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BUILDING INSOLVENCY JURISPRUDENCE: Limits of the Judicial Role in the Constitutional Adjudication Relating to the Provisions of the Insolvency and Bankruptcy Code 2016

Jasper Vikas

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BUILDING INSOLVENCY JURISPRUDENCE: Limits of the Judicial Role in the Constitutional Adjudication Relating to the Provisions of the Insolvency and Bankruptcy Code 2016

Jasper Vikas[*]

[***Abstract***: *Indian Insolvency Laws have changed drastically in the past five years, with the object to check the creditor-debtor conflicts in a more efficient and time-bound manner, resolve corporate insolvencies and also to improve the procedural certainty in regard to Insolvency disputes. The Insolvency and Bankruptcy Code, 2016 was passed to achieve the above objectives. But, it initially faced various obstacles such as, transfer of Management in a hasty manner and shift of control of the Insolvent Company to the new Management. The Supreme Court, therefore, while interpreting various provisions of the IBC, builds up, the Insolvency Jurisprudence, to remove the obstacles affecting the success of IBC and work towards effective Corporate Insolvency Resolution Process. And, in this process, a paradigm shift was observed, from being socialist to capitalist. In the present research Article, the Author shall firstly, analyse the obstacles and challenges posed by IBC, secondly, the effects of COVID-19 on the present state of Indian economy and particularly, on IBC and thirdly, he will analyse the interpretation of the Legislative Acts such as IBC and the limits of the judicial role in the Constitutional Adjudication. The purpose of this Article is to address questions such as, why the Courts do not use their full judicial power to analyse and interpret the economic legislations and instead, defer the issues to the Parliament?*]

I

Introduction

The Insolvency and Bankruptcy Code (IBC), 2016, has gained immense importance in a very short period because of its huge impact on the overall politico-economic-social structure of society. It would have long-lasting effects particularly on the corporate structure and their behaviour. Though, the legislation largely is in respect of the financial health of the Corporate Entities, yet, it was observed that in the last three years, it has affected almost every stakeholder concerning those Corporate Entities. Even otherwise, IBC has been modified multiple times since it's coming into force due to its

[*] Assistant Professor of Law, Executive Director, Centre for Tax Laws, National Law University, Delhi. *Email:* jasper.vikas@nludelhi.ac.in.

holistic impact on society. Supreme Court being one of the most trusted pillars of the constitutional machinery, has interpreted the IBC, in light of the constitutional spirit along with larger public interests. The Court has not only built up jurisprudence of insolvency and bankruptcy, but it has gone forward in redefining its various provisions as per the spirit of the Constitution of India. IBC was brought into force by the Government of India on first December 2016, in the seventieth year of the independence of India.

It was not the first time that India had got its own Insolvency Laws. However, the IBC is considered as an amalgamation of all the existing laws, with the ultimate object of reviving or so to state, resolving the debts of the insolvent companies. The agenda, of course, had been novel and the intent of the legislature, in the beginning, was to bring in the timely resolution of debts and the restructuring of industry in a manner, which is not unnecessarily delayed. It is essential to know that the working of economic legislations also implies the existence of a stable and robust constitutional state and institutions. India, is one of those democracies, that carries a long tradition of exclusive economic laws and institutions to check the health of the economy. In the present article, *firstly*, the challenges posed by the IBC are discussed, *secondly*, the effects of COVID-19 on the Indian economy and particularly on the IBC are examined, and *thirdly*, the interpretation of the legislative Acts such as IBC and the limits of the judicial role in the constitutional adjudication, is analysed. The purpose of this article is to address questions such as, why Courts do not use their full judicial power to adjudicate economic legislations and instead defer the issues to the Parliament?

II

Challenges before IBC: Working of Corporate Insolvency Resolution Process (CIRP)

The IBC, with its birth, has resulted into lots of difficulties for various people. The Code provides for Corporate Insolvency Resolution Process ('CIRP'). The biggest difficulty of CIRP is that, it has divested the control the management from the hands of the existing management to a Resolution Professional, who is almost a complete alien to the company. He has been given the control of Committee of Creditors (CoC) that too only comprising of the unrelated financial creditors having the voting rights. A mere representation is given to the erstwhile Board of Directors (BoD) of the Company, and the Operational Creditors, that too if the Operation Creditors met the threshold limits prescribed, to be represented. The Code, as enacted, aimed at the 'timely' resolution of debts, but as the things had turned out, over the period of time and as it is tested through legal waters, it has been devastating certainly for the Indian Industry, entailed consequences for the workers, the operational creditors, and the statutory authorities.

