Tribunal and Appellate Tribunal**.—
>
> xxx xxx xxx
>
> (2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—
>
> (*a*) Chief Justice of India or his nominee—Chairperson;
>
> (*b*) a senior Judge of the Supreme Court or Chief Justice of High Court—Member;

(*c*) Secretary in the Ministry of Corporate Affairs—Member; and

(*d*) Secretary in the Ministry of Law and Justice—Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote."

This was brought into force by a notification dated 09.02.2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr. Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of the NCLT in the year 2015 itself. Thus, by an Order dated 27.07.2015, (i) Justice Gogoi (as he then was), (ii) Justice Ramana, (iii) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (iv) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22.02.2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10.08.2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of the NCLT and NCLAT have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi.

NCLAT Bench only at Delhi.

15. It has been argued by Shri Rohatgi that as per our judgment in **Madras Bar Association (II)** (supra), paragraph 123 states as follows:

"**123.** We shall first examine the validity of Section 5 of the NTT Act. The basis of challenge to the above provision has already been narrated by us while dealing with the submissions advanced on behalf of the petitioners with reference to the fourth contention. According to the learned counsel for the petitioners, Section 5(2) of the NTT Act mandates that NTT would ordinarily have its sittings in the National Capital Territory of Delhi. According to the petitioners, the aforesaid mandate would deprive the litigating assessee the convenience of approaching the jurisdictional High

A Court in the State to which he belongs. An assessee may belong to a distant/remote State, in which eventuality, he would not merely have to suffer the hardship of travelling a long distance, but such travel would also entail uncalled for financial expense. Likewise, a litigant assessee from a far-flung State may find it extremely difficult and inconvenient to identify an Advocate who would represent him before NTT, since the same is mandated to be ordinarily located in the National Capital Territory of Delhi. Even though we have expressed the view, that it is open to Parliament to substitute the appellate jurisdiction vested in the jurisdictional High Courts and constitute courts/tribunals to exercise the said jurisdiction, we are of the view, that while vesting jurisdiction in an alternative court/tribunal, it is imperative for the legislature to ensure that redress should be available with the same convenience and expediency as it was prior to the introduction of the newly created court/tribunal. Thus viewed, the mandate incorporated in Section 5(2) of the NTT Act to the effect that the sittings of NTT would ordinarily be conducted in the National Capital Territory of Delhi, would render the remedy inefficacious, and thus unacceptable in law. The instant aspect of the matter was considered by this Court with reference to the Administrative Tribunals Act, 1985 in *S.P. Sampath Kumar case* [*S.P. Sampath Kumar* v. *Union of India*, (1987) 1 SCC 124 : (1987) 2 ATC 82] and *L. Chandra Kumar case* [*L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577], wherein it was held that permanent Benches needed to be established at the seat of every jurisdictional High Court. And if that was not possible, at least a Circuit Bench required to be established at every place where an aggrieved party could avail of his remedy. The position on the above issue is no different in the present controversy. For the above reason, Section 5(2) of the NTT Act is in clear breach of the law declared by this Court."

(emphasis supplied)

16. The learned Attorney General has assured us that this judgment will be followed and Circuit Benches will be established as soon as it is practicable. In this view of the matter, we record this submission and direct the Union of India to set up Circuit Benches of the NCLAT within a period of 6 months from today.

THE TRIBUNALS ARE FUNCTIONING UNDER THE WRONG MINISTRY

17. Shri Mukul Rohatgi argued that in **Madras Bar Association (I)** (supra), paragraph 120(xii) specifically reads as follows:

> "**120** We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:
>
> xxx xxx xxx
>
> (*xii*) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned.
>
> xxx xxx xxx"

Even though eight years have passed since the date of this judgment, the administrative support for these tribunals continues to be from the Ministry of Corporate Affairs. This needs to be rectified at the earliest.

18. However, the learned Attorney General pointed out Article 77(3) of the Constitution of India and **Delhi International Airport Limited v. International Lease Finance Corporation and Ors.**, (2015) 8 SCC 446, which state that once rules of business are allocated among various Ministries, such allocation is mandatory in nature. According to him, therefore, the rules of business, having allocated matters which arise under the Insolvency Code to the Ministry of Corporate Affairs, are mandatory in nature and have to be followed.

19. It is obvious that the rules of business, being mandatory in nature, and having to be followed, are to be so followed by the executive branch of the Government. As far as we are concerned, we are bound by the Constitution Bench judgment in **Madras Bar Association (I)** (supra). This statement of the law has been made eight years ago. It is high time that the Union of India follow, both in letter and spirit, the judgment of this Court.

CLASSIFICATION BETWEEN FINANCIAL CREDITOR AND OPERATIONAL CREDITOR NEITHER DISCRIMINATORY, NOR ARBITRARY, NOR VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA.

20. The tests for violation of Article 14 of the Constitution of India, when legislation is challenged as being violative of the principle of

A equality, have been settled by this Court time and again. Since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation. This aspect of Article 14 has been laid down in judgments too numerous
B to cite, from the very inception.

21. Another development of the law is that legislation can be struck down as being manifestly arbitrary. This has been laid down by the recent Constitution Bench decision in **Shayara Bano** (supra) as follows:

C "**95.** On a reading of this judgment in *Natural Resources Allocation case* [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1], it is clear that this Court did not read *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed
D the Court, after referring to all the earlier judgments, and *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when
E applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary" i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and
F not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

G **96.** Another Constitution Bench decision in *Subramanian Swamy* v. *CBI* [*Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36] dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been
H made to the Constitution Bench by the reference order in

Subramanian Swamy v. *CBI* [*Subramanian Swamy* v. *CBI*, (2005) 2 SCC 317 : 2005 SCC (L&S) 241] and after referring to several judgments including *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258], *Mardia Chemicals* [*Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311], *Malpe Vishwanath Acharya* [*Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1] and *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709], the reference, inter alia, was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

97. After referring to the submissions of the counsel, and several judgments on the discrimination aspect of Article 14, this Court held: (*Subramanian Swamy case* [*Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36] , SCC pp. 721-22, paras 48-49)

> "*48*. In *E.P. Royappa* [*E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165] , it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)
>
> > '*85*. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.'
>
> *Court's approach*
>
> *49*. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process

needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

xxx xxx xxx

100. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In *Cellular Operators Assn. of India* v. *TRAI* [*Cellular Operators Assn. of India* v. *TRAI*, (2016) 7 SCC 703], this Court referred to earlier precedents, and held: (SCC pp. 736-37, paras 42-44)

"*Violation of fundamental rights*

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. [See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] , SCC at p. 689, para 75.]

