[2019] 213 Comp Cas 198 (SC)

[IN THE SUPREME COURT OF INDIA]

SWISS RIBBONS P. LTD. AND ANOTHER

v.

UNION OF INDIA AND OTHERS

ROHINTON FALI NARIMAN and **NAVIN SINHA** JJ.

January 25, 2019.

HF ▸ Respondent/Directions/Clarification

NATIONAL COMPANY LAW TRIBUNAL—NATIONAL COMPANY LAW APPELLATE TRIBUNAL—APPOINTMENT OF MEMBERS—APPOINTMENTS BY SELECTION COMMITTEE CONSTITUTED IN TERMS OF SUPREME COURT'S DIRECTIONS—APPOINTMENTS NOT CONTRARY TO SUPREME COURT'S JUDGMENT—OBSERVATION OF SUPREME COURT THAT ADMINISTRATIVE SUPPORT FOR ALL TRIBUNALS SHOULD BE FROM MINISTRY OF LAW AND JUSTICE AND NOT FROM PARENT MINISTRIES OR DEPARTMENT—NOT FOLLOWED TILL NOW—DIRECTION TO GOVERNMENT TO FOLLOW DIRECTIONS IN LETTER AND SPIRIT—COMPANIES ACT, 2013, s. 412.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL—SITUS OF APPELLATE TRIBUNAL ONLY AT NEW DELHI—DIRECTION TO UNION GOVERNMENT TO SET UP CIRCUIT BENCHES OF APPELLATE TRIBUNAL WITHIN 6 MONTHS—COMPANIES ACT, 2013, s. 410.

INSOLVENCY RESOLUTION—FINANCIAL CREDITOR AND OPERATIONAL CREDITOR—CLASSIFICATION OF CREDITORS—INTELLIGIBLE DIFFERENTIA BETWEEN TWO TYPES OF CREDITORS HAVING DIRECT RELATION TO OBJECTS SOUGHT TO BE ACHIEVED BY CODE—OPERATIONAL CREDITORS NOT DISCRIMINATED AGAINST—CONSTITUTION OF INDIA, art. 14—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 5(7), (20), 7, 9—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016, regln. 38.

INSOLVENCY RESOLUTION—VALIDITY OF SECTION 12A OF CODE—WITHDRAWAL OF PETITION—PRIOR TO CONSTITUTION OF COMMITTEE OF CREDITORS PARTY CAN APPROACH TRIBUNAL DIRECTLY WITH APPLICATION FOR WITHDRAWAL OF PETITION—UPON CONSTITUTION OF COMMITTEE, NINETY PER CENT. OF COMMITTEE OF CREDITORS MUST ALLOW WITHDRAWAL—DECISION OF COMMITTEE NOT FINAL AND SUBJECT TO APPEAL BEFORE TRIBUNAL AND APPELLATE TRIBUNAL—SECTION 12A VALID—CONSTITUTION OF INDIA, art. 14—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 12A, 60—NATIONAL COMPANY LAW TRIBUNAL RULES, 2016, r. 11.

INSOLVENCY RESOLUTION—INFORMATION UTILITIES—EVIDENTIARY VALUE—INFORMATION UTILITY TO GIVE NOTICE TO DEBTOR WHOSE INFORMATION IT CREATES AND STORES—OTHER SOURCES ALSO AVAILABLE WHICH EVIDENCE FINANCIAL DEBT—INFORMATION UTILITIES ONLY PRIMA FACIE EVIDENCE OF DEFAULT—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 3(9)(c), 214(e)—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) REGULATIONS, 2017, regln. 20, 21.

INSOLVENCY RESOLUTION—RESOLUTION PROFESSIONAL—LIQUIDATORS—POWERS—RESOLUTION PROFESSIONAL ONLY HAS ADMINISTRATIVE POWERS AND NOT ADJUDICATORY POWERS OR QUASI-JUDICIAL POWERS—UPON DETERMINATION, PROFESSIONAL REQUIRED TO APPLY TO ADJUDICATING AUTHORITY FOR APPROPRIATE RELIEF—LIQUIDATOR EXERCISES QUASI-JUDICIAL POWER WHILE "DETERMINING" VALUE OF CLAIMS ADMITTED WHICH CAN BE APPEALED AGAINST TO ADJUDICATING AUTHORITY—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 40, 42—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016, regln. 35A.