Hasty Transfer of Management and Control of the Company to New Management

In the *first* phase, the brunt of IBC was faced, by companies by way of divestment of the management control. The Companies were virtually facing a collapse even though, theoretically, the operations of the Company were to continue. Similarly, in the *second* phase, when the resolution of debts took place, at times there was an 'artificial settlement' or 'resolution' with the creditors getting nothing but virtual peanuts. These provisions are completely constituted deviation from its predecessor Sick Industrial Companies (Special Provisions) Act, (SICA), 1985, which though was confined to the industries described in Schedule-I, of IDRA, but had been acting as a huge help to protect the interests of the Companies from their revival perspective and did not divest the management control. On the other hand, SICA provided protection, in terms of Section 22(1), which prevented recovery measures against the Companies and its guarantors.

IBC: A paradigm shift from Socialistic Approach to Capitalist Approach

Firstly, IBC had marked departure from the role of the High Court in the cases of winding up wherein again even if a Provisional Liquidator if at all was appointed on a winding-up matter being admitted or ultimately an Official Liquidator being appointed which was in rarest of rare occurrence, till then the management control of the company could be continued in the hands of its management. The important element which has to be seen was that these particular laws whether it was winding up law governed by the Companies Act, 1956 or the Sick Industrial Companies (Special Provisions) Act, 1985 were more in line with the socialistic cult (model) of the Indian economy and the Directive Principles of State Policy (DPSP) wherein what was being given importance was the continued employment to people[1] and wherein credence was being given to the freedom of profession and the right to trade to a person which was not being taken away ordinarily and only in rarest of the rare cases when a Company could not turn around, it would be put to liquidation.

Secondly, the rights of the employees are also protected under the Directive Principles of State Policy (DPSP), which cannot be forgotten while framing legislations. In this particular view of the matter, there was a situation where even though the revival or resolution was slow mechanism under SICA or for that matter, the settlement of dues was a slow exercise under the winding-up courts, still what was important was the survivability of the industry and the likelihood of re-gainment of the employment even in a situation where the employment itself had come to a grinding halt. As against this, with the coming of the IBC, the opportunity to be provided to the workers, employees, the management was all seemingly being withered away. The biggest challenge that had been brought under the IBC and which was a deviation from the earlier socialistic thought process had been that the Fundamental Rights and the Right to Equality have

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[1] Article 41 of the Constitution of India directs state that, within the limits of its economic capacity and development, make effective provision for securing the right to work.

been diluted by the Code and as the Code came in, the Supreme Court which could have saved the Companies from being sold at peanuts and the employees getting frustrated and operational creditors losing their hard-earned money, the constitutional delight and the nice perspective for providing equality to all, freedom of trade, business and right to employment, which was important from the constitutional perspectives, were all permitted to depart.

Resolution within fixed time versus Rights of the Stakeholders: Processes at the Crossroads

The very objective of the Code was to alter the nature of Insolvency proceedings. Earlier the process was adversarial in nature and under the IBC, it is all about lodging the claim only.[2] What was ultimately seen under the IBC was that there was an element of resolution at a very quick pace and though theoretically, it was resolved and in factual position, it was not. The Supreme Court could have protected such a situation but the Court had also given its blessings to the enactment and as a result, thereto, huge losses have been suffered. It is nobody's case that there is not a strong need to have robust Insolvency laws, but, the resolution should provide equal results for all and must not tilt in the favour of few. Though, the Supreme Court in various of its decisions had already changed the nature of the Insolvency proceedings.

COVID–19, Indian Economy and IBC: Issues and Concerns

The losses which have been suffered from the IBC are already so mammoth that the brunt is faced till date and to add salt to injury is the condition of the Indian economy in the wake of COVID-19 pandemic. COVID-19 had already hampered the pace of the business world over and India in particular, which forces the government to think of suspending Sections 7, 9 and 10 of IBC, which also means that the legislation viz. the IBC would be suspended for six months.[3] Be as it may, the law as it was originally introduced covered the aspect of Section 7 which dealt with the financial creditors, whether having disputed or undisputed debts having an entitlement to file a petition if the claim amount was more than Rs. 1 lakh. Similarly, under Section 9 of the IBC, if an operational creditor was claiming an amount more than Rs.1 lakh and if that amount was not being paid and was not disputed earlier and not notified in terms of the reply to the demand notice under Section 8 of the IBC, the proceedings could lie. Section 10, of course, dealt with a situation where the Companies could themselves file the petition.

