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ANALYSING SECTION 29A OF IBC READ WITH COMPANIES ACT, 2013: READING BETWEEN INELIGIBILITIES AND COMPROMISES

AUTHORED BY - NANDHAA KISHORE S
& INIYAVAN ABDULLAH SA

I. Abstract

Amongst a rigmarole of undecided questions of law and critical opinions of eminent corporate law enthusiasts, the Insolvency and Bankruptcy Code, 2016 (“IBC” for brevity) is nothing like the insolvency laws of other democracies the world over. For instance, the Insolvency Act of 1986, the United Kingdom counterpart of the IBC, is “an Act to consolidate the enactments relating to company insolvency and winding up including the winding up of companies that are not insolvent.”¹ The fundamental difference between the two statutes is in their respective natures of operation and scope; the younger one being a Code and the older, an Act. Comparing it to the Long Title of the IBC, it is evident that the main purpose behind both statutes is significantly different. The English Act intends to ensure the operation of the law “*and redress malpractice and wrongdoing*”² whereas the Code seeks to maximise the value of assets of such insolvent persons and balance the mechanism of repayment of debts. The bare perusal of the Long Title of the Code leaves us with the notion that winding up of corporate concerns is not the goal intended to be achieved herein. In fact, the end goal is quite the opposite.

The following paper analyses major questions of law by analysing several judicial pronouncements of the Supreme Court of India in light of the revised creditor-centric regime of the IBC. By throwing light on the operation of bankruptcy law in other countries, the exceptional spotlight of the IBC is analysed and the framework of Insolvency laws and the interpretation thereof with certain provisions of the Companies Act, 2013 will be analysed, thereby carving out the common ground wherein both these comprehensive statutes operate.

Keywords: Corporate Insolvency Resolution Process, Committee of Creditors, Insolvency Resolution Professional, moratorium, substantive consolidation, purposive interpretation.

¹ Long Title, United Kingdom Insolvency Act, 1986.

² *Ibid.*

II. Background study:

The Bankruptcy Law Reform Committee released a report dated 04.11.2015³ which discussed in detail the major reasons behind the enactment of the IBC along with the legislative intent behind its draft.

The antecedent structure of the bankruptcy process for companies was highly fragmented, with the powers of creditors and debtors governed by different legislation. Different statutes like the Sick Industrial Companies (Special Provisions) Act, 1985⁴ (SICA hereinafter) and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁵ (“SARFAESI” hereinafter) contain separate definitions of rights of creditors or debtors as the case may be. This raises challenges in achieving consistency and efficiency in the insolvency resolution process as well as interpretation of terminology and determination of capacities of parties to a dispute. An additional complication arises from the implementation of these diverse laws before various judicial fora. Matters decided by the Tribunal or Board of Industrial and Financial Reconstruction often undergo review in High Courts, creating two key issues in implementing the resolution framework.

Firstly, there is a lack of jurisdictional clarity. When one forum handles creditor rights, and another deals with debtor rights, decisions are frequently appealed, leading to stays or reversals before higher judicial or quasi-judicial authorities. Ideally, for the preservation of economic value, a single forum should hear both sides of the case and deliver a comprehensive judgment. Another pertinent problem often ignored by analysts at this stage is overlapping of judicial or technical expertise or clash between decisions of different fora.

Secondly, these fora might lack the necessary business or financial expertise, information, or capacity to effectively decide on insolvency and bankruptcy matters. This results in delays, extensions in reaching outcomes, and heightened susceptibility to appeals. Because of the absence of concrete law, major decisions are taken by the Courts without relying on any statutes. According to that Report, “Judicial precedent is set by “case law” which helps flesh out the statutory laws. These may also, in some cases, pronounce new substantive law where the statute

³ Bankruptcy Law Reform Committee, dated 04.11.2015, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf last accessed on 10 Nov 2023.

⁴ Sick Industrial Companies (Special Provisions) Act, 1985, Act No. 1 of 1986, Acts of Parliament, 1985 (India).