INSOLVENCY RESOLUTION—RESOLUTION APPLICANT—DISQUALIFICATION TO SUBMIT RESOLUTION PLAN—PERSON UNABLE TO SERVICE OWN DEBT WITHIN PERIOD PRESCRIBED UNFIT—NO VESTED RIGHT TAKEN AWAY BY APPLICATION—"CONNECTED PERSON"—MEANS PERSONS, NATURAL AS WELL AS ARTIFICIAL, CONNECTED WITH BUSINESS ACTIVITY OF RESOLUTION APPLICANT—EXPRESSIONS "RELATED PARTY" AND "RELATIVE" TO BE READ NOSCITUR A SOCIIS WITH CATEGORIES OF PERSONS MENTIONED IN *Explanation I* TO SECTION 29A(j) AND WOULD INCLUDE ONLY PERSONS WHO ARE CONNECTED WITH BUSINESS ACTIVITY OF RESOLUTION APPLICANT—EXCLUSION OF MICRO, SMALL, AND MEDIUM INDUSTRIES FROM APPLICATION OF SECTION 29A(c) AND (h) FOR VALID REASON AND BASED

ON INSOLVENCY LAW COMMITTEE REPORT—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 5(24), 29A.

INSOLVENCY RESOLUTION—LIQUIDATION—DISTRIBUTION OF ASSETS—PRIORITY OF DEBT—INTELLIGIBLE DIFFERENTIA BETWEEN FINANCIAL DEBTS AND UNSECURED OPERATIONAL DEBTS DIRECTLY RELATED TO OBJECT SOUGHT TO BE ACHIEVED BY CODE—NO DISCRIMINATION—CONSTITUTION OF INDIA, art. 14—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 53.

The Insolvency and Bankruptcy Code, 2016, is 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 separated from those of its promoters or 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 of the Code 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.

ARCELORMITTAL INDIA P. LTD. *v.* SATISH KUMAR GUPTA [2018] 211 Comp Cas 369 (SC) *and* INNOVENTIVE INDUSTRIES LTD. *v.* ICICI BANK [2017] 205 Comp Cas 57 (SC) *relied on*.

The committee for selection of members of the Tribunal and Appellate Tribunal is to be constituted in accordance with section 412 of the Companies Act, 2013, as amended by the Companies (Amendment) Act, 2017 and brought into force by a notification dated February 9, 2018. A committee had been constituted in compliance with the directions of the Supreme Court in Madras Bar Association *v.* Union of India [2014] 187 Comp Cas 426 (SC) ; [2014] 368 ITR 42 (SC) *and* Union of India *v.* R. Gandhi [2010] 156 Comp Cas 392 (SC) *in the year 2015. This Selection Committee was reconstituted on February 22, 2017 to make further appointments. In compliance with the directions of the Supreme Court, advertisements dated August 10, 2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of the National Company Law Tribunal and National Company Law Appellate Tribunal were appointed. The contentions with respect to invalidity of appointment of the Members of the Tribunals were answered.*

The Government's submission that the observation in the judgment of the Supreme Court in Madras Bar Association *v.* Union of India [2014] 187 Comp Cas 426 (SC) ; [2014] 368 ITR 42 (SC) *would be followed and Circuit Benches would be established as soon as it was practicable was to be recorded. The Union of India is to set up Circuit Benches of the National Company Law Appellate Tribunal within a period of 6 months.*

The Supreme Court in Union of India *v.* R. Gandhi [2010] 156 Comp Cas 392 (SC), *inter alia, had observed that the administrative support for all Tribunals should be from the Ministry of Law and Justice and neither the Tribunals nor their members should seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned. Even though eight years had passed since the date of the judgment, the administrative support for these Tribunals continued to be from the Ministry of Corporate Affairs. This was to be rectified at the earliest and the Government was to follow the judgment both in letter and spirit.*

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 mortgage documents and the like. The distinction between secured and unsecured creditors is a distinction which has been obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. The nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend term loans or for working capital that enable the corporate debtor to either set up or operate its business. On the other hand, contracts with the 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, the operational creditors can be many as opposed to the financial creditors, who lend finance for the setting 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 the 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. 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 courts of law. On the other hand, financial debts made to the banks and financial institutions are well-documented and defaults made are easily verifiable. 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 financial stress, which are things operational creditors do not and cannot do. 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 with direct relation to the objects sought to be achieved by the Code.

