IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 25176 of 2022

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SUNIL SURESHKUMAR KAKKAD

Versus

UNION OF INDIA

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FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL Sd/-

and

HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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SUNIL SURESHKUMAR KAKKAD
Versus
UNION OF INDIA

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Appearance:
MR SAURABH SOPARKAR, SENIOR COUNSEL WITH
MR ADITYA A GUPTA and MR MOHIT A GUPTA for the Petitioner(s) No. 1
MR DEVANG VYAS, ADDITIONAL SOLICITOR GENERAL OF INDIA WITH
MR ANKIT SHAH for the Respondent No.1
MS AISHWARYA REDDY FOR GUPTA LAW ASSOCIATES(9818) for the Respondent(s) No. 2
NOTICE SERVED for the Respondent(s) No. 3

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CORAM: **HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

Date : 26/10/2023

CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

1. The present petition has been filed with the following reliefs:

> *"16A. YOUR LORDSHIPS BE PLEASED to issue appropriate writ, direction or order to hold and declare that sub-clause (2) of section 33 of Insolvency and Bankruptcy Code, 2016 is unconstitutional being violative of Article 14, 21 and 300A of the Constitution of India and to strike down the same in the interest of justice.*
>
> *B. YOUR LORDSHIPS BE PLEASED to issue appropriate writ, direction or order to quash and set aside the decision of Committee of Creditors (Respondent No.3) to liquidate the Corporate Debtor taken in 2nd COC meeting as being against the objects of the Code in the interest of justice.*
>
> *C. YOUR LORDSHIPS BE PLEASED to issue appropriate writ, direction or order to direct the Committee of Creditors (Respondent No.3) to proceed with CIRP process and take all necessary*

steps in accordance with provisions of Insolvency and Bankruptcy Code, 2016 in the interest of justice.

D. YOUR LORDSHIPS BE PLEASED to stay the operation and implementation of the decision of liquidating the Corporate Debtor taken by Committee of Creditors in the 2nd COC meeting pending admission, hearing and final disposal of the petition in the interest of justice.

E. YOUR LORDSHIPS BE PLEASED to pass such other and further orders, which may be deemed fit in the interest of justice."

A. Preface:-

2. The petitioner is a shareholder and suspended director of M/s. Sujyot Infrastructure Pvt. Ltd., a company which is undergoing Corporate Insolvency Resolution Process and is referred to as 'Corporate Debtor', hereinafter. On the Insolvency Application being CP (IB) No.559 of 2019, filed against the Corporate Debtor under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**I&B Code**' or '**Code**'), the Corporate Insolvency Resolution Process ('**CIRP**') has been initiated by the Adjudicating Authority (NCLT, Ahmedabad)

against the Corporate Debtor vide order dated 22.12.2021 and an Interim Resolution Professional ('**IRP**') has been appointed. A Committee of Creditors (**COC**) was constituted on 22.12.2021 comprising of State Bank of India and Bank of Baroda. The first meeting of COC was convened on 1.2.2022. It is stated in the writ petition that COC in its very first meeting itself decided to liquidate the Corporate Debtor despite request made by the petitioner to explore the possibilities of its revival. The challenge is to the exercise of discretion by COC under Section 33(2) of the I&B Code to directly liquidate the Company without even issuing Expression of Interest to invite interested bidders for its revival.

3. The copy of the resolution of the first meeting 2nd phase dated 29.1.2022 of the COC is appended with the writ petition, a perusal of which indicates that the Resolution Professional initiated and recalled the discussion on the point of view of the majority of COC that there is no chance of revival or to restore the Company. It was noted that the Company (Corporate Debtor) is not a going concern for more than 5-7 years; there is no employee in the company; there is no key Managerial Person

available in the Company; the Corporate Debtor is out of business for the aforesaid period. Assets viz. liability and claims are not favourable for restart and revival of Corporate Debtor It is, thus, better to send the Company (Corporate Debtor) into liquidation rather than to spend unnecessary CIRP cost and prolong the matter. The financial creditors viz. Bank of Baroda and State Bank of India were of the aforesaid view and stated that two other companies of the same management are under liquidation and, in the said scenario, it is better to take company into liquidation. It further records that the suspended Director of the Company viz. the petitioner herein expressed his view to explore opportunity to revive the Company rather than to go for liquidation initially. However, both the financial creditors viz. State Bank of India and Bank of Baroda were of the view that since there was no resolution plan received in other two companies as well and as there is no operational activity for more than 5-7 years, the best possible way is to put the company into liquidation.

4. This decision of the COC is sought to be assailed by the petitioner in the present petition and the relief has been sought

to set aside the decision taken in the second COC meeting convened on 9.5.2022. It is also stated in the writ petition that pursuant to the notice dated 5.5.2022 of the second meeting of COC, the COC received emails from prospective investors showing interest to submit resolution plan. The copy of the minutes of meeting dated 9.5.2022 of COC appended with the writ petition has been placed before us to urge that though the Resolution Professional (**RP**) informed the members of the COC about the letters received from three promoters showing their interest in Corporate Debtor and thus, to submit resolution plan and the request to COC to consider publication of Form-G positively, however, the proposal to approve Form-G, inviting for Expression of Interest and its publication was turned down, resolving that *'Form G and its publication are hereby not approved / rejected by Committee of Creditors*'.

B. <u>Arguments of the learned counsels for the parties</u>:-

5. It is argued by Mr. Saurabh Soparkar, learned Senior Counsel appearing for the petitioner that Section 33(2) of the I&B Code confers unfettered powers on the COC to liquidate the Corporate Debtor even without making any attempt to revive

the debtor. Explanation to sub-section (2) of Section 33 provides that COC may take the decision to liquidate the Corporate Debtor, at any time, even before the preparation of the Information Memorandum which is the first step for making of a resolution plan. This drastic power conferred on the Corporate Debtor is wholly excessive and disproportionate and acts as an antithesis to the object of the I&B Code.

6. It was argued that the object and reason of the I&B Code in the long title itself indicates that the object of the Code is to complete the resolution process in a time-bound manner for maximising the value of assets of corporate persons, partnership firm and individuals. The I&B Code is constructed in a manner to achieve the object for revival of the Corporate Debtor and not to bring it to death by liquidation process. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 framed under the I&B Code by the Board has been placed before us to assert that Regulation 32(e) and (f) and 32A of the Regulations, 2016 mandate the liquidator to sell the Corporate Debtor as a going concern or the business of the Corporate Debtor as a going concern. Regulation 32A mandates

that where the Committee of Creditors has recommended sale under clause (e) or (f) of Regulation 32, the assets and liabilities of the Corporate Debtor, as identified by the Committee of Creditors shall be sold as a going concern. Where the liquidator is of the opinion that sale under clause (e) or (f) of Regulation 32 shall maximise the value of the Corporate Debtor, he shall endeavour to first sell under the said clauses. The contention is that the object of the I&B Code is revival of the Corporate Debtor and liquidation is the last resort.

7. Reliance is placed on the decision of the Apex Court in the case of ***Swiss Ribbons Pvt. Ltd. vs. Union of India & Others***[1] to submit that the Apex Court has observed therein that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the Corporate Debtor as a going concern. Reference was made to the previous decision in the case of ***ArcelorMittal (India) (P) Ltd. vs. Satish Kumar Gupta***[2], wherein it was

[1] (2019) 4 SCC 17
[2] (2019) 2 SCC 1

observed therein that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor from its own management and from a corporate death by liquidation. The Code is, thus, a beneficial legislation which puts the Corporate Debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the Corporate Debtor have, thus, been taken care of under the Code and the resolution process is, thus, designed in a manner that it is not adversarial to the corporate debtor. As far as possible, the efforts are to be made for revival of the Corporate Debtor.

8. It is, thus, argued that in view of the law laid down by the Apex Court that liquidation is available only as a last resort and primary objective of the I&B Code is revival of the Corporate Debtor, the Committee of Creditors cannot decide to go for liquidation without even consideration of the offer by the promoter to help preparation of resolution plan. Section 33(2) confers unfettered power on the Committee of Creditors to take the decision to liquidate the Corporate Debtor even before the preparation of the Information Memorandum which is the first

step in the making of the resolution plan. The information memorandum which is to be prepared under Section 29 of the I&B Code is to contain such relevant information as may be specified by the Board for formulating a resolution plan. Without the first step taken by the Committee of Creditors to get the relevant information to formulate resolution plan by utilising the information memorandum, there is no justification for the decision taken by the Committee of Creditors to go for liquidation. The minutes of the second meeting of COC dated 9.5.2022 clearly indicate that there was no application of mind by the COC in rejecting the proposal of three prospective investors outrightly, by forming an opinion that since the business of Corporate Debtor is not running for many years, there is no question of revival of the company.

