M/S. Innoventive Industries Ltd vs Icici Bank on 31 August, 2017

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Bench: Sanjay Kishan Kaul, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 8337-8338 OF 2017

M/S. INNOVENTIVE INDUSTRIES LTD. …APPELLANT

VERSUS

ICICI BANK & ANR. ...RESPONDENTS

JUDGMENT

R.F. Nariman, J.

1. The present case raises interesting questions which arise under the Insolvency and Bankruptcy Code of 2016 (hereinafter referred to as the Code), which received the Presidential assent on 28th May, 2016, but which provisions were brought into force only in November-December, 2016.

2. The appellant before us is a multi-product company catering to applications in diverse sectors. From August, 2012, owing to labour problems, the appellant began to suffer losses. Since the appellant was not able to service the financial assistance given to it by 19 banking entities, which had extended credit to the appellant, the appellant itself proposed corporate debt restructuring. The 19 entities formed a consortium, led by the Central Bank of India, and by a joint meeting dated 22nd February, 2014, it was decided that a CDR resolution plan would be approved. The details of this plan are not immediately relevant to the issues to be decided in the present case. The lenders, upon perusing the terms of the CDR proposal given by the appellant and a techno-economic viability study, (which was done at the instance of the lenders), a CDR empowered group admitted the restructuring proposal vide minutes of a meeting dated 23rd May, 2014. The Joint Lenders Forum at a meeting of 24 th June, 2014 finally approved the restructuring plan.

3. In terms of the restructuring plan, a master restructuring agreement was entered into on 9 th September, 2014 (hereinafter referred to as the MRA), by which funds were to be infused by the creditors, and certain obligations were to be met by the debtors. The aforesaid restructuring plan was implementable over a period of 2 years.

4. Suffice it to say that both sides have copiously referred to various letters which passed between the parties and various minutes of meetings. Ultimately, an application was made on 7 th December, 2016 by ICICI Bank Ltd., in which it was stated that the appellant being a defaulter within the meaning of the Code, the insolvency resolution process ought to be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant dated 17 th December, 2016, in which the appellant claimed that there was no debt legally due inasmuch as vide two notifications dated 22nd July, 2015 and 18th July, 2016, both under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (hereinafter referred to as the Maharashtra Act), all liabilities of the appellant, except certain liabilities with which we are not concerned, and remedies for enforcement thereof were temporarily suspended for a period of one year in the first instance under the first notification of 22nd July, 2015 and another period of one year under the second notification of 18 th July, 2016. It may be added that this was the only point raised on behalf of the appellant in order to stave off the admission of the ICICI Bank application made before the NCLT. We are informed that hearings took place in the matter on 22nd and 23rd December, 2016, after which the NCLT adjourned the case to 16th January, 2017.

5. On this date, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under the MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under the MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it.

6. By an order dated 17th January, 2017, the NCLT held that the Code would prevail against the Maharashtra Act in view of the non-obstante clause in Section 238 of the Code. It, therefore, held that the Parliamentary statute would prevail over the State statute and this being so, it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared.

7. By a separate order dated 23rd January, 2017 passed by the NCLT, in which a clarification application was dismissed, it was held that the second application of 16 th January, 2017 was raised belatedly and would not be maintainable for two reasons – (1) because no audience has been given to the corporate debtor in the Tribunal by the Code; and (2) the corporate debtor has not taken the plea contained in the second application in the earlier application. This was because a limited timeframe of only 14 days was available under the Code from the date of filing of the creditors' petition, to decide the application.

8. From the aforesaid order, an appeal was carried to the NCLAT, which met with the same fate. The NCLAT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other. Having recorded this, however, the NCLAT went on to

hold that the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under Section 7 of the Code. It was further held as under:

> "80. Insofar as Master Restructuring Agreement dated 8th September 2014 is concerned; the appellant cannot take advantage of the same. Even if it is presumed that fresh agreement came into existence, it does not absolve the Appellant from paying the previous debts which are due to the financial creditor.
>
> 81. The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage of the Master Restructuring Agreement dated 8th September, 2014."

9. Dr. A.M. Singhvi, learned Senior Advocate, who appeared on behalf of the appellants, has argued before us that the Appellate Tribunal, in fact, decided in his favour by holding the two Acts to be not repugnant to each other, but then went on to say that the Maharashtra Act will not apply. According to him, the Maharashtra Act would apply for the reason that the moratorium imposed by the two notifications under the Maharashtra Act continued in force at the time when the insolvency application was made by ICICI and that, therefore, the Code would not apply. According to him, the debt was kept in temporary abeyance, after which the Code would apply. He argued that he had a vested right under the Maharashtra Act and that the debt was only suspended temporarily. According to him, no repugnancy exists between the two statutes under Article 254 of the Constitution and each operates in its own field. The Maharashtra Act provides for relief against unemployment, whereas the Code is a liquidation process. Further, the Code is made under Entry 9, List III of the Seventh Schedule to the Constitution, whereas the Maharashtra Act, which is a measure for unemployment relief, is made under Entry 23, List III of the Seventh Schedule. This being so, as correctly held by the Appellate Tribunal, the two Acts operated in different spheres and, therefore, do not clash. Dr. Singhvi mounted a severe attack on the Appellate Tribunal by stating that the Tribunal ought to have gone into the MRA, in which case it would have discovered that there was no debt due by the appellant, inasmuch as the funds that were to be disbursed by the creditors to the appellant were never disbursed, as a result of which the corporate restructuring package never took off from the ground. He further argued that amounts due under the MRA had not yet fructified and for that reason also the application was premature.