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka* [*Khoday Distilleries Ltd.* v. *State of Karnataka*, (1996) 10 SCC 304], this Court held: (SCC p. 314, para 13) A

> '*13*. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power*. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary*". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such rules; they are unreasonable and ultra vires". *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution*.' B C D E F G

44. Also, in *Sharma Transport* v. *State of A.P.* [*Sharma Transport* v. *State of A.P.*, (2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25) H

'*25*. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.'"

(emphasis in original)

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

This judgment has since been followed in **Gopal Jha v. The Hon'ble Supreme Court of India**, Writ Petition (Civil) No. 745/2018 [decided on 25.10.2018] (at paragraph 27); **Indian Young Lawyers Associations and Ors. v. State of Kerala and Ors.**, Writ Petition (Civil) No. 373/2006 [decided on 28.09.2018]; **Joseph Shine v. Union of India**, Writ Petition (Criminal) No. 194/2017 [decided on 27.09.2018] (at paragraphs 110, 195, 197); **K.S. Puttaswamy v. Union of India**, Writ Petition (Civil) No. 494/2012 [decided on 26.09.2018] (at paragraphs 77, 78, 416, 724, 725, 1160); **Navtej Singh Johar and Ors. v. Union of**

India, (2018) 10 SCC 1 (at paragraphs 253, 353, 411, 637.9); **Lok Prahari v. State of Uttar Pradesh and Ors.**, (2018) 6 SCC 1 (at paragraph 35); and **Nikesh Tarachand Shah v. Union of India and Ors.**, (2018) 11 SCC 1 (at paragraph 23). A

22. Sections 5(7) and 5(8) of the Code define "financial creditor" and "financial debt" as follows: B

"**5. Definitions**.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; C

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes— D

(*a*) money borrowed against the payment of interest;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(*c*) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; E

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; F

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis;

(*f*) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; G

Explanation.—For the purposes of this sub-clause,—

(*i*) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and H

A (*ii*) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (*d*) and (*zn*) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(*g*) any derivative transaction entered into in connection with
B protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument
C issued by a bank or financial institution;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of this clause;

xxx xxx xxx"

D Section 5(20) defines "operational creditor" as follows:

"**5. Definitions**.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(20) "operational creditor" means a person to whom an
E operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

xxx xxx xxx"

Section 7 of the Code states:

F "**7. Initiation of corporate insolvency resolution process by financial creditor**.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate
G insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

H

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(*a*) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(*b*) the name of the resolution professional proposed to act as an interim resolution professional; and

(*c*) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(*a*) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(*b*) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (*b*) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(*a*) the order under clause (*a*) of sub-section (5) to the financial creditor and the corporate debtor;

A (*b*) the order under clause (*b*) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

23. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, B if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any C law and payable to the Government or any local authority.

24. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by D such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the Adjudicating Authority shall, within the prescribed period, ascertain E the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the Adjudicating Authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice F which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the Adjudicating Authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

G 25. The argument of learned counsel on behalf of the petitioners is that in point of fact, there is no intelligible differentia having relation to the objects sought to be achieved by the Code between financial and operational creditors and indeed, nowhere in the world has this distinction been made. The BLRC Report presents what according to it is the rationale for the reason to differentiate between financial and operational H creditors. The Report states as follows:

"While both types of creditors can trigger the IRP under the Code, the evidence presented to trigger varies. Since financial creditors have electronic records of the liabilities filed in the Information Utilities of Section 4.3, incontrovertible event of default on any financial credit contract can be readily verifiable by accessing this system. The evidence submitted of default by the debtor to the operational creditor may be in either electronic or physical form, since all operational creditors may or may not have electronic filings of the debtors' liability. Till such time that the Information Utilities are ubiquitous, financial creditors may establish default in a manner similar to operational creditors."

Similarly, the Insolvency and Bankruptcy Bill in the Notes on Clause 8 states:

"Clause 8 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. This procedure differs from the procedure applicable to financial creditors as operational debts (such as trade debts, salary or wage claims) tend to be small amounts (in comparison to financial debts) or are recurring in nature and may not be accurately reflected on the records of information utilities at all times. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions. Accordingly, the process for initiation of the insolvency resolution process differs for an operational creditor…… This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings."

However, the Insolvency Law Committee ["**ILC**"], in its Report of March 2018 dealt with debenture holders and fixed deposit holders, who are also financial creditors, and are numerous. The Report then went on to state:

"**10.6** For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding

A 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures are issued [Rule 18(1)(c), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security holders for whom no trustee B or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than the IRP) shall be appointed by the NCLT on the request of the IRP. It is to be noted that as the agent or trustee or insolvency professional, i.e. the authorised representative for the creditors discussed above C and executors, guarantors, etc. as discussed in paragraph 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to section 21(2)."

xxx xxx xxx

D "**10.8** In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security holders, deposit holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done E by adding a new provision to section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by the NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class F of financial creditors and shall vote on behalf of each of the financial creditor to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of G such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to H a large number of creditors voting at the same time."

Given this Report, the Code was amended and Section 21(6A) and 21(6B) were added, which are set out hereinbelow:

"**21. Committee of creditors**.—

xxx xxx xxx

(6-A) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs."

Also, Regulations 16A and 16B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

A Regulations, 2016 ["**CIRP Regulations**"] were added, with effect from 04.07.2018, as follows:

"**16A. Authorised representative**.—(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in
B Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-
C regulation (2) of regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of
D regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of
E creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative
F as and when the list is updated.

Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

G (6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight
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per cent per annum unless a different rate has been agreed to between the parties.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely:

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

16B. Committee with only creditors in a class.—Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s)."

