

**HIGH COURT OF TRIPURA**  
**AGARTALA**

WP(C)(PIL) No.04/2022

Sri Subhankar Bhowmik.

..... *Petitioner(s)*.

Vs.

Union of India and Anr.

..... *Respondent(s)*.

For Petitioner(s) : Mr. Anukul Seti, Advocate,  
Ms. R Guha, Advocate.

For Respondent(s) : Mr. Bidyut Majumder, Asstt. S. G.

**HON'BLE THE CHIEF JUSTICE MR. INDRAJIT MAHANTY**  
**HON'BLE JUSTICE MR. S G CHATTOPADHYAY**

**O R D E R**

**14/3/2022**

(Indrajit Mahanty, CJ).

The present petition has been filed with, *inter alia*, the following prayers :

1. Issue an appropriate Writ, Order or Direction more particularly in the nature of WRIT OF CERTIORARI or any other appropriate writ declaring the provisions of Section 3(10) of the Insolvency and Bankruptcy Code, 2016 read with Regulations 9A as *ultra vires* inasmuch as it fails to define the terms "other creditors" and accordingly, to strike them down on the vice of Article 14 of the Constitution of India, or the impugned provisions may be interpreted harmoniously to include the words "decree holder" as existing in Section 3(10) to be at par with "financial creditors" under Regulation 9(a), to save them from unconstitutionality;

2. Issue an appropriate Writ, Order or Direction more particularly in the nature of WRIT OF CERTIORARI or any other appropriate writ declaring that claims filed under a CIRP by "decree holder" under Regulation 9(a) of the CIRP Regulations, be considered at par with claims filed by "financial creditors" and be amenable to all consequential rights available to financial creditors; and/or ..."

[2] The counsel for the petitioner states that the petitioner is a shareholder of public listed companies, who are either creditors and/or corporate debtors in terms Insolvency and Bankruptcy Code, 2016 ("IBC"). He is therefore interested in the issues raised in the present petition, which deal with the manner in which claims under corporate insolvency resolution process are to be treated. He states that the issues raised, also effect the general public, as they would be germane to almost all corporate insolvency resolutions under the IBC. It is further stated that there is no authoritative pronouncement of the Hon'ble Supreme Court or Hon'ble High Court on the questions raised.

[3] Principally, the issues raised in the present petition deal with the treatment of "decree holders" who hold decrees against a Corporate Debtor under the insolvency resolution process. As such, the issue is one of classification. The Petitioner states that the IBC and / or the Regulations framed thereunder, do not prescribe the class of creditors to which the term "decree holder" belongs, and therefore there exists a need to iron out the

creases by this Hon'ble Court. It is suggested that without such prescription in the IBC, the class of "decree holders" falls into the residual class of "other creditors", which it is stated manifestly arbitrary and therefore violates Article 14. It is in this context, that the provisions of the IBC are to be examined.

[4] The Insolvency and Bankruptcy Code, 2016, came into effect on May 28, 2016. The Preamble of the IBC reads as under :

"An Act to consolidate and amend the laws relating to the reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

As such, the scheme of the IBC, in line with its stated objects, is to achieve efficiency and efficacy in the resolution process for corporate persons, partnerships and individuals. The provisions of the IBC are, therefore, guided by the said objective.

[5] The Hon'ble Supreme Court, while considering the Statement and Objects and the Preamble of the IBC, in the matter of *Swiss Ribbons*

*(P)Ltd. v. Union of India, (2019) 4 SCC 17*, was therefore, pleased to observe as under :

"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. ...Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme-workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal frame work, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.(See *Arcelor Mittal [Arcelor Mittal (India)(P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1]* at para 83, fn 3).

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which

puts the corporate debtor back on its feet, not being mere recovery legislation for creditors. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

That, maximization of the assets of a corporate debtor, is a cardinal principle of the IBC, has also been recognized by the Hon'ble Apex Court in Committee of Creditors of *Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (2020) 8 SCC 531* and in *Maharashtra Seamless Limited vs. Padmanabhan Venkatesh and Anr. (2020) 11 SCC 467*.

[6] In the aforesaid background, we proceed to examine the provisions of the IBC. The word "creditor" is defined in Section 3(10) of the IBC which reads as under :

"3(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"

A reading of the aforesaid section suggests that the Parliament in its wisdom recognized five types of creditors being "financial creditor" or "operational creditor", "secured creditor", "unsecured creditor" and a "decree-holder". A further examination of the provisions reveals that the phrases "financial creditor", "operational creditor" and "secured creditor" are defined in sections 5(7), 5(20), and 3(30) respectively. It would also be trite to note that a creditor who does not qualify as a "secured creditor" under Section 3(30), would by necessary implication mean an "unsecured creditor". However, the definitions contained in the IBC do not provide any definition for a "decree holder".