10. Shri H.N. Salve, learned Senior Advocate, appearing on behalf of the respondents, took us through the Code in some detail and argued before us that the object of this Code is that the interests of all stakeholders, namely shareholders, creditors and workmen, are to be balanced and the old notion of a sick management which cannot pay its financial debts continuing nevertheless in the management seat has been debunked by the Code. The entire object of the Code would be stultified if we were to heed Dr. Singhvi's submission, as according to Shri Salve, when an application is made under Section 7 of the Code, the only limited scope of argument before the

NCLT by a corporate debtor is that the debt is not due for any reason. According to Shri Salve, the first application in reply to the corporate debtor was, in fact, the only arguable point in the case which has been concurrently turned down. According to Shri Salve, after an interim resolution professional has been appointed and a moratorium declared, the directors of the company are no longer in management and could not, therefore, maintain the appeal before us. Also, according to Shri Salve, the NCLT and NCLAT were both right in refusing to go into the plea that, since the financial creditors had not pumped in funds, the corporate debtor could not pay back its debts in accordance with the MRA, as this plea was an after-thought which could easily have been taken in the first reply. Further, in order to satisfy our conscience, he has taken us through the MRA to some detail to show us that the appellant would emerge as a defaulter under the MRA in any case. He has also argued that it is obvious that the two Acts are repugnant to each other, inasmuch as they cannot stand together. Under the Maharashtra Act, a limited moratorium is imposed after which the State Government may take over management of the company. Under the Code, however, a full moratorium is to automatically attach the moment an application is admitted by the NCLT, and management of the company is then taken over by an interim resolution professional. Obviously, the moratorium under the Maharashtra Act and the management taken over by the State Government cannot stand together with the moratorium imposed under the Central Act and takeover of the management by the interim resolution professional. According to him, therefore, no case whatsoever is made out and the appeal should be dismissed, both on grounds of maintainability and on merits.

11. Having heard learned counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause title stating that the erstwhile directors do not represent the company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the company has been taken away and as they are otherwise affected as shareholders of the company. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

12. The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports, the most important of which is the report of the Bankruptcy Law Reforms Committee of November, 2015. 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 Debt 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), Debt 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 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 Business, and facilitate more investments leading to higher economic growth and development.

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

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, 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 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 Supplied)

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

14. Other nations are have marched ahead much before us. For example, the USA has adopted the Bankruptcy Reform Act of 1978, which has since been codified in Title XI of the United States Code. The US Code continues to favour the debtor. In a reorganization case under Chapter 11, the debtor and its existing management ordinarily continue to operate the business as a "debtor in possession" – See USC 11, Sec. 1107-1108. The Court can appoint a trustee to take over management of the debtor's affairs only for "cause" which includes fraud, dishonesty or gross mismanagement of the affairs of the debtor – See USC 11, Sec. 1104. Having regard to the aforesaid grounds, such appointments are rare. Creditors are not permitted a direct role in operating the on-going business operations of the debtor. However, the United States Trustee is to appoint a committee of creditors to monitor the debtor's ongoing operations. A moratorium is provided, which gives the debtor a breathing spell in which he is to seek to reorganize his business. While a Chapter 11 case is pending, the debtor only needs to pay post petition wages, expenses etc. In the meanwhile, the debtor can work on permanent financial resolution of its pre-petition debts. It is only when this does not work that the bankruptcy process is then put into effect.

15. The UK Law, on the other hand, is governed by the Insolvency Act of 1986 which has served as a model for the present Code. While piloting the Code in Parliament, Shri Arun Jaitley, learned Finance Minister, stated on the floor of the House:

> "SHRI ARUN JAITLEY: One of the differences between your Chapter 11 and this is that in Chapter 11, the debtor continues to be in possession. Here the creditors will be in possession. Now, the SICA is being phased out, and I will tell you one of the reasons why SICA didn't function. Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments were passed. Now since they were challenged before the Supreme Court, it didn't come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick

companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created." (Emphasis Supplied)

16. At this stage, it is important to set out the important paragraphs contained in the report of the Bankruptcy Law Reforms Committee of November, 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:

"As Chairman of the Committee on bankruptcy law reforms, I have had the privilege of overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy. This is a matter of critical importance: 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. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently." xxx xxx xxx xxx "The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.

This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place: to a limited extent, banks are able to repossess fixed assets which were pledged with them.

While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy: It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shriveled.

Both these phenomena are unsatisfactory. In many settings, debt is an efficient tool for corporate finance; there needs to be much more debt in the financing of Indian firms. E.g. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India s rapid growth are those which are more labour intensive. These industries have been starved of credit." xxx xxx xxx xxx "The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it." xxx xxx xxx xxx "Speed is of essence Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organisation 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 suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation 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 realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay." xxx xxx xxx xxx "The role that insolvency and bankruptcy plays in debt financing Creditors put money into

debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of • Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or • Business failure – which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency." xxx xxx xxx xxx "Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this." xxx xxx xxx xxx "Objectives The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

1. Low time to resolution.

2. Low loss in recovery.

3. Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

Principles driving the design The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

1. The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

2. The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

4. The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.

III. The Code will ensure a time-bound process to better preserve economic value.

8. The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start. IV. The Code will ensure a collective process.

9. The law must ensure 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.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution." xxx xxx xxx xxx "An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the IU) as described in Section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered Insolvency Professional to manage the IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered Insolvency Professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the Adjudicator to approach the Regulator for a registered Insolvency Professional for the case.

In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility (if the default has been filed with an information utility, tit such be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed." xxx xxx xxx xxx "Steps at the start of the IRP In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a "calm period" with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability. The first steps that the Adjudicator takes is put in place an order for a moratorium on debt recovery actions and any existing or new law suits being filed in other courts, a public announcement to collect claims of

liabilities, the appointment of an interim RP and the creation of a creditor committee." (Emphasis Supplied)

17. The stage is now set for an in-depth examination of Part II of the Code, with which we are immediately concerned in this case.