⁵ Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, Act No. 54 of 2002, Acts of Parliament, 2002 (India).

and precedent are silent.”⁶ The Committee went on to observe that “The judgments reviewed are those after June 2002 when the SARFAESI Act came into effect. It is illustrative of both debtor and creditor led process of corporate insolvency, and reveals a matrix of fragmented and contrary outcomes, rather than coherent and consistent, being set as precedents.” These judgments exemplify both debtor-driven and creditor-driven approaches to corporate insolvency. Instead of establishing consistent and coherent precedents, the outcomes depict a complex matrix of fragmented and conflicting decisions. According to the World Bank (2014)⁷, the average duration for insolvency resolution in India is four years due to the intricate corporate structure which requires more time in examination and decision making. Whereas the time taken for insolvency resolution is 0.8 years in Singapore and 1 year in London. According to World Bank’s Ease of Doing Business Index in 2017, India remains at the 130th position out of 190 countries globally.⁸ The Eradi Committee Report on the insolvency and winding up of companies, dated July 31, 2000 highlighted that out of 3068 cases referred to BIFR from 1987 to 2000, all except 1062 cases were disposed of. Among the disposed cases, 264 were revived, 375 were in negotiation for the revival process, 741 were recommended for winding up, and 626 were dismissed as not maintainable⁹. These statistics raise significant concerns about the efficacy of the SICA. The Committee emphasized that the effectiveness of the statute had been greatly compromised due to substantial delays in case disposal by BIFR. As a result, the Committee recommended the repeal of the SICA and suggested integrating its revival and rehabilitation provisions into the structure of the Companies Act, 1956. Fast-forward half a decade, the Companies Act 2013 was enacted followed by the Insolvency and Bankruptcy Code, 2016.

III. Research Method

The research design for this study is primarily exploratory and analytical in nature. It aims to understand the practical implications and challenges in the IBC in the context of roles and capacities of members of corporate debtors. The study will utilize both qualitative and

⁶ *Ibid*, para. 3.3.1. at pp. 26.

⁷ World Bank, “*Understanding Regulations for Small and Medium-Size Enterprises*”, Comparing Business Regulations for Domestic Firms in 189 Economies, 11th Ed. (2014), <https://openknowledge.worldbank.org/server/api/core/bitstreams/6ff40dd1-9eb0-5a1e-91fc-66b625e4fb85/content> last accessed on 10 Nov 2023.

⁸ Business Standard, “*India moves up by just one notch on world bank’s ease of doing business’ index*”, https://www.business-standard.com/article/economy-policy/india-moves-up-by-just-one-notch-on-world-bank-s-ease-of-doing-business-index-116102501493_1.html last accessed on 10 Nov 2023.

⁹The Eradi Committee Report on “*Law Relating to Insolvency and Winding Up of Companies*” dated July 31, 2000, <https://ibbi.gov.in/uploads/resources/July%202000.%20Eradi%20Committee%20Report%20on%20Law%20relati%20to%20Insolvency%20and%20winding%20up%20of%20Companies.pdf> last accessed on 10 Nov 2023.

quantitative research methods to achieve comprehensive insights. This qualitative method of research limits the scope to a relatively small group of subjects by carefully observing the stages of Corporate Insolvency Resolution Process (CIRP), liquidation, sale of assets, and winding up of a corporate debtor. The authors intend to apply analytical methods of research to find and compile the most relevant information on insolvent companies, and the capacity of certain related personnel of such companies in initiating CIRP and liquidation proceedings. Reliance will be placed on secondary sources, including legislative documents related to the IBC, including the Code itself, and subsidiary regulations, case law and judgments from the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), and the Supreme Court, academic articles, books, research papers, and reports analysing the IBC's impact on corporate insolvency. The qualitative and quantitative findings will be interpreted collectively to draw meaningful conclusions. The authors will address the research objectives by comparing the research findings with the existing literature on corporate insolvency and the IBC.

