



2023 INSC 1018

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No 1281 of 2021

Dilip B Jiwrajka

... Petitioner(s)

Versus

Union of India & Ors

... Respondent(s)

WITH

W.P.(C) No. 149/2022

W.P.(C) No. 307/2022

W.P.(C) No. 308/2022

W.P.(C) No. 525/2022

W.P.(C) No. 472/2022

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W.P.(C) No. 1113/2022

W.P.(C) No. 89/2023

W.P.(C) No. 133/2023

W.P.(C) No. 216/2023

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W.P.(C) No. 118/2023

W.P.(C) No. 77/2023

W.P.(C) No. 173/2023

W.P.(C) No. 233/2023

W.P.(C) No. 166/2023

W.P.(C) Diary No(s). 4241/2023

W.P.(C) Diary No(s). 4379/2023

W.P.(C) No. 161/2023

W.P.(C) No. 181/2023

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W.P.(C) No. 298/2023

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W.P.(C) No. 1242/2023

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

Table of Contents

I. Background	16
II. Scheme of the IBC	17
III. Submissions	25
A. Submissions on behalf of the Petitioners	25
B. Submissions on behalf of the Respondents	29
IV. Analysis	37
A. Comparative Analysis of Part II and Part III of the IBC	38
1. Stages under Part II and III	38
2. The Role of the Resolution Professional in Corporate as opposed to Individual Insolvency	39
3. The impact of a moratorium under Section 14 of Part II vis-a-vis interim- moratorium under Section 96 of Chapter III of Part III.....	46
4. The Role of the Adjudicating Authority	47
B. Applicability of the Principles of Natural Justice.....	48
1. Role of the Resolution Professional as a facilitator is to collate facts	49
2. Role of the Adjudicatory Authority	54
3. A right of representation has been provided under Section 99(2).....	55
C. Challenge to the constitutional validity	58
V. Conclusion	61

1. Applications for condonation of delay in refiling the writ petitions are allowed.

I. Background

2. In a batch of three hundred and eighty four petitions under Article 32 of the Constitution, the petitioners challenge the constitutional validity of Sections 95 to 100 of the Insolvency and Bankruptcy Code 2016¹. The individual facts of each case are not reproduced here as we are deciding the constitutionality of the above provisions of the IBC.
3. The principle aims of the IBC are to promote investment, and resolution of insolvencies of corporate persons, firms, and individuals in a time bound manner. The IBC consolidated and amended a web of laws which had led to an ineffective and inefficient mechanism for resolution of insolvencies marked with significant delays.
4. Part III of the IBC deals with insolvency resolution and bankruptcy for individuals and partnership firms. Chapter III of Part III which is titled "Insolvency Resolution Process" ("IRP") comprises of Sections 94 to 120. Prior to the introduction of the IBC, insolvency in relation to individuals was governed by the provisions of the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920, both of which stand repealed.

¹ "IBC"

5. The provisions of the IBC apply to personal guarantors to corporate debtors.² In exercise of the power conferred by Section 1(3), a notification was issued on 15 November 2019 by the Union Government in the Ministry of Corporate Affairs. The notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Section 79, Section 94 to 187, Sections 239(2)(g), (h) and (i), Sections 239(2)(m) to (zc); Section 239(2)(zn) to (zs) and Section 249. The notification was challenged before this Court. In **Lalit Kumar Jain v Union of India**³ a two-Judge Bench *inter alia*, held that the liability of a guarantor is not discharged merely on the discharge of the corporate debtor.
6. By Amending Act 26 of 2018, Parliament introduced amendments *inter alia*, in Section 60 which provides for the jurisdiction of the adjudicating authority, namely, the National Company Law Tribunal.⁴ Among other things, the amendments to Section 60 comprehend the jurisdiction of the Tribunal in matters involving the bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of a corporate debtor.
7. In order to consider the nature of challenge in these proceedings, it would be appropriate to make a brief reference to the provisions of the IBC.

II. Scheme of the IBC

8. Part I of the IBC deals with preliminary matters, such as its application and definitions. Part II deals with insolvency resolution and liquidation for corporate persons. Part III deals with insolvency resolution and bankruptcy for individuals and partnership firms. Part IV provides for the regulation of insolvency professionals,

² Section 2(e), IBC as amended by the Amending Act 8 of 2018

³ (2021) 9 SCC 321

⁴ "Tribunal"

agencies and information utilities. Part V contains miscellaneous provisions.

9. Chapter I of Part III contains preliminary provisions, including, definitions. Section 78 indicates that the Part shall apply to matters relating to “fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees”. However, the Central Government is empowered to specify a higher threshold not exceeding one lakh rupees. Section 79(1) indicates that the adjudicating authority for the purpose of Part III “means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993”. Chapter II, which is yet to be brought into force, contains provisions in relation to the “fresh start process”.

10. Chapter III provides for the insolvency resolution process. Under Chapter III, the insolvency resolution process can be initiated by a debtor or a creditor. Section 94(1)⁵ enables a debtor who commits a default to apply, either personally or through a resolution professional, to the adjudicating authority for initiating the insolvency resolution process.

⁵ 94. Application by debtor to initiate insolvency resolution process.—

(1) A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.

(2) Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

(3) An application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.

(4) A debtor shall not be entitled to make an application under sub-section (1) if he is—

(a) an undischarged bankrupt;

(b) undergoing a fresh start process;

(c) undergoing an insolvency resolution process; or

(d) undergoing a bankruptcy process.

(5) A debtor shall not be eligible to apply under sub-section (1) if an application under this Chapter has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this section.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied with such fee as may be prescribed.

11. Section 95⁶ enables the creditor to apply for the initiation of the insolvency resolution process either by himself, or jointly with other creditors or through a resolution professional. Under sub-section (2), a creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating a resolution process against any one or more partners of the firm; or the firm. Section 95(4) stipulates the requirements of an application made by a creditor for the initiation of the insolvency resolution process. The application is governed by the form and manner as prescribed by Rules framed by the Central Government under Section 239. A copy of the application has to be furnished to the debtor. Immediately on the filing of an application under Section 94 or Section 95, an interim moratorium operates by virtue of the statutory provisions of Section 96⁷ and the adjudicating authority is required to

⁶ 95. Application by creditor to initiate insolvency resolution process.—

(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against—

- (a) any one or more partners of the firm; or
- (b) the firm.

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to—

- (a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;
- (b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and
- (c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.

⁷ “96. Interim moratorium.—(1) When an application is filed under section 94 or section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period—

- (i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and
- (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.”

appoint a resolution professional.

12. Where the application has been filed through a resolution professional, the adjudicating authority has to direct the Insolvency and Bankruptcy Board of India⁸ to confirm within seven days that there are no disciplinary proceedings pending against the resolution professional. Thereafter, the Board has to either confirm the appointment of the resolution professional or to reject it and nominate another resolution professional for conducting the resolution process within seven days. Alternatively, where the application has been filed by the debtor or creditor without a resolution professional, the adjudicating authority has to direct the Board within seven days to nominate a resolution professional to conduct the process. The Board then has a period of ten days to make a nomination. Section 97(5)⁹ states that “the adjudicating authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4). The resolution professional, upon appointment, is provided a copy of the application for the insolvency resolution process.

⁸ “Board”

⁹ 97. Appointment of resolution professional.—

(1) If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either—

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

(4) The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).