[7] At first blush, it seems that the aforesaid, as submitted by the counsel for the petitioner, is an inadvertent omission. However, a closer scrutiny of the provisions of the IBC reveals otherwise.

Before proceeding to the same, however, it would be trite to understand the rights of a decree holder *per se*, i.e. dehors the contours of IBC. The right of a decree holder, in the context of a decree, is at best a right to execute the decree in accordance with law. Even in a case where the decree passed in a suit is subject to the appellate process and attains finality, the only recourse available to the decree-holder is to execute the decree in accordance with the relevant provisions of the Civil Procedure

Code, 1908. Suffice it to say, that the provisions contained in Order 21 provides for the manner of execution of decrees in various situations. The said provisions also provide for the rights available to judgement debtors, claimant objectors, third parties etc., to ensure that all stake holders are protected. The provisions of the CPC, therefore subjects the rights of a decree-holder to checks and balances that an executing court must follow before the fruits of such decree can be exercised. Given the same, the rights of a decree-holder, subject to execution in accordance with law, remain inchoate in the context of the IBC. This is principally because, the IBC, by express mandate of the moratorium envisaged by Section 14(1), puts a fetter on the execution of the decree itself.

[8] Section 14 provides as under :

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor **including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;**

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

Therefore, in terms of Section 14(l)(a), the right of the decree-holder to execute the decree in civil law, freezes by virtue of the mandatory and judicially recognized moratorium that commences on the insolvency commencement date. This is because a decree, in a given case may be amenable to challenge by way of an appellate process, and/or by way of objections in the execution process. In that sense, the passing of the decree may be the recognition of a claim of the decree holder, however, the said claim itself is ultimately subject to doubt till the execution proceedings are finalized. For instance, a judgement & decree in a civil suit, may be upheld throughout the appellate chain right up to the Hon'ble Apex Court. However, even that would not automatically entitle the decree holder to the fruits of the decree. The same would still remain, subject to objections in execution proceedings which if allowed, would frustrate the decree. Therefore, whereas the IBC rightly recognizes decree-holders as a class of creditors whose claims need to be acknowledged in a corporate insolvency



resolution process, the IBC by express provision of Section 14 (1)(a) bars execution of a decree by the same decree holder against the corporate debtor.

[9] The aforesaid conclusion also finds force in a conjoint reading of the Section 14(1)(b) and Section 28 of the IBC. Section 14(1)(b) provides, *inter alia*, that the NCLT, on the insolvency commencement date shall declare a moratorium on "*transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*" In the context of an unexecuted decree, the subject matter of the decree, be it money, moveable property, immoveable property, or of any other nature, remains on the books of the corporate debtor. The moratorium envisaged by Section 14(1)(b) therefore, expressly bars transfer, encumbering, alienation or disposal of such assets. Seen in the context of the Statement of Objects and Reasons and the Preamble of the IBC, this provision ensures that its stated purpose of achieving preservation and maximization of the assets of a corporate debtor is not defeated. In fact, to ensure that such assets remain protected, even whilst in the hands of an Interim Resolution Professional or a Resolution Professional, as the case may be, Section 28(1)(d), creates a further fetter and provides that a resolution professional, during the corporate

insolvency process, shall not "record any change in ownership interest of the corporate debtor", without prior approval of the Committee of Creditors.

[10] A reading of the aforesaid provisions makes it clear that, in effect, an unexecuted decree, in the hands of a decree holder under the IBC regime, cannot be executed. At best, a decree signifies a claim that has been judicially determined and in that sense is an "admitted claim" against the corporate debtor. Therefore, the IBC rightly categorises a decree-holder, as a creditor in terms of the definition contained in Section 3(10). Execution of such a decree, is however subject to the fetters expressly imposed by the IBC (in addition to and over and above the requirements and limitations of the execution process under the CPC), which cannot be wished away.

[11] Looked at from another angle, the decree-holder gets a statutory status as a creditor under Section 3(10) of the IBC, by virtue of the decree. Since the decree cannot be executed by operation of the moratorium under Section 14, the IBC makes a provision to protect the interests of a decree holder by recognizing it as a creditor. The interest recognized is that in the decree and not in the dispute that leads to the passing of the decree. This is apparent from the fact that decree holders as a class of creditors are kept

separate from "financial creditors" and "operational creditors". No divisions or classification is made by the statute within this class of decree holders. The inescapable conclusion from the aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held. The IBC does not provide for any malleability or overlap of classes of creditors to enable decree holders to be classified as financial or operational creditors.