18. There are two sets of definition sections. They are rather involved, the dovetailing of one definition going into another. Section 3 defines various terms as follows:

> "Sec. 3(6) "claim" means—
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> (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;

Sec. 3(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

Sec. 3(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;

Sec. 3(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 repaid by the debtor or the corporate debtor, as the case may be;

Sec. 3(13) "financial information", in relation to a person, means one or more of the following categories of information, namely:—

(a) records of the debt of the person;

(b) records of liabilities when the person is solvent;

(c) records of assets of person over which security interest has been created;

(d) records, if any, of instances of default by the person against any debt;

(e) records of the balance sheet and cash-flow statements of the person; and

(f) such other information as may be specified. Sec. 3(19) "insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207;" (Emphasis Supplied)

19. Certain definitions contained in Section 5 are also important from our point of view. Section 5(7), (8), (12), (14), (20) and (27) read as under:

> "Sec. 5(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;
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> Sec. 5(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—
>
> (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;
>
> (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;
>
> (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
>
> (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
>
> (g) any derivative transaction entered into in connection with 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 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;

Sec. 5(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;

Sec. 5(14) “insolvency resolution process period” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;

Sec. 5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Sec. 5(27) “resolution professional”, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional;”

20. Under Section 4 of the Code, Part II applies to matters relating to the insolvency and liquidation of corporate debtors, where the minimum amount of default is rupees one lakh. Sections 6, 7 and 8 form part of one scheme and are very important for the decision in the present case. They read as follows:

> “Sec. 6. Persons who may initiate corporate insolvency resolution process. - Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.
>
> Sec. 7. Initiation of corporate insolvency resolution process by financial creditor. - (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate 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.
>
> (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;

(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.

Sec. 8. Insolvency resolution by operational creditor.- (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred."

21. Section 12 provides for a time limit for completion of the insolvency resolution process and reads as follows:

> "Sec. 12. Time-limit for completion of insolvency resolution process.- (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
>
> (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.
>
> (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:
>
> Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once."

22. Sections 13 and 14 deal with the declaration of moratorium and public announcements and read as under:

> "Sec. 13. Declaration of moratorium and public announcement.- (1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order—
>
> (a) declare a moratorium for the purposes referred to in section 14;
>
> (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and
>
> (c) appoint an interim resolution professional in the manner as laid down in section 16.

> (2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

Sec. 14 Moratorium.- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

23. Under Section 17, from the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor vests with interim resolution professional. Section 17(1)(a) reads as under:

> "Sec. 17. Management of affairs of corporate debtor by interim resolution professional. - (1) From the date of appointment of the interim resolution professional,—

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;"

24. Under Section 20 of the Act, the interim resolution professional shall manage the operations of the corporate debtor as a going concern. Section 21 is extremely important and provides for appointment of a committee of creditors. Section 21 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.

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

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

(3) 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.

(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 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 or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(a) authorise 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.

(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities under sub-section (6) .

(8) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five 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 comprise of such persons to exercise such functions in such manner as may be specified by the Board.

(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."

25. Under Section 24, members of the committee of creditors may conduct meetings in order to protect their interests. Under Section 28, a resolution professional appointed under Section 25 cannot take certain actions without the prior approval of the committee of creditors. Section 28 reads as under:

"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;

(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 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;

(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 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 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 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 committee of creditors unless approved by a vote of seventy five 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 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."

26. The most important sections dealing with the restructuring of the corporate debtor are Sections 30 and 31, which read as under:

"Sec 30. Submission of resolution plan.- (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent. of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered: Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Sec 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.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

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 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.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution

professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

34. On the facts of the present case, we find that in answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code. However, the Appellate Tribunal by the impugned judgment held thus:

> "78. Following the law laid down by Hon'ble Supreme Court in "Yogendra Krishnan Jaiswal" and "Madras Petrochem Limited" we hold that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.
>
> 79. In view of the finding as recorded above, we hold that the Appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under Section 7 of the Insolvency & Bankruptcy Code, 2016." This statement by the Appellate Tribunal has to be tested with reference to the constitutional position on repugnancy.

35. Article 254 of the Constitution of India is substantially modeled on Section 107 of the Government of India Act, 1935. Article 254 reads as under:

> "Article 254 - Inconsistency between laws made by Parliament and laws made by the Legislatures of States (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the Legislature of a State [***] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State." Section 107 reads as follows:
>
> "Inconsistency between Federal Laws and Provincial or State Laws (1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.
>
> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General or for the signification of His Majesty's pleasure has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter.

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved has received the assent of the Governor-General or of His Majesty,

shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy be void."

36. The British North America Act, which is the oldest among the Constitutions framed by the British Parliament for its colonies, had under Sections 91 and 92 exclusive law making power for the different subjects set out therein which is distributed between Parliament and the Provincial Legislatures. The only concurrent subject was stated in Section 95 of the said Act, which reads as follows:

> "In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada." It is for this reason that the Canadian cases on repugnancy were said to be somewhat restricted and have rarely been applied in construing Article 254.

37. In so far as the US Constitution is concerned, there again legislative powers are reserved completely to the States and Congress is given the power to legislate only on enumerated subjects that are set out in Article 1 Section 8 of the US Constitution. In this context, no questions of repugnancy can arise as the States can legislate even with respect to matters laid down in Article 1 Section 8 so long as they do not exceed the territorial boundary of the State. It is only when Congress actually enacts legislation under Article 1 Section 8 that State legislation, if any, on the same subject matter can be said to be ousted. However, when Congress passed the Eighteenth Amendment to the US Constitution, by which it imposed prohibition, Section 2 thereof stated that Congress and the several States shall have concurrent powers to enforce this Article by appropriate legislation. The question that arose in State of Rhode Island v. Palmer, 253 U.S. 350, was as to the meaning of the expression "concurrent power". It was argued that, unless both Congress and the State legislatures concurrently enact laws, laws under Section 2 of the Eighteenth Amendment could not be made. This argument was turned down by the majority judgment of Van Devanter, J. which, strangely enough, merely announced conclusions on the questions involved without any reasoning 1. Van Devanter, J.'s majority judgment held (at 387):

> "8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

> 9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." Two dissents, on the other hand, held that unless the Congress and the States concurrently legislate, Section 2 does not give them the power to enforce prohibition. The US cases also do not, therefore, assist in this context.