26. It is obvious that debenture holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

27. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is

A different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money.
B By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality.
C Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes
D in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these *qua* operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-
E documented and defaults made are easily verifiable.

28. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is
F financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by
G the Code.

NOTICE, HEARING, AND SET-OFF OR COUNTERCLAIM *QUA* FINANCIAL DEBTS.

29. This Court, in **Innoventive Industries** (supra) stated as
H follows:

"**27.** The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the

A Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority. Under sub-section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is

payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise."

30. Section 3(9)(c) read with Section 214(e) of the Code are important and are set out as under:

"**3. Definitions**.—In this Code, unless the context otherwise requires,—

xxx xxx xxx

(9) "core services" means services rendered by an information utility for—

xxx xxx xxx

(*c*) authenticating and verifying the financial information submitted by a person; and

xxx xxx xxx"

"**214. Obligations of information utility**.—For the purposes of providing core services to any person, every information utility shall—

xxx xxx xxx

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

xxx xxx xxx"

31. It is clear from these Sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 ["**Information Utilities Regulations**"], are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.

32. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:

A (a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;

(b) Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);

B (c) Order of a court, tribunal or arbitral panel adjudicating on the default;

(d) Record of default with the information utility;

(e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;

C

(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;

(g) A record of default as available with any credit information company;

D

(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.

33. Rule 4 (3) of the aforesaid Rules states as follows:

"**4. Application by financial creditor**.—

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xxx xxx xxx

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

F

xxx xxx xxx"

Section 420 of the Companies Act, 2013 states as follows:

"**420. Orders of Tribunal**.—(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity

G of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

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Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act. A

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned."

Rules 11, 34, and 37 of the National Company Law Tribunal Rules, 2016 ["**NCLT Rules**"] state as follows: B

"**11.** Inherent Powers.—Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal." C

xxx xxx xxx

34. General Procedure.—(1) In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice. D

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT 3. E

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5." F

xxx xxx xxx

"**37.** Notice to Opposite Party.- (1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents. G

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according H

A reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record."

A conjoint reading of all these Rules makes it clear that at the stage of the Adjudicating Authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the Adjudicating Authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process *malafide*, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:

"**65. Fraudulent or malicious initiation of proceedings**.—(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

34. Also, punishment is prescribed under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. Section 75 reads as under:

"**75. Punishment for false information furnished in application**.—Where any person furnishes information in the application made under Section 7, which is false in material

particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees."

35. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way – amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the Adjudicating Authority under Section 60. Section 60(5)(c) reads as follows:

"**60. Adjudicating Authority for corporate persons**.—

xxx xxx xxx

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

xxx xxx xxx

(*c*) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

36. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. Form C dealing with submission of claims by financial creditors in the CIRP Regulations states thus:

"**FORM C**

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

[*Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016*]

[Date]

A From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

B The Interim Resolution Professional/Resolution Professional,

[Name of the Insolvency Resolution Professional / Resolution Professional]

[Address as set out in public announcement]

C **Subject: Submission of claim and proof of claim.**

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

D

Relevant Particulars		
	Name of the financial creditor	
	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	
	Address and email address of the financial creditor for correspondence	
	Total amount of claim (including any interest as at the insolvency commencement date)	
	Details of documents by reference to which the debt can be substantiated	
	Details of how and when debt incurred	
	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	

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	Details of any security held, the value of the security, and the date it was given	
	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
	List of documents attached to this claim in order to prove the existence and non-payment of claim due to the financial creditor	
(Signature of financial creditor or person authorised to act on his behalf) [Please enclose the authority if this is being submitted on behalf of the financial creditor]		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

* PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

DECLARATION

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows:

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ..... day of ..... 20....., actually indebted to me for a sum of Rs. [insert amount of claim].

2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below:

   [Please list the documents relied on as evidence of claim].

3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.

4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].

5. I am/I am not a related party of the corporate debtor, as defined under Section 5(24) of the Code.

6. I am eligible to join committee of creditors by virtue of proviso to Section 21(2) of the Code even though I am a related party of the corporate debtor.

Date:
Place:

(Signature of the claimant)

VERIFICATION

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at … on this …… day of ……., 20…

(Signature of claimant)

[*Note*: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]"

37. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the learned Solicitor General

for this shift in legislative policy. *First* is predictability and certainty. *Secondly*, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it. *Thirdly*, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant. *Fourthly*, the trigger that would lead to liquidation can only be upon failure of the resolution process.

38. In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:

> "**3. Definitions**.—In this Code, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (6) "claim" means—
>
> (*a*) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (*b*) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> xxx xxx xxx
>
> (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
>
> (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;
>
> xxx xxx xxx"

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor

A has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

B

SECTIONS 21 AND 24 AND ARTICLE 14: OPERATIONAL CREDITORS HAVE NO VOTE IN THE COMMITTEE OF CREDITORS.

39. Section 21 of the Code reads as follows:

"**21. Committee of creditors**.—(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

C

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

D

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

E

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

F

(3) Subject to sub-sections (6) and (6-A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

G

(4) Where any person is a financial creditor as well as an operational creditor,—

(*a*) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be

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included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(*b*) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(*a*) authorize the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(*b*) represent himself in the committee of creditors to the extent of his voting share;

(*c*) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(*d*) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6-A) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an

A insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

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

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition."