[12] As a consequence, once a decree holder is recognized as a creditor, all provisions of the IBC that apply to creditors, including the waterfall provisions are applicable in all their force. The rights like each and every other creditor are subject to the overall objective of maximization of assets of the corporate debtor for the benefit of all stake holders in line with the commercial wisdom of the Committee of Creditors. The role of the resolution professional thus, in context of a decree holder is to recognize and admit the existence of the decree and no further. Once admitted as a creditor, the efforts must be to preserve and maximise the assets of a corporate debtor. The resolution professional cannot look behind the decree. In the resolution process, he must acknowledge and admit the decree as an admitted claim, unless such decree has been set aside.

[13] It was contended that all decrees may not be amenable to precise valuation. For instance, decrees for specific performance or decrees for completing sale of property where part payments have been made. In our opinion, this situation has been provided for by the IBC. Where the decree is not amenable to precise valuation, the resolution professional must follow the procedure for estimation of its value provided in the Regulation 14 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, ("**CIRP Regulations**"). For instance, in cases involving part payments for sale of property, the payments already made by the decree holder creditor would be a reasonable guide for estimation of the claims of a decree holder. Where specific performance is of a contract, the resolution professional may estimate on the basis of past business records of the corporate debtor to estimate its claims. The effort of the resolution professional in such cases has to be guided by Regulation 14 of the CIRP Regulations and the overall objective of the IBC to maximise assets of the corporate debtor.

[14] The powers of a resolution professional are only to vet and verify the decree. Even the executing court, that executes the decree after adjudication of objections, cannot look behind the decree. That being so, it cannot be argued that the resolution professional should do what the court

cannot. Seen in this backdrop, the reason for keeping decree holders as a separate class from the other identified classes in Section 3(10) is *ex facie* apparent. The resolution professional cannot look to the nature of the original claim that resulted in the decree as that would require looking behind the decree. Looked at in another manner, once a decree quantifies a debt due the nature of the dispute that resulted in the quantification ceases to exist. In the books of a corporate debtor, it will show only as a liability and not as a financial debt or operational debt. The same cannot be said to be arbitrary, or unreasonable.

[15] Once seen in the aforesaid context, the claim of a decree holder, is subject to all the rigors of the resolution process and has to be satisfied along with all other claims, in accordance with the waterfall mechanism envisaged by the IBC. Since the claims cannot be classified as operational or financial, appropriate provisions (Regulation 9A) and forms (Form F) for filing of claims is provided in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This is also reflected in the title to Form F which reads "Proof of Claim by Creditors (Other than Financial Creditors and Operational Creditors)". It is trite to say that the assets of a corporate debtor inure to the benefit of all creditors, decree holders being one of them. The distinction of decree holders as

creditors from "financial creditors" and "operational creditors", as seen aforesaid is intelligible and take forward the purpose of the IBC. The same cannot be stated to be discriminatory or arbitrary.

[16] Another argument sought to be pressed to us is that the decree holders as a class of creditors have been discriminated as they do not find a place on the Committee of Creditors in terms of Section 21 of the IBC and in terms of Regulation 16 of the CIRP Regulations. This too, we feel, is stated to be rejected. The role of the Committee of Creditors, was discussed by the Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., (2022) 1 SCC 401*, in the following manner :

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

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

[17] Membership of the Committee of Creditors has to be seen in context of its role under the IBC. The IBC, therefore, put the onus of taking key decisions in a graded manner putting foremost the interest of the creditor concerned to bring a corporate debtor back on its feet. Financial creditors who have large exposure to a corporate debtor therefore get the first preference, followed by operational creditors, who are also interested in contained operations and therefore the revival of the corporate debtor. A decree holder on the other hand, holds a decree as a result of crystallizing and determining a dispute through an adversarial process of litigation. The corporate insolvency resolution process, as has been settled by the Hon'ble Apex Court in the matter of *Swiss Ribbons (Supra.)*, is not an adversarial process. The Apex Court, while considering the corporate insolvency resolution process in that case, had observed thus :

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery

legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/ those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests."

[18] To put the steering wheel of a non-adversarial process to revive a corporate debtor, in the hands of an adversarial claimant, would defeat the very purpose of the IBC. As such, we find no merit in the contentions raised by the petitioner. Writ petition stands dismissed.

Pending application(s), if any, also stands disposed of.

( S G CHATTOPADHYAY, J ) ( INDRAJIT MAHANTY, CJ )