38. On the other hand, the Commonwealth of Australia Constitution Act of 1900, also enacted by the British Parliament, has a scheme by which Parliament, in Section 51, has power to make laws with respect to 39 stated matters. Under Section 52, Parliament, subject to the Constitution, has exclusive power to make laws only qua three subjects set out therein. Section 109 of the Australian Constitution reads as under:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

39. Since the Australian cases deal with repugnancy in great detail, they have been referred to by the early judgments of this Court.

40. In Zaverbhai Amaidas v. State Of Bombay, (1955) 1 SCR 799, a question arose as to the efficacy of a Bombay Act of 1947 vis-à-vis the Essential Supplies (Temporary Powers) Act of 1946, as amended in 1950. This Court, after referring to Section 107 of the Government of India Act and Article 254 of the Constitution, stated that Article 254, is in substance, a reproduction of Section 107 with one difference– that the power of Parliament under Article 254(2) goes even to the extent of repealing a State law. This Court then examined the subject matters of the two Acts and found that the Parliamentary enactment as amended in 1950 prevailed over the Bombay Act in as much as the higher punishment given for the same offence under the Bombay Act was repugnant to the lesser punishment given by Section 7 of the Parliamentary enactment.

41. In Tika Ramji v. State of U.P., (1956) SCR 393, this Court, after setting out Article 254 of the Constitution, referred in detail to a treatise on the Australian Constitution and to various Australian judgments as follows:

> "Nicholas in his Australian Constitution, 2nd ed., p. 303, refers to three tests of inconsistency or repugnancy:— (1) There may be inconsistency in the actual terms of the competing statutes (R. v. Brisbane Licensing Court, [1920] 28 CLR 23).
>
> (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code (Clyde Engineering Co. Ltd. v. Cowburn, [1926] 37 CLR 466).

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter (Victoria v. Commonwealth, [1937] 58 CLR 618; Wenn v. Attorney-General (Vict.), [1948] 77 CLR 84) Isaacs, J. in Clyde Engineering Company, Limited v. Cowburn [(1926) 37 CLR 466, 489] laid down one test of inconsistency as conclusive: "If, however, a competent legislature expressly or implicitly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field".

Dixon, J. elaborated this theme in Ex parte McLean [(1930) 43 CLR 472, 483]:

"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse. But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter".

To the same effect are the observations of Evatt, J. in Stock Motor Plough Ltd. v. Forsyth [(1932) 48 CLR 128, 147]:

"It is now established, therefore, that State and Federal laws may be inconsistent, although obedience to both laws is possible. There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main, been reached, by ascribing "inconsistency" to a State law, not because the Federal law directly invalidates or conflicts with it, but because the Federal law is said to "cover the field". This is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas. It is no more than a cliche for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority".

The Calcutta High Court in G.P. Stewart v. B.K. Roy Chaudhury [AIR 1939 Cal 628] had occasion to consider the meaning of repugnancy and B.N. Rau, J. who delivered the judgment of the Court observed at p. 632:

"It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test: there may well be cases of repugnancy where both laws say "don't" but in different ways. For example, one law may say, "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time". Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified". The learned Judge then discussed the various authorities which laid down the test of repugnancy in Australia, Canada, and England and concluded at p. 634:

"The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaacs, J. in the Australian 44 hour case (37 C.L.R. 466) if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law".

Sulaiman, J. in Shyamakant Lal v. Rambhajan Singh [(1939) FCR 188, 212] thus laid down the principle of construction in regard to repugnancy:

"When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. Their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the Province of Ontario where the prohibitions of the Canadian Act are not and may never be in force: (Attorney-General for Ontario v. Attorney-General for the Dominion) [(1896) AC 348, 369-70]." (at pages 424-427) (Emphasis Supplied) This Court expressly held that the pith and substance doctrine has no application to repugnancy principles for the reason that:

> "The pith and substance argument also cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction vested in the Centre under Entry 52 of List I, the only question which survived being whether, putting both the pieces of legislation enacted by the Centre and the State Legislature together, there was any repugnancy, a contention which will be dealt with hereafter." (at pages 420-421)

42. In Deep Chand v. State of U.P., 1959 Supp. (2) SCR 8, this Court referred to its earlier judgments in Zaverbhai (supra) and Tika Ramji (supra) and held:

> "Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:
>
> (1) Whether there is direct conflict between the two provisions;
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> (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field." (at page 43)

43. In Pandit Ukha Kolhe v. State of Maharashtra, (1964) 1 SCR 926, this Court found that Sections 129A and 129B did not repeal in its entirety an existing law contained in Section 510 of the Code of Criminal Procedure in its application to offences under Section 66 of the Bombay Prohibition Act. It was held that Sections 129A and 129B must be regarded as enacted in exercise of power conferred by Entries 2 and 12 in the Concurrent List. It was then held:

> "It is, difficult to regard Section 129B of the Act as so repugnant to Section 510 of the Code as to make the latter provision wholly inapplicable to trials for offences under the Bombay Prohibition Act. Section 510 is a general provision dealing with proof of reports of the Chemical Examiner in respect of matters or things duly submitted to him for examination or analysis and report. Section 129B deals with a special class of reports and certificates. In the investigation of an offence under the Bombay Prohibition Act, examination of a person suspected by a Police Officer or Prohibition Officer of having consumed an intoxicant, or of his blood may be carried out only in the manner prescribed by Section 129A: and the evidence to prove the facts disclosed thereby will be the certificate or the examination viva voce of the registered Medical Practitioner, or the Chemical Examiner, for examination in the course of an investigation of an offence under the Act of the person so suspected or of his blood has by the clearest implication of the law to be carried out in the manner laid down or not at all. Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act, otherwise than in the manner set out in Section 129A cannot therefore be used as evidence in the case. To that extent Section 510 of the code is superseded by Section 129B. But the report

> of the Chemical Examiner relating to the examination of blood of an accused person collected at a time when no investigation was pending, or at the instance not of a Police Officer or a Prohibition Officer remains admissible under Section 510 of the Code." (at pages 953-954)

44. In M. Karunanidhi v. Union of India, (1979) 3 SCR 254, this Court referred to a number of Australian judgments and judgments of this Court and held:

> "It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:-
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> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.
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> 2. That such an inconsistency is absolutely irreconcilable.
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> 3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

In Colin Howard's Australian Federal Constitutional Law, 2nd Edition the author while describing the nature of inconsistency between the two enactments observed as follows:-

> "An obvious inconsistency arises when the two enactments produce different legal results when applied to the same facts".
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> In the case of Hume v. Palmer (38 CLR 441) Knox, C.J. observed as follows:-
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> "The rules prescribed by the Commonwealth Law and the State law respectively are for present purposes substantially identical, but the penalties imposed for the contravention differ... In these circumstances, it is I think, clear that the reasons given by my brothers Issacs and Starke for the decisions of this Court in Union Steamship Co. of New Zealand v.
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> Commonwealth (36 CLR 130) and Clyde Engineering Co. v. Cowburn (37 CLR 466) establish that the provisions of the law of the State for the breach of which the appellant was convicted are inconsistent with the law of the Commonwealth within the meaning of sec. 109 of the Constitution and are therefore invalid".
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> Issacs, J. observed as follows:-

"There can be no question that the Commonwealth Navigation Act, by its own direct provisions and the Regulations made under its authority, applies upon construction to the circumstances of the case. It is inconsistent with the State Act in various ways, including (1) general supersession of the regulations of conduct, and so displacing the State regulations, whatever those may be; (2) the jurisdiction to convict, the State law empowering the Court to convict summarily, the Commonwealth Law making the contravention an indictable offence, and therefore bringing into operation sec. 80 of the Constitution, requiring a jury; (3) the penalty, the State providing a maximum of £50 the Commonwealth Act prescribing a maximum of £100, or imprisonment, or both; (4) the tribunal itself".

Starke, J. observed as follows:-

"It is not difficult to see that the Federal Code would be 'disturbed or deranged' if the State Code applied a different sanction in respect of the same act. Consequently the State regulations are, in my opinion, inconsistent with the law of the Commonwealth and rendered invalid by force of sec. 109 of the Constitution".

In a later case of the Australian High Court in Ex. Parte Mclean (43 CLR 472) Issacs and Starke, JJ. while dwelling on the question of repugnancy made the following observation:-

"In Cowburn's case (supra) is stated the reasoning for that conclusion and we will now refer to those statements without repeating them. In short, the very same conduct by the same persons is dealt with in conflicting terms by the Commonwealth and State Acts. A Court, seeing that, has no authority to inquire further, or to seek to ascertain the scope or bearing of the State Act. It must simply apply sec. 109 of the Constitution, which declares the invalidity pro tanto of the State Act".

Similarly Dixon, J. observed thus:-

"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse Hume v. Palmer (supra)".

In the case of Zaverbhai Amaidas v. The State of Bombay [(1955) 1 SCR 799] this Court laid down the various tests to determine the inconsistency between two enactments and observed as follows-

"The important thing to consider with reference to this provision is whether the legislation is 'in respect of the same matter'. If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct

matters though of a cognate and allied character, then Article 254 (2) will have no application. The principle embodied in section 107 (2) and Article 254 (2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State".

"It is true, as already pointed out, that on a question under Article 254 (1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law". In the case of Ch. Tika Ramji & Ors. etc. v. The State of Uttar Pradesh & Ors. [(1956) SCR 393] while dealing with the question of repugnancy between a Central and a State enactment, this Court relied on the observations of Nicholas in his Australian Constitution, 2nd Ed. p.303, where three tests of inconsistency or repugnancy have been laid down and which are as follows:-

"(1) There may be inconsistency in the actual terms of the competing statutes (R. v. Brisbane Licensing Court, [1920] 28 CLR 23).

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code (Clyde Engineering Co. Ltd. v. Cowburn, [1926] 37 CLR 466).

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter (Victoria v. Commonwealth, [1937] 58 CLR 618; Wenn v. Attorney-General (Vict.), [1948] 77 CLR 84) This Court also relied on the decisions in the case of Hume v. Palmer as also the case of Ex Parte Mclean (supra) referred to above. This Court also endorsed the observations of Sulaiman, J. in the case of Shyamakant Lal v. Rambhajan Singh [(1939) FCR 188] where Sulaiman, J. observed as follows:

"When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other, and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility".

> In the case of Om Prakash Gupta v. State of U.P. [(1957) SCR 423] where this Court was considering the question of the inconsistency between the two Central enactments, namely, the Indian Penal Code and the Prevention of Corruption Act held that there was no inconsistency and observed as follows:-
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> "It seems to us, therefore, that the two offences are distinct and separate. This is the view taken in Amarendra Nath Roy v. The State (AIR 1955 Cal 236) and we endorse the opinion of the learned Judges, expressed therein. Our conclusion, therefore, is that the offence created under section 5 (1) (c) of the Corruption Act is distinct and separate from the one under section 405 of the Indian Penal Code and, therefore, there can be no question of section 5 (1) (c) repealing section 405 of the Indian Penal Code. If that is so, then, Article 14 of the Constitution can be no bar".