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[2] Financial Creditors can file a claim before the Insolvency Resolution Professional (IRP) in Form C under Regulation 8 of the Insolvency and Bankruptcy Board of India (insolvency resolution process for corporate persons) Regulations 2016.

[3] This amendment would certainly affect the genuinely affected lenders from recovering the debt. *See,* Shreya Prakash, *A case against suspending IBC amidst Covid-19 crisis* (Apr. 8, 2020 THE HINDU BUSINESS LINE Delhi), *available at*: https://www.thehindubusinessline.com/opinion/a-case-against-suspending-ibc-amidst-covid-19-crisis/article31287927.ece#. (last visited 15 Apr., 2020).

The benchmark of Rs.1 lakh has recently been lifted with the coming up of COVID – 19 up to Rs. 1 Crore[4] but what is to be seen is that the coming into force of the IBC brought in the huge filing of petitions and it gave an impression that the entire country and its industry is insolvent.

Amendments to IBC and Indian Economy: Supreme Court Originalist approach to Constitutional Interpretation

To add misery to the situation whereas, in the initial Code, anybody including the existing promoters could get an opportunity to put forth their Resolution Plan, in August 2018, an Ordinance was brought in whereby section 29A was introduced to the IBC[5]. As a result, thereto, the management of the Companies was completely divested of their rights to put forth the Resolution Plan, in case they felt in trap of any of the ingredients contained in Section 29A of Insolvency Code with the most mildest therein being a non-performing asset. Of course, the only grace in the entire law subsequently was that the legislation had given a concession. Thereafter, to exclude the MSMEs from the purview of the provisions of Section 29A of the IBC and giving them the right to put forth the Resolution Plans. Be as it may, the clutches of Section 29A of the IBC completely divested the entrepreneurial thought process, which was existing in the country for long and which was the reason as to why seemingly the majority of the companies had not opposed the IBC as it was brought forth, because at that time they contemplated the synergies coming to them for the purpose of resolution of dues with substantial haircuts and beneficent provisions coming in under the Code. It may be further pointed out that the IBC has been an ever-evolving Code and right since 2016 with crucial amendments happening at quick succession including but not limited to the financial creditors under the IBC under Section 5(8) were made to cover the homebuyers as well.

Innoventive Industries Case: Speeding Up of the Insolvency Resolution Process

Of course, the challenges were brought to the IBC, for the first time, in the matter of *Innoventive Industries*[6] case, where the court categorically observed that one of the objectives of the IBC was to speed up the insolvency process. The Court, in this case, discussed the data of the world bank, which clearly shows that India is losing the race in terms of time for the completion of the Insolvency process.[7] As such, the Supreme

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[4] *Govt raises default threshold to Rs 1 cr for invoking insolvency proceedings against firms,* (2020, The Economic Times) *Available at:* https://economictimes.indiatimes.com/news/economy/policy/govt-raises-default-threshold-to-rs-1-cr-for-invoking-insolvency-proceedings-against-firms/articleshow/74796076.cms?from=mdr (last visited 15 Apr., 2020).

[5] Section 29A was incorporated in IBC 2016 vide Insolvency and Bankruptcy Code (Amendment) Act 2017 dated: 18.01.2018.

[6] *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 S.C.C. 407 (para 13).

[7] According to world bank data, Indian insolvency resolution process takes approximately minimum 4.3 years for the completion, whereas, in comparison to India, in the United Kingdom

Court seems to have weighed its Judgment based on the intent to expeditiously resolve the Insolvencies. However, what is critical is that the Supreme Court ought to have possibly given consideration to an important aspect that India is a developing country with its industrialization only coming in the year 1950s for the first time and that a country needs a lot of time for stabilizing itself. In such view of the matter, it could not be equated with the developed countries of the world, wherein industrialization had come centuries before. It seems that the zeal to improve the World Bank's ease of doing business had coerced the Government to bring in Insolvency & Bankruptcy Code. Of course, the idea was novel but it was a departure to the intent of our founding fathers whose objective was to build up a strong economy and for building up of a strong economy, stability ought to have been provided. It is essential for the sustenance of economic legislations that it must be holistically enacted keeping in mind their impact on society as a whole. Essentially, businesses are the backbone of any economy, as they provide employment and any adverse impact on them would certainly prove fatal for the whole economy. Insolvency resolution process also is necessary and therefore, the Government had proceeded with its ultimate objective of resolution and thereafter, while morally the legislation was right in divesting the control of the management but it forgot that in the majority of the cases, the financial doldrums, which a company used to face because of macro-economic factors and the non-congenial industrial environment including the huge rate of interest which were being charged in India as compared to the developed economies of the world. Anyhow, the *second* and possibly the most forceful challenge after the *Innoventive Industries* case was in the matter of *Swiss Ribbons*[8] case, which can also be termed as substantive Judgment on the subject wherein there was a complete amalgam of challengeable ingredients under the provisions of the IBC.