Operational creditors are not discriminated against and article 14 of the Constitution is not infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

The evidence provided by private information utilities is only prima facie evidence of default. It is clear from sections 3(9)(c) and 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 it clear that other sources are also available which evidence a financial debt.

A conjoint reading of rules 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 Authority and be heard by the Authority before an order is made admitting the application. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties under sections 65 and 75 of the Code.

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 of the Code. 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.

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 initiation of insolvency resolution process by financial creditors under section 7 and by operational creditors under sections 8 and 9 of the Code becomes clear.

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 plan is binding on all stakeholders. Since financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess the 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 payable for such goods and services, and are typically unable to assess viability and feasibility of business. The Tribunal has, while looking into the 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 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 of the Code unless a minimum payment is made to operational creditors, being not less than liquidation value. Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, further 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.

Section 12A of the Code was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with retrospective effect from June 6, 2018 providing for withdrawal of the application admitted under section 7, 9 or 10 on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors. Before this section was inserted, the court, under article 142 of the Constitution of India, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the National Company Law Tribunal or the National Company Law Appellate Tribunal.

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 what is to happen before a committee of creditors is constituted (in terms of 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). At any stage where the committee of creditors is not yet constituted, a party can approach the National Company Law Tribunal directly, which may, in exercise of its inherent powers under rule 11 of the National Company Law Tribunal 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 each case. 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 Insolvency Law Committee 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 or withdrawal claim, the National Company Law Tribunal, and thereafter, the National Company Law Appellate Tribunal can always set aside such decision under section 60 of the Code. For all these reasons, section 12A of the Code also passes constitutional muster.

Regulations 20 and 21 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, also makes it clear that apart from the stringent requirements as to registration of an information 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 is only prima facie evidence of default, which is rebuttable by the corporate debtor, the challenge based on this ground must also fail.

It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim. 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 of the 2016 Regulations, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination. 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 these sections that when the liquidator "determines" the value of claims admitted under section 40 of the Code, 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, who 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.

It is clear that no vested right is taken away by application of section 29A of the Code.

ARCELORMITTAL INDIA P. LTD. *v.* SATISH KUMAR GUPTA [2018] 211 Comp Cas 369 (SC) *followed*.

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, the categories of persons who are ineligible under section 29A of the Code, 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.

It is clear that section 29A of the Code goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of the Reserve Bank of India, would be a person who though able to pay, does not pay. A non-performing asset, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by the Reserve Bank. It is clear from the Reserve Bank of India's Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated July 1, 2015 that accounts are declared non-performing only if defaults made by a corporate debtor are not resolved (for example, interest on 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 non-performing asset, what is clear is that a sub-standard asset would then be a non-performing asset which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment or interest on the principal remains overdue for more than three months, after which, its account is declared a non-performing asset. During the period of one year thereafter, since it is now classified as a sub-standard 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-months period, banks and financial institutions do not declare the accounts of corporate debtors to be non-performing assets. As a

matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared a non-performing asset. 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 seek. A person who cannot service a debt for the aforesaid 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 referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Nor can the period of one year be found fault with, as this is a policy matter decided by the Reserve Bank and which emerges from its Master Circular, as during this period, a non-performing asset is classified as a sub-standard asset. The ineligibility attaches only after this one year period is over as the non-performing asset now gets classified as a doubtful asset.

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) of the Code show that such persons must be "connected" with the resolution applicant within the meaning of section 29A(j) of the Code. This being the case, such 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. The contention that the expression "connected person" in* Explanation I, *clause (ii) to section 29A(j) of the Code cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future as this would be arbitrary as the* Explanation *would then apply to an indeterminate person is not tenable 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.