9. Reliance has been placed on the decision of the Apex Court in the case of ***Shayara Bano vs. Union of India and Others***[3] to submit that the Apex Court has laid down the doctrine of Manifest arbitrariness therein and defined it as:

"Manifest arbitrariness, therefore, must be something

[3] (2017) 9 SCC 1

> *done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."*

Arbitrariness in legislation is very much a facet of unreasonableness in Article 19(2) to (6) and it has been held therein that there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well. It was argued that the doctrine of proportionality as a constitutional doctrine as has been highlighted in the case of ***Om Kumar vs. Union of India***[4] has been noted therein to record that so far as Article 14 is concerned, when the Courts considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences. This is nothing but the principle of proportionality. The legislation or rules have been struck down as being arbitrary in the sense of being unreasonable. Whenever legislation is 'manifestly arbitrary', i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism

[4] (2001) 2 SCC 386

and not in pursuit of promotion of healthy competition and equitable treatment, it can be struck down on the ground of arbitrariness, being constitutionality infirm. The submission is that the legislation should conform to norms which are rationale, informed with reasons and guided by public interest, etc.

10. Further, reliance is placed on the decision of the Apex Court in the case of ***S. G. Jaisinghani vs. Union of India and Others***[5] to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be confined within clearly defined limits. The decision should be made by the application of known principles and rules and, in general, such decision should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. The rule of law may be said to be the sworn

[5] AIR 1967 SC 1427

enemy of caprice.

11. Reliance is also placed on the judgment of the Apex Court in the case of ***Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others***[6] to place the observations made therein as under:

> *"316. Thus it could be hold that Art. 14 read with 16(1) accords right to an equality or an equal treatment consistent with the principles of natural justice. Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. Wider the discretion, the greater the chances of abuse. Absolute discretion is destructive of freedom. than of man's other inventions. Absolute discretion marks the beginning of the end of the liberty. The conferment of absolute power to dismiss a permanent employee is antithesis to justness or fair treatment. The exercise of discretionary power wide of mark would bread arbitrary, unreasonable or unfair actions and would not be consistent with reason and justice. The provisions of a statute, regulations or rules*

[6] 1991 Supp (1) SCC 600

that empower an employer or the 'management to dismiss, remove or reduce in rank of an employee, must be consistent with just, reasonable and fair procedure. It would, further, be held that right to public employment which includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Art. 21 of the Constitution. Any procedure prescribed to deprive such a right to livelihood or continued employment must be just, fair and reasonable procedure. In other words an employee in a public employment also must not be arbitrarily unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure. Otherwise any law or rule in violation thereof is void."

12. The contention is that absolute discretion is destructive of freedom and is antithesis to justness or fair treatment. The conferment of the absolute discretion to the COC would result in arbitrary, unreasonable or unfair actions and would not be consistent with reasons and justice. Such an absolute discretion conferred upon the Committee of Creditors in the Explanation

to sub-section (2) of Section 33 is in contradiction to the rule of reasonableness and is susceptible to lead to arbitrariness. Such legislation cannot but be held to be unconstitutional.

13. Reliance is further placed on the decision of the Apex Court in the case of ***Jyoti Pershad vs. The Administrator for the Union Territory of Delhi***[7] to place before us the law laid down therein to test the validity of a rule within the import, content and scope of Article 14 of the Constitution. The extract of paragraph '12' of the said decision placed before us, is to be noted hereinunder:

> *"12. The import, content and scope of Art. 14 of the Constitution has been elaborately considered and explained in numerous decisions of this Court and it is, therefore, unnecessary for us to embark on any fresh investigation of the topic, but it would be sufficient to summarise the principles, or rather the rules of guidance for the interpretation of the Article which have already been established, and then consider the application of those rules to the provisions of the enactment now impugned. It is only necessary to add that the decisions of this Court laying down the proper construction of Art. 14 rendered up to 1959 have been summarised in the form of 5 propositions by Das C. J. in Ramakrishna*

[7] AIR 2017 SC 4609

Dalmia v. Justice Tendolkar (1), but we are making a summary on slightly different lines more relevant to the enquiry regarding the provision with which we are concerned in the present case.

Reliance is also placed on the observations in the case of ***Shayara Bano and others vs. Union of India and others*** and in the case of ***S. G. Jaisinghani vs. Union of India and others***[8] to substantiate the above submissions.

14. Mr. Ankit Shah, learned counsel for the Union of India, in rebuttal, placed the decision of the Apex Court in the case of ***M. K. Rajagopalan vs. Dr. Periasamy Palani Gounder and Another***[9], wherein the decisions of the Apex Court in the cases of ***Swiss Ribbons (supra)*** and ***ArcelorMittal (India) (P) Ltd. (supra)*** have been considered, and it was held that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor from its own management and from a Corporate death by liquidation. Taking note of the decision of the Apex Court in the case of ***Jaypee Kensington Boulevard Apartments Welfare***

8 AIR 1967 SC 1427
9 2023 SCC OnLine SC 574

Association and others vs. NBCC (India) Limited and others[10], in para 164 therein, it was noted that the Apex Court underscored the crucial role of Committee of Creditors in the entire CIRP with reference to several past decisions, wherein it is held that the commercial wisdom of COC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed Resolution Plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in COC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the 'commercial wisdom' of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable. In the case *of* ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory***

[10] (2022) 1 SCC 401

vs. Satish Kumar Gupta and others[11], Three-Judge Bench of the Apex Court after survey of all the relevant provisions concerning Corporate Insolvency Resolution Process, has explained the assignment of different role players in the process. The Court has again explained the primacy endowed on the commercial wisdom of the Committee of Creditors and reasons therefor. Taking note of the observations in the case of ***K. Sashidhar vs. Indian Overseas Bank***[12] therein, it was noted therein that it is the commercial wisdom of the Committee of Creditors to decide as to whether or not to rehabilitate the Corporate Debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail, the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion.

15. The learned Senior Counsel appearing for the petitioner, in rejoinder, has also referred to the decision in the case of ***M. K. Rajagopalan (supra)*** to place the observations in para 189

[11] (2020) 8 SCC 531
[12] (2019) 12 SCC 150

therein to submit that the Court has taken note therein that the commercial wisdom of COC is assigned primacy in CIRP for it represents collective business decision, which is arrived at after thorough examination of the proposed resolution plan and assessment made with involvement of experts by the body of persons who are most vitally interested in rapid and efficient decision making. It follows as a necessary corollary that to be worth its name, the commercial wisdom of COC would come into existence and operation only when all the relevant information is available before it and is duly deliberated upon by all its members, who have direct and substantial interest in the survival of Corporate Debtor and in the entire CIRP. Placing the aforesaid observations, it was vehemently contended by the learned Senior Counsel appearing for the petitioner that in the light of the above noted principle, the question of commercial wisdom of CIRP would come into picture when the relevant information which have direct and substantial interest in the survival of the Corporate Debtor has been duly deliberated upon by the members of COC. In the instant case, in view of Explanation to sub-section (2) of Section 33, the COC did not

even collect the information which was relevant or material to take the decision whether to go in for liquidation and took decision without even trying to revive the company / corporate.

16. It is, thus, submitted that Explanation to sub-section (2) of Section 33, which confers unfettered, arbitrary power upon the COC to take the decision to liquidate the Corporate Debtor even before the preparation of the information memorandum, cannot withstand the test of reasonableness and has to be held unconstitutional being manifestly arbitrary.

C. Analysis:-

17. Having heard the learned counsels for the parties and perused the record.

18. To deal with the submissions of the learned counsels for the parties, we are first required to go through the provisions of the Insolvency and Bankruptcy Code, 2016 enacted on 28.5.2016. The Statement of objects and reasons of the said enactment contained the objective of I&B Code which is to consolidate and amend the laws relating to reorganisation and insolvency resolution of Corporate persons, partnership firms

and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. It was noted in the statement that the then existing framework of insolvency and bankruptcy was inadequate, ineffective and resulted in undue delay. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit and encourage entrepreneurship. It would also improve ease of doing business and facilitate more investment leading to higher economic growth and development. The Code seeks to provide for designating the NCLT and DRT as the adjudicating authority 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.