(5) The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).

(6) A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for insolvency resolution process.

13. Section 98 contains provisions for the replacement of the resolution professional.

Section 99¹⁰ contains provisions for the submission of a report by the resolution professional to the adjudicating authority.

14. The scheme of Section 99 is that the resolution professional is required to examine the application which has been preferred by the debtor or the creditor within ten days of appointment and to submit a report to the adjudicating authority "recommending for approval or rejection of the application". In other words, the resolution professional under sub-section (1) of Section 99 performs a three-fold function:

- (i) The duty to examine the application submitted by the debtor or the creditor;
- (ii) The submission of a report; and
- (iii) The incorporation of recommendations in the report either for the approval or the rejection of the application which has been submitted by the debtor or the creditor.

¹⁰ "99. Submission of report by resolution professional.—(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing—

- (a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;
- (b) evidence of encashment of a cheque issued by the debtor; or
- (c) a signed acknowledgment by the creditor accepting receipt of dues.

(3) Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that—

- (a) the application satisfies the requirements set out in section 94 or 95;
- (b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(8) Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94 be treated as an application under section 81 by the Adjudicating Authority.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(10) The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be."

15. Where an application has been filed by the creditor, the resolution professional, as sub-section (2) indicates, “may require the debtor to prove repayment of the debt claimed as unpaid by the creditor”. The debtor may be required to furnish:

- (i) Evidence of the electronic transfer from the bank account of the debtor repaying the unpaid amount;
- (ii) Evidence of the encashment of a cheque issued by the debtor; or
- (iii) An acknowledgement signed by the creditor accepting receipt of dues.

16. In terms of sub-section (3), the debtor is not entitled to dispute the validity of debts which are registered with the information utility and form the subject matter of the application for the insolvency resolution process. Section 99(4) enables the resolution professional to seek further information or an explanation “in connection with the application”, as may be required from the debtor or the creditor or any other person for the purposes of examining the application. The person from whom such a request is made is under an obligation to supply it within seven days. Sub-section (6) clarifies the limited ambit entrusted to the resolution professional. In terms of the provision, the resolution professional has to examine the application and ascertain that:

- (i) The application satisfies the requirement of Section 94 or Section 95; and
- (ii) The applicant has provided information and furnished an explanation which has been sought from him under sub-section (4).

17. After carrying out this process, the resolution professional may recommend the acceptance or rejection of the application in a reasoned report. A copy of the report is provided to the debtor or creditor, as the case may be, under sub-section (10). The jurisdiction of the adjudicating authority, upon the submission of the report, is

stipulated in Section 100.¹¹

18. In terms of Section 100, the adjudicating authority has a time line of fourteen days from the submission of the report to either admit or reject the application for insolvency resolution process. In the event that the adjudicating authority admits an application, it is empowered, on the request of the resolution professional to require that negotiations be conducted between the debtor and the creditor for the purpose of arriving at a repayment plan. The adjudicating authority is required to provide a copy of its order together with the report of the resolution professional and the application to the creditors within seven days from the order. If the application is rejected by the adjudicating authority on the ground that it was made with an intent to defraud the creditors or the resolution professional, the order of the adjudicating authority is to record that the creditor is entitled to file for a bankruptcy under Chapter IV.

19. The interim moratorium under Section 96 commences from the application filed under Sections 94 or 95, and ceases to have effect on the date of the admission of the application. Consequently, Section 101¹² contains provisions for a statutory

¹¹ "100. Admission or rejection of application.—(1) The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

(2) Where the Adjudicating Authority admits an application under sub-section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

(3) The Adjudicating Authority shall provide a copy of the order passed under sub-section (1) along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be, to the creditors within seven days from the date of the said order.

(4) If the application referred to in section 94 or 95, as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV."

¹² 101. Moratorium.—

(1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

(2) During the moratorium period—

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial

moratorium with effect from the admission of an application under Section 100.

20. The moratorium remains in force for a period of 180 days or when an order approving the repayment plan is passed, whichever is earlier. The effect of the statutory moratorium is that the any pending legal action in respect of the debt is stayed; no new action may be initiated by the creditors in respect of the debt; and the debtor shall not transfer or alienate his assets or legal rights or beneficial interest therein.

21. The remaining provisions of Chapter III relate to the issuance of public notices and inviting claims from the creditors, registration of their claims, preparation of the list of creditors, a repayment plan, meetings of creditors, the rights of secured creditors, approval of the repayment plan by creditors and the order of the adjudicating authority on the repayment plan. Consequential provisions have been made in the remaining provisions of Part III, *inter alia*, for the completion of the repayment plan (Section 117) and a discharge order (Section 119).

22. In exercise of the powers conferred by Section 239, the Central Government has notified the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019. The rules specify the form in which the applications have to be submitted under Sections 94 and 95.

interest therein;

(3) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

III. Submissions

23. Now, it is in this backdrop that it would become necessary to analyse the submissions made on behalf of the parties.

A. Submissions on behalf of the Petitioners

24. Dr Abhishek Manu Singhvi, senior counsel has set forth the following propositions for determination by the Court:

- (i) The IBC is an invasive *in rem* proceeding and is highly prejudicial against the respondent;
- (ii) Before initiating proceedings for insolvency under the IBC and the appointment of a resolution professional or, at the minimum, before the resolution professional takes any action, there must be a determination by a judicial body of the existence of a debt;
- (iii) The following ought not to take place automatically after the filing of an application under Section 95 without judicial adjudication/intervention, namely:
 - (a) An automatic interim moratorium;
 - (b) The automatic appointment of a resolution professional subject to worthiness;
 - (c) The resolution professional seeking information from the guarantor; and
 - (d) The resolution professional examining the information received and submitting a report;
- (iv) None of the above steps, once performed, is reversible under Section 100

which is the first stage at which two crucial steps take place (a) it is the first time at which a judicial body adjudicates; and (b) it is the first stage at which the guarantor is furnished with a hearing by the adjudicating authority;

- (v) The power to seek information not only from a guarantor but also from third parties which is made available to the resolution professional is untrammelled and is being routinely exercised;
- (vi) Common law consistently provides natural justice unless explicitly prohibited by statute. Any statutory exclusion is subject to review and may be invalidated, except in cases related to special reasons like national security;
- (vii) All that the petitioners seek is natural justice by a judicial body at the stage of Section 97(1) similar to the exercise of the adjudicating authority which discharges its functions under Section 7 or 9 of the IBC; and
- (viii) The IBC follows the same model as sought by the petitioners under Sections 7 and 9 and neither any reasonable distinction nor any qualification exists for denying the right to adjudicatory hearing to a guarantor in the same statute when confronted with the application under Section 95.

25. Primarily, the submission which has been urged on behalf of the petitioners by Dr Abhishek Manu Singhvi postulates that the fundamental aspect as to whether the jurisdiction to entertain an application under Chapter III of Part III exists must be

determined at the threshold by giving the debtor or personal guarantor an opportunity to be heard. The submission is that logically the determination of the jurisdictional question has to take place first before the appointment of the resolution professional under Section 97(5). Consequently, it has been submitted that the adjudicating authority must be required to determine at the threshold whether (a) a debt exists; and (b) whether the debt has been effaced.

