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## Case Comment: Deconstructing Insolvency: A Case Analysis of Dilip B. Jiwrakja v Union of India

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### INTRODUCTION

In India, the creditors who deal with loans to entities have seen an increase in safeguards and protection towards them. As rightly so, the Insolvency and Bankruptcy Code, 2016<sup>1</sup> is a safeguard to overlook reorganization and insolvency of body corporates, partnerships, or even individuals ensuring that the dues on borrowings made are repaid or else debtors would accordingly be punished. One interesting aspect of the Insolvency and Bankruptcy Code, 2016 is that of a personal guarantor, whereby a third party acts as a personal guarantor to the debtor who would repay the dues to the creditor in case of a default in payment by the debtor. It was only on Nov 15, 2019, that the central government passed a notification that included personal guarantors under Part- III of the IBC, 2016 which was upheld in the case of Lalit Kumar Jain v Union of India<sup>2</sup>. Moreover, this trend has potentially shed light on the grey area of guarantees given by such third parties since according to the data of the Insolvency and Bankruptcy Board,

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<sup>1</sup> Insolvency and Bankruptcy Code 2016

<sup>2</sup> *Lalit Kumar Jain v Union of India* (2021) SCC OnLine SC 396

there have been 117 admitted cases against personal guarantors in 2023 as compared to 28 cases in 2022 before NCLTs.<sup>3</sup> This paper through the lenses of the case Dilip B. Jiwrajka v Union of India<sup>4</sup> tries to analyse whether provisions 95- 100 of the IBC, 2016 are constitutional or not since they violate Article 14.<sup>5</sup>

## BRIEF FACTS

Around 384 writ petitions were filed before the Hon'ble Supreme Court under Article 32 regarding provisions 95- 100 of the IBC, 2016<sup>6</sup>. The curative petitions were filed to challenge the constitutional validity of the above-mentioned provisions since they contended were violative of Articles 14<sup>7</sup> and 21<sup>8</sup>. The issue was accepted by the Hon'ble Supreme Court and accordingly, a 3-judge bench of Dr.DY Chandrachud, J.B Pardiwala, and Manoj Misra was formed to decide on the case.

## ISSUES RAISED

1. Whether Sections 95-100 of IBC 2016 are constitutional.
2. Whether Sections 95-100 of IBC 2016 are violative of Articles 14 and 21.

## ARGUMENTS

1. Through this writ petition, the petitioners contended that as under Sections 94<sup>9</sup> and 95<sup>10</sup>, a creditor or debtor who filed the application results in the automatic imposition of interim moratorium along with a resolution professional (RP) who is appointed for the procedure. In the eyes of the petitioner, this procedure commences without providing the concerned debtor

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<sup>3</sup> Pavan Burugula, 'Surge in Personal Guarantor Cases under IBC in FY23' *The Economic Times* (22 February 2023) <<https://economictimes.indiatimes.com/news/economy/finance/surge-in-personal-guarantor-cases-under-ibc-in-fy23/articleshow/98160847.cms?from=mdr>> accessed 10 February 2024

<sup>4</sup> *Dilip B. Jiwrajka v Union of India* WP (C) No 1281/2021

<sup>5</sup> Constitution of India 1950, art 14

<sup>6</sup> *Dilip B. Jiwrajka v Union of India* WP (C) No 1281/2021

<sup>7</sup> Constitution of India 1950, art 14

<sup>8</sup> Constitution of India 1950, art 21

<sup>9</sup> Insolvency and Bankruptcy Code 2016, s 94

<sup>10</sup> Insolvency and Bankruptcy Code 2016, s 95

an opportunity to be heard thereby violating the right to be heard which is an intrinsic feature based on principles of natural justice.

2. The petitioners drew a parallel between Part II and Part III of the act asserting the differences in the process of applications between Corporate Debtors (Part II) and Debtors (Part III). For the process of initiating insolvency against Corporate Debtors (Part II), the process of interim moratorium and resolution professional (RP) commences only after judicial adjudication according to section 7<sup>11</sup> or 9<sup>12</sup> of IBC, 2016. Whereas for debtors it commences immediately after filing the application which was to them arbitrary and violative of Article 14 i.e. Right to Equality.