Swiss Ribbons' Case: Originalist approach of Interpretation

There are various ways of interpreting the Constitution, broadly we can classify them into the following, (a) Originalists (intention based) whose main focus while interpreting the constitution is to locate the intention of its drafters, whereas, (b) Originalists (text-based) focuses on the words mentioned in the constitution. (c) Non-Originalists, on the other hand, focuses on the principles inherent in the constitution. Essentially, while interpreting the constitution, courts engage in moral and economic reasonings also, which is not their exclusive domain at all, as they are trained to understand and interpret primarily legal reasonings. And, it always questionable whether courts can have a final say on subjects such as economics or ethics? Philosophers are trained to work on ethical issues and economists are trained to look at economic problems, whereas, legal philosophers can refer it to anything other than black-letter texts or legal reasonings. Now, the mute question here is as to whose

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it takes one year, USA takes one and a half years and South Africa takes two years. And, Indian ranking in the World Bank's Ease of Doing Business rankings 2015, stands at 135th position out of 190 countries.

8 *Swiss Ribbons* v. *Union of India* (2019) 4 S.C.C. 17.

reasoning regarding moral or economic issues can be taken as appropriate, as the judges and lawyers use practical reasoning to tackle such issues. In essence, while interpreting economic legislations such as, IBC, whose impact is huge and which has the tendency to affect the overall political, economic and social structure of the society, is the legal reasoning of the courts appropriate enough to tackle complex economic dilemmas? In *Swiss Ribbon* case, the Supreme Court has used its legal reasoning for answering various pure economic questions such as, whether there is any difference between the financial creditor and the operational creditor? Or whether section 29A would have an adverse effect on the Insolvency Resolution Process, as the bid of the erstwhile management was negated? The answers to these questions require expert understanding of economic issues, for instance, how business is practically run in India? What are the traditional practices attached to the business? How if theoretically business is put into the hands of the new management, it will run successfully?

Swiss Ribbon: Shift in Legislative Policy from 'Inability to Pay Debts' to 'Determination of Default'

While deciding the constitutional challenge to the IBC in the matter of *Swiss Ribbons*, Supreme Court had not only given nod to the IBC but had predominantly discussed the shift in legislative policy from 'inability to pay debts' to 'determination of default' and held section 29A of the IBC to be constitutionally valid. The Court observed that the provisions like section 29A are essential to prevent industrial decline and has huge importance for the economy. Court also discussed its the powers vis-a-vis the powers of the Legislature regarding making of the socio-economic legislations and for which court after discussing US judicial authorities such as *Lochner*[9], *Coppage*[10], *Adkins*[11], and *Burns*[12], observed that it was way back abandoned that the 'due process' sanctions courts to hold legislation as unconstitutional, especially in those cases, where the court believes that the legislature has completely acted unwisely. Even otherwise, Justice Brandeis in *New State Ice Co.*[13] case while echoing with Justice Holmes observed that experimentation is essential for the physical sciences, whereby trial and error number of discoveries and inventions were made and in legal science, it is the courts who are containing the experimentation of the legislature in the social and economic field. He further observed that it is essential to encourage experimentation because it will help in the remoulding of the constitution of the nation and also in building new economic practices and institutions to tackle the ever-changing social and economic needs of the society. And, therefore, one must not deny the right to experiment to the legislature, as it may lead to serious consequences for the nation as a whole. In fact, in *Olsen's*[14] case, the US court goes to the extent of saying with unanimity that the court in fact, has no

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[9] *Lochner* v. *New York*, 198 U.S. 45 (1905).

[10] *Coppage* v. *Kansas*, 236 U. S. 1 (1915).

[11] *Adkins* v. *Children's Hospital*, 261 U. S. 525, 567, 570 (1923).

[12] *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924).

[13] *New State Ice Co.* v. *Liebman*, 285 U.S. 262 (1932).