26. The submission has been sought to be advanced from two perspectives. Firstly, it postulates that a judicial aspect is involved even before the resolution professional begins the task outlined in Section 99, for determining the jurisdictional requirements for the existence and continuity of a debt. Secondly, following the appointment of the resolution professional under Section 97(5), wide-ranging powers are granted by Section 99(4) to demand information not only from the debtor but also from third parties. As a result, the submission emphasizes the need for a judicial determination by the adjudicating authority before the stage outlined in Section 100. Senior counsel argues that without incorporating a requirement for a hearing before the adjudicating authority prior to the appointment of a resolution professional, the provisions of Sections 95 to 100 would be arbitrary and violative of Article 14. Therefore, it is urged that a judicial application of mind by the adjudicating authority is essential even before the appointment of a resolution professional to avoid such consequences.

27. The submission which has been urged by Dr Singhvi has been buttressed further in the course of the submissions urged before this Court by Mr Ritin Rai, senior counsel.

28.Mr Ritin Rai argued that:

- (i) A person as an applicant under Section 95 claims to be a creditor to whom a debt is owed. The existence of a debt which is owed is a jurisdictional fact which has to be determined by the adjudicating authority at the very threshold;
- (ii) Section 97 (5) postulates that a resolution professional has to be appointed by the adjudicating authority. This being the first interface of the adjudicating authority, it must satisfy itself at that stage of the existence of a creditor-debtor relationship which must be demonstrated to exist. The entire jurisdiction in terms of the entertainment of an application under Part III would depend on the proof of the jurisdictional fact;
- (iii) The plain consequence of the appointment of a resolution professional under Section 97(5) is that broad powers are given to them in terms of Section 99(4). The appointment of a resolution professional has serious consequences for the debtor besides which the credit worthiness of the debtor is seriously impinged. In many cases, lending documents trigger a default when an insolvency notice is issued as a consequence of which collateral or independent debts may become invocable by a lending agency. Bearing in mind the broad ranging enquiries which are made by the resolution professional, the debtor is excluded from accessing the remedies of an adjudicatory nature; and
- (iv) In view of both the requirement of establishing a jurisdictional fact at the

threshold and the impact of the enquiries which are made by the resolution professional, civil consequences would follow upon the conduct of an enquiry under Section 99 by the resolution professional. As a consequence, natural justice involving the adjudicatory body must be read into the provisions, at that stage.

29. We have also heard in support of the petitions other counsel, including, Mr Rajiv Dutta, Mr Prateek Seksaria, senior counsel, Mr Arvind Kumar Gupta, Mr Vijay Kumar Singh, Mr Masoom Shah, Ms Pooja M Saigal, Mr Abhimanyu Bhandari, Ms Nina R Nariman, Mr Mohit Chaudhary, Ms Eeshna Kumar, Ms Purni Gupta, Mr Subhankar Nag, Ms Tahira Karanjawala and Mr Mathews J Nedumpara. We would be dealing with some of the supplementary submissions which have been urged at a subsequent stage of the judgment.

B. Submissions on behalf of the Respondents

30. Mr Tushar Mehta, Solicitor General appearing on behalf of the Union of India and the State Bank of India, has urged the following submissions:

- (i) The time bound resolution of insolvency constitutes the heart and soul of the provisions of the IBC;
- (ii) Part II of the IBC which deals with the resolution of corporate insolvency and Part III which deals with the resolution and bankruptcy of individuals and partnership firms contains distinct provisions;
- (iii) Under Sections 7 and 9 which deals with an application for initiation of

corporate insolvency resolution process¹³ by a financial creditor and the operational creditor respectively, the admission of the application itself triggers the CIRP. Thereupon, by an operation of the statute, a moratorium comes into operation under the provisions of Section 14. Such a moratorium, *inter alia*, has a direct impact on the corporate debtor who is prevented from transferring, encumbering, alienating or disposing of any of its assets. Consequently, the admission of an application under Section 7 or Section 9 triggers serious consequences as a result of which the legislature has mandated the involvement of the adjudicating authority at that very stage itself;

- (iv) The moratorium under Section 96, unlike Section 14, is for the benefit of the guarantor or, as the case may be, the debtor. At the stage of an application under Section 94 or Section 95, no adjudication takes place. The interim moratorium under Section 96 does not impose an embargo on alienation of assets, legal rights or beneficial interest of the debtor. Hence, the moratorium under Part II under Section 14 is markedly different in its nature and character from the interim-moratorium under Section 96 in Part III;
- (v) The function of a resolution professional under Section 99 is not of an adjudicatory nature. The purpose of a resolution professional under Part III is only to collate facts. Section 99, in any event, does contemplate a sufficient opportunity to the debtor in the process of formulating the recommendation of the resolution professional to the adjudicatory body.

¹³ "CIRP"

This is evident from the provisions of Section 99(2) in terms of which the resolution professional may require the debtor to prove the payment of debt. Moreover, in terms of sub-section (6), the resolution professional has to examine the application and ascertain whether the application satisfies the requirements of Section 94 or 95. The resolution professional has to ascertain that the applicant has provided information and furnished an explanation which is sought under sub-section (4);

- (vi) The process which is followed by the resolution professional in Section 99 only results in a report containing a recommendation either that the application should be accepted or rejected. Such a report does not have a binding character on the adjudicating authority. Absolute compliance of the principles of natural justice is implicated at the stage when the adjudicating authority exercises its jurisdiction under Section 100 for the purpose of determining whether to admit or reject the application. A hearing is contemplated at that stage when (a) an adjudication takes place; and (b) adverse consequences ensue.

31. In other words, it has been submitted by the Solicitor General that:

- (i) The requirement of observing the principles of natural justice arises at the adjudicatory stage under Section 100;
- (ii) The process which is followed by the resolution professional is only for the purpose of collating facts and submitting a report together with recommendations to the adjudicating authority which does not possess the character of a submission which binds the adjudicating authority;

- (iii) Even during the course of the process which is followed by the resolution professional, the statute has indicated sufficient engagement for the debtor with the resolution professional;
- (iv) The imposition of a moratorium under Section 96 is intended to insulate the debtor and, unlike the moratorium under Section 14 or 101, is of no prejudice to the debtor; and
- (v) Consistent with the time lines which are provided by the IBC, it would be inappropriate to read compliance with the principles of natural justice at a stage anterior to Section 100 since it would dislocate the entire scheme of the IBC.

32. Mr Rakesh Dwivedi, senior counsel appearing on behalf of the State Bank of India, has urged that:

- (i) The concept of natural justice is flexible in nature which has to be tailored to the needs of a given situation;
- (ii) The object of CIRP in Part II and in Chapter III of Part III is entirely distinct:
 - (a) Part II envisages the exclusion of the existing management from the affairs of the corporate debtor;
 - (b) A drastic moratorium comes into place; and
 - (c) Following an unsuccessful resolution plan, liquidation follows;
- (iii) In contrast, in terms of Chapter III of Part III, what is sought in the first

instance is a repayment plan which is preceded, therefore, by an examination by the resolution professional as to whether:

- (a) there is a loan;
 - (b) there is a repayment; and
 - (c) the nature of the repayment plan, if there is a continuing default;
- (iv) Bearing in mind the distinct statutory features of Part II, on one hand, and Part III, on the other, Chapter III of Part III has contemplated appointment of a resolution professional straightaway preceding the performance of an adjudicatory function by an adjudicatory body;
- (v) If, as submitted by the petitioners, an adjudicating authority was required to make a threshold determination at the stage when it appoints the resolution professional under Section 97(5), the subsequent stage of Section 99 would be rendered *otiose*. Parliament has, in a calibrated manner, interposed a resolution professional before the adjudicatory stage under Section 100 bearing in mind the limited role of the resolution professional which is to gather information, examine the application submitted under Sections 94 or 95 and determine as to whether it meets the requirements of the statute;
- (vi) Section 99(3) which provides that the debtor shall not be entitled to dispute the validity of the debt where the debt has been registered with the information utility applies only to the examination by a resolution professional and does not impose a bar on the adjudicating authority; and
- (vii) Section 99(6) uses the expressions “examine”, “ascertain” and “satisfies”.