The Insolvency Law Committee 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 and exempted these industries from section 29A(c) and (h) of the Code. The rationale for excluding such industries from the eligibility criteria laid down in section 29A(c) and (h) of the Code 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 providing that 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, has been inserted in the Code with retrospective effect from June 6, 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 the 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.

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 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 of the Constitution of India does not get infracted. For these reasons, the challenge to section 53 of the Code must also fail.

The tests for violation of article 14 of the Constitution of India, when legislation is challenged as being violative of the principle of equality, have been settled by the 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. Another development of the law is that legislation can be struck down as being manifestly arbitrary.

It is settled law that 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.

Cases referred to :

Adams *v.* Tanner [1917] 244 U. S. 590 (para 7)

Adkins *v.* Children's Hospital [1923] 261 U. S. 525 (para 7)

Aggarwal (P. D.) *v.* State of U. P. [1987] 3 SCC 622 (para 65)

Ajay Hasia *v.* Khalid Mujib Sehravardi [1981] 1 SCC 722 ; [1981] SCC (L & S) 258 (para 21)

ArcelorMittal India P. Ltd. *v.* Satish Kumar Gupta [2018] 211 Comp Cas 369 (SC) (paras 4, 6, 11, 63, 64, 65)

Attorney-General for India *v.* Amratlal Prajivandas [1995] 83 Comp Cas 804 (SC) (para 74)

Balco Employees Union (Regd.) *v.* Union of India [2002] 108 Comp Cas 193 (SC) (paras 8, 9)

Bhavesh D. Parish *v.* Union of India [2000] 101 Comp Cas 459 (SC) (para 8)

Brilliant Alloys P. Ltd. *v.* Rajagopal (S.) [2019] 213 Comp Cas 196 (SC) (para 51)

Cellular Operators Association of India *v.* Telecom Regulatory Authority of India [2016] 7 SCC 703 (para 21)

Chandra Kumar (L.) *v.* Union of India [1997] 228 ITR 725 (SC) ; [1997] 105 STC 618 (SC) (para 15)

Chitra Sharma *v.* Union of India [2018] 210 Comp Cas 609 (SC) (para 63)

Coppage *v.* Kansas [1915] 236 U. S. 1 (para 7)

Darshan Singh *v.* Ram Pal Singh [1992] Supp (1) SCC 191 (para 65)

Day-Brite Lighting, Inc. *v.* Missouri [1952] 342 U. S. 421 (para 7)

Delhi International Airport Ltd. *v.* International Lease Finance Corporation [2015] 8 SCC 446 (para 18)

Director General of Foreign Trade *v.* Kanak Exports [2016] 2 SCC 226 (para 8)

Ferguson *v.* Skrupa [1963] 372 U. S. 726 (para 7)

Garg (R. K.) *v.* Union of India [1982] 133 ITR 239 (SC) (para 8)

Govind Das *v.* ITO [1976] 1 SCC 906 (para 65)

Holden *v.* Hardy (169 U. S. 366) (para 7)

Indian Express Newspapers (Bombay) P. Ltd. *v.* Union of India [1985] 1 SCC 641 ; [1985] SCC (Tax) 121 (para 21)

Innoventive Industries Ltd. *v.* ICICI Bank [2017] 205 Comp Cas 57 (SC) (paras 4, 6, 9, 29)

Jacobson *v.* Massachusetts (197 U. S. 11) (para 7)

Jay Burns Baking Co. *v.* Bryan [1924] 264 U. S. 504 (para 7)

Khoday Distilleries Ltd. *v.* State of Karnataka [1996] 10 SCC 304 (para 21)

Lincoln Federal Labor Union, etc. *v.* Northwestern Iron and Metal Co. [1949] 335 U. S. 525 (para 7)

Lochner *v.* New York [1905] 198 U. S. 45 (para 7)

Lok Prahari *v.* State of Uttar Pradesh [2018] 6 SCC 1 (para 21)

Madras Bar Association *v.* Union of India [2014] 187 Comp Cas 426 (SC) ; [2014] 368 ITR 42 (SC) (paras 2, 15)

Madras Bar Association *v.* Union of India [2015] 190 Comp Cas 484 (SC) (paras 2, 4, 13)