(i) <u>Legal Scheme of the I&B Code</u>:-

19. The long title of the Code reads as under:

> *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate*

persons, partnership firms and individuals in a time bound manner for maximisation 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 order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

20. Part II of the Code deals with 'insolvency resolution and liquidation for corporate persons'. Section 5(1) defines 'Adjudicating Authority', for the purposes of this Part, means 'National Company Law Tribunal' constituted under Section 408 of the Companies Act, 2013. Chapter II in Part II deals with Corporate Insolvency Resolution Process (CIRP). Section 5(11) defines 'initial date', means the date on which the financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating Corporate Insolvency Resolution Process. Section 5(12) defines '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. Section 7

enables financial creditor(s) to file application for initiating CIRP against the Corporate Debtor before the Adjudicating Authority when a default has occurred. Sections 8 and 9 deals with the action which can be taken by Operational Creditor to initiate CIRP. Section 10 provides for initiation of CIRP by Corporate applicant, by an application with the Adjudicating Authority. Section 12 provides timeline for completion of Corporate Insolvency Resolution Process (CIRP), which is 180 days from the date of admission of the application to initiate such process. Sections 13 and 14 deal with initiation of Moratorium and public announcement thereof, prohibiting certain actions against the Corporate Debtor and with respect to the assets of the Corporate Debtor recovery etc. Section 13 provides that the Adjudicating Authority after admission of the application under Section 7 or Section 9 or Section 10 shall appoint an interim resolution professional in the manner as laid down in Section 7. The Moratorium under Section 14 begins with the order passed by the Adjudicating Authority, on the public announcement of the initiation of CIRP. Section 15 provides the manner of making public announcement of CIRP

under the order referred to in Section 13. Section 15(1) provides that the public announcement of the CIRP for the Corporate Debtor shall include information relevant to creditors as on the last date for the submission of claims and details of the entire resolution professional responsible for receiving claims. Section 16 provides for appointment of Interim Resolution Professional (IRP) and Section 17 states that from the date of appointment of IRP, the management of the affairs of the Corporate Debtor shall vest in and outline the manner in which the IRP is vested with the management of the Corporate Debtor. The duties of IRP laid down in Section 20 provide that the Interim Resolution Professional (IRP) shall make every endeavour to protect and preserve the value of the Corporate Debtor and manage the operation of the Corporate Debtor as a going concern and reads as under:

> *20. (1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.*
>
> *(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—*

(a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern."

21. Section 21 provides for constitution of Committee of Creditors by IRP after collation of all claims received against the Corporate Debtor and determination of the financial position of

the Corporate Debtor. It reads:

> *21. (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 partyto 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."

22. Section 22 of the I&B Code mandates that the first meeting of the Committee of Creditors shall be held within seven days of the constitution of the Committee of Creditors (COC). It further empowers COC to either resolve to appoint the Interim Resolution Professional as a Resolution Professional or

to replace the interim resolution professional by another Resolution Professional. In case, the COC decides to continue the IRP as a Resolution Professional, it shall communicate its decision to IRP, the Corporate Debtor and the adjudicating authority. However, to replace the IRP, it shall have to file an application before the adjudicating authority for the appointment of the proposed resolution professional, in accordance with the Code, which shall be appointed by the Adjudicating Authority after confirmation by the Board. Further, the CIRP is to be conducted by the Resolution Professional, which shall manage the operation of the Corporate Debtor during the CIRP period. The resolution professional shall exercise power and duties as vested and conferred upon the IRP (Interim Resolution Professional) under Chapter II. Section 24 provides the manner in which the meeting of COC (Committee of Creditors) would be held. Section 25 outlines the duties of Resolution Professional. Section 28 provides that the Resolution Professional during CIRP shall not take any of the actions mentioned in sub-section (1) without the prior approval of the Committee of Creditors (COC) by the vote of 66% of the voting

shares. The COC is mandated to report the action of the Resolution Professional contrary to the Code as per sub-section (4) of Section 28 to the Board for taking necessary action against the Resolution Professional, which is held to be void under the Code. Section 29 provides for preparation of the Information Memorandum and reads as under:

> *"29. (1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.*
>
> *(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—*
>
> *(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;*
>
> *(b) to protect any intellectual property of the corporate debtor it may have access to; and*
>
> *(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.*
>
> *Explanation.—For the purposes of this section, "relevant*

information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified."

23. Section 29A provides for eligibility of the resolution applicant. Sections 30 and 31 deal with submission and approval of resolution plan. Section 32 provides a remedy of appeal against an order approving the resolution plan, in the manner and on the grounds laid down in sub-section (3) of Section 61. Section 33 relevant for our purpose as contained in Chapter III pertaining to liquidation process is to be noted hereinunder:

"33. (1) Where the Adjudicating Authority, —

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the

non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and (iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the

resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator."

24. At this juncture, we may note that under sub-section (2), on the decision of the Committee of Creditors, approved by not less than 66% of the voting share, the Adjudicating Authority shall have to pass liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of Section 33, to

liquidate the Corporate Debtor. Section 61 provides remedy of appeal against the order passed by the Adjudicating Authority before the National Company Law Appellate Tribunal. Sub-section (4) of Section 61 further reads thus:

> *"61(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."*

25. It is relevant to note that the decision of the Committee of Creditors to liquidate the Corporate Debtor becomes final only when the Appellate Authority passes a liquidation order as referred to above. The appeal against a liquidation order passed under Section 33 can be filed on the ground of material irregularity or fraud committed in relation to such an order.

26. Section 231 of the I&B Code bars the jurisdiction of the Civil Court in respect of any matter in which the Adjudicating Authority or the Board is empowered to pass any order or in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or Board under the Code.

27. Taking note of the above provisions of the I&B Code, we may further record that COC is constituted under Section 21 of the I&B Code which consists of financial creditors. The term 'financial creditor' has been defined in Section 5(7) to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. The process of insolvency resolution and liquidation concerning Corporate persons (debtors) has been qualified by Part-II of the I&B Code. Part II contains seven chapters. Chapter I provides that Part II shall apply to matters relating to the insolvency and liquidation of Corporate Debtors where the minimum amount of the default is one lakh rupees. Chapter II deals with the procedure to be followed for the Corporate Insolvency Resolution Process. Chapter III provides for initiation of liquidation leading to dissolution of Corporate Debtor. Chapter VII provides for adjudicatory process. From the scheme of the provisions, it is clear that the provisions contained in Part II of the Code are self-contained Code, providing for the procedure for consideration of the resolution plan by COC and taking decision for initiation of liquidation process.

(ii) <u>Amendment under challenge</u>:-

28. The challenge before us is to the provisions contained in the Explanation inserted in sub-section (2) of Section 33 by way of Amendment Act No.26 of 2019 viz. Insolvency and Bankruptcy Code (Amendment) Act, 2019. Section 8 of the Amendment Act, 2019 reads thus:

> *"8. In section 33 of the principal Act, in sub-section (2), the following Explanation shall be inserted, namely:––*
>
> *"Explanation.–– For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum."*

29. The statement of objects and reasons of the Amendment Act, 2019, as contained in the Insolvency and Bankruptcy Code (Amendment) Bill No. XXVI of 2019 dated 19.7.2019 reads as under:

> *"STATEMENT OF OBJECTS AND REASONS*
>
> *The Insolvency and Bankruptcy Code, 2016 (the Code)*

was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation 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 order or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

2. The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.

3. In view of the aforesaid difficulties and in order to fill the critical gaps in the corporate insolvency

framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, inter alia, provides for the following, namely:–

(a) to amend clause (26) of section 5 of the Code so as to insert an Explanation in the definition of "resolution plan" to clarify that a resolution plan proposing the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger to enable the market to come up with dynamic resolution plans in the interest of value maximisation;

(b) to amend sub-section (4) of section 7 of the Code to provide that if an application has not been admitted or rejected within fourteen days by the Adjudicating Authority, it shall provide the reasons in writing for the same;