Sub-section (7) of Section 99 contemplates a recommendation by a resolution professional while sub-section (9) requires that the report should contain reasons. The debtor is involved at every stage of the process. The statute has provided for sufficient compliance with the principles of natural justice. Moreover, there is a valid classification in law between CIRP for the corporate debtors and the provisions of insolvency resolution process of individuals. Distinct provisions have been justifiably made by Parliament bearing in mind that such a classification is based on an *intelligible differentia* and, hence, it meets the requirement of Article 14 of the Constitution.

33. Mr Nakul Dewan, senior counsel has opposed the petitions based on the following submissions:

- (i) Plainly read and properly implemented, there is no significant civil consequence on a debtor or personal guarantor before the stage of adjudication under Section 100. Therefore, there is no breach of natural justice under Chapter III of Part III of the IBC; and
- (ii) The procedure outlined under Chapter III serves the avowed purpose of the IBC to work towards rehabilitation. Liquidation (of a corporate debtor) or bankruptcy (of an individual debtor or partnership) is only a last resort if rehabilitation fails.

34. Buttressing the above submissions Mr Dewan urged that prior to the notification of 15 November 2019, this Court had to determine whether insolvency proceedings could continue against a guarantor notwithstanding the discharge of a corporate

debtor. This, it was urged, has been answered in the negative.

35. Mr Dewan has sought to draw a distinction between a moratorium under Section 14, on one hand, and an interim-moratorium under Section 96, submitting that the latter operates on the debt and not on the debtor. Consequently, the issuance of an interim-moratorium under Section 96 does not affect any right of the debtor. Moreover, it has been submitted that the insolvency resolution process under Part III can be instituted either by a creditor or a debtor and the IBC is meant to give equal protection whether it is the debtor or the creditor who has initiated the proceedings. It has been urged that unlike Section 96, Section 101(2)(c) targets the debtor by restraining the alienation of the property at the post adjudication stage. The submission is that the role of the resolution professional is to act as a facilitator for compiling information under Part III, which is distinct from the role of the interim resolution professional in Part II, as defined in Section 5(27) read with Section 17 of the IBC. In contrast, in Part III, it is Section 97 which provides for the appointment of the resolution professional with a limited role to collate information and submit a recommendation to the adjudicating authority.

36. Senior counsel has relied on the report of the Bankruptcy Law Reforms Committee¹⁴ and the Board Regulations to support the submission that:

- (i) The role of the resolution professional is not that of an adjudicator; and
- (ii) While collecting information, the resolution professional is entrusted with a duty to maintain confidentiality.

¹⁴ "BLRC"

37. The submission which has been urged by Mr Dewan is that the provisions of Part III of Chapter III eventually lead to the creation of a repayment plan and, only if that fails, to a bankruptcy. The adjudicatory role of the interim resolution professional under Section 18 is sought to be distinguished from the role of the liquidator who discharges certain adjudicatory functions if an order of liquidation is passed in view of the provisions of Sections 40 and 42.

38. Finally, it has been urged that an alleged ground of misuse of a provision in a particular case cannot be utilized to challenge the constitutional validity of a statute which Parliament is competent to enact.

39. We have also heard Mr Amar Dave, counsel appearing on behalf of some of the respondents who has urged that:

- (i) The actual process of judicial adjudication takes place at the stage of Section 100 before the adjudicating authority;
- (ii) The entire framework of the IBC is based on the observance of stringent time lines as a consequence of which prolonging the process should not be countenanced. Adding an intermittent stage, as suggested by the petitioners, for the adjudicating authority to decide a "jurisdictional question" would result in the dislocation of the very scheme of the IBC;
- (iii) In view of the provisions of Section 96, once a moratorium has taken effect, it would not be open to the bank to take action in the meantime. Hence, the time lines which have been set out in the statute must be

looked at with a degree of strictness;

- (iv) There has been no challenge to the provisions of Section 94 of the IBC by any of the petitioners; and
- (v) The legislature has provided in Section 95(4) with the details of the documents which are to be provided to the resolution professional and, hence, the submission that the resolution professional is left into an uncharted discretion would be lacking in substance.

IV. Analysis

40. While assessing the merits of the rival submissions, we propose to divide this judgment into three distinct parts. In the course of Part A, we propose to conduct a functional analysis comprising of:

- (a) A comparison between the stages of Part II and Part III of the IBC;
- (b) The role of the resolution professional in corporate as opposed to individual insolvency;
- (c) The impact of a moratorium under Section 14 of Part II, on one hand, and an interim-moratorium under Section 96 of Chapter III of Part III, on the other; and
- (d) The role of the adjudicating authority in applications under Part II, on one hand, and Part III, on the other.

41. Having carried out a functional analysis in the above terms, we propose in Part B of

this judgment, to analyse the applicability of the principles of natural justice. Finally, having put together the different strands of thought, we would deal in Part C with the constitutional validity of the statutory provisions of Sections 95 to 100 which are challenged in these proceedings.

A. Comparative Analysis of Part II and Part III of the IBC

1. Stages under Part II and III

42. Part II of the IBC provides for insolvency resolution and liquidation for corporate persons. In terms of Section 6, a financial creditor, an operational creditor or the corporate debtor itself may initiate a CIRP in respect of a corporate debtor who commits a default.

43. Section 7 provides for the initiation of a CIRP by a financial creditor either on its own or jointly with other financial creditors by filing an application before the adjudicating authority, when a default has occurred. Section 8 provides that an operational creditor may on the occurrence of a default furnish a demand notice of the unpaid operational debt, demanding payment of the amount which is in default from the corporate debtor. In terms of Section 9, on the expiry of a stipulated period of ten days from the date of the demand notice, the operational creditor is empowered to file an application before the adjudicating authority for initiating a CIRP if the debt has not been paid. Section 10, on the other hand, provides for the initiation of the CIRP by the corporate applicant, as defined in Section 5(5).

44. As opposed to the provisions of Chapter II of Part II of the IBC, Part III specifically deals with insolvency resolution and bankruptcy for individuals and partnership firms. Chapter II of Part III deals with the “fresh start process”, which is yet to be

enforced. Chapter III of Part III provides for the insolvency resolution process. In Part III of the IBC, the IRP can be initiated by: (a) a debtor; or (b) a creditor acting as an individual entity or on behalf of other creditors. A debtor or a creditor is empowered to institute an application for the initiation of the IRP through a resolution professional as well.

45. The fundamental aspect which needs to be noticed is that Part II of the IBC, on one hand, and Part III, on the other, deal with distinct processes for the resolution of insolvencies. The former deals with resolution of insolvencies of corporate entities, whereas the latter deals with the resolution of insolvencies of individuals and partnership firms.