IV. Introduction

It is a well-known fact that the IBC acts as a life-saviour in the backdrop of failure of erstwhile insolvency laws like the Provincial Insolvency Act, 1920, the Sick Industrial Companies (Special Provisions) Act, 1985, The Presidency Towns Insolvency Act, 1909, etc. It was found to be “problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts.”¹⁰ This led to two serious problems – lack of certainty of jurisdiction, and the presence of multiple judicial fora attempting to resolve the same category of cases. This was the backdrop in which the IBC found its inception.¹¹

However, there are certain areas of the insolvency regime not accounted for by the original enactment of 2016, which were subsequently inserted vide amendments in 2017¹², 2018¹³, and 2019¹⁴. The questions of law before NCLATs and also the Supreme Court have led to the passage of such amendments, one of which has opened up several debates and cross-opinions. Section

¹⁰ *Supra*, note 5.

¹¹ *Ibid*.

¹² Ministry of Law and Justice, The Insolvency and Bankruptcy Code (Amendment) Act, 2017, No. 8 of 2018, [3703GI.p65 \(ibbi.gov.in\) last accessed on 11 Nov 2023.](#)

¹³ Ministry of Law and Justice, The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26 of 2018, [1671GI.p65 \(ibbi.gov.in\) last accessed on 11 Nov 2023.](#)

¹⁴ Ministry of Law and Justice, The Insolvency and Bankruptcy Code (Amendment) Act, 2019, No. 26 of 2019, [630af836c9fbbed047c42dbdfd2aca13.pdf \(ibbi.gov.in\) last accessed on 8 Oct 2023.](#)

29A of the IBC inserted vide an amendment in 2018¹⁵ has disentitled certain members of a corporate debtor from proposing resolution plans for CIRP to take place. The Committee of Creditors (“CoC”) is not permitted to pursue the resolution ideas suggested by such members listed under Section 29A or any other persons acting jointly or in concert with such person.¹⁶ The pragmatic approach taken by the Apex Court was to read this ineligibility under Section 29A into the capacity of such a member to propose a compromise or arrangement as under Sections 230 to 232 of the Companies Act, 2013¹⁷. The issue dealt with hereunder would be whether such an ineligibility not provided for by Parliament may be arrived at by judicial determination. Moreover, the present position of law regarding such schemes for compromise and arrangement is that they are permitted to be proposed at the time of liquidation. The same position is put under scrutiny in light of the statutory purpose behind the enactment of the IBC and such other legislation, like the Companies Act. The authors first examine the nature of insolvency laws in other countries and then conduct an analysis of the legislative intent of the same in India.

V. Insolvency Laws in Other Jurisdictions – persuasive value

A. Insolvency Laws in the United Kingdom:

In the United Kingdom, the recent enactment of the Corporate Insolvency and Governance Act, 2020¹⁸ (CIGA) has witnessed insertion of provisions for ‘free-standing moratorium’¹⁹ and a refurbished ‘restructuring plan’ regime, with ‘cross-class cram down’²⁰. It has been the view of jurists and corporate law experts that such a free-standing moratorium applied to the IBC would postpone the threat of litigation and will provide the members of the Corporate Debtor a significant breathing space to plan the revival thereof.²¹ Although the scope of the CIGA offers a target of adaptation for the IBC, specifically in the post-COVID era, the Code contains a creditor-centric regime²² wherein the CoC is given precedence in the repayment of debts owed by the

¹⁵ Insolvency and Bankruptcy Code (Amendment) Act, 2018, dated 18th January 2018, w.e.f., 23.11.2017, [1671GI.p65 \(ibbi.gov.in\) last accessed on 12 Aug 2023.](#)

¹⁶ The Insolvency and Bankruptcy Code, 2016, Section 29A(a), 29A(b), 29A(c), No. 31 of 2016, Acts of Parliament, 2016 (India).

¹⁷ The Companies Act, 2013, Section 230, 231, 232, No. 18 of 2013, Acts of Parliament, 2013 (India).

¹⁸ The Corporate Insolvency and Governance Act, 2020, Ch. 12, Acts of Parliament, 2020 (UK). <https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted> last accessed on 16 Dec 2023.

¹⁹ Ali Shalchi, *Corporate Insolvency and Governance Act*, Commons Library Research Briefing, 8971, 4 (2022). <https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf> last accessed on 12 Nov 2023.

