SWISS RIBBONS SC RULING:

IBC Must Stay On, The Defaulters Paradise Is Lost!

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Editor's Note: *It shall not be an exaggeration of say that the instant case has laid down the foundation of bankruptcy law once again. The Hon'ble Supreme Court has endorsed the Code right from its inception and vide its order has reinforced the validity of the Code. In its order dated 25.01.2019, the Hon'ble Supreme Court stated that:*

> *"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."*

This piece discusses the key highlights of this landmark judgement.

The following is our quick summary of the ruling of the Apex Court.

Arguments assailing the Code

1. Objections as to constitution of NCLT and NCLAT
   - Whether the same is in accordance with Madras Bar Association ruling?
   - Whether the Tribunals should not be working under the administrative control of the Ministry of Law?
2. Scheme of the law distinguishing between financial and operational creditors is not based on intelligible criteria, and is, therefore, discrimination
3. Information utilities can be given the power to certify the existence of a default
4. Sec 12A allows CoC members to continue to dominate proceedings even if the corporate debtor has settled with the creditor who is not paid
5. RP has powers of adjudication – which is violative of the basic principles of dispensation of justice
6. Several issues on sec. 29A
   - Retrospective application of sec. 29A
   - 29A is contrary to the objective of speedy resolution
   - Blanket bar on all promoters without distinguishing between those who are unscrupulous, and others, is bad in law
   - Relatives without having any relation with the promoters have been ousted from bidding

SC ruling

7. Judiciary should play minimal role in role of the legislature in framing economic laws, based on several Indian and global precedents

8. The foremost objective of the Code is "reorganisation", that is, resolution. Liquidation is only the last resort

9. On appointment of NCLT and NCLAT members, the Apex court went by the Govt affidavit on adherence to the guidelines set by the SC in the Madras Bar Association case

10. NCLAT circuit Benches (that is, regional benches) will be set up within 6 months – direction of the Apex court

11. The Court makes statement on putting NCLT and NCLATs under the administrative charge of the Ministry of Law, without any specific time frame

12. Classification of creditors into financial creditors and operational creditors

    - Neither arbitrary, nor discriminatory, nor violative of Art 14

    - While the court notes the submission of the Counsel that this distinction is not there anywhere in the world, it refers to BLRC report for the basis of the distinction

    - Court pointed to several reasons for distinguishing, including the fact that financial creditors may engage in viability studies and may restructure the debt – which operational creditors do not.

    - As regards operational creditors not having the power to vote, reference to the Insolvency Law Committee report which discussed the issue, and decided not to make change in the law on this point

    - Principle of fair and equitable treatment of all creditors is incorporated, since now Reg 38 requires the resolution applicant to state how the plan meets the interests of operational creditors too

13. Sec 12A being violtative of Art 14

    - Once the CIRP is triggers, the proceeding becomes a proceeding in rem, that is, collective proceeding, which cannot be terminated by an individual creditor.

    - Additionally, the Apex court has directed as follows: "We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement.

    - Further, the Apex court also clarifies: "it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the

committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code." From this dictum of the Apex court, the powers of the NCLT under sec. 60 get a strong boost. In appropriate circumstances, the Tribunals may even overrule the decision of the CoC.

14. Information utilities determining existence of default

    - The noting of the default by the IU is only prima facie evidence. It may be rebutted.

15. RP having adjudicative powers:

    - RP is only given administrative, rather than quasi-judicial powers. As against this, a liquidator "determines" the claim, which is quasi-judicial in nature, and may be appealed against in terms of sec. 42

    - The RP is a facilitator of the process. The liquidator does not work under the control of the CoC [para 61]

16. Constitutionality of sec 29A

    - Retrospective application of sec. 29A – no vested right has been taken away. Resolution applicants have no vested right to put resolution plans.

    - Malfeasance is not the only criteria for making a person ineligible.

    - The bar of ineligible persons continues over resolution as well as liquidation – para 69

    - Very importantly, the Court has ruled that the categories of "related persons" in sec 29A have to be read noscitur a sociis[ejusdem generis, that is, having the same flavour] with Explanation 1, and if so read, "would include only persons who are connected with the business activity of the resolution applicant."

17. Section 53 is not violative of art 14

    - The Court found the following criteria to be intelligible: "We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses."
