



भारतीय दिवाला और शोधन अक्षमता बोर्ड

Insolvency and Bankruptcy Board of India

24th November, 2023

Subject: Judgment¹ dated 9th November, 2023 of the Hon'ble Supreme Court of India in the matter of Dilip B Jiwrajka Vs. Union of India & Ors. [WP (Civil) No 1281 of 2021 with other writ petitions]

1. BRIEF BACKGROUND:

384 writ petitions were filed challenging the constitutional validity of sections 95 to 100 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code).

2. OBSERVATIONS OF THE HON'BLE SUPREME COURT

2.1. Role of RP in Corporate Insolvency as opposed to Individual Insolvency

- While both Part II and Part III of Code, uses the expression “resolution professional”, notably, the provisions of Part II contain a material difference from those of Part III relating to the role and functions of a resolution professional (RP).
- The role of RP under Part II has to be contra-distinguished from the role ascribed to him in Part III, as in Part III he is appointed for the purpose of resolving insolvencies and bankruptcies for individuals and partnership firms.
- In Part II, the Adjudicating Authority (AA) is contemplated to have an adjudicatory role right at the threshold. In contrast, in Chapter III of Part III, the appointment of a RP is contemplated by section 97; and under sub-section (5) of section 97, the AA has to appoint the RP who is either recommended under sub-section (2) or nominated by the IBBI under sub-section (4).
- Evidently, sub-section (3), operate on the RP alone and cannot be construed to be a bar qua the adjudicatory function of the AA under section 100.
- The RP is empowered by sub-section (4) of section 99 to seek further information or an explanation in connection with the application from the debtor, creditor or any other person who in the opinion of the RP may provide information. The information which the RP is empowered to seek acts as an aid to his duty to examine the application and submit a report either recommending the approval or the rejection of the said application. In other words, the information which the RP is permitted to seek acts as a bridge that facilitates the RP to discharge the functions conferred upon of the RP in terms of sub-section (1) of section 99.

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- The RP is required to examine the application as per sub-section (6) of Section 99 to ascertain two things: firstly, the application satisfies the requirement of section 94 or section 95 and, secondly, the applicant has provided the information and furnished the explanation which is sought under sub-section (4). After examination and ascertainment as specified in sub-section (6), the RP may either recommend the acceptance or rejection of the application by submitting a report along with reasons; and a copy of the report has to be furnished to the debtor or the creditor, as the case may be.
- Upon submission of the report, section 100(1) stipulates that the AA has to pass an order either admitting or rejecting the application within fourteen days from the date of such submission of the report under section 99.
- The RP does not have the kind of power under Part III which their counterpart has in Part II. No provision has been made in Part III empowering the RP to take over the assets or the business which is being carried on by the individual or the partnership firm. The RP does not possess an adjudicatory function in terms of the provisions of section 99. The legislature considered it appropriate to interpose the RP before the adjudicatory function of the AA which commences under section 100.
- The role under Section 99 which is ascribed to the RP is that of a facilitator and is to gather relevant information on the basis of the application submitted under section 94 or section 95 and after carrying out the process which is referred to in sub-section (2), sub-section (4) and sub-section (6) of section 99, to submit a report recommending the acceptance or rejection of such application.
- Significantly, the statute has used the expression “*examine the application*”, “*ascertain*” and “*satisfies the requirements*” and “*recommend*” the acceptance or rejection of the application. The use of these expressions leaves no manner of doubt that the RP is not entitled to perform an adjudicatory function or to arrive at any binding conclusions on facts. Rather, the role of the RP is purely recommendatory in nature and cannot bind the creditor, the debtor or, the AA.
- In terms of section 78, Part III applies to individuals or partnership firms where the amount of default is not less than one thousand rupees or any amount which the Central Government may specify, not exceeding one lakh rupees. The AA would be inundated if all amounts of alleged defaults as low as one thousand rupees were to be judicially determined. Bearing in mind the nature and context of the insolvency resolution, the legislature has stepped in by providing an intermediate stage where the RP will collate and compile the relevant material and submit it in the form of a report to the AA recommending either the acceptance or the rejection of the application for initiating insolvency.

2.2. Impact of a moratorium under Section 14 of Part II vis-a-vis interim moratorium under Section 96 of Chapter III of Part III

- In terms of section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under section 94 or section 95 triggers the interim moratorium which ceases to have effect on the date of the admission of the application (under section 100). The consequences which flow from an interim moratorium are specified in clause (b) of sub-section (1) of section 96. The impact of the interim-moratorium under section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate

any legal action or proceedings in respect of any debt. The crucial words used in both the clauses i.e., clause (b)(i) and clause (b)(ii) of sub-section (1) of section 96 are “*in respect of any debt*”. These words indicate that the interim-moratorium which is intended to operate by the legislature is primarily in respect of a debt as opposed to a debtor. Clause (b) of sub-section (1) indicates that the purpose of the interim-moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt.

- This must be contra-distinguished from the provisions for moratorium contained in section 14 in relation to the CIRP under Part II. The moratorium under section 14 operates on the order passed by an AA. The purpose of the moratorium under section 96 is protective. The object of the moratorium is to insulate the CD from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt.