[14] *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.*, 313 U. S. 236, 246 (1941).

concern at all with the wisdom of the legislation and also with its need and appropriateness. It was unequivocally, held by the Court that only in one circumstance, the Court can check the power of the legislature to do an experiment and that is, on the ground of arbitrariness, capriciousness and unreasonability. It was already a settled law that the high power of judicial review is not only applicable in substantive matters but also in procedural issues as well. But, even in those cases, where the Court exercised its high power of judicial review, the Court must not substitute its own prejudices while building legal and constitutional principles. And by relying upon the reasoning of *R.K. Garg's*[15] case, the Court had laid off its hands from the adjudication of the issues in the challenge. Supreme Court in *Swiss Ribbons* case also viewed that the judiciary should not give judicial decision over the legislative intent especially in economic legislations, whereas, Courts can give their judicial decisions only in those cases which relate to the Fundamental Rights affecting the lives of the people. Essentially, the legislations related to the economic field are based more upon experiments, which, in other words, can be termed as, trial and error of the policy and that is why the Courts are inadequate to anticipate and tackle all such possible situations and conditions and abuses which the legislature is in the position to do so. And, therefore there is every possibility that in this process of trial and error, various crudities may be left unattended in this complicated and experimental hardcore economic legislations and even sometimes inequities are also ignored, but, this won't make a case of struck off of the provision as invalid.[16] The Court here did not want to touch upon the economic regulation and was of the view that the issues of fundamental human rights can otherwise be taken care of. But, the Supreme Court ought to have considered an important element that human rights of a person automatically get impacted with economic legislation and the same could not be given away. It was for this very reason that when the Fundamental Rights were being brought into force, at that particular stage, the right to profession and to do business was covered under Article 19 of the Constitution of India which in effect implies that our constitutional founders were of the considered view that the human rights have no meaning without the economic lives. In the light of the present pandemic, COVID-19, which has affected the world's powerful economies, it is necessary to feel for the Industries, especially, MSMEs who are facing serious financial stress. It is being felt that the industries, entities, companies and individuals and workers have to be provided with a helping hand which is critical and the Supreme Court ought to have accordingly considered this vital aspect that yes handholding of industry is required, but a simple strict wooden norm will not work and what is critical is the revivability, survivability and continuity in employment and settlement at a reasonable level rather than the degrading settlements and frustrating situations wherein not only the managements lose their control but the workers lose their jobs, the operational creditors' amounts are washed away and the statutory authorities face huge haircuts. Ultimately, for whom the IBC could have been beneficial is something which the Supreme Court ought to have dealt with in a more proactive way rather than being swayed away by the fact that the IBC is an economic legislation. One can see that when the Supreme Court in *Swiss*

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[15] *R.K. Garg* v. *Union of India* (1981) 4 S.C.C. 675.

[16] *Swiss Ribbons* v. *Union of India* (2019) 4 S.C.C. 17.

Ribbons case applied the common law approach and held that various judicial precedents had already settled the tests for the violation of Article 14 of the Constitution of India. And, if the Court can come to the conclusion that there is the presence of intelligible differentia, and there is a relationship between the two kinds of the creditors, then, in that case, the Court can allow the differentiation as the same is done to achieve the object of the IBC. It is indeed worth mentioning that the Supreme Court had thus been seemingly influenced by the fact that the financial creditors could be distinguished from the operational creditors. While forgetting that there are lacunae in the language of financial creditors under the IBC and the operational creditors who were hugely dependent on the payment of their debts could not be distinguished in a way and their properties could not be permitted to be written off at the whims and fancies of the legislation because a person, who is a stakeholder has to be given due credence. Supreme Court had itself recognized the factor of the interests of stakeholders being taken into consideration but forgot that the stakeholders include the workers, the suppliers, the financial creditors, the government authorities in all and huge discrimination wherein the voting rights are also even taken away from the operational creditors, is something which is not in consonance with the settled Constitutional norms.

No Vested Right of Resolution Applicant while Considering or Approving its Resolution Plan[17]

It could be understood to an extent that if a person is heard is his rights are taken away. But the founding fathers of the Constitution of India had never thought of a situation where a person goes unheard. However, the IBC as was brought in and as was applied and upheld by the Supreme Court, brought in a situation where the right to heard was even being taken away from stakeholders leaving some opportune ones, who were ultimately covered in the concept of unrelated financial creditors. This could not have been the intent of the legislation and the Supreme Court ought to have interfered in a way that all the people whose rights are getting impacted get the right to be heard either directly or through their representatives and thereafter their rights may be modified. But a person cannot be condemned unheard and which is the basic feature of not only our Constitution but of the principles of natural justice as evolved over the last 7 decades after India regained its independence. Be as it may, the Supreme Court had upheld the constitutional validity of the IBC in its entirety and had also ruled away the objections raised to the introduction of Section 29A of the IBC by the promoters of the companies who had principally stated that in the majority of cases, they could not be faulted for the financial losses being suffered by the companies which were primarily due to the macro-economic factors and therefore, the management could not be blamed. Supreme Court had however taken a view wherein it had simply given importance to the aspect that yes there is a defaulting entity and its promoters have no right. Further, even the guarantors of the companies were not being given a right to say when their case was that they had extended their guarantees for the flourishing of the business of the