40. Section 24(3), 24(4), and Section 28, which are also material, read as follows:

"**24. Meeting of committee of creditors**.—

xxx xxx xxx

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(*a*) members of [committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6-A) of Section 21 and sub-section (5)];

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

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

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

xxx xxx xxx"

xxx xxx xxx

"**28. Approval of committee of creditors for certain actions**.—(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely—

(*a*) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(*b*) create any security interest over the assets of the corporate debtor;

A (*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(*d*) record any change in the ownership interest of the corporate
B debtor;

(*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

C (*f*) undertake any related party transaction;

(*g*) amend any constitutional documents of the corporate debtor;

(*h*) delegate its authority to any other person;

(*i*) dispose of or permit the disposal of shares of any shareholder
D of the corporate debtor or their nominees to third parties;

(*j*) make any change in the management of the corporate debtor or its subsidiary;

(*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of
E business;

(*l*) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(*m*) make changes in the appointment or terms of contract of
F statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the
G committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action
H shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code. Approval of committee of creditors for certain actions." A

41. In this regard, the BLRC Report states:

"The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities…… The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors." B C D

"The second is that any proposed solution must explicitly account for the IRP costs and the liabilities of the operational creditors within a reasonable period from the approval of the solution if it is approved. The Committee argues that there must be a counterbalance to operational creditors not having a vote on the creditors committee. Thus, they concluded that the dues of the operational creditors must have priority in being paid as an explicit part of the proposed solution. This must be ensured by the RP in evaluating a proposal before bringing it to the creditors committee. If there is ambiguity about the coverage of the liability in the information memorandum that the RP presents to garner solutions, then the RP must ensure that this is clearly stated and accounted for in the proposed solution." E F G

The Joint Parliamentary Committee Report of April, 2016 ["**Joint Parliamentary Committee Report**"] on the Insolvency and Bankruptcy Code also agreed with these observations but modified Section 24 so as H

A to permit operational creditors to be present at the meetings of the committee of creditors, albeit without voting rights, if operational creditors aggregate to 10% or more of the total debts owed by the corporate debtor.

The Joint Parliamentary Committee Report also opined as follows:

B "**21. Role of Operational Creditors - Clause 24**

Some of the stakeholders in the memorandum/views furnished before the Committee were of the opinion that whereas operation creditor has right to make application for initiation of corporate insolvency resolution process, operational creditors like workmen,
C employees, suppliers have not been given any representation in the committee of creditors which is pivotal in whole resolution process. In this regard, one of the stakeholders has suggested that committee of creditors may contain operational creditors as well, with some thresholds.

D In this context, while appreciating that the operational creditors are important stakeholders in a company, the Committee took note of the rationale of not including operational creditors in the committee of creditors as indicated in notes on Clause 21 appended with the Bill which states as under:-

E "The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors are typically not able
F to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Similarly, financial creditors who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts.
G Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).

H

All decisions of the Committee shall be taken by a vote of not less than seventy-five per cent of the voting share. In the event there are no financial creditors for a corporate debtor, the composition and decision-making processes of the corporate debtor shall be specified by the Insolvency and Bankruptcy Board. The Committee shall also have the power to call for information from the resolution professional."

The Committee after due deliberations are of the view that, if not voting rights, operational creditors at least should have presence in the committee of creditors to present their views/concerns on important issues considered at the meetings so that their views/ concerns are taken into account by the committee of creditors while finalizing the resolution plan."

(emphasis supplied)

The original Insolvency and Bankruptcy Bill did not allow operational creditors to attend the committee of creditors at all. This Bill was amended whilst in the form of a Bill, the Joint Parliamentary Committee deciding as follows:

"The Committee, therefore, decided to modify clause 24(3) and (4) as given under:

Modified Clause 24(3)

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

(a) members of committee of creditors;

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

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

Modified Clause 24(4)

"The directors, partners and one representative of operational creditors as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

A Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting."

42. What is also of importance is the fact that Expert Committees have been set up by the Government to oversee the working of the B Code. Thus, the report of the Insolvency Law Committee of March, 2018, after examining the working of the Code, thought it fit not to amend the Code so as to give operational creditors the right to vote. This was stated as follows:

"This rationale still holds true, and thus it was deemed fit not to C amend the constitution of the CoC. Further, operational creditors whose aggregate dues are not less than ten percent of the debt have a right to attend the meetings of the CoC. Also, under the resolution plan, they are guaranteed at least the liquidation value."

"…The Committee agreed that presently, most of the resolution D plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code."

E 43. Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability. F Thus, Section 30(4) states:

"**30. Submission of resolution plan**.—

xxx xxx xxx

(4) The committee of creditors may approve a resolution plan by G a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, H

where the resolution applicant is ineligible under Section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

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

Provided also that the eligibility criteria in Section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

xxx xxx xxx"

It is important to bear in mind that once the resolution plan is approved by the committee of creditors and thereafter by the Adjudicating Authority, the aforesaid plan is binding on all stakeholders as follows:

"**31. Approval of resolution plan**.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

xxx xxx xxx"

A 44. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study B has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and C services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

45. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law D ["**UNCITRAL Guidelines**"] recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

> **"Ensuring equitable treatment of similarly situated creditors**
>
> E 7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have F struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, G for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside H

acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

"**38. Mandatory contents of the resolution plan**.— (1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(*a*) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;

(*b*) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(*c*) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Post amendment, Regulation 38 reads as follows:

"**38. Mandatory contents of the resolution plan**.—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

A (1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

xxx xxx xxx"

47. The aforesaid Regulation further strengthens the rights of B operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

48. For all the aforesaid reasons, we do not find that operational creditors are discriminated against or that Article 14 has been infracted C either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

SECTION 12A IS NOT VIOLATIVE OF ARTICLE 14

49. Section 12A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from D 06.06.2018. It reads as follows:

"**12-A. Withdrawal of application admitted under Section 7, 9 or 10**.—The Adjudicating Authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety E per cent voting share of the committee of creditors, in such manner as may be specified."

50. The ILC Report of March 2018, which led to the insertion of Section 12A, stated as follows:

"**29.1** Under rule 8 of the CIRP Rules, the NCLT may permit F withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, G judicial permission for withdrawal of CIRP was granted [*Lokhandwala Kataria Construction Pvt. Ltd. v. Ninus Finance & Investment Manager LLP*, Civil Appeal No. 9279 of 2017; *Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited*, Civil Appeal No. H 9286/2017; *Uttara Foods and Feeds Private Limited v. Mona*

Pharmacem, Civil Appeal No. 18520/2017]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*" Thus, it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

(emphasis in original)

29.2 On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in the case of *Uttara Foods and Feeds Private Limited v. Mona Pharmacem*, Civil Appeal No. 18520/2017) and even otherwise, as the issue can be specifically addressed by amending rule 8 of the CIRP Rules."