2.3. Role of the Adjudicating Authority

- The adjudicatory function of the AA commences, under Part III, after the submission of a recommendatory report by the RP. Evidently, the legislature has carefully calibrated: (i) The role of the RP; (ii) The imposition of the moratorium; and (iii) The stage at which the AA steps in under Part II, on one hand, and Part III, on the other.
- Section 100(1) requires the AA to pass an order either admitting or rejecting the application within fourteen days from the date of the submission of the report by RP under section 99.
 - The AA has the power to issue instructions to the debtor and creditor(s) regarding purpose to initiate negotiation, if it admits the application. But if it rejects such application, it may entitle the creditors to file for bankruptcy if such rejection is on the ground that it was intended to defraud the creditors or the resolution professional.
 - The provisions dealing with moratorium under section 101(2)(c) correspond broadly to the provisions of section 14(1)(b) in relation to Part II.
 - Significantly, clause (c) of section 101(2) which places a restraint on the transfer, alienation or disposal of assets, does not find a place in section 96(1)(b). It consequently operates only after the admission of an application under section 100.

2.4. Applicability of principles of natural justice

2.4.1. Role of the Resolution Professional as a facilitator is to collate facts

- Parliament has provided for engagement of the debtor with the RP at various stages. Sub-section (2) of section 99 stipulates that where an application has been filed by the creditor under section 95, the RP may require the debtor to prove the repayment of the debt in the manner which has been indicated in sub-clauses (a), (b) and (c). Evidently, the expression “*may require the debtor to prove repayment of the debt*” implicates the role of the debtor in explaining, whether, as a matter of fact, the debt remains unpaid or has been paid.
- The RP cannot decide the issue in absence of an opportunity to the debtor, to furnish an explanation and to produce material evidencing the payment of the debt. Likewise, sub-section (4) of section 99 empowers the RP to seek further information or explanation in connection with the application from the debtor or the creditor.

- The expression “*in connection with the application*” does not contemplate a roving enquiry by the RP but an inquiry for the purpose of making the ultimate recommendation in the report on the nature of the application itself. The RP, after carrying out the process which is evidenced in sub-sections (2) and (4), in particular, is then required to make an ascertainment in terms of sub-section (6) of section 99. It is thereafter that the RP would submit a report either recommending the acceptance or rejection of the application together with the reasons in support of the report.
- The provisions of Section 99 thus leave no doubt that the process which takes place before the RP is not an *ex-parte* process against the debtor, against whom the insolvency resolution process is sought to be initiated. The legislature has ensured that the recommendation is made after taking in to account the information or as the case may be, the explanation that is furnished by the debtor. Thus, it cannot be said that there is any element of bias in the report submitted by the RP nominated by the creditor.
- The principles articulated in *Swiss Ribbons Private Limited v Union of India* elucidate that the resolution professional’s functions are administrative, not adjudicatory. *Essar Steel India Limited v Satish Kumar Gupta*, underscores the non-adjudicatory nature of the resolution professional’s role. Further support for the administrative role of the resolution professional is drawn from the BLRC’s drafting instructions, affirming that the resolution professional’s role is primarily administrative for information and documentation collation and verification of the creditor’s claim under Section 95 of IBC.
- The RP, operating under the regulatory oversight of the IBBI, plays a vital role in the effective functioning of the insolvency process and contributes significantly to its efficiency. Firstly, the RP is only entitled to seek information which is strictly relevant to the examination of the application for IRP; and secondly, regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with para 21 of the First Schedule, casts an obligation on the resolution professional to ensure confidentiality of all information relating to the insolvency process. The BLRC also acknowledges the information imbalance between debtors and creditors, necessitating the resolution professional’s investigative role in individual insolvency. Therefore, Section 99 empowers the resolution professional to seek information.
- The right to privacy is subject to reasonable restraints. In the context of section 99(4), the legitimate aims of establishing a comprehensive framework for individual insolvency and aiding the adjudicating authority justify seeking personal financial information, balancing privacy rights with the objective.
- Hon’ble SC observed that an adjudicatory role interposed at the stage of section 97(5) cannot be accepted. The power which is conferred on the AA at the stage of filing of an application, is to appoint a RP. The purpose of the appointment of a RP is a facilitative exercise as contemplated by section 99 and which ends with a report either recommending the acceptance or rejection of the application. Bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the AA in adjudicating what is described as a jurisdictional question at the stage of section 97(5).

2.4.2. Role of the Adjudicatory Authority

- The true adjudicatory function of the authority commences under section 100 after the submission of the report.

- Section 100(1) stipulates that the adjudicating authority must issue an order within fourteen days of receiving the report, either admitting or rejecting the application filed under sections 94 or 95, depending on the circumstances. AA conducts an independent assessment, not solely relying on the RP's report, to decide the fate of applications under section 94 or 95 of the Code.
- The entire scheme of Sections 99 and 100 implicates timelines laid down by the Parliament would rendered nugatory if an adjudicatory role were to be read into the provisions of section 97(5). The final reason which would militate against accepting the submission is that the provisions of section 99 do not as such implicate any adverse civil consequences.