[17] *Arcelor Mittal India Private Limited* v. *Satish Kumar Gupta* (2019) 2 S.C.C. 1.

company and had not taken any independent financial assistance and could not be put to jeopardy. The Court had also held that the provisions of the IBC including Section 53[18], which dealt with 'waterfall mechanism' did not violate Article 14 of the Constitution even though under liquidation, the operational creditors may not get anything and the workers dues are also restricted to the past 24 months when the distribution is to be made to the workers of the companies if at all. In this way, it clearly affects the rights of the workers. The Court had ultimately based its legal reasoning primarily on the ground that IBC is an economic legislation and Court further expressed happiness on the performance of the IBC while it ought to have *firstly*, appreciated the financial hardships which have been ultimately caused due to the coming into force of the IBC and *secondly*, how the various people including the corporate debtor, its management, its guarantors, employees, financial creditors, operational creditors, statutory authorities are suffering time and again. *Thirdly*, the Court also forgot the fact that the statutory authorities say, for instance, the taxation authorities were also not being given any right to object to the amounts being paid to them under the IBC in view of the fact that Section 238 of the IBC has an overriding effect. Ultimately, Supreme Court held that earlier experiments to tackle Insolvencies and Bankruptcies were a failure, therefore, a need arose to have IBC, which primarily deals in economic matters thereby affecting the Indian economy as a whole. Court surprisingly ignored the above-referred fallacies enshrined in the Code as 'so-called crudities and inequities' and allowed Code to pass the constitutional muster. Court further observed that it is essential for any nation to do experimentation in the economic field and it's a very big responsibility and judiciary cannot contain the right to the experimentation of the legislature. Rather, the Court observed that there are several amendments already made in the short life of IBC and it's an ongoing process, which includes all the stakeholders of the society.[19] Supreme Court while upholding the IBC applied statistics also, to justify the presence of IBC and its various provisions, and had also gone by the fact that already by the implementation of the Act, money started recovering to the financial creditors at a good pace.[20] Court did not see that IBC is an economic legislation and it has a huge impact on the whole society and therefore, it is essential to see whether the Code is adversely affected other stakeholders of the society, such as employees and erstwhile management or not? And, it is not just used to revitalise the financial health of the financial creditors. It is essential to locate the balance between the various objectives or else the time will come which will soon show the adverse impact of the Act on Indian Economy. It is not altogether ruled out in theory that the new management would do better for the revival of the corporate entity, but, practically, it is the erstwhile management who is better equipped to deal with the do's and don'ts and good and bad for the company as they are better aware of the reasons for the failure of the said entity. The disposal rate of cases, whether by way of out of court settlement or by way of

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[18] Section 53 of the IBC provides water fall provision for the distribution of assets in case of proceeds from the sale of liquidation assets. The section sets forth the order of priority for distribution from sale of proceeds with time and manner prescribed in the section.

[19] *Swiss Ribbons* v. *Union of India* (2019) 4 S.C.C. 17 (para 120).

[20] *Id*. at para 121.

resolution plans, cannot be a yardstick to check the constitutionality of legislative Acts like IBC.

Committee of Creditors of Essar Steel India:[21] *Commercial Wisdom of the CoC upheld and No interference permitted by Adjudicating Authority and Appellate Tribunal*

Swiss Ribbons was a milestone case, which held that legislature is the only institution who has the ability to tackle the economic issues appropriately and rather used post legislative statistics to read the success of the Code also. But, in *Committee of Creditors of Essar Steel India*, Supreme Court went further and held that the commercial wisdom resides with the Committee of Creditors (CoC) and therefore, the Adjudicating Authority and Appellate Tribunal are not permitted to interfere. It was thus held that the decision taken by the CoC is final and not subject to scrutiny till the time the Resolution Plan is not in contravention to any existing law. In this way, *Essar Steel India* is the extension of *Swiss Ribbons*, at least in the context that in this matter, the Court had made CoC as the institution empowered with commercial wisdom and warned Adjudicating Authority and Appellate Tribunal from interfering with it.