51. Before this Section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the NCLT or the NCLAT.

Regulation 30A of the CIRP Regulations states as under:

"**30A. Withdrawal of application**.—(1) An application for withdrawal under Section 12-A shall be submitted to the interim

A resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under Regulation 36A.

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes B of clauses (*c*) and (*d*) of Regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

C (4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

D This Court, by its order dated 14.12.2018 in **Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors.**, SLP (Civil) No. 31557/2018, has stated that Regulation 30A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of E invitation for expression of interest under Regulation 36A.

52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is F to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the G committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of H each case.

53. The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster.

EVIDENCE PROVIDED BY PRIVATE INFORMATION UTILITIES: ONLY *PRIMA FACIE* EVIDENCE OF DEFAULT

54. A frontal attack was made by Shri Mukul Rohatgi on the ground that private information utilities that have been set up are not governed by proper norms. Also, the evidence by way of loan default contained in the records of such utility cannot be conclusive evidence of what is stated therein. The BLRC Report had stated:

> "Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court…… Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay."

55. The setting up of information utilities was preceded by a regime of information companies which were referred to as credit information companies ["**CICs**"], as recommended by the Siddiqui Working Group in 1999. The Attorney General pointed out, in his written submission, that:

A "In 2013, the RBI constituted another Committee under the chairmanship of Aditya Puri, MD, HDFC Bank to examine reporting formats used by CICs and other related issues. The Committee's report led to the standardization of data formats for reporting corporate, consumer and MFI data by all credit institutions and streamlining the process of data submission by credit institutions to CICs. In 2015, all credit institutions were directed by RBI to become members of all the CICs and submit current and historical data about specified borrower to them and to update it regularly.

C The purpose of setting up the above regime of information utilities was to reduce information asymmetry for improved credit risk assessment and to improve recovery processes.

The setting up of IUs marks a shift in the above position as not only is the information with IUs used to reduce information asymmetry, but it is also to be treated as prima facie evidence of the transaction for the purpose of IBC proceedings. This assists in improving the timelines for the resolution process."

56. The Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. Regulations 20 and 21 read as follows:

"**20. Acceptance and receipt of information**.—(1) An information utility shall accept information submitted by a user in Form C of the Schedule.

F (2) On receipt of the information submitted under sub-regulation (1), the information utility shall—

(*a*) assign a unique identifier to the information, including records of debt;

G (*b*) acknowledge its receipt, and notify the user of—

(*i*) the unique identifier of the information;

(*ii*) the terms and conditions of authentication and verification of information; and

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(*iii*) the manner in which the information may be accessed by other parties.

21. Information of default.—(1) On receipt of information of default, an information utility shall expeditiously undertake the processes of authentication and verification of the information.

(2) On completion of the processes of authentication and verification under sub-regulation (1), the information utility shall communicate the information of default, and the status of authentication to registered users who are—

(*a*) creditors of the debtor who has defaulted;

(*b*) parties and sureties, if any, to the debt in respect of which the information of default has been received."

57. The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General, is only *prima facie* evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail.

RESOLUTION PROFESSIONAL HAS NO ADJUDICATORY POWERS.

58. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

"**18. Duties of interim resolution professional**.—(1) The interim resolution professional shall perform the following duties, namely—

(*a*) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(*i*) business operations for the previous two years;

(*ii*) financial and operational payments for the previous two years;

(*iii*) list of assets and liabilities as on the initiation date; and

(*iv*) such other matters as may be specified;

(*b*) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(*c*) constitute a committee of creditors;

(*d*) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(*e*) file information collected with the information utility, if necessary; and

(*f*) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(*i*) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(*ii*) assets that may or may not be in possession of the corporate debtor;

(*iii*) tangible assets, whether movable or immovable;

(*iv*) intangible assets including intellectual property;

(*v*) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(*vi*) assets subject to the determination of ownership by a court or authority;

(*g*) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term "assets" shall not include the following, namely—

(*a*) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(*b*) assets of any Indian or foreign subsidiary of the corporate debtor; and

(*c*) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

59. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:

"**10. Substantiation of claims.**—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim."

xxx xxx xxx

"**12. Submission of proof of claims.**—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of

A creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

B (a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

C (d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount of claim.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

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(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

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It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made as follows:

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"**35A. Preferential and other transactions.—**(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

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(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered

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under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

60. As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. Sections 41 and 42, by way of contrast between the powers of the liquidator and that of the resolution professional, are set out hereinbelow:

"**41. Determination of valuation of claims**.—The liquidator shall determine the value of claims admitted under Section 40 in such manner as may be specified by the Board.

42. Appeal against the decision of liquidator.—A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision."

It is clear from these Sections that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the Adjudicating Authority under Section 42 of the Code.

61. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority.

CONSTITUTIONAL VALIDITY OF SECTION 29A.

62. Section 29A reads as follows:

"**29A. Persons not eligible to be resolution applicant**.—A person shall not be eligible to submit a resolution plan, if such

A person, or any other person acting jointly or in concert with such person—

(*a*) is an undischarged insolvent;

(*b*) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(*c*) at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

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

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.—For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior

resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(*d*) has been convicted for any offence punishable with imprisonment—

(*i*) for two years or more under any Act specified under the Twelfth Schedule; or

(*ii*) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (*iii*) of Explanation I;

(*e*) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (*iii*) of Explanation I;

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

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

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not

A otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(*h*) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency
B resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

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

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

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

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

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

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

Provided that nothing in clause (*iii*) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate
F debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account
G of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

Explanation II.—For the purposes of this section, "financial entity" shall mean the following entities which meet such
H criteria or conditions as the Central Government may, in

consultation with the financial sector regulator, notify in this behalf, namely— A

(*a*) a scheduled bank;

(*b*) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding; B

(*c*) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999); C D

(*d*) an asset reconstruction company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(*e*) an Alternate Investment Fund registered with the Securities and Exchange Board of India; E

(*f*) such categories of persons as may be notified by the Central Government."