Madras Petrochem Ltd. *v.* Board for Industrial and Financial Reconstruction [2016] 194 Comp Cas 594 (SC) (para 6)

Malpe Vishwanath Acharya *v.* State of Maharashtra [1998] 2 SCC 1 (para 21)

Mardia Chemicals Ltd. *v.* Union of India [2004] 120 Comp Cas 373 (SC) (para 21)

Metropolis Theater Co. *v.* City of Chicago (57 L Ed 730) ; [1913] 228 U. S. 61 (para 8)

Morey *v.* Doud [1957] 351 U. S. 457 ; [1957] 1 L Ed 2d 1485 (para 8)

Munn *v.* Illinois [1876] 94 U. S. 13 (para 8)

Natural Resources Allocation, *In re*, Special Reference No. 1 of 2012 [2012] 10 SCC 1 (para 21)

Navtej Singh Johar *v.* Union of India [2018] 10 SCC 1 (para 21)

New State Ice Co. *v.* Liebmann [1932] 285 U. S. 262 (para 7)

Nikesh Tarachand Shah *v.* Union of India [2018] 11 SCC 1 (para 21)

Northern Securities Co. *v.* United States (193 U. S. 197) (para 7)

Olsen *v.* Nebraska ex rel. Western Reference and Bond Assn. [1941] 313 U. S. 236 (para 7)

Otis *v.* Parker (187 U. S. 606) (para 7)

Paripoornan (K. S.) *v.* State of Kerala [1994] 5 SCC 593 (para 65)

Pyare Lal Sharma *v.* Jammu and Kashmir Industries Ltd. [1990] 67 Comp Cas 195 (SC) (para 65)

Ritesh Agarwal *v.* Securities and Exchange Board of India [2008] 114 Comp Cas 12 (SC) (para 65)

Royappa (E. P.) *v.* State of Tamil Nadu [1974] 4 SCC 3 ; [1974] SCC (L & S) 165 (para 21)

Salomon *v.* A. Salomon and Co. Ltd. [1897] AC 22 (HL) (para 63)

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State of A. P. *v.* McDowell and Co. [1996] 3 SCC 709 (para 21)

State Bank's Staff Union (Madras Circle) *v.* Union of India [2005] 7 SCC 584 (para 64)

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Union of India *v.* Gandhi (R.) [2010] 156 Comp Cas 392 (SC) (paras 4, 13, 17, 19)

West Coast Hotel Co. *v.* Parrish [1937] 300 U. S. 379 (para 7)

Williamson *v.* Lee Optical Co. [1955] 348 U. S. 483 (para 7)

Writ Petition (Civil) Nos. 99, 115, 100, 459, 598, 775, 822, 849 and 1221 of 2018, 37 of 2019 and S. L. P. (C) No. 28623 of 2018.

Counsel for the appearing parties :

K. K. Venugopal, Attorney General for India.

Tushar Mehta, Solicitor General.

Mrs. Madhvi Diwan and *Vikramjit Banerjee*, ASGs.

Shyam Diwan, Rakesh Dwivedi, Sajan Poovayya, C. U. Singh, Mukul Rohatgi, K. V. Vishwanathan and *Chetan Sharma*, Senior Advocates.

Other Advocates : *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, R. R. Gupta, Ms. Ankita Prakash, Ms. Sindhu T. P., M/s. Indian Law, Raghav Bansal* (for *M/s. Parekh and 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*), *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, Liz Mathew, Jahan A. Chokshi, Ms. Sansriti, Eklavya Dwivedi, Navneet R., Raghav Mehrotra, Vipin Kumar Jai, Vipul Jai, Shailly Dinkar, Hitesh Kumar Sharma, 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 Sajlan, Deepak Joshi, Aakash Lamba, T. Mahipal, Sahil Monga, Utkarsh Maria, Nakul Gandhi, M/s. Karanjawala and 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 and *Arun Aggarwal*.

JUDGMENT

The judgment of the court was delivered by

ROHINTON FALI NARIMAN J.—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. **1**

Shri Mukul Rohatgi, the 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 and certain members of the National Company Law Appellate Tribunal, 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[1], 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 **2**

1. See [2015] 190 Comp Cas 484 (SC).