3. According to the Petitioners, the principles of natural justice had to be incorporated before the initial stage of applying since the parties were bound to be heard at the first instance before the interim moratorium was imposed along with the appointment of a resolution professional (RP). Besides, they contended that jurisdictional questions such as subsistence or payment of debt could be looked upon/ ascertained before initiating the insolvency procedure.

4. The petitioners argued that the process of moratorium and RP hurt the reputations and creditworthiness of debtors at large. The process attaches a stigma to the concerned debtors thereby affecting their fundamental right to trade or engage in any form of business as under Article 19(1)(g)<sup>13</sup> of the Constitution. Moreover, it could result in significant financial consequences to the debtors since it would be difficult to request borrowings from lending institutions, especially in times of need.

5. Lastly, the petitioners raised concerns regarding the unregulated powers that lie with the Resolution Professional (RP) upon commencement of the application procedure. They contended that such RPs should not be given such broad powers to the extent of seeking information or explanations from debtors, creditors, or any concerned person without providing

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<sup>11</sup> Insolvency and Bankruptcy Code 2016, s 7

<sup>12</sup> Insolvency and Bankruptcy Code 2016, s 9

<sup>13</sup> Constitution of India 1950, art 19

an opportunity for a fair and personal hearing. They argued that the principle of Audi Alterum Partem should apply against the excess authority granted to the RPs.

## JUDGEMENT

The Hon'ble Supreme Court analyzed the contentions and accordingly pronounced the judgment into different parts answering each aspect. To arrive at this decision, the court made a comparison between the procedure of Part II and Part III, evaluated the provisions of the code, and compared it with the principles of natural justice.

The Hon'ble Court clarified the position of the Resolution Professional as administrative whereby they are given powers to take up the facilitation role. The powers conferred on them are not arbitrary since they help facilitate the insolvency procedure up until it reaches the judicial adjudication stage. The court also clarified the appointment of Resolution Professional as an integral part since information or explanations collected can guide the process especially since they are required to verify the applications and provide recommendation reports for the same, hence they were empowered to demand proof.

While emphasizing the facilitative role of RP, the Court clarified the roles of RPs whereby in Part II, the RP is appointed only after the application is filed so that affairs of the corporate debtors can be looked upon. Moreover, requiring judicial adjudication at the time of appointing the RP would undermine the significance of submitting the report to the adjudicating authority and would require rewriting the statute, which is not permissible<sup>14</sup>. Furthermore, according to Section 78<sup>15</sup> of the code, the minimum amount for a default amounts to INR 1,000, so if the matter is to be judicially determined then it would overburden the courts with applications for insolvency as low as rupees 1,000 INR.

The Court further clarified that according to Section 96, an interim moratorium was to be protective since it prevents newer suits from being instituted or any pending suits commencing

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<sup>14</sup> Neerav Merchant, 'India's Supreme Court Blesses Personal Guarantor Insolvency Provisions' (*Majmudar & Partners*, 07 December 2023) <<https://www.majmudarindia.com/indias-supreme-court-blesses-personal-guarantor-insolvency-provisions/>> accessed 10 February 2024

<sup>15</sup> Insolvency and Bankruptcy Code 2016, s 78

against the corporate debtors once the application is filed. In comparison the moratorium provided under Section 14 prohibits any transfer, encumbrance, alienation, or disposal of assets, legal rights, or beneficial interests of corporate debtors.<sup>16</sup>

When the issue of natural justice arose, the Court clarified that there was no violation of the principles of natural justice because, during the examination procedure conducted by the RP, the debtor was provided a reasonable opportunity to take part and provide reasons and explanations. Based on this, the RP makes a recommendation report taking into consideration the information passed by the debtors after which the adjudicating authority takes an assessment to ensure that the concerned debtor has a fair opportunity to receive hearings. Moreover, according to section 100<sup>17</sup>, the court conducts an independent inquiry in which the concerned debtor has a chance to make submissions before the admissibility of claims against them.