²⁰ Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006, No.18, Acts of Parliament, 2013 (India); Department for Business, Energy, and Industrial Strategy, Explanatory Notes; Re Virgin Atlantic Airways Ltd., [2020] EWHC 2376 (Ch.); Flora v. Wakom (Heathrow) Ltd., [2007] 1 WLR 482.

²¹ Manikyamba et al., “*Analysis of Insolvency Laws of India, Australia, Canada, USA, and UK*”, 2 SN Bus Econ 2, 152 (2022) <https://doi.org/10.1007/s43546-022-00323-1> last accessed on 12 Nov 2023.

²² Archana Kaushik et al., “*An Empirical Investigation of the Relationship Between Recovery Management Practices and NPA Levels in Indian Banks*”, 33 Journal of Namibian Studies 1944, 1950 (2023), <https://namibian->

corporate concern. The CIGA however focusses more on debtors' rights and measures to abate the harshness of COVID-19. The CIGA contains six Parts and eight Schedules governing the process of moratorium in the interest of the corporate debtor²³, whereas the aspects of moratorium in the IBC are inclined towards placing a bar on the continuance of business of the corporate debtor, and instead focusses on repayment of debts to the creditor²⁴. The Supreme Court has observed²⁵ that once a moratorium either under Section 14 or Section 33 of the IBC has been upheld against a corporate debtor, recovery proceedings as under the Customs Act, 1961 will not apply. Such an observation is based on the precedence afforded to the stake of the creditor, in the creditor-centric regime established under the Code. Moreover, in the UK, according to the Insolvency Act of 1956, the daily operation of the company retains with the directors even though the management is controlled by the insolvency practitioner. However, in India pursuant to section 17(1)(b) of the IBC, the powers of the Board of Directors are suspended and their rights and responsibilities are provided to the IRP, thus restricting the role played by the directors.²⁶ This is one of the main considerations for the instant analysis in purview of Section 29A and the purpose behind it.

B. Insolvency Laws in the United States:

In the United States, the renowned "debtor-possession" approach has been established. A debtor possession approach is based upon the possession and control of the company's management administered by the corporate debtor²⁷ rather than giving the administration of management to Insolvency resolution Professionals like in India or, handing over the administration of management to creditors which is followed in the UK. The US law lays down the process of Reorganisation²⁸ which is a method by which a company that is financially distressed in its

[studies.com/index.php/JNS/article/view/2281/1564](https://www.studies.com/index.php/JNS/article/view/2281/1564) last accessed on 15 Nov 2023; M. P., Ram Mohan et al., "*Stigma, Corporate Insolvency, and Law: International Practices and Lessons for India*", IIMA Working Paper 1, 30 (2022). <https://ssrn.com/abstract=4109719> last accessed on 15 Nov 2023.

²³ Toube et al., "*Evaluation of the UK's CIGA Reforms: A Best Practice Model for Other Jurisdictions?*", South Square Digest 1, 3 (2023) https://wlv.openrepository.com/bitstream/handle/2436/625182/Toube_et_al_Evaluation_of_CIGA_Reforms_2023.pdf?sequence=3 last accessed on 16 Nov 2023.

²⁴ Srijan Jha, "*Selective Litigation: The True Purpose of I.B.C. Moratorium*", 5 RGNUL Fin. & Mercantile L. Rev. 57 (2018) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/rfladme5&div=19&id=&page=> last accessed on 12 Dec 2023.

²⁵ ABG Shipyard v. Central Board of Indirect Taxes and Customs, 2022 SCC OnLine SC 1101.

²⁶ The Insolvency and Bankruptcy Code, 2016, Section 17, No. 31 of 2016, Acts of Parliament, 2016 (India).

²⁷ Gurrea-Martínez et al., "*The Treatment of Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform*", SMU 1, 4 (2022) <https://dx.doi.org/10.2139/ssrn.4067966> last accessed on 12 Dec 2023.