Supreme Court's approach towards IBC as an 'Economic Legislation'

Subsequently thereto, as mentioned, the legislation had brought in the homebuyers also within the ambit of the IBC. With this, there was a situation wherein the developers faced a huge level of stress with the homebuyers claiming themselves to be financial creditors proceeding against the interests of the developers, who were also suffering because of macro-economic factors. The challenge was thus brought to the amendment whereby the homebuyers were being brought within the ambit of the financial creditors under Section 5(8) of the Code[22]. Even though the issue of challenge in *Pioneer Urban Land and Infrastructure* case was confined to Section 5(8)(f) of the IBC whereby the homebuyers were brought within the ambit of the IBC, the Supreme Court had made its decision on the economic legislation and had not interfered with the provisions of the Code. The Court had primarily followed the legal reasoning given in *Swiss Ribbons case* only, where the legislature's right to experiment in matters which are economic in nature were upheld. While completely forgetting that economic legislation cannot crush the rights of the people as enshrined in the Constitution of India especially Part III of the Constitution of India, which contemplates the protection of the Fundamental Rights of the people. The Court in *Pioneer Urban Land and Infrastructure* reiterated the constitutional principles to test the legislation on the yardstick of Article 14[23]. The Court followed *Ram Krishna Dalmia* case wherein the Court held that, *firstly*, the legislation is

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[21] *Committee of Creditors of Essar Steel India* v. *Satish Kumar Gupta,* 2019 (16) S.C.A.L.E. 319.

[22] The amendments were upheld in the *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416.

[23] *See*, *Karnataka Live Band Restaurants Assn.* v. *State of Karnataka*, (2018) 4 S.C.C. 372 at 393, *State of Bihar* v. *Shree Baidyanath Ayurved Bhawan* (2005) 2 S.C.C. 762 at 783 and *Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar* A.I.R. 1958 S.C. 538.

constitutional even if it related to the single individual, as the individual there be treated as a class, due to the presence of special circumstance. *Secondly*, there is always a presence of constitutionality in favour of the enactment and burden of proof lies on the person who challenges such constitutionality. *Thirdly*, there is always a presumption that legislation is the best institution who can understand the needs of its people and therefore its discriminations are always based on adequate and appropriate grounds. *Fourthly,* 'the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest"[24]. *Fifthly*, to sustain the presumption of constitutionality, the court may consider the matters of common knowledge, report, history of the times and can assume any other fact present at the time of the passing of the legislation. And, s*ixthly*, the Court would always consider a presumption in favour of the legislature regarding good faith and knowledge of the existing conditions regarding the constitutionality of the legislation, but such presumption cannot always hold the existence of some 'undisclosed and unknown reasons' for carrying discriminating legislation, hostile to some individuals or corporates.

Essentially, the Court has principled the fact that legislature as a primary institution, is empowered to recognise the degrees of harm and therefore can conveniently confine the application of the legislation to particular cases, wherever there is a clearly deemed need arises. Similarly, Court in *Ambica Mills*[25] *case* held that particularly in reference to economic legislations where the 'classifications that are under-inclusive[26]' would not be resulted into the 'death-knell' of such laws on the anvil of Article 14. In light of the above facts, it is essential to know what tests courts should employ while dealing with 'law-making under-inclusive' in economic matters? And, how the court is expecting the legislature to choose between inaction or perfection? While answering the above questions in *Ambica Mills Case,* Court categorically held that in 'utilities, tax and economic regulation cases' it is necessary for the judiciary to maintain judicial self-restraint, because, in the constitutional setting, the legislature is already burdened with the affirmative responsibility to tackle such issues. Courts are because not familiar with the local problems and therefore, are not an appropriate institution to check the various

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[24] *Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar* A.I.R. 1958 S.C. 538 at para 14.

[25] *State of Gujarat and Anr.* v. *Shri Ambica Mills Ltd., Ahmedabad, etc.* (1974) 4 SCC 656

[26] A classification can be termed as under-inclusive, 'when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include'. (Shri Ambica Mills, 1974). In short, the Court held that every that classification created by the legislation is bad and termed as under-inclusive, where a State deliberately differentiate between the persons who are situated together while giving benefits or burdens to them. similarly, the classification can be termed as 'over-inclusive', when the legislation with a purpose includes all, including those who are similarly situated as well as others who are not so situated also. In this case, the burden would be shared by a larger number of persons. We can relate such classification with the ordering of Herod to murder all the male children born on a particular day, because someday, one of those male persons would be responsible for his downfall.

needs and difficulties of the community. It is the work of the legislature to collect the data from the society and create legislations to either improve the conditions of the society or to remove the obstacles and hurdles affected the growth of the society.