(c) to amend sub-section (3) of section12 of the Code to mandate that the insolvency resolution process of a corporate debtor shall not extend beyond three hundred and thirty days from the insolvency commencement date, which will include the time taken in legal proceedings, in order to prevent undue delays in the completion of the Corporate Insolvency Resolution Process. However, if the process, including time taken in legal proceedings, is not completed within the said period of three hundred

and thirty days, an order requiring the corporate debtor to be liquidated under clause (a) of sub-section (1) of section 33 shall be passed. It is clarified that the time taken for the completion of the corporate insolvency resolution process shall include the time taken in legal proceedings;

(d) to insert sub-section (3A) in section 25A of the Code to provide that an authorised representative under sub-section (6A) of section 21 will cast the vote for all financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote, in order to facilitate decision making in the committee of creditors, especially when financial creditors are large and heterogeneous group; 4 5 (e) to amend sub-section (2) of section 30 of the Code to provide that–

(i) the operational creditors shall receive an amount that is not less than the liquidation value of their debt or the amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priorities in section 53 of the Code, whichever is higher;

(ii) the financial creditors who do not vote in favour of the resolution plan shall receive an amount that is not less than the liquidation value of their debt; (iii) the provisions shall apply to the corporate insolvency

resolution process of a corporate debtor–

(A) where a resolution plan has not been approved or rejected by the Adjudicating Authority; or

(B) an appeal is preferred under section 61 or 62 or such appeal is not time barred under any provision of law for the time being in force; or

(C) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;

(f) to amend sub-section (1) of section 31 of the Code to clarify that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities;

(g) to amend sub-section (2) of section 33 of the Code to clarify that the committee of creditors may take the decision to liquidate the corporate debtor, in accordance with the requirements provided in sub-section (2) of section 33, any time after the constitution of the committee of creditors under sub-section (1) of section 21 until the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

4. The Bill seeks to achieve the above objectives."

(iii) <u>Judicial Pronouncement re: objectives of the Code</u>:-

30. Coming to the judicial pronouncement pertaining to the field, in the case of ***Innoventive Industries Ltd. vs. ICICI Bank***[13], the Apex Court, after analysing the historical background in which the Code was enacted has noted that one of the primary objectives of the Code was to bring the insolvency law in India under a single Unified umbrella with the object of speeding up of the insolvency process, to resolving matters pertaining to insolvency and bankruptcy in a time bound manner, which under the then existing framework resulted in undue delays in resolution. Para 16 of the said judgment referred to the report of the Bankruptcy Law Reforms Committee of November 2015 to note that:

> *"Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the _calm period' can help keep an organization 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*

[13] (2018) 1 SCC 407

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 realization 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 realization 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."

31. Taking note of the scheme of the Code, the Apex Court has noted in para '33' as under:

"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."

32. In the case of ***ArcelorMittal (India) (P) Ltd.*** *(supra)*, on the issue revolving around the ineligibility of resolution applicants to submit resolution plan after the introduction of Section 29A into the I&B Code, with effect from 23.11.2017, the above principles in ***Innoventive Industries Ltd.*** *(supra)* were noted to record that insofar as the Code requires either that the Corporate Debtor be taken over by another management and run as a going concern or, if that fails, go into liquidation. The

time limit for completion of insolvency resolution process is laid down in Section 12, which is 180 days from the date of admission of the application. This is extendable by a maximum period of 90 days only if the Committee of Creditors, by the vote of 66% of the voting shares, votes to extend the said period and further if the Adjudicatory Authority specified that such process cannot be completed within 180 days and pass order to extend the duration of such process. It was noted by the Apex Court that what is important is the proviso to Section 12(3) which states that any extension of the period under Section 12 cannot be granted more than once. This has to be read with the third proviso to Section 30(4) which states that the maximum period of 30 days mentioned in the second proviso is allowable as the only exception to the extension of the aforesaid period for the purpose of proviso of sub-section (3) of Section 12, meaning thereby the extension of the aforesaid period not being granted more than once. It is further noted that in the event that the said period ends with either without receipt of a resolution plan or after rejection of a resolution plan under Section 31, the consequence is provided by Section 33, which makes it clear

that when either of these two contingencies occurs, the Corporate Debtor is required to be liquidated in the manner laid down in Chapter III. It was, thus, observed that:

> *"Section 12, construed in the light of the object sought to be achieved by the Code, and in the light of the consequence provided by Section 33, therefore, makes it clear that the periods previously mentioned are mandatory and cannot be extended."*

33. In the aforesaid background, the Apex Court had examined the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 in the case of ***Swiss Ribbons*** *(supra)*, wherein the challenge was on various grounds amongst other that the classification between Financial Creditors and Operational Creditors is based on no intelligible differentia, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution and if that is not possible, then ultimately, liquidation. Further challenge was to Section 29A(c) providing that a person's account may be classified as a Non Performing Asset (NPA) in accordance with the guidelines of the Reserve Bank of India (RBI), despite him not being a willful defaulter. Taking note of the Statement of objects and

reasons of the Code as referred to in *Innoventive Industries Ltd. (supra)* and the preamble of the Code, it was held in paragraphs 27 and 28 as under:

> *"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets.*

Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further

dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

34. It was further observed in paragraph 51 that:

"51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."

35. The provisions pertaining to notice, hearing and set of counterclaim qua financial debts have further been noted to record the difference between Financial Creditors and Operational Creditors. The scheme of the Code as to how and when the Insolvency Resolution Process begins, as noted in

Innoventive Industries Ltd. (supra) in paragraphs 27 to 30 has been noted in paragraph 52 thereof as under:

> *"52. 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."

36. In paragraphs 54 and 55, it was noted that information in respect of debts incurred by financial debtors is easily available through information utilities, which under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves and information provided as to the debt is accurate. This is done by giving notice to the Corporate Debtor who then has an opportunity to correct such information. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for other sources which may be taken as an evidence of a financial debt. Rule 4(3) of the Rules

2016 has been noted therein to record that the application filed by the financial creditor with the Adjudicating Authority, has to be dispatched forthwith by Registered Post or Speed Post to the registered office of the Corporate Debtor. Sections 65 and 75 of the Code, provides for penalties in order to protect the Corporate Debtor from being dragged into the Corporate Insolvency Resolution Process in a *mala fide* manner or false information in the application made by a financial creditor, have further been noted to record that a conjoint reading of all the provisions makes it clear that at the stage of Adjudicating Authority's satisfaction to Section 7(5) of the Code, the Corporate Debtor is served with the copy of the application filed with the Adjudicating Authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. Punishment is provided for furnishing false information in the application made by a financial debtor which further deters a financial creditor from wrongly invoking the provision of Section 7 of the Code.

(iv) <u>Judicial Pronouncement re: Role of Committee of Creditors (COC)</u>:-

37. Taking note of the above scheme of the Code, we may further proceed to go through the decisions of the Apex Court discussing the role of Committee of Creditors (COC) comprising of financial creditors in the whole process of insolvency resolution and liquidation concerning corporate persons as contained in Part II of I&B Code.

38. In the case of ***K. Sashidhar*** *(supra)*, the Apex Court has dealt with the specific issue with regard to the scope of judicial review by the Adjudicating Authority in relation to the opinion expressed by COC on the proposal for approval of the resolution plan. The occasion has, thus, arisen to consider the role of COC in the insolvency resolution process. Taking note of the constitution of COC under Section 21 of the I&B Code, it was observed therein that the provisions of Part II of the I&B Code are self-contained Code. Reference has also been made to the decision of *Innoventive Industries Ltd. (supra)*, to note that most important objective of the Code was to bring the insolvency law

in India under a single unified umbrella with the object to speed up the insolvency process. It was further noted that in *ArcelorMittal (India) (P) Ltd. (supra)*, the Apex Court had adverted to the timelines specified in the Code for completion of the insolvency resolution process and the consequence thereof. The jurisdiction of the Adjudicating Authority under Section 31 in the matter of approval of resolution plan was considered and taking note of the provisions of Section 33 (as it then was), it was noted that in case the requirement of Section 31(1) for approval of resolution plan is not fulfilled, in such a situation, the Adjudicating Authority can have no other option but to initiate liquidation process in term of Section 33(1) of the I&B Code. Coming to the role of COC and the jurisdiction of the Adjudicating Authority, it was held in paragraph 52 therein that the legislature, consciously, has not provided any ground to challenge the 'commercial wisdom' of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable. The Apex Court has further considered the report of the Bankruptcy Law Reforms Committee of November 2015 to note that primacy has been

given to COC to evaluate the various possibilities and make a decision. The said principles as laid down in paragraphs '52' and '53' are relevant to be extracted hereinunder:

> *"52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for*

ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

53. In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to the CoC to evaluate the various possibilities and make a decision. It has been observed thus:

"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." (emphasis supplied)

39. While analysing the provisions of Sections 30 and 31 pertaining to submission of resolution plan and the discretion of the Adjudicating Authority to scrutinise the resolution plan, it was noted that the discretion of the Adjudicating Authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of the financial creditors. Even in that enquiry, the ground on which the Adjudicating Authority can reject the resolution plan is in reference to matters specified in Section 30(2), when

the resolution plan does not confirm to the stated requirements. As regards the power and function of the Board established under Section 188 of the I&B Code, they have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting of the resolution plan under Section 30(4) of the I&B Code. It was, thus, observed that:

> *"55. … … … The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code."*

40. It may be noted that in the said case, the contention was

that voting by the dissenting financial creditors suffers from the vice of being unreasonable, irrational, unintelligible and an abuse of exercise of power. It was argued that the power bestowed on the financial creditors to cast their vote under Section 30(4) is coupled with a duty to exercise that power with utmost care, caution and reason, keeping in mind the legislative intent and the spirit of the I&B Code – fullest attempt should be made to revive the Corporate Debtors and not to mechanically shove them to the brink of liquidation process, which has the inevitable impact on larger public interests and the stakeholders in particular, including workers associated with the company. Dealing with the said argument, it was held in paragraph '62' as under:

> *"62. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground – to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic*

defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."

41. In the case of ***Essar Steel*** *(supra)*, the question as to the role of the resolution applicant, resolution professional, Committee of Creditors that are constituted under the I&B Code, 2016 was considered in the light of the dispute therein pertaining to the decision of NCLAT (Appellate Tribunal) in

modifying and substituting the resolution plan approved by the Committee of Creditors (COC). Taking note of the provisions of Section 21(2), BLCR report of 2015, which formed the basis for enactment of the Insolvency Code, it was observed that since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. The constitution of the COC under Section 21(2) and the provisions of Sections 24 and 28 of the I&B Code were noted therein to hold in paragraph '60' as under:

> *"60. Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most*

> *importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its 55 feasibility and viability, and various other requirements as may be prescribed by the Regulations."*

42. Further noticing the Regulations 18 to 26 of 2016' Regulations dealing with the meetings to be conducted by the COC and Regulation 39(3), it was held that:

> *"This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants."*

43. Placing reliance on the decision in ***K. Sashidhar*** *(supra)*, referring to paragraphs 34, 35 and 52 thereof it was held in paragraph '64' in ***Essar Steel*** *(supra)* as under:

> *"64. Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which 59 obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of*

creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

44. In the case of ***Maharashtra Seamless Limited vs. Padmanabhan Venkatesh and others***[14], a three-Judges Bench of the Apex Court referring to the enunciation of *Essar Steel* (supra) has reiterated the primacy assigned to the commercial

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wisdom of the Committee of Creditors in the matter of Corporate Insolvency Resolution.

45. In the case of ***Jaypee Kensington Boulevard Apartments Welfare Association*** *(supra)*, the Apex Court, while relying on the decisions of *K. Sashidhar (supra)* and *Essar Steel (supra)* extracting the above noted passages from the said decisions underlining the decisive commercial wisdom of Committee of Creditors, observed in paragraph '98' as under:

> *"98. For what has been noticed hereinabove, it would not be an exaggeration in terms that, in corporate insolvency resolution process, the role of Committee of Creditors is akin to that of a protagonist, giving finality to the process (subject, of course, to approval by the Adjudicating Authority), who takes the key decisions in its commercial wisdom and also takes the consequences thereof. As noticed, the process is aimed at bringing the corporate debtor back on its feet and it is acknowledged that appropriate disposition of a defaulting corporate debtor and the choice of solution, to keep the corporate debtor as a going concern or to liquidate it, is to be made by the financial creditors, who could assess the viability and may take decisions in modification of the terms of the existing liabilities. In other words, the decision as to whether the corporate debtor be resurrected or not, by*

> *acceptance of a particular resolution plan, is essentially a business decision and hence, is left to the committee consisting of the financial creditors, that is, the Committee of Creditors but, with the requirement that the resolution plan, for its approval, ought to muster not less than 66% votes of the voting share of the financial creditors.*"

46. Referring to the above noted decisions of the Apex Court, the observations in *Jaypee Kensington Boulevard Apartments Welfare Association (supra)* that the decision as to whether the corporate debtor be resurrected or not, by acceptance of a particular resolution plan, is essentially a business decision and hence is left to the committee consisting of the financial creditors, that is, the Committee of Creditors, complying with the provisions of the I&B Code, is relevant to be reiterated. The significance of primacy of Committee of Creditors in the corporate insolvency resolution has been delineated by the Apex Court in the abovenoted decision.

(v) <u>Analysis of the arguments of the Petitioner's Counsel</u>:-

47. Coming back to the arguments of the learned Senior Counsel for the petitioner that the power conferred upon the

COC to take the decision to liquidate the Corporate Debtor even before the preparation of the information memorandum, by Section 8 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 is antithesis to the object of I&B Code, which according to him, is only to bring back the Corporate Debtor as a going concern, by way of Corporate Insolvency Resolution Process (CIRP). We may reocrd that the challenge is to Section 8 of the Amendment Act, 2019, inserting Explanation in sub-section (2) of Section 33 on the ground that the power conferred on the Committee of Creditors to take the decision to liquidate the Corporate Debtor even before the preparation of the information memorandum, is contrary to the object of the Act. The contention is that by the said amendment the legislature has provided unregulated and uncanalised power to the COC which is prone to arbitrariness. In the scheme of the I&B Code, amongst the steps taken in the Corporate Insolvency Resolution Process as contained in Chapter II of Part II, Section 29 provides a necessary stage of preparation of the information memorandum, which is to contain such relevant information and is to be prepared in such form and manner as may be specified

by the I&B Code, for formulating a resolution plan. Sub-section (2) of Section 29 provides that the resolution professional shall provide to the resolution applicant access to all relevant information, contained in the information memorandum, as required by the resolution applicant to make the resolution plan for the Corporate Debtor, which shall include the financial position of the Corporate Debtor, all information related to the disputes by or against the Corporate Debtor and any other matter pertaining to the Corporate Debtor as may be specified. It was argued that the Corporate Insolvency Resolution Process (CIRP) cannot be permitted to be skipped or overturned by the Committee of Creditors (COC) before taking a decision to liquidate the Corporate Debtor. If this is permitted, it would lead to inclusion of element of arbitrariness in the CIRP as the Committee of Creditors (COC) without even perusal of the resolution plan or giving opportunity to the resolution professional to prepare a resolution plan, would initiate the liquidation process. This is a glaring example of the legislation in the Explanation to sub-section (2) of Section 33, being manifestly arbitrary.

48. Dealing with the above, we are required to analyse the reasons for bringing the amendments 2019. Paragraph 2 of the Statement of objects and reasons of the Bill' 2019 states that primary objective of the Code is to conclude "**the insolvency resolution in a time bound manner for maximisation of value of assets in order to balance the interest of all the stakeholders**". Concerns have been raised with regard to the extensive litigation causing undue delays, which may have hampered the value maximisation. It was noted that there is a need to ensure that all creditors are treated fairly. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit (Emphasis supplied). Paragraph 3 of the Statement of objects and reasons further states that the amendments are being brought to remove the difficulties faced in the implementation of various provisions of the Code in its spirit and objective and in order to fill the critical gaps in the corporate insolvency framework.

49. We may further note that the constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, has been examined by the Apex Court in the case of ***Essar Steel*** *(supra)*. By means of Section 4 of the Amending Act of 2019, in sub-section (3) of Section 12 of the Principal Act, second and third provisos were added to extend the original timelines in which a CIRP must be completed for a period of 100 days, making it to 330 days, including the time taken in legal proceeding in relation to such resolution process of the Corporate Debtor. Section 30(2)(b) by Section 6 of the Amending Act of 2019 gave operational creditors something more than that was given earlier by way of sub-clauses (i) and (ii) of clause (b), which is to be paid after amendment as a minimum amount to an operational creditor. While dealing with the challenge to the amended Section 30(2) by the Amending Act of 2019, it was reiterated in paragraph '129' therein as under:

> *"129. As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the*

requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment."