Similarly in the case of Deep Chand v. The State of Uttar Pradesh & Ors. (1959 Supp (2) SCR 8) this Court indicated the various tests to ascertain the question of repugnancy between the two statutes and observed as follows:-

> "Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:-
>
> (1) Whether there is direct conflict between the two provisions;
>
> (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field".

In the case of Megh Raj and Ors. v. Allah Rakhia & Ors. (AIR 1942 FC 27) where Varadachariar, J. speaking for the Court pointed out that where as in Australia a provision similar to section 107 of the Government of India Act, 1935 existed in the shape of section 109 of the Australian Constitution, there was no corresponding provision in the American Constitution. Similarly, the Canadian cases have laid down a principle too narrow for application to Indian cases. According to the learned Judge, the safe rule to follow was that where the paramount legislation does not purport to be exhaustive or unqualified there is no inconsistency and in this connection observed as follows:-

> "The principle of that decision is that where the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provision made in it, it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law".
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> "The position will be even more obvious, if another test of repugnancy which has been suggested in some cases is applied, namely, whether there is such an inconsistency between the two provisions that one must be taken to repeal the other

by necessary implication." In the case of State of Orissa v. M. A. Tulloch & Co. [(1964) 4 SCR 461] Ayyangar J. speaking for the Court observed as follows:-

"Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation".

In the case of T. S. Balliah v. T. S. Rangachari [(1969) 3 SCR 65] it was pointed out by this Court that before coming to the conclusion that there is a repeal by implication, the Court must be satisfied that the two enactments are so inconsistent that it becomes impossible for them to stand together. In other words, this Court held that when there is a direct collision between the two enactments which is irreconcilable then only repugnancy results. In this connection, the Court made the following observations:-

"Before coming to the conclusion that there is a repeal by implication, the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together and the repeal of the express prior enactment must flow from necessary implication of the language of the later enactment. It is therefore necessary in this connection to scrutinise the terms and consider the true meaning and effect of the two enactments".

"The provisions enacted in s. 52 of the 1922 Act do not alter the nature or quality of the offence enacted in s. 177, Indian Penal Code but it merely provides a new course of procedure for what was already an offence. In a case of this description the new statute is regarded not as superseding, nor repealing by implication the previous law, but as cumulative".

"A plain reading of the section shows that there is no bar to the trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence".

On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:-

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field." (at pages 272-278) (Emphasis Supplied)

45. In Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 3 SCR 130, this Court after referring to the earlier judgments held:

"Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Art. 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to cl. (2). The proviso to Art. 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the

subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together. See: Zaverbhai Amaidas v. State of Bombay (1955 1 SCR 799), M. Karunanidhi v. Union of India (1979 3 SCR 254) and T. Barai v. Henry Ah Hoe & Anr. (1983 1 SCC 177).

We may briefly refer to the three Australian decisions relied upon. As stated above, the decision in Clyde Engineering Company's case (supra), lays down that inconsistency is also created when one statute takes away rights conferred by the other. In Ex Parte McLean's case, supra, Dixon J. laid down another test viz., two statutes could be said to be inconsistent if they, in respect of an identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties. In Stock Motor Ploughs Limited's case, supra, Evatt, J. held that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. As already stated the controversy in these appeals falls to be determined by the true nature and character of the impugned enactment, its pith and substance, as to whether it falls within the legislative competence of the State Legislature under Art. 246(3) and does not involve any question of repugnancy under Art. 254(1).

We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-s. (3) of s. 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-s. (3) of s. 5 of the Act which is a law made by the State Legislature is void under Art. 254(1). The question of repugnancy under Art. 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Art. 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante clause in Art. 246(1) read with the opening words "Subject to" in Art. 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Art. 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as "List I". But if Art. 254(1) is read as a whole, it will be seen that it is expressly made subject to cl. (2) which makes reference to repugnancy in the field of

> Concurrent List–in other words, if cl. (2) is to be the guide in the determination of scope of cl. (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Art. 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law.
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> There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (a) and
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> (b) or (b) alone. It is now settled that the words "with respect to" qualify both the clauses in Art. 254(1) viz. a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The under lying principle is that the question of repugnancy arises only when both the Legislatures are competent to legislate in the same field i.e. with respect to one of the matters enumerated in the Concurrent List. Hence, Art.

254(1) can not apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the Court in A. S. Krishna's case, supra, while dealing with s. 107(1) of the Government of India Act, 1935 to the effect:

> "For this section to apply, two conditions must be fulfilled: (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void." In Ch. Tika Ramji's case, supra, the Court observed that no question of repugnancy under Art. 254 of the Constitution could arise where parliamentary legislation and State legislation occupy different fields and deal with separate and distinct matters even though of a cognate and allied character and that where, as in that case, there was no inconsistency in the actual terms of the Acts enacted by Parliament and the State Legislature relatable to Entry 33 of List III, the test of repugnancy would be whether Parliament and State Legislature, in legislating on an entry in the Concurrent List, exercised their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be exhausted as to cover the entire field, and added:
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> "The pith and substance argument cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction of the Centre under Entry 52 of List I, the only question which survived being whether put in both the pieces of legislation enacted by the Centre and the State Legislature, there was any such repugnancy." This observation lends support to the view that in cases of overlapping between List II on the one hand and Lists I and

III on the other, there is no question of repugnancy under Art. 254(1). Subba Rao. J. speaking for the Court in Deep Chand's case, supra, interpreted Art. 254(1) in these terms:

"Art. 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualified the said exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and law made by the State shall, to the extent of such repugnancy, be void." (at pages 179-183) (Emphasis Supplied)

46. In Vijay Kumar Sharma & Ors. Etc v. State Of Karnataka, (1990) 2 SCC 562, this Court held that the Karnataka Contract Carriages (Acquisition) Act, 1976 enacted under Entry 42 of List III was not repugnant to the Motor Vehicles Act, 1988 enacted under Entry 35 of the same List. In so holding, Sawant, J. laid down:

"32.Thus the Karnataka Act and the MV Act, 1988 deal with two different subject matters. As stated earlier the Karnataka Act is enacted by the State Legislature for acquisition of contract carriages under Entry 42 of the Concurrent List read with Article 31 of the Constitution to give effect to the provisions of Articles 39(b) and (c) thereof. The MV Act 1988 on the other hand is enacted by the Parliament under Entry 35 of the Concurrent List to regulate the operation of the motor vehicles. The objects and the subject matters of the two enactments are materially different. Hence the provisions of Article 254 do not come into play in the present case and hence there is no question of repugnancy between the two legislations." (at page 581)

47. Ranganath Misra, J., in a concurring judgment, posed the question as to whether when the State law is under one head of legislation in the Concurrent List and the Parliamentary legislation is under another head in the same list, can there be repugnancy at all? The question was answered thus:

"13. In cl. (1) of Art. 254 it has been clearly indicated that the competing legislations must be in respect of one of the matters enumerated in the Concurrent List. The seven Judge Bench examining the vires of the Karnataka Act did hold that the State Act was an Act for acquisition and came within Entry 42 of the Concurrent List. That position is not disputed before us. There is unanimity at the bar that the Motor Vehicles Act is a legislation coming within Entry 35 of the Concurrent List. Therefore, the Acquisition Act and the 1988 Act as such do not relate to one common head of legislation enumerated in the Concurrent List and the State Act and the parliamentary statute deal with different matters of legislation." "19. A number of precedents have been cited at the hearing and those have been examined and even some which were not referred to at the bar. There is no clear authority in support of the stand of the petitioners — where the State law is under one head of legislation in the Concurrent List, the subsequent Parliamentary legislation is under another head of legislation in the same list and in the working of the two it is said to give rise to a

question of repugnancy." (at pages 575 and 577)

48. In Rajiv Sarin v. State of Uttarakhand, (2011) 8 SCC 708, this Court examined the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 vis-à-vis the Forest Act, 1927 and found that there was no repugnancy between the two. This Court held:

> "52. The aforesaid position makes it quite clear that even if both the legislations are relatable to List III of the Seventh Schedule of the Constitution, the test for repugnancy is whether the two legislations "exercise their power over the same subject-matter..." and secondly, whether the law of Parliament was intended "to be exhaustive to cover the entire field". The answer to both these questions in the instant case is in the negative, as the Indian Forest Act, 1927 deals with the law relating to forest transit, forest levy and forest produce, whereas the KUZALR Act deals with the land and agrarian reforms.
>
> 53. In respect of the Concurrent List under Seventh Schedule to the Constitution, by definition both the legislatures viz. the Parliament and the State legislatures are competent to enact a law. Thus, the only way in which the doctrine of pith and substance can and is utilised in determining the question of repugnancy is to find out whether in pith and substance the two laws operate and relate to the same matter or not. This can be either in the context of the same Entry in List III or different Entries in List III of the Seventh Schedule of the Constitution. In other words, what has to be examined is whether the two Acts deal with the same field in the sense of the same subject matter or deal with different matters." (at page 727) (Emphasis Supplied)

49. It will be noticed that the Constitution Bench judgment in Rajiv Sarin (supra) does not at all refer to Tika Ramji (supra). Tika Ramji (supra) had clearly held that the doctrine of pith and substance cannot be referred to in determining questions of repugnancy, once it is found that both the Parliamentary law and State law are referable to the Concurrent List. Therefore, the statement in paragraph 53 in Rajiv Sarin (supra), that the doctrine of pith and substance has utility in finding out whether, in substance, the two laws operate and relate to the same matter, may not be a correct statement of the law in view of the unequivocal statement made in Tika Ramji (supra) by an earlier Constitution Bench decision. 2 However, the following sentence is of great importance, which is, that the two laws, namely, the Parliamentary and the State legislation, do not need to find their origin in the same entry in List III so long as they deal, either as a whole or in part, with the same subject matter. This clarification of the law is important in that Ranganath Misra, J.'s separate concurring opinion in Vijay Kumar Sharma (supra) seems to point to a different direction. However, Hoechst Pharmaceuticals (supra), also does not agree with this view and indicates that so long as the two laws are traceable to a matter in the Concurrent List and there is repugnancy, the State law will have to be yield to the Central law except if the State law is covered by Article 254(2).

50. The case law referred to above, therefore, yields the following propositions:

i) Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.

ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

iii) The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation;

also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

iv) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject matters.

v) Repugnancy must exist in fact and not depend upon a mere possibility.

vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso.

51. Applying the aforesaid rules to the facts of the present case, we find that the State statute in question is the Maharashtra Act. The Statement of Objects and Reasons for the aforesaid Act reads thus:

> "In order to mitigate the hardship that may be caused to the workers who may be thrown out of employment by the closure of an undertaking, Government may take over such undertaking either on lease or on such conditions as may be deemed suitable and run it as a measure of unemployment relief. In such cases Government may have to fix revised terms of employment of the workers or to make other changes which may not be in consonance with the existing labour laws or any agreements or awards applicable to the undertaking. It may become necessary even to exempt the undertaking from certain legal provisions. For these reasons it is proposed to obtain power to exclude an undertaking, run by or under the authority of Government as a measure of unemployment relief, from the operation of certain labour laws or any specified provisions thereof subject to such conditions and for such periods as may be specified. It is also proposed to make a provision to secure that while the rights and liabilities of the original employer and workmen may remain suspended during the period the undertaking is run by Government, they would revive and become enforceable as soon as the undertaking ceases to be under the control of Government." There is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution, which reads as under:

"23. Social security and social insurance; employment and unemployment." Sections 3 and 4 of the Maharashtra Act are material and are set out herein:

"3. Declaration of relief undertaking .