2. The Role of the Resolution Professional in Corporate as opposed to Individual Insolvency

46. In the above backdrop, it would now be necessary to advert to the role which is ascribed to the resolution professional in Part II and Part III. While both the Parts use the expression “resolution professional”, notably, the provisions of Part II contain a material difference from those of Part III relating to the role and functions of a resolution professional. Section 5(27) provides that a resolution professional, for the purposes of Part II, means an insolvency professional appointed to conduct the CIRP or the pre-packaged insolvency resolution process, as the case may be, and to include an interim resolution professional. Part II of the IBC provides in Section 16 for the adjudicating authority to appoint an interim resolution professional on the insolvency commencing date. The insolvency commencing date is defined in Section 5(12) to mean the date of the admission of an application for initiating the CIRP by the adjudicating authority under Sections 7, 9 or Section 10, as the case

may be. In other words, upon the admission of an application which has been filed by the operational creditor or the debtor, the provision for the appointment of an interim resolution professional is triggered in terms of Section 16. Since Part II of the IBC deals with the resolution of corporate insolvencies, the statute has implicated the role of the adjudicating authority at the very threshold.

47. Upon the appointment of the interim resolution professional, Section 17¹⁵ postulates that:

- (a) The management of the affairs of the corporate debtor shall vest in the interim resolution professional;
- (b) The powers of the Board of Directors or partners of the corporate debtor shall stand suspended and be exercised by the interim resolution professional;
- (c) The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to all documents and

¹⁵ **17. Management of affairs of corporate debtor by interim resolution professional.**—(1) From the date of appointment of the interim resolution professional,—

- (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
 - (b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;
 - (c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
 - (d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.
- (2) The interim resolution professional vested with the management of the corporate debtor shall—
- (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
 - (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
 - (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
 - (d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and.
 - (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

records; and

- (d) The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to the accounts and furnish information relating to the corporate debtor to the interim resolution professional.

48. The duties of the interim resolution professional are specified in Section 18.¹⁶ The interim resolution professional under Section 20, has a mandate to 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”.

49. The other provisions of Part II indicate the further steps which are to be taken by the interim resolution professional, including constituting a Committee of

¹⁶ 18. Duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

- (i) business operations for the previous two years;
- (ii) financial and operational payments for the previous two years;
- (iii) list of assets and liabilities as on the initiation date; and
- (iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
- (ii) assets that may or may not be in possession of the corporate debtor;
- (iii) tangible assets, whether movable or immovable;
- (iv) intangible assets including intellectual property;
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this 1 [section], the term “assets” shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Creditors¹⁷ as specified in Section 21. Several other consequences do follow upon the appointment of a CoC, including the preparation of an Information Memorandum under Section 29, the submission of a resolution plan under Section 30, and the approval of a resolution plan under Section 31.

50. Chapter III of Part II deals with a distinct eventuality, namely, the initiation of liquidation broadly in situations where the resolution plan has not been received or the resolution plan is rejected by the adjudicating authority for non-compliance of the requirements specified for approval of the resolution plan in Section 31. These provisions elicit the vital role which is entrusted to the interim resolution professional initially and later to the resolution professional in cases involving corporate insolvencies. This role has to be contra-distinguished from the role which is ascribed to a resolution professional in Part III, who is appointed for the purpose of resolving insolvencies and bankruptcies for individuals and partnership firms. Sections 94 and 95, as we have noticed, provide for applications by the debtor or the creditor for the initiation of the insolvency resolution process in relation to these entities. The appointment of a resolution professional takes place under Section 97. In Part II, as we have noticed earlier, the adjudicating authority is contemplated to have an adjudicatory role right at the threshold. In contrast, in Chapter III of Part III, the appointment of a resolution professional is contemplated by Section 97. Under sub-section (5) of Section 97, the adjudicating authority has to appoint the resolution professional who is either recommended under sub-section (2) or nominated by the Board under sub-section (4).

¹⁷ "CoC"

51. The duties of a resolution professional in a process under Chapter III of Part III are contained in Section 99. The resolution professional is required, firstly, to examine the application within ten days of appointment. Secondly, they may require the debtor to prove that the repayment of the debt which is claimed to be unpaid by the creditor has taken place. The debtor may do so by evidencing an electronic transfer of the unpaid amount from a bank account of the debtor or produce evidence of the encashment of a cheque issued by a debtor or a signed acknowledgement by the creditor of the receipt of the dues.
52. We will deal with the impact of sub-section (3) of Section 99 subsequently. Evidently, the provisions of sub-section (3), operate on the resolution professional alone and cannot be construed to be a bar qua the adjudicatory function of the adjudicating authority under Section 100. The resolution professional is empowered by sub-section (4) of Section 99 to seek further information or an explanation in connection with the application from the debtor, creditor or any other person who in the opinion of the resolution professional may provide information. The information which the resolution professional is empowered to seek is in aid to his duty to examine the application and submit a report either recommending the approval or the rejection of the application. In other words, the information which the resolution professional is permitted to seek is channelised for the purpose of the functions of the resolution professional in terms of sub-section (1) of Section 99.
53. The resolution professional is required to examine the application and to ascertain two things: firstly, that the application satisfies the requirement of Section 94 or Section 95 and, secondly, that the applicant has provided the

information and furnished the explanation which is sought under sub-section (4). Having carried out the process of examination and ascertainment as specified in sub-section (6), the resolution professional may either recommend the acceptance or the rejection of the application by submitting a report. The report has to record reasons and a copy of the report has to be furnished to the debtor or the creditor, as the case may be. The role of the resolution professional prior to the adjudication process by the adjudicating authority comes to a conclusion with the submission of a report. Upon the submission of the report, the matter then lies within the jurisdiction of the adjudicating authority. This is evident from the fact that Section 100(1) stipulates that the adjudicating authority has to pass an order either admitting or rejecting the application within fourteen days from the date of the submission of the report under Section 99.

54. The salient aspect which emerges from the above analysis is that the resolution professional does not possess an adjudicatory function in terms of the provisions of Section 99. In Chapter III of Part III, the legislature has dealt with the resolution of individual or partnership insolvencies and bankruptcies. Therefore, the legislature considered it appropriate to interpose the resolution professional before the adjudicatory function of the adjudicating authority commences under Section 100. The resolution professional does not have the kind of power which their counterpart has in Part II. No provision has been made in Part III empowering the resolution professional to take over the assets or the business which is being carried on by the individual or the partnership. The role under Section 99 which is ascribed to the resolution professional is that of a facilitator and is to gather relevant information on the basis of the application which has

been submitted under Section 94 or Section 95 and after carrying out the process which is referred to in sub-section (2), sub-section (4) and sub-section (6) of Section 99, to submit a report recommending the acceptance or rejection of the application. Significantly, the statute has used the expression “examine the application”, “ascertain” and “satisfies the requirements” and “recommend” the acceptance or rejection of the application. The use of these expressions leaves no manner of doubt that the resolution professional is not intended to perform an adjudicatory function or to arrive at binding conclusions on facts. The role of the resolution professional is purely recommendatory in nature and cannot bind the creditor, the debtor or, the adjudicating authority.