Reiterating its reasons, the Hon'ble Supreme Court rejected the writ petition stating that the provisions 95- 100 of the IBC, 2016 were constitutional and not violative of Articles 14 and 21.<sup>18</sup>

## CRITICAL ANALYSIS

The judgment in *Dilip B. Jiwrajka v Union of India*<sup>19</sup> provides an insightful interpretation of the provisions within the Insolvency and Bankruptcy Code, 2016 (IBC), particularly focusing on Sections 95 to 100. The Court properly distinguishes between corporate and individual insolvency proceedings, clarifying their position in the context of insolvency proceedings.

One notable observation of the Court's judgment is the classification of the Resolution Professional's role as a facilitator which is not explicitly mentioned in the insolvency code. As a facilitator, the Resolution Professional plays a very vital role in ensuring the smooth functioning

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<sup>16</sup> Insolvency and Bankruptcy Code 2016, s 14

<sup>17</sup> Insolvency and Bankruptcy Code 2016, s 100

<sup>18</sup> Apoorva, 'Explained | Supreme Court Verdict Upholding Constitutional Validity of Provisions Relating to Personal Guarantors in IBC' *SCC Online* <<https://www.sconline.com/blog/post/2023/12/01/explained-supreme-court-verdict-upholding-constitutional-validity-provisions-on-personal-guarantors-in-ibc/>> accessed 19 January 2024

<sup>19</sup> *Dilip B. Jiwrajka v Union of India* WP (C) No 1281/2021

of facilitation by collecting information and explanations to create recommendation reports. The Court had to ascertain the facilitating role of the Resolution Professional due to the absence of its nature in the provisions.

The Court's clarification on the applicability of moratoriums under Section 14 (Part II) and Section 96 (Part III) provides a better understanding of the protective measures available to debtors depending on the nature of their debts. Though the nature of the procedure differs for both, particularly the grant of immediate moratorium and RP for individual debtors, it is much required to prevent the overburdening of cases. If this differentiation did not exist, the judiciary would be overflowing with insolvency cases ranging from small amounts of individuals to enormous amounts of body corporates.

Moreover, the Court acknowledges the principles of natural justice being present whereby the concerned debtor is provided with a fair opportunity to be heard before the admissibility of claims. This goes in line with the power of RP to question the debtor to gather information and explanations regarding the debt to be repaid. However, the Court should provide for a more transparent mechanism of allotting personal hearings to the debtors at the time when an application is filed beforehand. This way, the principle of fair hearing would be much more evident on the face of it without the RP getting the first instance of garnering information and requiring the debtor to answer accordingly.

## **CONCLUSION**

The repeated filing of many writ petitions amounting to more than 300 petitions went in vain as the Supreme Court dismissed them upholding provisions 95- 100 of the IBC, 2016. The intentions of the petitions were for the Supreme Court to revisit the provisions, since according to them the laid down provisions were arbitrary and did not provide for the principles of natural justice wherein there is no fair hearing given to the concerned parties. Besides, the provisions mentioned the process and procedure to ascertain the extent of insolvency at the time of application either by the creditor or debtor. The provisions mandate the procedure as necessary thereby giving powers to the Insolvency and Bankruptcy Board of India (IBBI) to appoint a

Resolution Professional and grant a moratorium according to the situation. It is seen as a step-by-step process upon the appointment of the R.P. to facilitate the collection of information and explanations which would be forwarded for further review.

According to the writ petitions, a demand was made for a clearer and more relaxed procedure for the parties against whom the insolvency application was filed since they do not get opportunities to present their case until the Resolution professional initiates the hearing. Besides, they are provided with limited opportunities for a hearing up until the Resolution Professional raises inquiries regarding the information provided about the insolvency of a party. Though the parties are provided with the right to be heard, the IBBI empowers the role of RPs to take the first step to question and garner explanations from the concerned parties for a smooth and time-bound disposal of insolvency hearings along with compliance with legal provisions.

In conclusion, the judgment given by the Supreme Court serves as a landmark decision that elucidates the intricacies of the IBC by balancing the insolvency procedure along with the rights of debtors. It upholds constitutional principles, by ensuring fairness and due process of law at the same time taking into consideration the provisions 95-100 of the code. The decision contributes towards the evolving jurisprudence of insolvency law in India, by ensuring the removal of grey areas present in the statute while maintaining a smooth process in solving insolvency disputes.