63. This Section was first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, which amended the Insolvency and Bankruptcy Code on 23.11.2017. The Finance Minister while moving the Amendment Bill stated as follows: F

"The core and the soul of this new Ordinance is really Clause 5, which is Section 29A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act, and, therefore, Clause 29A introduces those who are not eligible to apply. For instance, there is a clause with regard to an G H

A undischarged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act to act as a Director cannot apply; and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And, there is also a disqualification in clause (c) with regard to those who are corporate debtors and who, as on the date of the application making a bid, do not operationalize the account by paying the interest itself, i.e., you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively, this clause will mean that those, who are in management and on account of whom this insolvent or the non-performing asset has arisen, will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational, and yet I would like to apply and get the same enterprise back at a discounted value, for this is not the object of this particular Act itself. So clause 5 has been brought in with that purpose in mind."

(emphasis supplied)

The Statement of Objects and Reasons for the aforesaid amendment states:

"**2.** The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible."

(emphasis supplied)

This Court has held in **ArcelorMittal** (supra): A

"**27.** A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with sub-clauses (c), (f), (i) and (j) thereof. B

28. It will be noticed that the opening lines of Section 29A contained in the Ordinance of 2017 are different from the opening lines of Section 29A as contained in the Amendment Act of 2017. What is important to note is that the phrase "*persons acting in concert*" is conspicuous by its absence in the Ordinance of 2017. The C concepts of "*promoter*", "*management*" and "*control*" which were contained in the opening lines of Section 29A under the Ordinance have now been transferred to sub-clause (c) in the Amendment Act of 2017. It is, therefore, important to note that the Amendment Act of 2017 opens with language which is of wider import than that contained in the Ordinance of 2017, evincing D an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

29. The opening lines of Section 29A of the Amendment Act refer to a *de facto* as opposed to a *de jure* position of the persons mentioned therein. This is a typical instance of a "*see through provision*", so that one is able to arrive at persons who are actually E in "*control*", whether jointly, or in concert, with other persons. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "*person*" whose eligibility is to be gone into. However, a purposeful and contextual F interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only G permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in *Salomon* v. *A Salomon and Co. Ltd.* [1897] AC 22 will not apply. For it is important to discover in such cases as to who are the real individuals H

A or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan."

Similarly in **Chitra Sharma v. Union of India**, Writ Petition (Civil) No. 744 of 2017 [decided on 09.08.2018], this Court observed as follows:

B "**31.** Parliament has introduced Section 29A into the IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process....."

C "**32.** …… The Court must bear in mind that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a back-door entry to erstwhile managements in the CIRP. Section 30 of the IBC, as amended, also clarifies that a D resolution plan of a person who is ineligible under Section 29A will not be considered by the CoC……"

RETROSPECTIVE APPLICATION

64. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because E a part of the requisites for its action is drawn from a time antecedent to its passing [S*ee* State Bank's Staff Union (Madras Circle) v. Union of India and Ors., (2005) 7 SCC 584 (at paragraph 21)]. In **ArcelorMittal** (supra), this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan as follows:

F "**79.** Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the committee of creditors for its approval, but the committee of creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the G financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before

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the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

65. This being the case, it is clear that no vested right is taken away by application of Section 29A. However, Shri Viswanathan pointed out the judgments in **Ritesh Agarwal and Anr. v. SEBI and Ors.**, (2008) 8 SCC 205 (at paragraph 25), **K.S. Paripoornan v. State of Kerala and Ors.**, (1994) 5 SCC 593 (at paragraphs 60-66), **Darshan Singh v. Ram Pal Singh and Anr.**, 1992 Supp (1) SCC 191 (at paragraph 35), **Pyare Lal Sharma v. Managing Director and Ors.**, (1989) 3 SCC 448 (at paragraph 21), **P.D. Aggarwal and Ors. v. State of U.P. and Ors.**, (1987) 3 SCC 622 (at paragraph 18), and **Govind Das and Ors. v. Income Tax Officer and Anr.**, (1976) 1 SCC 906 (at paragraphs 6 and 11), to argue that if a Section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the Section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to be prospective in nature. However, in our judgment in **ArcelorMittal** (supra), we have already held that resolution applicants have no vested right to be considered as such in the resolution process. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. We are of the view that the observations made in **ArcelorMittal** (supra) directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies under Section 29A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail.

SECTION 29A(C) NOT RESTRICTED TO MALFEASANCE

66. According to learned counsel for the petitioners, Section 29A(c) treats unequals as equals. A good erstwhile manager cannot be lumped with a bad erstwhile manager. Where an erstwhile manager is not guilty of malfeasance or of acting contrary to the interests of the corporate

A debtor, there is no reason why he should not be permitted to take part in the resolution process. After all, say the counsel for the petitioners, maximization of value of the assets of the corporate debtor is an important objective to be achieved by the Code. Keeping out good erstwhile managers from the resolution process would go contrary to this objective.

B 67. This objection by the petitioners was countered by the learned Attorney General and Solicitor General, stating that the various clauses of Section 29A would show that a person need not be a criminal in order to be kept out of the resolution process. For example, under Section 29A(a), it is clear that a person may be an undischarged insolvent for no fault of his. Equally, under Section 29A(e), a person may be disqualified C to act as a director under the Companies Act, 2013, say, where he has not furnished the necessary financial statements on time [*see* Section 164(2)(a)[4] of the Companies Act, 2013].

68. The learned counsel for some of the petitioners have also argued that the proviso to Section 35(1)(f) that was added by the D Insolvency and Bankruptcy Code (Amendment) Act, 2017 [dated 19.01.2018] with retrospective effect from 23.11.2017 is manifestly arbitrary and violative of Article 14 of the Constitution of India. The proviso to Section 35(1)(f) reads as follows:

> E "**35. Powers and duties of liquidator**.—(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—
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> xxx xxx xxx

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[4] "**164. Disqualifications for appointment of director**.—

F xxx xxx xxx

(2) No person who is or has been a director of a company which—

(*a*) has not filed financial statements or annual returns for any continuous period of three financial years; or

(*b*) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

G shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so:

Provided that where a person is appointed as a director of a company which is in default of clause (*a*) or clause (*b*), he shall not incur the disqualification for a period of six months from the date of his appointment.