2.4.3. *A right of representation has been provided under Section 99(2)*

- Sub-section (4) is prefaced by the words “*for the purposes of examining an application*”. In other words, the information which the RP is empowered to seek or the explanation required to be furnished to the RP is the specific purpose of examining such application. That apart, sub-section (4) also goes on to specify that the information or explanation may be sought in connection with the application. Thus, the nature of the information or the explanation which is sought must have a nexus with the application. The right to file such representation is sufficient compliance of *audi alterum partem* requirements.
- An interim-moratorium is placed on legal proceedings concerning the debt to safeguard the debtor from further legal action. However, the interim-moratorium does not act to freeze the assets and legal rights and title of the debtor. Once a recommendation is made, it is not binding on the AA. The authority would only decide after looking at the recommendation of the RP and affording full opportunity of hearing to the debtor or the personal guarantor, as the case may be.
- While seeking information from third party, The RP must seek information relatable to the application filed under section 94(1) or 95, but not information in roving nature. Sub-section (3) of section 99 provides that where a debt for which an application has been filed by the creditor is registered with an information utility, the debtor shall not be entitled to dispute the validity of the debt. This provision under sub-section (3) operates only in relation to the recommendatory function of the RP. That provision cannot operate to bind the adjudicatory function of the adjudicating authority when it exercises its jurisdiction under section 100.

Constitutional Validity

- The task before the RP is to collate and collect information on the basis of application filed under section 94 or section 95 before submitting a report to the AA but not adjudicatory. When interpreting Part II of the IBC, the Courts have inferred the necessity of granting an opportunity to a debtor before initiating the insolvency resolution process against them. This includes the provision of providing a copy of the application and all relevant documents.

- Although section 100 does not explicitly mention a hearing for a debtor, the requirement of a hearing has to be read into section 100. The key point is that the lack of explicit mention of a hearing in a provision does not automatically make it unconstitutional because such a requirement can be read into the statute.
- The legislature has evidently made provisions in section 99 to allow for the engagement of the debtor with the RP before a report is submitted to the AA. The process under section 100 before the AA must be complied with the principles of natural justice. The AA is duty bound to hear the person against whom an application has been filed under section 94 or section 95 before it comes to the conclusion as to whether the application should be admitted or rejected. AA is also entrusted with the duty to decide questions of law and fact and to arrive at a conclusion on either to admit or reject the said application filed by the debtor or the creditor under Chapter III of Part III.
- The information sought by the RP from the debtor, the creditor, or third parties must be relevant to the examination of the application of IRP but not roving one. The RP should provide fair opportunity to the debtor. The aim of vesting such powers in the RP combined with his duty to keep such information confidential meets the proportionality test which the Apex Court itself has devised for privacy under Article 21 of the Constitution. The nature of the RP's role, the powers, and its nexus with the legitimate aim of the legislation also lead us to the conclusion that the impugned provisions are compliant with Article 14 of the Constitution. Therefore, sections 95 to 100 of the IBC are not unconstitutional.
- Further, sub-section (1) of section 95 indicates that a creditor may apply either by themselves or jointly with other creditors or through a RP to the AA for initiating an IRP. Sub-section (2) provides that in a situation where a creditor has applied under sub-section (1) in relation to a partnership debt, the application may be filed against (a) any one or more partners of the firm; or (b) the firm. The provisions of sub-section (2), in other words, cannot control the ambit of sub-section (1) of section 95.
- It is a well settled principle that a law is not retrospective in nature merely because some parts of the cause of action on which the law operates has arisen in the past. Prior to the commencement of the IBC, the field was governed by the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920. With the enactment of the IBC, the insolvency resolution process in relation to individuals and partnership firms is governed by Part III of the Code. The Code cannot be held as operating in a retroactive manner so as to violate Article 14 of the Constitution.
- Accordingly, held that the impugned provisions of the IBC do not suffer from any manifest arbitrariness so as to offend Article 14 of the Constitution.

Conclusion

- i. No judicial adjudication is involved at the stages envisaged in sections 95 to section 99 of the IBC.

- ii. The RP appointed under section 97 serves a facilitative role and the report to be submitted to the AA is recommendatory in nature on whether to accept or reject the application.
- iii. It is incorrect to hold that the hearing conducted by the AA for the purpose of determining '*jurisdictional facts*' at the stage when it appoints a RP under section 97(5) of the Code. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review.
- iv. The RP may exercise the powers vested under section 99(4) of the Code for the purpose of examining the application and to seek information on matters relevant to the application from debtor, creditor or third-party sans roving ones.
- v. As the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the RP, there is no violation of natural justice under section 95 to section 100 of the IBC.
- vi. No judicial determination takes place until the AA decides under section 100 whether to accept or reject the application. The report of the RP is only recommendatory in nature and does not bind the AA when it exercises its jurisdiction under section 100.
- vii. The AA must observe the principles of natural justice while accepting or rejecting the application in exercise of power under section 100 of the Code.
- viii. The purpose of the interim-moratorium under section 96 is to protect the debtor from further legal proceedings; and
- ix. The provisions of section 95 to section 100 are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.