55. This distinction between the role of the resolution professional in a CIRP under Part II, and an IRP under Part III is of crucial importance. The reason why the legislature has chosen it fit to interpose the function of the resolution professional even before the adjudicating authority under Section 100 comes, is that the application under Section 94 or Section 95, is sought to be moved principally against an individual or a partnership. In terms of Section 78, Part III applies to individuals or partnership firms where the amount of default is not less than one thousand rupees or any amount which the Central Government may specify, not exceeding one lakh rupees. The adjudicating authority would be inundated if all amounts of alleged defaults as low as one thousand rupees were to be judicially determined. Bearing in mind the nature and context of the insolvency resolution, the legislature has stepped in by providing an intermediate stage where the resolution professional will collate and compile the relevant materials and submit it in the form of a report to the adjudicating authority recommending either the

acceptance or the rejection of the application for initiating insolvency.

56. The next aspect of the analysis would require us to dwell on the impact of the moratorium which is imposed under Section 96.

3. The impact of a moratorium under Section 14 of Part II *vis-a-vis* interim-moratorium under Section 96 of Chapter III of Part III

57. Section 96, as its marginal note indicates, deals with an “interim-moratorium”. In terms of Section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under Section 94 or Section 95 triggers the interim moratorium which then ceases to have effect on the date of the admission of the application (under Section 100). The consequences which flow from an interim moratorium are specified in clause (b) of sub-section (1) of Section 96. The impact of the interim-moratorium under Section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate any legal action or proceedings in respect of any debt. The crucial words which are used both in clause (b)(i) and clause (b)(ii) of sub-section (1) of Section 96 are “in respect of any debt”. These words indicate that the interim-moratorium which is intended to operate by the legislature is primarily in respect of a debt as opposed to a debtor. Clause (b) of sub-section (1) indicates that the purpose of the interim-moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt.

58. This must be contra-distinguished from the provisions for moratorium which are contained in Section 14 in relation to the CIRP under Part II. Section 14(1)(a)

provides that on the insolvency commencement date, the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including proceedings in execution shall stand prohibited by an order of the adjudicating authority. Clause (b) of sub-section (1) of Section 14 empowers the adjudicating authority to declare a moratorium restraining the transfer, encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein. Significantly, the moratorium under Section 14 operates on the order passed by an adjudicating authority. The purpose of the moratorium under Section 96 is protective. The object of the moratorium is to insulate the corporate debtor from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt.

4. The Role of the Adjudicating Authority

59. The resolution professional submits a report to the adjudicating authority. The report is purely recommendatory in nature and does not bind the adjudicating authority. Section 100(1) requires the adjudicating authority to pass an order either admitting or rejecting the application within fourteen days from the date of the submission of the report under Section 99. The adjudicating authority has the power to instruct the debtor and the creditor to enter into negotiation if it admits the application. It may also entitle the creditors to file for bankruptcy if it rejects the application on the ground that it was intended to defraud the creditors or the resolution professional. The provisions dealing with moratorium under Section 101(2)(c) correspond broadly to the provisions of Section 14(1)(b) in relation to Part II. Significantly, clause (c) of Section 101(2) which places a restraint on the transfer, alienation or disposal of assets does not find a place in Section 96(1)(b).

It consequently operates only after the admission of an application under Section 100.

60. This analysis would indicate that the adjudicatory function of the adjudicating authority commences, under Part III, after the submission of a recommendatory report by the resolution professional. Evidently, bearing in mind the clear differences between the CIRP under Part II and insolvency resolution process for individuals and partnership under Part III, the legislature has carefully calibrated:

- (i) The role of the resolution professional;
- (ii) The imposition of the moratorium; and
- (iii) The stage at which the adjudicating authority steps in under Part II, on one hand, and Part III, on the other.

61. This is based on an intelligible differentia between the nature of the insolvency resolution process in the case of a corporate debtor, on one hand, and individuals or partnerships, on the other.

B. Applicability of the Principles of Natural Justice

62. Having thus analysed the provisions of Part III of Chapter II, we shall now analyse the impact of the requirements of natural justice. It is a well settled principle of law that natural justice postulates two requirements: firstly, *audi alterum partem* i.e. an opportunity of being heard to a person who is liable to be affected by an investigation, enquiry, proceeding or action; and secondly, *nemo judex in causa sua*, which means that the person should not be a judge in their own cause.

63. The principles of natural justice have also been expanded to require that a reasoned order be passed against an individual who is liable to be affected.

Though, at one stage, in the evolution of law, a distinction was sought to be drawn between administrative action, on one hand, and judicial or quasi-judicial, on the other, as the law has progressed, that distinction has been substantially watered down, if not obliterated. In other words, the requirement to observe the principles of natural justice arises both in the context of purely judicial or quasi-judicial action as well as administrative action which has an adverse impact on the individual or entity against which action is initiated.

64. At the same time, it needs to be noted that the principles of natural justice are not to be construed in a straitjacket. The nature of natural justice is liable to vary with the exigencies of the situation. In a given situation, it may extend to a fully-fledged evidentiary hearing while, on the other hand, the principles of natural justice may require that a bare minimum opportunity should be given to an individual who is liable to be affected by an action, to furnish an explanation to the allegations or the nature of the enquiry.

1. Role of the Resolution Professional as a facilitator is to collate facts

65. In the provisions of Chapter III, particularly in Section 99, Parliament has provided for an engagement of the debtor with the resolution professional at various stages. Sub-section (2) of Section 99 stipulates that where an application has been filed by the creditor under Section 95, the resolution professional may require the debtor to prove the repayment of the debt in the manner which has been indicated in sub-clauses (a), (b) and (c). Evidently, the expression “may require the debtor to prove repayment of the debt” implicates the role of the debtor in explaining, whether, as a matter of fact, the debt remains unpaid or has been paid.

66. The resolution professional cannot decide that issue in the absence of an opportunity to the debtor to furnish an explanation and to produce material evidencing the payment of the debt. Likewise, sub-section (4) of Section 99 empowers the resolution professional, in the course of carrying out an examination of an application to seek further information or explanation in connection with the application from the debtor or the creditor. The expression “in connection with the application” indicates that Parliament has not contemplated a roving enquiry by the resolution professional but an enquiry for the purpose of making the ultimate recommendation in the report on the nature of the application itself. The resolution professional, after carrying out the process which is evidenced in sub-sections (2) and (4), in particular, is then required to make an ascertainment in terms of sub-section (6). It is thereafter that the resolution professional would submit a report either recommending the acceptance or rejection of the application together with the reasons in support of the report.
67. The provisions of Section 99 thus leave no manner of doubt that the process which takes place before the resolution professional is not an *ex parte* process in the absence of a debtor against whom the insolvency resolution process is sought to be initiated. Though, the ultimate report of the resolution professional has only a recommendatory value, the legislature has ensured that the recommendation is made after taking into account the information or, as the case may be, the explanation that is furnished by the debtor. Thus, it cannot be said that there is any element of bias in a report submitted by an RP who is nominated by the creditor. In the decision in **Ravi Ajit Kulkarni v. State Bank of India**¹⁸, it

¹⁸ (2021) SCC OnLine NCLAT 641, para 42.

has been emphasized that under Section 98 of the IBC, the debtor retains the option to replace the RP appointed under Section 97 by filing an appropriate application with the adjudicating authority.