50. It was noted that the challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53. The rationale for only financial creditors handling the affairs of the Corporate Debtor and resolving them, deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code, has been noted in paragraph '56' in ***Essar Steel*** *(supra)*, relevant extract of which is to be reproduced hereunder:

"4. Creation of the creditors committee

The creditors committee will have the power to decide the final solution by majority vote in the negotiations.

The majority vote requires more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities. The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained…

The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.

5.3.3 Obtaining the resolution to insolvency in the IRP

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over

time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market."

(vi) Judicial review of an Economic Legislation:-

51. Dealing with the challenge to the constitutional validity of Section 8 of the Amendment Act of 2019 before us, we are further required to note the law pertaining to the scope of judicial review of an economic legislation. In ***Essar Steel***, referring to the decision in ***Swiss Ribbons*** *(supra)*, it was noted by the Apex Court that referring (*inter alia*) to various American decisions in paragraphs 17 to 24, it was held in ***Swiss Ribbons*** *(supra)* that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the

legislative judgment in economic choices must be given a certain degree of deference by the Courts. Paragraphs 17 to 24 of ***Swiss Ribbons*** *(supra)*, as noted in ***Essar Steel*** *(supra)* while examining the constitutional validity of Sections 4 and 6 of the Amending Act of 2019, are to be reproduced hereinunder:

> *"17. In the United States, at one point of time, Justice Stephen Field's dissents of the 19th Century were translated into majority opinions in the early 20th Century. This was referred to as the Lochner era, in which the U.S. Supreme Court, over a period of 40 years, consistently struck down legislation which was economic in nature as such legislation did not, according to the Court, square with property rights. As a result, a large number of minimum wage laws, maximum hours of work in factories laws, child labour laws, etc. were struck down. The result, as is well known, is that President Roosevelt initiated a courtpacking plan in which he sought to get authorization from Congress to 22 appoint additional judges to the Supreme Court, who would have then overruled the Lochner line of precedents. As it turned out, that became unnecessary as Justice Roberts switched his vote so that a 5:4 majority from 1937 onwards upheld economic legislation. It is important to note that the dissents of Justice Holmes and Justice Brandeis now became the law.*

18. Holmes, J. had, in his dissent in Lochner v. New York, 198 U.S. 45 (1905), stated: (SCC OnLine US SC paras 48-49 : US pp. 75-76)

"48. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U. S. 11. United 23 States and state

statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U. S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis v. Parker, 187 U. S. 606. The decision sustaining an eight hour law for miners is still recent. Holden v. Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.

It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

49. General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit

that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter 24 aspect it would be open to the charge of inequality I think it unnecessary to discuss.

19. Similarly, in New State Ice Co. v. Liebman, 285 U.S. 262 (1932), Justice Brandeis echoed Justice Holmes as follows: —

"48. The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the

Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

49. To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

20. The Lochner doctrine was finally buried in Ferguson v. Skrupa, 372 U.S. 726 (1962), where the Supreme Court held:

"5. Both the District Court in the present case and the Pennsylvania court in Stone adopted the philosophy of

Adams v. Tanner, and cases like it, that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and, by so doing, violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner, the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U. S. 45 (1905), outlawing —yellow dog‖ contracts, Coppage v. Kansas, 236 U. S. 1 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U. S. 525 (1923), and fixing the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U. S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,

'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is

restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

And, in an earlier case, he had emphasized that, _The criterion of constitutionality is not whether we believe the law to be for the public good' [Adkins v. Children's Hospital, 261 U. S. 525, 567, 570 (1923) (dissenting opinion)].

6. The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned… with the wisdom, need, or appropriateness of the legislation. [Olsen v. Nebraska ex rel. Western Reference & Bond Assn., 313 U. S. 236, 246 (1941)]' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to, 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the

Fourteenth Amendment was intended to secure' [Sproles v. Binford, 286 U.S. 374, 388 (1932)]. It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law' [Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949)].

7. In the face of our abandonment of the use of the "vague contours" [Adkins v. Children's Hospital, 261 U. S. 525, 535 (1923)] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on Adams v. Tanner is as mistaken as would be adherence to Adkins v. Children's Hospital, overruled by West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). Not only has the philosophy of Adams been abandoned, but also this Court, almost 15 years ago, expressly pointed to another opinion of this Court as having "clearly undermined" Adams. [Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)]. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the

wisdom of legislation,' [Day-Brite Lighting, Inc., v. Missouri, 342 U.S. 421, 423 (1923)] and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought' [Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955)]. Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us, but with the body constituted to pass laws for the State of Kansas.

8. Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only —invidious discrimination‖ which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act - advice which a nonlawyer cannot lawfully give him. If the State of

Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellee thinks it ought to be under the Kansas Constitution. (emphasis supplied)

21. In this country, this Court in R.K. Garg v. Union of India, (1981) 4 SCC 675 has held:

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:

'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'

The Court must always remember that —legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaption of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States

Supreme Court in Secretary of Agriculture v. Central Roig Refining Company [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

* * *

19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be offered for unearthing black money. Those who have successfully evaded

taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the tax department are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. 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‖ and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in Munn v. Illinois [94 US 13] , namely,

'that courts do not substitute their social and economic beliefs for the judgment of legislative bodies'. The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. The Court 32 should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theater Company v. City of Chicago [57 L Ed 730 : 228 US 61 (1912)] :

12. ... The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere error of government are not subject to our judicial review.

It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is

being utilized for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld." (emphasis supplied)

22. Likewise, in Bhavesh D. Parish v. Union of India, (2000) 5 SCC 471, this Court held:

"26. The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organized system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have largescale ramifications and can put the clock back for a number of years. The process of rationalization of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional

legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

* * *

30. Before we conclude there is another matter which we must advert to. It has been brought to our notice that Section 45-S of the Act has been challenged in various High Courts and a few of them have granted the stay of provisions of Section 45-S. When considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. Merely because a statute comes up for examination and some arguable point is raised, which persuades the courts to consider the controversy, the legislative will should not normally be put under suspension pending such consideration. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation, unless the same is set aside after final hearing and, therefore, the tendency to grant stay of legislation relating to economic reform, at the interim stage, cannot be understood. The system of checks and balances has to be utilized in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional

efficacy at the threshold itself."

23. In DG of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226, this Court has held:

"109. Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In Balco Employees' Union v. Union of India [Balco Employees' Union v. Union of India, (2002) 2 SCC 333], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature."

24. It is with this background, factual and legal, that the constitutional validity of the Insolvency and Bankruptcy Code, 2016 has to be viewed."

52. We may further note paragraph 120 in ***Swiss Ribbons*** *(supra),* wherein it is stated that the Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the Nation. It was noted that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders (emphasis supplied). The Apex Court has again noted in paragraph 121 noticing the figures therein as to how the experiment conducted in enacting the Code is proving to be largely successful. The observations in paragraph 120 and 121 in ***Swiss Ribbons*** *(supra)* are relevant to be extracted hereinunder:

> *"120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals*

with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the 149 Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

121. We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the Adjudicating Authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being

accepted. Of these eighty cases, the liquidation value of sixty three such cases is INR 29,788.07 crores. However, the amount realized from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, the Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017- 150 2018, and to INR 13195.20 crores for the first six months of 2018- 2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14530.47 crores in 2016-2017, to INR 18469.25 crores in 2017- 2018, and to INR 18798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs."

It is in the above background that the constitutional

validity of Sections 4 and 6 of the Amending Act of 2019 was examined by the Apex Court therein.