H xxx xxx xxx"

(*f*) subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

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

xxx xxx xxx"

69. According to the learned counsel for the petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well – there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected.

THE ONE-YEAR PERIOD IN SECTION 29A(C) AND NPAS

70. It is clear that Section 29A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of the RBI, would be a person who though able to pay, does not pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by the RBI. It is important at this juncture to advert to the aforesaid guidelines. The RBI's Master Circular on *Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances* dated

01.07.2015 ["**RBI Master Circular**"] consolidates instructions issued upto 30.06.2015 on NPAs. Clause 2.1 defines NPAs as under:

"2. DEFINITIONS

2.1 Non-performing Assets

2.1.1 An asset, including a leased asset, becomes non--performing when it ceases to generate income for the bank.

2.1.2 A non-performing asset (NPA) is a loan or an advance where;

i. interest and/ or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

ii. the account remains 'out of order' as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/ CC),

iii. the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

iv. the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops,

v. the instalment of principal or interest thereon remains overdue for one crop season for long duration crops,

vi. the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitization transaction undertaken in terms of guidelines on securitization dated February 1, 2006.

vii. in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

2.1.3 In case of interest payments, banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter.

2.1.4 In addition, an account may also be classified as NPA in terms of paragraph 4.2.4 of this Master Circular."

Clause 4 of the RBI Master Circular deals with asset classification as follows:

"4. ASSET CLASSIFICATION

4.1 Categories of NPAs

Banks are required to classify non--performing assets further into the following three categories based on the period for which the asset has remained non--performing and the realisability of the dues:

- Sub-standard Assets
- Doubtful Assets
- Loss Assets

4.1.1 Sub-standard Assets

With effect from March 31, 2005, a sub-standard asset would be one, which has remained NPA for a period less than or equal to 12 months. Such an asset will have well defined credit weaknesses that jeopardize the liquidation of the debt and are characterized by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

4.1.2 Doubtful Assets

With effect from March 31, 2005, an asset would be classified as doubtful if it has remained in the sub-standard category for a period of 12 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as sub-standard, with the added characteristic that the weaknesses make collection or liquidation in full – on the basis of currently known facts, conditions and values – highly questionable and improbable.

4.1.3 Loss Assets

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

xxx xxx xxx"

71. What is clear from the aforesaid circular is that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months, after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. What is important to bear in mind is also the fact that, prior to this one-year-three-month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. The saying of Jesus comes to mind – "if the blind lead the blind, both shall fall into the ditch." The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only after this one year period is over as the NPA now gets classified as a doubtful asset.

72. The Committee set up by the Government to oversee the working of the Code has, in its Report of March 2018, also considered this aspect of the matter and has opined as follows:

"**14.8** In regards to the disqualification under clause (c) for having an NPA account, it was also stated to the Committee that the

time period for existence of the NPA account must be increased from one year to three years. The reason provided was that a downturn in a typical business cycle was most likely to extend over a year. However, in the absence of any concrete data, the Committee felt that there is no conclusive way to determine what the ideal time period for existence of an NPA should be for the disqualification to apply. *The Committee felt that the Code was a relatively new legislation and therefore, it would be prudent to wait and allow industry experience to emerge for a few years before any amendment is made to the NPA holding period under section 29A(c). In relation to applicability of section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP.*"

(emphasis in original)

RELATED PARTY

73. A constitutional challenge has been raised against Section 29A(j) read with the definition of "related party". "Related party" is defined in the Code as follows:

"**5. Definitions**.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(24) "related party", in relation to a corporate debtor, means—

(*a*) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(*b*) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(*c*) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(*d*) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;

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

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

B

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

C

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

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

D

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

E

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

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

F

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

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

G

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

(*iii*) interchange of managerial personnel between the corporate debtor and such person; or

H

(*iv*) provision of essential technical information to, or from, the corporate debtor;

(24A) "related party", in relation to an individual, means—

(*a*) a person who is a relative of the individual or a relative of the spouse of the individual;

(*b*) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(*c*) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(*d*) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

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

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

(*g*) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(*h*) a person on whose advice, directions or instructions, the individual is accustomed to act;

(*i*) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

(*a*) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely—

(*i*) members of a Hindu Undivided Family,

(*ii*) husband,

(*iii*) wife,

(*iv*) father,

(*v*) mother,

(*vi*) son,

(*vii*) daughter,

(*viii*) son's daughter and son,

(*ix*) daughter's daughter and son,

(*x*) grandson's daughter and son,

(*xi*) granddaughter's daughter and son,

(*xii*) brother,

(*xiii*) sister,

(*xiv*) brother's son and daughter,

(*xv*) sister's son and daughter,

(*xvi*) father's father and mother,

(*xvii*) mother's father and mother,

(*xviii*) father's brother and sister,

(*xix*) mother's brother and sister, and

(*b*) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;"

74. What is argued by the petitioners is that the mere fact that somebody happens to be a relative of an ineligible person cannot be good enough to oust such person from becoming a resolution applicant, if he is otherwise qualified. We were urged, by Shri Viswanathan in particular, to apply the doctrine of nexus that is well known and that has been applied by this Court in several judgments in other legal contexts, more particularly, in **Attorney General for India and Ors. v. Amratlal Prajivandas and Ors.**, (1994) 5 SCC 54. Paragraph 44 reads as under:

"**44.** It is contended by the counsel for the petitioners that extending the provisions of SAFEMA to the relatives, associates and other 'holders' is again a case of overreaching or of over-breadth, as it may be called — a case of excessive regulation. It is submitted that the relatives or associates of a person falling under clause (*a*) or clause (*b*) of Section 2(2) of SAFEMA may have acquired properties of their own, may be by illegal means but there is no reason why those properties be forfeited under SAFEMA just because they are related to or are associates of the detenu or convict, as the case may be. It is pointed out that the definition of 'relative' in Explanation (2) and of 'associates' in Explanation (3) are so wide as to bring in a person even distantly related or associated with the convict/detenu, within the net of SAFEMA, and once he comes within the net, all his illegally acquired properties can be forfeited under the Act. In our opinion, the said contention is based upon a misconception. SAFEMA is directed towards forfeiture of "illegally acquired properties" of a person falling under clause (*a*) or clause (*b*) of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu — whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu — whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in clauses (*a*) and (*b*) of Section 2(2) that their relatives and associates mentioned in clauses (*c*) and (*d*) of the said sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his

A relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA [That this was the object of the Act is evident from para 4 of the preamble which states: "And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants." We are not saying that the preamble can be utilized for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the said object.] . We may proceed to explain what we say. Clause (*c*) speaks of a relative of a person referred to in clause (*a*) or clause (*b*) (which speak of a convict or a detenu). Similarly, clause (*d*) speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in clause (*d*) are, the matter becomes clearer. 'Associates' means — (*i*) any individual who had been or is residing in the residential premises (including outhouses) of such person ['such person' refers to the convict or detenu, as the case may be, referred to in clause (*a*) or clause (*b*)]; (*ii*) any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; (*iii*) any association of persons, body of individuals, partnership firm or private company of which such convict/detenu had been or is a member, partner or director; (*iv*) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*) at any time when such person had been or is a member, partner or director of such association of persons, body of individuals, partnership firm or private company; (*v*) any person who had been or is managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*); (*vi*) the trustee of any trust where (*a*) the trust has been created by such convict/detenu; or (*b*) the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less

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than 20% of the value of the assets of the trust on that date; and (*vii*) where the competent authority, for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (*c*) and (*d*) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate — it does not matter whether he intends such a person to be a mere name-lender or whether he really intends that such person shall be the real owner and/or possessor thereof — or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates — in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(*c*). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates)

A mentioned in Section 2(2)(*e*) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property — even though purchased from a convict/detenu — is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in clause (*e*) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B."

(emphasis supplied)

75. We are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29A(j). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29A(j). All the categories in Section 29A(j) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and

"relative" contained in the definition Sections must be read *noscitur a sociis* with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant.

76. An argument was also made that the expression "connected person" in Explanation I, clause (ii) to Section 29A(j) cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future. This would be arbitrary as the explanation would then apply to an indeterminate person. This contention also needs to be repelled as Explanation I seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan. This disposes of all the contentions raising questions as to the constitutional validity of Section 29A(j).

EXEMPTION OF MICRO, SMALL, AND MEDIUM ENTERPRISES FROM SECTION 29A

77. The ILC Report of March 2018 found that micro, small, and medium enterprises form the foundation of the economy and are key drivers of employment, production, economic growth, entrepreneurship, and financial inclusion.

78. Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 classifies enterprises depending upon whether they manufacture or produce goods, or are engaged in providing and rendering services as micro, small, or medium, depending upon certain investments made, as follows:

> "**7. Classification of enterprises.—**(1) Notwithstanding anything contained in Section 11-B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, associations of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

A (*a*) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as—

(*i*) a micro enterprise, where the investment in plant and
B machinery does not exceed twenty-five lakh rupees;

(*ii*) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(*iii*) a medium enterprise, where the investment in plant and
C machinery is more than five crore rupees but does not exceed ten crore rupees;

(*b*) in the case of the enterprises engaged in providing or rendering of services, as—

(*i*) a micro enterprise, where the investment in equipment
D does not exceed ten lakh rupees;

(*ii*) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

E (*iii*) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

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F 79. The ILC Report of 2018 exempted these industries from Section 29A(c) and 29A(h) of the Code, their rationale for doing so being contained in paragraph 27.4 of the Report, which reads as follows:

"**27.4** Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial
G creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant

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exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants."

(emphasis supplied)

80. Thus, the rationale for excluding such industries from the eligibility criteria laid down in Section 29A(c) and 29A(h) is because *qua* such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation. Following upon the Insolvency Law Committee's Report, Section 240A has been inserted in the Code with retrospective effect from 06.06.2018 as follows:

"**240-A. Application of this Code to micro, small and medium enterprises**.—(1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (*c*) and (*h*) of Section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(*a*) not apply to micro, small and medium enterprises; or

(*b*) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued under sub-section (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days referred to in sub-section (3) shall not include any period during which the House referred to in sub-

section (4) is prorogued or adjourned for more than four consecutive days.

(6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.—For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006)."

81. It can thus be seen that when the Code has worked hardship to a class of enterprises, the Committee constituted by the Government, in overseeing the working of the Code, has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240A. This is an important instance of how the executive continues to monitor the application of the Code, and exempts a class of enterprises from the application of some of its provisions in deserving cases. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would also show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them.

SECTION 53 OF THE CODE DOES NOT VIOLATE ARTICLE 14.

82. An argument has been made by counsel appearing on behalf of the petitioners that in the event of liquidation, operational creditors will never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors. This, according to them, would render Section 53 and in particular, Section 53(1)(f) discriminatory and manifestly arbitrary and thus, violative of Article 14 of the Constitution of India.

Section 53(1) reads as follows:

"**53. Distribution of assets**.—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such

manner as may be specified, namely—

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

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

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

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

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

(*d*) financial debts owed to unsecured creditors;

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

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

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

(*f*) any remaining debts and dues;

(*g*) preference shareholders, if any; and

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

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83. The BLRC Report, which led to the enactment of the Insolvency Code, in dealing with this aspect of the matter, has stated:

"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at

A a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer."

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"For the remaining creditors who participate in the collective action of Liquidation, the Committee debated on the waterfall of liabilities that should hold in Liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realizations, and that these are typically paid out net of the costs of insolvency resolution and Liquidation. In order to bring the practices in India in-line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in Liquidation should be as follows:

1. Costs of IRP and liquidation.

2. Secured creditors and Workmen dues capped up to three months from the start of IRP.

F 3. Employees capped up to three months.

4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date;

G 5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest

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6. Remaining debt

7. Surplus to shareholders."

84. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail.

EPILOGUE

85. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

A 86. We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. B Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has C come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017-2018, and to INR 13195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores D for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017-2018, and to INR 18798.20 crores in the first six months of 2018-2019. E These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

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Nidhi Jain Petitions disposed of.