

Insolvency and Bankruptcy Code 2016- Constitutional Validity Case Comment

S. Sankar Ganesh

(LLB (Hons), I Year, The Tamilnadu Dr. Ambedkar Law University, Chennai)

(E – Mail: ssgthecounsel@gmail.com)

Abstract:

The constitutional validity of Insolvency and Bankruptcy Code, 2016 was upheld in total in the case Swiss Ribbons Private Limited v Union of India and the honorable Supreme Court held its nerve and derailed the shortcomings/interpretation difficulties by means of analyzing the sections of the code in detail.

Keywords — Insolvency and Bankruptcy Code 2016, IBC 2016 Constitutional Validity, Swiss Ribbons

1. INTRODUCTION

There were so many laws to handle the process of insolvency and Bankruptcy which resulted in the delay of recovery from the defaulters and it took so much of time to arrive a settlement or decision. This resulted in the impede economic process and invariably it affected the legal processing system. As per the world bank report, it was found that India was taking almost 4.5 years in settling the economic disputes especially with respect to Insolvency and Bankruptcy. The erstwhile Acts were questioned, and its operational success was challenged. Hence to overcome this difficulties, Insolvency and Bankruptcy Code (IBC) was introduced and enacted in the parliament during the year 2016.

Since its inception, the new Code was challenged in the Court of Law vehemently for the term financial creditor and operational creditor and the importance for the financial creditor in the core committee of creditors. The intelligible differentia between financial and operational creditor was challenged and it was said unconstitutional under Article 14 of the Constitution. The voting rights of operational creditors were also challenged and disputed why the opportunity was not given to them. The honourable apex court in its various judgments have ratified the provisions of IBC, 2016 as constitutional before the case under the review.

In the case under review, *Swiss Ribbons Pvt. Ltd. v. Union of India*¹ the honourable apex court held that the judiciary should exercise restraint while examining the constitutional validity of economic legislations and upheld the constitutional validity of all the provisions of IBC, 2016. Thus, the case under review is the landmark case. It opened the windows of Insolvency and bankruptcy legislation provisions and its importance.

2. CONSTITUTIONAL VALIDITY OF SECTION 7, 8 AND 9 OF THE CODE

The counsel of the petitioner challenged the differentia between the financial and operational creditor as stipulated in the IBC, 2016. The counsel submitted that the differentia is not as per the article 14 of the constitution and it violates the provision. Further it was contended that the differentiation between financial creditor and operational creditor is not reasonable and hence it should be set aside and unconstitutional. The counsel relied on the case *ShayaraBano v Union of India*² for discrimination between financial creditor and operational creditor and hence argued that the difference is not valid and unconstitutional.

The counsel of the respondent submitted the intelligible differentia in the differentiation between the financial creditor and the operational creditor. The counsel further submitted that the differentiation is reasonable and submitted the arguments in favour.

The court patiently listened the arguments of the counsels and further determined the real meaning and differentiation between the financial creditor and operational creditor. The Bench observed that financial creditors or lenders to the institution are the creditors who lends the money for the upliftment of the institution and for the growth of the institution from the day of the debt. Moreover, the financial creditor or the lender travelling with the institution or organization and knows what happens in the organization. Whereas, the operational creditors are mere creditors based on the transactions with the institution or organization and they may not be aware of the facts of the institution or organization. Hence the financial creditors must be given preference than to the operational creditors. The Court observed that Sec 7,8 and 9 of the IBC 2016 are valid and constitutional.

¹ Writ Petition (Civil) No. 99 of 2018. Decision date- 25.01.2019

²(2017) 9 SCC 1

3. **CONSTITUTIONAL VALIDITY OF SEC 12A AND 29A**

The counsel of the petitioner by relying on the judgement in the case of *Uttara Foods and Feeds Pvt Ltd v Mona Pharmachem*³ contended that Sec 12A of IBC 2016 is unconstitutional by means of approval of 90% of voting share of the committee of Creditors for the settlement. The counsel argued that “Unbridled and uncanalized power is given to the committee of creditors to reject legitimate settlements entered into between creditors and the corporate debtors”.

The counsel of the petitioner further contended that Section 29A which leads to speedy resolution process, but this will in turn lead to more challenges on the said speedy resolution process and which will slow down the insolvency resolution process.

The counsel of the respondent placed the reliance on the judgement in the case *Innoventive Industries Ltd v ICICI Bank and Anr*⁴ that disputes which may be raised by the financial creditor will be resolved during the resolution process, as they have given the amount as loan. Moreover, the operational creditors concerns will be duly considered as they will be relieved based on the liquidation of assets as per the norms stipulated. Further the counsel of the respondent submitted that insofar as Section 12A is concerned, once an application by a creditor is admitted by the Adjudicating Authority, the proceeding becomes a proceeding in rem and is no longer an individual proceeding but a collective proceeding. The counsel of the respondent further relied on the judgements made in *ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors.*⁵ and said Sec 29A is valid and constitutional.

4. **CONCLUSION**

The Insolvency code is a legislation which deals with economic matters and in the larger sense deals with the economy of the country. The court observed that the experiment contained in the Code, judged by the generality of its provisions and not by so called crudities and inequities that have pointed out by the petitioners, passes constitutional muster.

The court has taken a stand of purposive interpretation mechanism and enabled the legislation and the mechanism to run without any interruptions. The court has taken enormous steps in interpreting the difficulties enumerated in economic legislations and has provided a clear understanding of the concepts

³Civil Appeal No. 18520/2017 (decided on 13.11.2017)

⁴(2018) 1 SCC 407

⁵Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018]

behind the legislation. It has envisaged a bigger challenge and the prospects in the field of insolvency and bankruptcy.

The law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. The court must while examining the constitutional validity of a legislation of this kind, be resilient, not rigid, forward looking, not static, liberal, not verbal as observed in the case *Munn v Illinois*⁶ in the United States Supreme Court.

The Supreme Court has welcomed the legislation since its inception and this judgment has made a red-carpet travel for the provisions of the code and it has made a huge impact in the field of insolvency and bankruptcy. IBC acts as an instant remedy for financial creditors, which invites foreign investment to India.

REFERENCES

- (1) *Swiss Ribbons Pvt. Ltd. v. Union of India* Writ Petition (Civil) No. 99 of 2018. Decision date- 25.01.2019
- (2) *ShayaraBano v Union of India* (2017) 9 SCC 1
- (3) *Uttara Foods and Feeds Pvt Ltd v Mona Pharmachem* Civil Appeal No. 18520/2017 (decided on 13.11.2017)
- (4) *Immoventive Industries Ltd v ICICI Bank and Anr*(2018) 1 SCC 407
- (5) *ArcelorMittal India Private Limited v. Satish Kumar Gupta and Ors.*, Civil Appeal Nos. 9402-9405/2018 [decided on 04.10.2018]
- (6) *Munn v Illinois*[94 US 13]

⁶ [94 US 13]