DISENTANGLING SWISS RIBBONS

Written by **Surbhi Burman**

3rd Year, BBA-LLB (Hons.), Vivekananda Institute of Professional Studies

SWISS RIBBONS PVT. LTD. & ANR.

v.

UNION OF INDIA & ORS.

(2019) 2 SCALE 5

(Decided by the Supreme Court of India on January 25, 2019)

*The decision in **Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.** proved to script history as the Supreme Court upheld the constitutional validity of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**IBC** or "**Code**"). The effective coalescence of the Constitution and corporate laws vindicated the ruling of the Apex Court. A delicate balance between the importance of a healthy economic regime and Constitutional principles underscored the decision.*

While sidestepping doctrinal arguments made on the groundwork of inequality, the Court extended a wide and amorphous latitude to bolster the economic interests. By doing so, the Court created a bulwark of the exposition of corporate and commercial laws.

In making a verdict on the constitutionality of the IBC, the Court sanitised the legal position by maintaining the decision on sound rationale and principles of non-arbitrariness. The precedent sets forth the tune and framework for the diversity of IBC decisions to arrive. The Comment goes on to discuss the scope and interpretational principles of this case.

Recovery of loans and maximisation of value of assets along with promotion of entrepreneurship are the indispensable conditions of a thriving economy. Faced with this proliferating issue, the Legislature enacted the Insolvency and Bankruptcy Code, 2016. While the Code is a panoptic and self-encompassing law, it has been riddled with challenges to various provisions contained in it for the purposes of directions and clarifications thereto.

Into this gulf came ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.***, wherein the Court markedly manifested its willingness to abdicate the scepticisms surrounding IBC. The case ensured that the government had great leeway to introduce reforms with adequate guiding principles. In doing so, the Court reiterated and reaffirmed the serviceable metamorphosis of scattered and divergent laws to a whole and unified statute book.

Swiss Ribbons required the Court to consider the constitutionality of the Code. The case was viewed as a spokesperson to vouch that the enactment of economic laws is almost always necessarily empirical and the case at hand did not differ with the others on this count. The opinion was delivered by ***Justice Rohinton Fali Nariman*** who wrote the same for the constituted Division Bench. The opinion was uniformly consistent in its intention and raison d'être.

The bench deployed the canon of judicial hands off qua economic legislation and prior judicial mandate to provide gravitational momentum to its decision. The same was propelled by the constitutional guarantees of non-arbitrariness, no discrimination policy and upkeep with the doctrine of equality.

The petitioners presented a multi-pronged challenge to the constitutionality of IBC. ***Firstly***, contrary to the judgments in ***Union of India v. R. Gandhi, President, Madras Bar Association v. Madras Bar Association***[1] ***[Madras Bar Association (I)]*** and ***Madras Bar Association v. Union of India***[2], Section 412(2) of the Companies Act, 2013 was not repealed which resulted in the circumstance that the two Judicial Members of the Selection Committee got outweighed by the three bureaucrats. ***Secondly***, the National Company Law Tribunal (NCLT) and National

[1] *Union of India v. R. Gandhi, President, Madras Bar Association*, (2010) 11 SCC 1.
[2] *Madras Bar Association v. Union of India*, (2015) 8 SCC 583.

Company Law Appellate Tribunal (NCLAT) draw administrative support and sustenance from the Ministry of Corporate Affairs instead of the Ministry of Law and Justice. ***Thirdly***, the absence of circuit benches of the NCLAT is a technical violation. ***Fourthly***, the classification of financial creditors and operational creditors was assailed as having no intelligible differentia and further, no nexus to the object of the Code. This argument was charged on the assumption that the financial debtor is not afforded a notice and opportunity to dispute the genuineness of the claims while the same is an entitlement of the operational debtor. Even otherwise, a hostile discrimination exists between the two classes. ***Fifthly***, the establishment of information utilities was censured in as much as some may work with a profit motive. ***Sixthly***, it was asserted that Section 12A of the IBC is not in consonance with the legislative scheme as a high threshold has been enacted to withdraw the insolvency application. ***Seventhly***, the conferment of adjudicatory powers to the Insolvency Resolution Professional (IRP) was asserted to be against the basic tenets of access to justice. ***Lastly***, a frontal assault was made on the provisions embodied under Section 29A of the Code. It was their averment that the retrospective application of Section 29A impedes with the vested rights of erstwhile promoters to participate in the recovery process. Further Section 29A(c) imposes a blanket ban on the participation of all the promoters of the corporate debtor without giving regard to considerations of causes of non-payment of dues. Accentuating the same, the account of a person, under Section 29A(c), could be classified as a Non Performing Asset (NPA) despite him not being a wilful defaulter. The period of one year was also assailed as unreasonable.

The Court, prima facie, dismissed the technical arguments. In response to the first argument, the Court relied upon an administrative affidavit and reaffirmed that the appointment of members of the NCLT and NCLAT is conducted in accordance with the judicial precedents.

In regard to the second contention, the Court favoured with the petitioners in as much as it found itself bound by the judgment in ***Madras Bar Association (I)*** wherein it was held that the administrative support for all Tribunals should be from the Ministry of Law and Justice**.**

The Court accepted the third argument of the petitioner but chose to merely issue a direction to the Union of India to set up Circuit Benches of the NCLAT within a period of 6 (six) months from the date of the decision. Thus, this submission lost its spike.

Rejecting the fourth argument advanced by the petitioners, the Court emphasised that financial creditors are secured creditors whereas most operational creditors are unsecured. Further, the nature of loan agreements and quantum of amounts sanctioned therein, by the two classes of creditors, were wholly divergent. The distinction was well past its zenith when it was pointed out that financial creditors are involved with assessing the viability of the corporate debtor whereas operational creditors do not do so. Thus, the Code envisages an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code. Adverting to statutory provisions, the Court upheld that the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors was maintained.

Referring to the next issue, the Court observed that the process of authentication and verification of information includes cross checking the same from the debtor who has defaulted. This evidence is, thus, qualified as rebuttable and hence, this contention did not find favour with the Court.

Alluding to the subsequent question, the Supreme Court held that Section 12A was constitutional in as much as the reasoning to keep the threshold high is justified. The rationale behind the same is that all financial creditors have to consider the withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, is to be entered into.

Citing Regulations 10, 12, 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Court elucidated that the resolution professional is given administrative as opposed to quasi-judicial powers.

The remnants of the arguments, relating to Section 29A, were also discarded by the Court. Relying on ***ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors.***[3], the Court held that resolution applicants have no vested right to be considered as such in the resolution process. Thus, the challenge to the vested right in an erstwhile promoter of a corporate debtor to bid for the property of the corporate debtor in liquidation failed. The one year period was held to be in tune with the legislative policy. The Court noted that an account was declared only after the

[3] *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors.*, (2019) 2 SCC 1.

lapse of the one year time period provided to service the debt and hence, this argument lost ground. In light of the above, IBC passed its litmus test.

In conclusion, the Apex Court accorded a purposive interpretation to the provisions of the IBC. It tailored the judgment to ensure that the culpability and accountability, flowing from the Code, fit the glove. Rooted in good public sentiment, the verdict stood with the concrete law and dismissed the conjectural speculations. By stabilising the legal position, the Court has successfully wrested the health of the economic regimes from the stealthy hold of corporate defaulters. In furtherance of the same, the Court ensured that the Legislature is provided reasonable autonomy to accommodate its policies to the prevailing needs of the society. This case would, hence, go on as a catalyst of the Indian economic jurisprudence.