(1) If at any time it appears to the State Government necessary to do so, the State Government may, by notification in the Official Gazette, declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan, guarantee or financial assistance has been provided by the State Government shall, with effect from the date specified for the purpose in the notification, be conducted to serve as a measure of preventing unemployment or of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of this Act.

(2) A notification under sub-section (1) shall have effect for such period not exceeding twelve months as may be specified in the notification; but it shall be renewable by like notifications from time to time for further periods not exceeding twelve months at a time, so however that all the periods in the aggregate do not exceed fifteen years.

4. Power to prescribe industrial relations and other facilities temporarily for relief undertakings. (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provision whatsoever, the State Government may, by notification in the Official Gazette, direct that–

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-section (2) of section 3–

(i) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be exempt therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do not however affect the policy of the said laws) as may be specified in the notification;

(ii) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of the State Government, for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;

(iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;

(iv) any right, privilege, obligation on liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed;

(b) the right, privilege, obligation and liability referred to in clause (a) (iv) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued:

> Provided that in computing the period of limitation for the enforcement of such right, privilege, obligation or liability, the period during which it was suspended under clause
>
> (a) (iv) shall be excluded notwithstanding anything contained in any law for the time being in force.
>
> (2) A notification under sub-section (1) shall have effect from such date, not being earlier than the date referred to in sub-section (1) of section 3, as may be specified therein, and the provisions of section 21 of the Bombay General Clauses Act, 1904, shall apply to the power to issue such notification."
>
> 52. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, inter alia, of corporate persons. Insofar as corporate persons are concerned, amendments are made to the following enactments by Sections 249 to 252 and 255:
>
> "249. Amendments of Act 51 of 1993.
>
> The Recovery of Debts due to Banks and Financial Institutions Act, 1993 shall be amended in the manner specified in the Fifth Schedule.
>
> 250. Amendments of Act 32 of 1994.

The Finance Act, 1994 shall be amended in the manner specified in the Sixth Schedule.

251. Amendments of Act 54 of 2002.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be amended in the manner specified in the Seventh Schedule.

252. Amendments of Act 1 of 2004.

The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule.

(253) and (254) xxx xxx xxx

255. Amendments of Act 18 of 2013.

The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."

53. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein. In Ravula Subba Rao and another v. The Commissioner of Income Tax, Madras, (1956) S.C.R. 577, this Court held:

> "The Act is, as stated in the preamble, one to consolidate and amend the law relating to income-tax. The rule of construction to be applied to such a statute is thus stated by Lord Herschell in Bank of England v. Vagliano [(1891) AC 107, 141]:
>
> "I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably "intended to leave it unaltered..." We must therefore construe the provisions of the Indian Income-tax Act as forming a code complete in itself and exhaustive of the matters dealt with therein, and ascertain what their true scope is." (at page 585) Similarly in Union of India v. Mohindra Supply Company, [1962] 3 S.C.R. 497, this Court held:
>
> "The Arbitration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council in Narendra Nath Sircar v. Kamlabasini Desai [(1896) LR 23, IA 18] observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in Bank of England v. Vagliano Brothers [(1891) AC 107, 144-145] to the following effect:
>
> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior

decisions....” The court in interpreting a statute must therefore proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the pre-existing law; nor to add words which are not to be found in the statute, or “for which authority is not found in the statute”.” (at pages 506-508) In Joseph Peter v. State of Goa, Daman and Diu, (1977) 3 SCC 280, this Court dealt with a Goa regulation vis-à-vis the Code of Criminal Procedure. In that context, this Court observed: “A Code is complete and that marks the distinction between a Code and an ordinary enactment. The Criminal Procedure Code, by that canon, is self-contained and complete.” (at page 282) There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as under:

“9. Bankruptcy and insolvency”

54. On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

55. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. Also, Section 238 of the Code reads as under:

> "Sec. 238. Provisions of this Code to override other laws.-
>
> The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law." It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.

56. Dr. Singhvi, however, argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the moment the notification under the said Act ceases to have effect. We are afraid that we cannot accede to this contention. The notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year upto 15 years, the whole scheme and object of the Code would be set at naught. Undeterred by this, Dr. Singhvi, however, argued that since the suspension of the debt took place from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code. It is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

57. Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of Dr. Singhvi, viz. that under the MRA, it was because the creditors did not disburse the amounts thereunder that the appellant was not able to pay its dues. We are of the view that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22 nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

58. Even otherwise, Shri Salve took us through the MRA in great detail. Dr. Singhvi did likewise to buttress his point of view that having promised to infuse funds into the appellant, not a single naya paisa was ever disbursed. According to us, one particular clause in the MRA is determinative on the

merits of this case, even if we were to go into the same. Under Article V entitled "Representations and Warranties", clause 20(t) states as follows:

> "(t) NATURE OF OBLIGATIONS.
>
> The obligations under this Agreement and the other Restructuring Documents constitute direct, unconditional and general obligations of the Borrower and the Reconstituted Facilities, rank at least pari passu as to priority of payment to all other unsubordinated indebtedness of the Borrower other than any priority established under applicable law."

59. The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

60. The appeals, accordingly, stand dismissed. There shall, however, be no order as to costs.

.....J. (R.F. Nariman) .....J. (Sanjay Kishan Kaul) New Delhi;

August 31, 2017.