68. The submission which has been urged on behalf of the petitioners, however, is that Section 97(5) contemplates a role for the adjudicating authority in the appointment of a resolution professional anterior to the stage which is contemplated during the course of adjudication under Section 100. It has been urged that when the adjudicating authority appoints a resolution professional under Section 97(5), the adjudicating authority should be required to decide the jurisdictional questions on the basis of which the provisions of Part III are implicated. In other words, it is urged that, at that stage, it would be necessary for the adjudicating authority to apply its mind as to whether (i) a debt subsists; and (ii) the relationship of creditor and debtor subsists. This is similar to the UNCITRAL Guide which emphasises the need for the insolvency court to evaluate commencement criteria before admitting insolvency proceedings, ensuring a fair hearing for the parties involved.¹⁹

69. Reliance has been placed on the decision in **Ujjam Bai v State of Uttar Pradesh**²⁰ to support the submission that unless such an exercise is carried out, the debtor would be exposed to a wide-ranging enquiry by the resolution professional under Section 99 accompanied by a duty to furnish information or an explanation as required by the resolution professional. We are not inclined to accept this assertion. The principles articulated in **Swiss Ribbons Private**

¹⁹ UNCITRAL Legislative Guide on Insolvency, 2004, Part 2(I), paras 56, 57.

²⁰ AIR 1962 SC 1621

Limited v Union of India²¹ elucidate that the resolution professional's functions are administrative, not adjudicatory. **Essar Steel India Limited v Satish Kumar Gupta**,²² underscores the non-adjudicatory nature of the resolution professional's role. Further support for the administrative role of the resolution professional is drawn from the BLRC's drafting instructions, affirming that the resolution professional's role is primarily administrative for information and documentation collation and verification of the creditor's claim under Section 95 of the IBC.²³

70. We would also like to deal with the submission that the resolution professional is empowered to direct the personal guarantor and others to disclose sensitive personal information without a prior hearing. This demand for information, lacking an opportunity for the personal guarantor to be heard, raises (according to the petitioners) concerns about violating the right to privacy. We are of the considered view that the resolution professional, operating under the regulatory oversight of the Board, plays a vital role in the effective functioning of the insolvency process and contributes significantly to its efficiency. Firstly, the resolution professional is only entitled to seek information which is strictly relevant to the examination of the application for IRP; and secondly, regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with para 21 of the First Schedule, casts an obligation on the resolution professional to ensure confidentiality of all information relating to the insolvency process. The BLRC also acknowledges the information imbalance between debtors and creditors, necessitating the

²¹ (2019) 4 SCC 17

²² (2020) 8 SCC 531, Para 48.

²³ The Report of the Bankruptcy Laws Reforms Committee, Volume I, 4 November 2015, at 115-118.

resolution professional's investigative role in individual insolvency.²⁴ Therefore, Section 99 empowers the resolution professional to seek information.

71. In **K.S. Puttaswamy (9 Judge Bench) v Union of India**²⁵, this Court laid down the threshold requirements to balance privacy with legitimate state interest emanating from the procedural and content-based mandate of Article 21, as follows - (a) legality, i.e. there must be a law in existence; (b) the pursuit of a legitimate aim; and (c) proportionality of the legitimate aims with the object sought to be achieved. The right to privacy is subject to reasonable restraints. In the context of Section 99(4), the legitimate aims of establishing a comprehensive framework for individual insolvency and aiding the adjudicating authority justify seeking personal financial information, balancing privacy rights with the objective.
72. We are of the view that the submission that an adjudicatory role should be interposed at the stage of Section 97(5) cannot be accepted. The power which is conferred on the adjudicating authority at the stage of filing of an application is to appoint a resolution professional. The appointment of a resolution professional is for the purpose of a facilitative exercise which is contemplated by Section 99 which, as we have noted, eventually ends in a report either recommending the acceptance or rejection of the application. Bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the adjudicating authority in adjudicating what is described as a jurisdictional question at the stage of Section 97(5).

²⁴ The Report of Bankruptcy Law Reforms Committee, Volume I, 2015, Para 6.3.2.

²⁵ (2017) 10 SCC 1, para 310.

2. Role of the Adjudicatory Authority

73. Section 100(1) stipulates that the adjudicating authority must issue an order within fourteen days of receiving the report, either admitting or rejecting the application filed under Sections 94 or 95, depending on the circumstances. Importantly, the adjudicating authority does not mechanically accept or reject applications based solely on the resolution professional's report. Instead, it must actively engage in a fair process, affording the debtor a fair opportunity to present their case. The adjudicating authority arrives at its determination by considering arguments supported by relevant material particulars. In essence, the adjudicating authority conducts an independent assessment, not solely relying on the resolution professional's report, to decide the fate of applications under Section 94 or 95 of the IBC.
74. The true adjudicatory function of the authority commences under Section 100 after the submission of the report. Another reason why we are not inclined to accept the submission is that what is described as a jurisdictional question by the petitioners may not be a simple matter to be decided as a question of law. The jurisdictional questions of the nature which have been suggested by the petitioners, namely, on whether there is a subsisting debt or whether the relationship of debtor and creditor subsists, would involve a decision on mixed questions of law and fact. The entire scheme of Sections 99 and 100 implicates time lines which have been laid down by Parliament. The entire process of implementing these time lines would be rendered nugatory if an adjudicatory role were to be read into the provisions of Section 97(5). The final reason which would militate against accepting the submission is that the provisions of Section

99 do not as such implicate any adverse civil consequences particularly if those provisions are read in the manner in which we now propose to elucidate.

3. A right of representation has been provided under Section 99(2)

75. On behalf of the petitioners, it has been submitted that the resolution professional has been empowered to make wide ranging enquiries for the purpose of eliciting information under sub-section (4) of Section 99. In our view, it is necessary to clarify the ambit of sub-section (4) of Section 99. Sub-section (4) is prefaced by the words “for the purposes of examining an application”. In other words, the information which the resolution professional is empowered to seek or the explanation which the resolution professional can require to be furnished is for that purpose. That apart, sub-section (4) also goes on to specify that the information or explanation may be sought in connection with the application. In other words, the nature of the information or the explanation which is sought must have a nexus with the application. Therefore, properly read, the power to seek information or, for that matter, to seek an explanation is related to the nature of the application which has been submitted under Section 94 or Section 95. We are of the view that the right to file such representation is sufficient compliance of *audi alterum partem* requirements.

76. Hence, the petitioners' assertion that the statutory framework, as interpreted and applied by the adjudicating authority, results in a violation of natural justice lacks merit. The reliance on **State Bank of India v Rajesh Agarwal**²⁶ does not help the case of the petitioners, as the court in that case established that exceptions

²⁶ (2023) SCC OnLine SC 342.

to natural justice must be confined to the 'narrowest possible limits.' The court underscored that the waiver of prior hearing is permissible only in situations where its inclusion would obstruct the entire process. In that case, the court specifically addressed the duties of banking authorities, emphasizing the obligation to adopt fair procedures and afford borrowers a hearing before classifying their accounts as fraud accounts, given the serious penal and civil consequences. The court further held that reasoned orders must be passed when categorizing an account as a fraud account. It then clarified that no hearing is required before lodging an FIR. In other words, it held that the principles of *audi alteram partem* must be read into the Circular issued by the Reserve Bank of India on the classification of bank accounts as fraud accounts. However, a crucial distinction is made here, signifying that the circumstances of this case are distinct from those considered in **Rajesh Agarwal (supra)**. The classification of the borrowers account as fraud without giving any opportunity of being heard entailed significant material consequences, including the disability on accessing institutional finance. That may be contra-distinguished with the procedure under Section 95 to Section 99. In this, a person is not deemed a debtor but a resolution professional is appointed to ascertain whether the facts substantiate the application for an IRP. An interim-moratorium is placed on legal proceedings concerning the debt to safeguard the debtor from further legal action. However, the interim-moratorium does not act to freeze the assets and legal rights and title of the debtor. Once a recommendation is made, it is not binding on the adjudicating authority. The authority would only decide after looking at the recommendation of the resolution professional and affording full opportunity of hearing to the debtor or the personal guarantor, as the case may be.