(vii) <u>Conclusions</u>:-

53. Reverting to the challenge before us, the only ground to challenge the validity of the Explanation to sub-section (2) of Section 31, which provides discretion to the Committee of Creditors to take the decision to liquidate the Corporate Debtor, any time after its constitution under sub-section (1) of Section 21, before the confirmation of the resolution plan, including, at any time before the preparation of the information memorandum, is that the discretion conferred upon the Committee of Creditors to liquidate the Corporate Debtor without even taking first step in preparation of the resolution plan by the resolution professional, may result in arbitrary decision. As the power conferred upon the COC, is unguided and uncanalised, it is prone to abuse as in the instant case, where the COC not even entertained the request of the Corporate Debtor to issue Form G to provide an opportunity to the resolution applicants to submit their plan. As discussed above, the rationale for providing that the financial creditors

will be handling the affairs of the Corporate debtor can be seen from the BLRC Report of 2015 extracted hereinabove, wherein while recommending for creation of Creditors Committee, it was stated that the Code will provide that the Creditors Committee should be restricted to only the financial creditors. It was further stated in the matter of "obtaining the resolution to insolvency in the IRP" that the Committee (BLRC) is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. However, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. The decision will come from the deliberations of the Creditors Committee in response to the solutions proposed by the market (emphasis supplied).

54. The flexibility that the Code gives to the Committee of Creditors to approve or not to approve resolution plan has been

recognised in various provisions of the Code, noted hereinabove. The scope of the jurisdiction of the Adjudicating Authority in the matter of approval of resolution plan by the Committee of Creditors is confined to the requirement as referred to in sub-section (2) of Section 3 and the voting pattern of financial creditors, for approval as provided in sub-section (4) of Section 30. In the entire scheme of the Act, primacy has been given to the decision of the Committee of Creditors. Paragraph 3.4.2 of the BLRC Report of 2015 which lays down the principles drawing the design of the new insolvency and bankruptcy resolution framework, as noted in paragraph '76' in ***Essar Steel*** *(supra)* is also relevant to be extracted at this juncture:-

> *"76. The BLRC Report, 2015 is of great help in understanding what is meant by respecting the rights of all creditors equally. Paragraph 3.4.2 of the said report states:*
>
> *"3.4.2 Principles driving the design*
>
> *The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:*
>
> * * *
>
> *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." (emphasis supplied)

55. A reading thereof indicates that the essence is that 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. The reasons for bringing the Amendment Act of 2019 noted by the Apex Court in ***Essar Steel*** *(supra)*, in paragraph 110 is also to be noted hereinunder:

"110. Closely on the heels of the impugned NCLAT judgment which was delivered on 04.07.2019, a representation dated 17.07.2019 was written by the Deputy Secretary General, FICCI to the Secretary, Ministry of Corporate Affairs, pointing out the flaws of the NCLAT judgment and suggesting that the Government may consider amendment of the Code to reinstate the law as it was and should be. This representation stated:

"A case in point is the recent NCLAT judgment which, in

effect, places Secured and unsecured Financial Creditors as well as Financial and Operational Creditors on an equal footing, thus virtually erasing the distinction specifically carved between these two classes of creditors by the provisions of the Code. It may be noted that the consequences of this order stretch beyond this particular case.

The doctrine that secured creditors shall rank ahead of unsecured creditors is a core principle of banking. It allows banks to lend to companies and individuals at lower rates of interest in a secured lending because they know that their loan is secured and in the eventuality of a default, their losses would be mitigated. By virtue of this order, the borrowing rates for all classes would go up in the future because banks can't be sure of protecting their losses. The fundamental principles of credit analysis and rating no longer hold true. This would also result in unjust enrichment for some creditors who, knowing that they don't have benefit of the security, lent at a much higher rate as compared to the secured lenders. Besides earning far more money than secured creditors, due to higher interest rate during the pre insolvency stage they now have the benefit of higher share in the plan value, at the expense of secured creditors. In fact the ruling puts in question the very concept of security – what is the use of a charge/security if it is meaningless in insolvency? Even other statutes, including the Companies Act, 2013 clearly lay down a

distinction between secured and unsecured creditors and if both are treated at par it will be a huge disincentive for secured creditors…In fact, in its judgement on the constitutionality of the IBC earlier this year, the Supreme Court had justified the difference between financial and operational creditors. The NCLAT order effectively negates that distinction, which is against the fundamental theme of the IBC. If the distinction between secured and unsecured financial creditors and between financial and operational creditors is not maintained, bankers would be reluctant to use the IBC provisions for resolution of stressed assets, and would prefer for the companies to enter liquidation, which is certainly not the intent of the Code. The decision may also open the floodgates for reopening of previously concluded cases as well as filing of fresh applications and appeals by operational creditors, alleging discrimination and seeking parity with financial creditors and also by unsecured financial creditors, alleging discrimination and seeking parity with secured financial creditors.

* * *

We would like to draw your attention to Sections 30 and 31 of the Code which contain detailed provisions on submission and approval of the resolution plan. As per section 31(1), once the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements of section 30, it shall

approve the resolution plan. The Insolvency and Bankruptcy Board of India has also prescribed rules and regulations on mandatory requirements of resolution plan. The statute thus clearly empowers the committee of creditors to decide the distribution of funds. It also recognizes that as long as the resolution plan is in conformity with law, the Adjudication Authority must approve the resolution plan, as is evidenced by the usage of the word 'shall' in section 31(1). In K. Sashidhar case the Supreme Court has clearly held that commercial decisions of the committee of creditors are not open to judicial review. We would like to clarify that the fundamental principle that there should be no discrimination between similarly situated creditors is not being questioned by the industry. The question is whether we can redefine class to mean all financial creditors irrespective of inter-creditor arrangement or their security. Such a finding is a complete rewrite of laws, practices and the agreement and bargain of parties at the time of financing (or when goods or services were provided).

We therefore strongly suggest that the Government may consider amendment of the Code to expressly clarify the distinction between secured and unsecured creditors and between financial and operational creditors. Also, decisions of resolution applicant, as accepted by the committee of creditors should be considered final unless they are found to be contrary to law. This would avoid

> *any confusion; be in line with the global practices and held India retain its status of preferred investment destination."*

56. It was further noted in paragraph 118 as to what has prompted the legislature to bring the I&B Code with a view to consolidate and amend the the law relating to reorganise finances and insolvency resolution of corporate persons. Referring to BLRC Report of 2015, it was noted in paragraph 118 in ***Essar Steel*** *(supra)* as under:

> *"118. The raison d'être for this provision comes from the experience that has been plaguing the legislature ever since SICA was promulgated. The problems of SICA and other successor enactments was stated in graphic detail in Madras Petrochem Limited v. BIFR (2016) 4 SCC 1 at paragraphs 17 to 23. It will be seen from these paragraphs that though SICA, the Recovery of Debts Act of 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") all provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all these statutory measures proved to be abject failures in resolving stressed assets. It is for this reason that the BLRC Report of 2015 stated:*

"In limited circumstances, if 75 % of the creditors committee decides that the complexity of a case requires more time for a resolution plan to be finalised, a onetime extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator. This is starkly different from certain present arrangements which permit the debtor / promoter to seek extensions beyond any limit.

This approach has many strengths:
(i) Asset stripping by promoters is controlled after and before default.

(ii) The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.

(iii) Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring.

(iv) All parties knows that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.

(v) The role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed

on the creditors committee, and that 75% of the creditors do indeed support the resolution plan.

* * *

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.

This same idea is found in FSLRC's treatment of the failure of financial firms. The most important objective in 124 designing a legal framework for dealing with firm failure is the need for speed.

Identifying and addressing the sources of delay

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems.

Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay.

The second important source of delays lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realising the objectives of the Code.

* * *

Conclusion

The failure of some business plans is integral to the

> *process of the market economy. When business failure takes place, the best outcome for society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigor and greater competition."*

57. It can, thus, be seen that the decision as to whether the Corporate Debtor can be reorganised to finance the same as a going concern using a new arrangement of liabilities and with a new management team, or it is to be put into liquidation, is left to the commercial wisdom of the Committee of Creditors, decision of which is made non-justiciable under the Code. The reason being that, as stated in BLRC Report of 2015, speed is the essence for working of the Bankruptcy Code for two reasons; firstly that 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. Secondly, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. The delays

cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay. The Committee in the BLRC Report of 2015 has also noted that one of the important sources of delays lies in the adjudicatory mechanism.