In *V.C. Shukla*[27] case, the Court further elaborated that in a large and diverse democracy like India, the nation changes in a short span and it is, therefore, difficult to have laws keeping in mind the benefits of all and therefore it is essential to have some classification. And, we are also aware of the fact that there cannot be a possibility to have some mathematical precision to pass the test as enshrined in Article 14 or else it would affect the beneficial legislations, and therefore, the best test is to see that the legislation would not create hostile discrimination. In fact, in *Mardia Chemicals*[28] case the Court categorically held that Court would not thwart the intent of the Parliament, even if to some extent it harshly operated on a small section of the Society if the legislation was enacted in the public interest.

As such, the Supreme Court in *Pioneer Urban Land and Infrastructure*[29] case had upheld the Constitutional vires and while certain caveats had brought in a situation wherein the homebuyers being in the ambit of financial creditors were given a far-reaching empowering section thereby causing huge loss to the developers, who were being harassed and were put to economic hardships only based on some small claims of the creditors being homebuyers, who in the majority of the cases were also contemplating their exit because they did not consider the project to be economically viable on a longer run. The Supreme Court has thus in the matters of *Innoventive Industries Ltd.* (supra), *Swiss Ribbons* (supra) and *Pioneer Urban* (supra) missed these important aspects of the legislation acting contrary to the fundamental rights enshrined under Article 14, 19(1)(g) and 300A of the Constitution. Though it is a separate case that now as far as home buyers are concerned, a criterion has been laid down that there has to be at least 10% in number or at least 100 buyers in a project, who have to together form the group to proceed under the IBC and further, a dilution has been brought with the coming of the new law wherein the threshold limit for any IBC proceeding has now been enhanced to Rs.1 crore.

In the aforesaid cases, the Court has, instead of using its potential power, somehow deferred the issues in the realm of the elected branch of the government, on the ground that they are well versed with the political, social and economic condition of the State. Can this deference be called as the doctrine of constitutional interpretation? Legal interpretation as we are aware of is driven by two types of evaluative judgements, *substantive* and *institutional* evaluation. *Substantive* evaluation defines as the merits (reasons) of interpreting the particular constitutional provision in either way. Whereas, *institutional* evaluation refers to the extent and limit of their own role, including the limits of interpretation. The doctrine of deference refers to *institutional* evaluation, since

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[27] *V.C. Shukla* v. *State (Delhi Administration)*, (1980) Supp. S.C.C. 249.

[28] *Mardia Chemicals Ltd.* v. *Union of India,* (2004) 4 S.C.C. 311.

[29] *Pioneer Urban Land and Infrastructure Limited* v. *Union of India* (2019) 8 S.C.C. 416.

it directly relates with the Courts intervention in the legislative or executive action.[30] In this way, the Court actually decides on the basis of non-merit reasons, which falls under the category of institutional evaluation and indeed can be read as one of the doctrine of constitutional interpretation. The Supreme Court in the above decisions, decided on the basis of the substantive application of the laws in the economy and calculating the existence of the legislation on the ground of its success in recovering financial health of the economy back. The Court in this way had actually adopted minimal deference with the elected branches rather than substantive deference.

Conclusion

Essentially, any modern economy, in the present time, requires Insolvency and Bankruptcy laws as these economic legislations are very effective against the creation of non-performing assets (NPAs) and are also helpful in containing the health of the financial institutions. But we must not forget that *firstly*, along with the growth and development of economy, the state has to safeguard the constitutional principles such as, rule of law, which are essential for the survivability of the Indian industries and its employees. It should also help in the survivability of the operational creditors and the statutory authorities, who are being treated as the operational creditors. Supreme Court ought to have considered these important aspects while proceeding with the resolution issues under the IBC, because, of course, the insolvency resolution is very important but it cannot be at the cost of huge and immense loss to the entrepreneurship and to the workers, employers and everyone *in toto*. *Secondly*, The entrepreneurship cannot be developed in a day and it is essential to know that Indian entrepreneurs, unlike western counterparts do not work in a straight forward formal economy, but, they work in a typical Indian business environment where, even in the present twenty-first century, centuries-old traditional trade practices are being followed and because of the presence of huge informal economy in India, there are many factors which affect their businesses and consequently, have a huge and significant impact on all stakeholders. Though, all the above processes, right from the passing of the economic legislation to the judicial non-interference thereto on most counts due to its economic nature as discussed above, is helpful in achieving the purpose of bringing certain (even if, mild) changes to the present politico-social-legal structure of India or to its constitutional order, even if it is only about painting pebbles in golden colours. This can be said so, because there is no *gold* anywhere and there is also no possibility of the presence of *gold* in the law as well.

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[30] Aileen Kavanagh, *'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication'*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY, 190 (Grant Huscroft ed., 2008).