Consequently, the petitioners' argument lacks merit when assessed against these established legal principles.

77. Rules have been framed in 2019 in pursuance of the provisions of Section 239(2). The Rules, inter alia, provide for the Form (Form A) in which an application under Section 94 has to be submitted; the Form (Form B) in which a demand notice has to be served under Section 95(4) on the guarantor demanding payments; and the Form (Form C) in which an application has to be submitted under Section 95(1). Form A is the statutory Form in which an application is submitted by the debtor. Form C, on the other hand, is the statutory Form in which an application is submitted by a creditor. Form C is required to be filled in by the creditor who institutes an application for the initiation of the insolvency resolution process. This includes particulars of the applicant, particulars of the guarantor, particulars of the debt and particulars of the insolvency professional. The creditor who fills up Form C would have to furnish such information as lies within the knowledge of the creditor who is the applicant under Section 95(4). When the resolution professional is empowered to seek information or an explanation in connection with the application, such information or explanation must be relevant to and bearing a connection with the nature of the application itself.
78. Even when the resolution professional seeks information from a third party, the information cannot be of a roving nature, but must be relatable to the application which has been filed under Section 94(1) or, as the case may be, Section 95. Sub-section (3) of Section 99 provides that where a debt for which an application has been filed by the creditor is registered with an information utility, the debtor

shall not be entitled to dispute the validity of the debt. This provision in sub-section (3) operates only in relation to the recommendatory function of the resolution professional. That provision cannot operate to bind the adjudicatory function of the adjudicating authority when it exercises its jurisdiction under Section 100.

C. Challenge to the constitutional validity

79. In view of the above analysis, it now becomes necessary to analyse as to whether there is any substance in the challenge to the constitutional validity of the provisions of Sections 95 to 100. We have already indicated that the function of the resolution professional under Section 99 is purely facilitative. The task before the resolution professional is not to adjudicate but to collate and collect information on the application under Section 94 or Section 95 before submitting a report to the adjudicating authority. When interpreting Part II of the IBC, the Courts have inferred the necessity of granting an opportunity to a debtor before initiating the insolvency resolution process against them. This includes the provision of a copy of the application and all relevant documents. Although Section 100 of the IBC does not explicitly mention a hearing for a debtor, the requirement of a hearing has to be read into Section 100. In legal interpretation, when a statute is silent on a specific aspect, like a hearing, and there is no explicit prohibition, the courts may imply or read in such a requirement.²⁷ The key point is that the lack of explicit mention of a hearing in a provision does not automatically make it unconstitutional because such a requirement can be read

²⁷ *Swadeshi Cotton Mills v. Union of India*, (1981) 1 SCC 664; *Mangilal v. State of M.P.*, (2004) 2 SCC 447 and *Manohar v. State of Maharashtra*, (2012) 13 SCC 14.

into the statute.

80. The legislature has evidently made provisions in Section 99, as we have construed earlier, to allow for the engagement of the debtor with the resolution professional before a report is submitted to the adjudicating authority. The process under Section 100 before the adjudicating authority must be compliant with the principles of natural justice. The adjudicating authority is duty bound to hear the person against whom an application has been filed under Section 94 or Section 95 before it comes to the conclusion as to whether the application should be admitted or rejected. The duty of the adjudicating authority to furnish a hearing attaches to its role and function as an authority which is entrusted to decide questions of law and fact and to arrive at a conclusion on either to admit or reject the application filed by the debtor or the creditor under Chapter III of Part III.
81. The resolution professional in exercise of their duty under Section 99 may not embark on a roving enquiry into the affairs of the debtor or personal guarantor, as the case may be. The information sought by the resolution professional from the debtor, the creditor, or third parties must be relevant to the examination of the application of IRP. In this process, the debtor would inevitably be furnished with a fair opportunity by the resolution professional. Further, the aim of vesting such powers in the resolution professional combined with his duty to keep such information confidential meets the proportionality test which this court has devised for privacy under Article 21 of the Constitution. The nature of the resolution professional's role, the powers, and its nexus with the legitimate aim of the legislation also lead us to the conclusion that the impugned provisions are compliant with Article 14 of the Constitution. Therefore, we hold that Sections 95

to 100 of the IBC are not unconstitutional.

82. For the reasons which we have already indicated, we have come to the conclusion that an adjudicatory decision-making process of the nature which has been suggested by the petitioners would not be implicated under Section 97(5). To accept the submission of the petitioners would render the provisions of Sections 99 and 100 *otiose*.
83. Before concluding, it would be necessary to deal with two incidental submissions which were heard during the course of the hearing. It is sought to be urged that sub-section (2) of Section 95 indicates that an application under sub-section (1) can be initiated only in respect of a partnership debt which is owed to the creditor. We are of the view that this is not a correct reading of Section 95. Sub-section (1) indicates that a creditor may apply either by themselves or jointly with other creditors or through a resolution professional to the adjudicating authority for initiating an IRP. Sub-section (2) provides that in a situation where a creditor has applied under sub-section (1) in relation to a partnership debt, the application may be filed against (a) any one or more partners of the firm; or (b) the firm. The provisions of sub-section (2), in other words, cannot control the ambit of sub-section (1) of Section 95.
84. The second incidental submission which was urged is that the provisions of Sections 95 to 100 are retroactive in nature since they would operate in respect of guarantees which may have been executed before the statutory provisions were brought into force. It is a well settled principle that a law is not retrospective in nature merely because some parts of the cause of action on which the law

operates has arisen in the past. Prior to the commencement of the IBC, the field was governed by the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920. With the enactment of the IBC, the insolvency resolution process in relation to individuals and partnership firms is governed by Part III of the IBC. The IBC cannot be held as operating in a retroactive manner so as to violate Article 14 of the Constitution.

85. For the above reasons, we have come to the conclusion that the impugned provisions of the IBC do not suffer from any manifest arbitrariness so as to offend Article 14 of the Constitution. This is subject to the clarification on the interpretation of Section 99 in the text of this judgement.

V. Conclusion

86. We summarise the conclusion of this judgment below:
- (i) No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;
 - (ii) The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;
 - (iii) The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage

when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

- (iv) The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;
- (v) There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;
- (vi) No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;
- (vii) The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 for the purpose of determining whether to accept or reject the application;
- (viii) The purpose of the interim-moratorium under Section 96 is to protect the

debtor from further legal proceedings; and

- (ix) The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.

87. The writ petitions are accordingly dismissed.

88. Applications for substitution of the name of the Bank/Company are allowed.

89. Pending applications, including the applications for intervention, stand disposed of.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[J B Pardiwala]

.....J.
[Manoj Misra]

New Delhi;
November 09, 2023
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