58. While noticing the reasons for bringing the Amending Act of 2019, it may also be relevant to note that one of the main issues flagged on the floor of the House namely, Rajya Sabha during discussion on amendment was the delay due to the litigation. In the speech of the Hon'ble Finance Minister on the floor of the House, as noted in paragraph 119 in ***Essar Steel*** *(supra)*, it was highlighted that with the passage of time, the original intent of quick resolution of stressed assets is getting diluted. It is, therefore, essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been encouraging. The speech of the Hon'ble Finance Minister on the floor of the House highlighting object for which the amendment was made, has been noted by the Apex Court in ***Essar Steel*** *(supra)* to record that aid from the

speech was taken only in order to explain why the Amending Act of 2019 was brought about. The timely resolution of stressed assets is a key factor in the successful working of the Code. (emphasis supplied)

59. What is further important to note that the discretion given to the Committee of Creditors in Explanation to sub-section (2) of Section 33, which is qualified by the word 'may', makes it clear that this is only a guideline set out by the Explanation to sub-section (2), which may be applied by the Committee of Creditors in arriving at a business decision to go in for a resolution plan or to take a decision to liquidate the Corporate Debtor even before the preparation of the Information Memorandum.

60. From the above discussion, it can be culled out that:-

(i) Speed is of essence for the working of the Bankruptcy code;

(ii) The Committee of Creditors (COC) has widest discretion to approve the best resolution plan;

(iii) The appropriate disposition of a defaulting firm is a business decision and only the creditors can make it;

(iv) The choice of the solution to keep the entity as a going concern will be voted on by the Creditors Committee;

(v) The decision as to whether the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated, will come from the deliberations of the Creditors Committee.

61. It can be said that the Amending Act of 2019 simplifies by way of Explanation in Section 33(2) which covers liquidation that the COC may decide to liquidate the Corporate Debtor at any time after the setting up of the COC until the confirmation of the resolution plan, including at any time before the preparation of the Information Memorandum. It seems that this change has become pertinent because of the delay caused in the insolvency process as it was insisted earlier that a liquidation order may be passed only after the failure of the CIRP even though an early liquidation, in a given case, would have resulted

in value maximisation.

62. In view of the above discussion, the challenge to Section 8 of the Amending Act of 2019 inserting Explanation to sub-section (2) of Section 33, raised on the ground that the COC cannot be conferred power to give a go-bye to the CIRP as the revival of the Company (Corporate Debtor) in the Bankruptcy Code is first and foremost solution, is liable to be turned down.

63. Further, on the contention that the power conferred on the COC in the Explanation under Section 8 of the Amending Act of 2019 smacks of uncanalised, unguided power which may result in the abuse of the process in the Code, we may note that sub-section (2) of Section 33 provides that the liquidation order has to be passed by the Adjudicating Authority on intimation of the decision of Committee of Creditors, which shall be approved by not less than 66% of the voting share of the financial creditors. The remedy of appeal under Section 61(4) has been provided against the liquidation order passed under Section 33, which may be filed on the grounds of material irregularity or fraud committed in relation to such a liquidation order. There, thus,

exists check on the Committee of Creditors (COC) and the Adjudicating Authority who may take decision to liquidate the Corporate Debtor in a fraudulent manner or by a decision which suffers from manifest irregularity in the process. Section 62 further provides remedy of appeal against the order passed by the Appellate Tribunal (NCLAT) on the question of law arising out of such order under the Code.

64. It, therefore, can be seen that adequate checks and balances have been provided in the Code so as to ensure that the insolvency resolution and liquidation process for Corporate Persons is conducted in a manner that it is completed in a time-bound manner for maximisation of value of assets, in order to balance the interest of all the stakeholders.

65. We may further note that in the resolution process, which starts with the filing of application as per Section 7 or 9 or 10 of the I&B Code, where the financial creditor is an applicant at the stage of moving the application, it has to furnish information required under sub-section (3) of Section 7 which shall have to be examined by the Adjudicating Authority to ascertain the

existence of default, by passing an order recording reasons in writing under sub-section (5) of Section 7. The Adjudicating Authority also has power to reject the application under sub-section (2) if it is incomplete. The Corporate Insolvency Resolution Process (CIRP) commenced from the date of admission of the application under sub-section (5) of Section 7. The next step after public announcement of CIRP is appointment of an Interim Resolution Professional (IRP) by the Adjudicating Authority, as proposed in the application under Section 7 made by the financial creditor. The Interim Resolution Professional (IRP) shall be liable to manage the affairs of the Corporate Debtor from the date of appointment. Duties of Interim Resolution Professional (IRP) has been underlined in Section 18 and Section 20 mandates the IRP to make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operation of the Corporate Debtor as a going concern. The constitution of Committee of Creditors (COC) by the Interim Resolution Professional (IRP) shall be made after collation of all claims received against the Corporate Debtor and determination of

financial position of the Corporation Debtor. The Committee of Creditors (COC), within a period of 7 days from its constitution, shall have to hold its first meeting and to proceed with the process of appointment of Resolution Professional to conduct Corporate Insolvency Resolution Process (CIRP). The stage of preparation of Information Memorandum under Section 29 is reached after appointment of Resolution Professional by the Committee of Creditors (COC), under the order passed by the Adjudicating Authority, which shall have to be made after confirmation by the Board. The Information Memorandum under Section 29A is to be prepared by the Resolution Professional containing such relevant information as may be specified by the Board for formulating a resolution plan, which shall have to be provided to the resolution applicant.

66. It can, thus, be seen that in the process which commenced with the initiation of CIRP on the application of the financial creditor, the financial position of the Corporate Debtor has already been determined by the Interim Resolution Professional (IRP) and all the claims against the Corporate Debtor are collated. At this stage, by the Amending Act of 2019, with the

insertion of Explanation to sub-section (2) of Section 33, discretion is conferred upon the Committee of Creditors (COC) to take a decision to liquidate the Corporate Debtor, at any time after its constitution, before confirmation of the resolution plan, or even before the preparation of the Information Memorandum. In our considered opinion, this power given to COC is in conformity with the object of the Bankruptcy Code (I&B Code) and the amendment has sought to keep the Code in sync with the changing times, to overcome the unique challenges it has faced in litigation since its inception.

67. It may not be out of place to take into account the relevant facts of the instant case at this juncture. At the cost of repetition, it may be noted that in the first and second meetings of the COC, it was noted that the Corporate Debtor is out of business since about more than 5/7 years; Company is not a going concern since the aforesaid period and there was no employee in the company; there was no key managerial person; asset / liability and claims were not favourable for restart and revival of Corporate Debtor. It is noted in the resolution of the first meeting of the Committee of Creditors that the petitioner

herein viz. the shareholder of Director of the Company requested to record his statement that according to him, there was a possibility of revival of the company and that he would try to provide the data and that although at that time, there was no employee available and no financial data was available, he would try to provide the same, if possible. It was further discussed in the second meeting that there was no information / documents / details available from the Corporate Debtor / Board of Directors (suspended) so far, the information memorandum could not be prepared completely as such, which in turn, will not render any help to any prospective investor. It was also noted that the possession of the property was not with the RP and it incomplete Information Memorandum will be provided to the prospective investor and if he acts upon the same, it may lead to various complications in future and, thus, it was deliberated that as the business of the Corporate Debtor was not running since many years, there was no question of revival of the company and the best solution was to proceed with the liquidation. The voting results as noted therein to discuss and approve Form G – Invitation of Expression of Interest and its

publication and filing of suitable application before the NCLT, Ahmedabad Branch for extension of CIRP for 90 days, shows that it was resolved that “Form G and its publication are not approved / rejected by the Committee of Creditors”. This decision of the Committee of Creditors looking to the financial position of the Corporate Debtor, in the instant case, cannot be termed as an act of manifest arbitrariness on the part of the Committee of Creditors, as sought to be urged by the learned Senior Counsel for the petitioner. In any case, this issue need not be examined by us and observations made hereinabove are only in order to deal with the contentions of the learned Senior Counsel for the petitioner that the decision of the Committee of Creditors in its first and second meetings itself, to liquidate the Corporate Debtor, is a reflection of manifest arbitrariness on the part of the COC. We may clarify that the aforesaid observations made by us shall not be treated as our opinion formed on the merits of the case of the petitioner, in case the petitioner decides to raise further challenge before the Appellate Authority under the I&B Code.

68. On a threadbare discussion of the object and purpose of

the I&B Code and the Amending Act of 2019, we do not find any merit in the challenge to the validity of Section 8 of the Amending Act of 2019 explaining the power of Committee of Creditors already enshrined in the I&B Code.

69. With the above, the writ petition is dismissed being devoid of merits. No order as to costs.

Sd/-

(SUNITA AGARWAL, CJ)

Sd/-

(ANIRUDDHA P. MAYEE, J.)

Bharat