²⁸ Legal Information Institute, <https://www.law.cornell.edu/uscode/text/26/368> last accessed 22 Nov 2023. Cornell Law School; Internal Revenue Code, 1986, Internal Revenue Code Section 368, Act of Congress, 1986 (USA).

operation restructures its assets and capital in order to take up a better position.²⁹ Further elucidation was done by the District Court in the case of *Re: Lionel Corporation*³⁰ wherein the principle that a debtor in possession has a fiduciary duty to unsecured creditors was established. In this case, the Court ordered to sell a particular asset which was in the possession of debtor, prior to approval of a reorganization plan which in turn deprives the rights of the equity holders. Yet another practice gaining prominence is equitable subordination³¹. Equitable subordination involves treating certain claims or interests as lower in priority than others due to factors such as inequitable conduct, fraud, or abuse of fiduciary duty.³² This doctrine is more commonly associated with bankruptcy laws in the United States and some other jurisdictions. This remedy can be achieved under Section 510(c) of US Bankruptcy Reforms Act³³. The best example was given by the US court in *Re: Owens Corning case*,³⁴

“...if a corporate parent is both a creditor of a subsidiary and also dominates the affairs of that entity as to prejudice its other creditors, a court may place payment priority to the parent below that of the other creditors. The equitable subordination places bad acting creditors behind other creditors when the distributions are made”.³⁵

C. Contrasting Indian scenario:

In light of the Doctrine of Substantive Consolidation,³⁶ the IBC does not include mechanism for grouping the corporate debtor's bankruptcy as together. The doctrine essentially enables the Adjudicating Authority to merge the assets and liabilities of all such individual entities under a common umbrella while involving them in common CIRP also known as group insolvency³⁷. This doctrine recognizes that in certain situations, multiple affiliated entities (such as holding and subsidiary companies) may be so interconnected. By treating them as separate legal entities

²⁹ Stephan Madaus, “Corporate Reorganisation Law and the Shaping Powers of Market Realities and Doctrinal Concepts” 42 Oxf. J. of L. St. 1195–1211 (2022) <https://doi.org/10.1093/ojls/gqac021> last accessed 20 Nov 2023.

³⁰ Re Lionel Corp. 722 F.2d 1063, 1068 (2d Cir. 1983).

³¹ Chaitman, H. D. “The Equitable Subordination of Bank Claims”, JSTOR 1561, 1563-1564 (1984) <http://www.jstor.org/stable/40686586> last accessed 20 Nov 2023.

³² Thomas G.W. Telfer, “Equitable Subordination Redux? Section 183 of the Bankruptcy and Insolvency Act and respecting the “Legislative Will” of Parliament”, 64 Can. Bus. L.J. 316 (2020-2021) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/canadbus64&div=23&id=&page=> last accessed 15 Nov 2023.

³³ The Federal Bankruptcy Reforms Act, 1978, §. 510, No.92 United States Congress, 1978 (USA)

³⁴ Re: Owens Corning, 419 F.3d 195, 206 (3d Cir. 2005).

³⁵ *Ibid.*, at “History of Substantive Consolidation”, para. A.

³⁶ J. Stephen Gilbert, “Substantive Consolidation in Bankruptcy: A Primer”, 43 VLR 207, 207-243 (1990) <https://scholarship.law.vanderbilt.edu/vlr/vol43/iss1/5> last accessed 21 Nov 2023.

³⁷ Vara Jahangirdar and Sanjhi Agarwal., “Group Insolvency: Time to Stop Relying on the Judiciary to Fill a Legislative Lacuna?”, 8 RGNUL Fin. & Mercantile L. Rev. 98, 102 (2021) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/rfladme8&div=25&id=&page=> last accessed 21 Nov 2023.

during the insolvency process could be impractical or detrimental to the overall resolution process. This would allow pooling of the assets and liabilities for resolution plan for revival of such companies.³⁸ The Court has opined that the substantive consolidation has a significant impact on the assets of the consolidated entities and in certain cases, the impact of substantive consolidation on the assets is considered self-evident, without the need for further investigation.³⁹ This can be particularly relevant in cases where there are complex intercompany transactions or where entities within a group are closely interconnected financially. The NCLT Bench at Mumbai applied this doctrine in one instance⁴⁰ where a group of 18 insolvent companies was considered as one legal entity vide a petition of the bank (creditor). Two companies were left out because they were not insolvent and they operated in a different line of business.

Moreover, Indian Parliament foresaw the inconvenience in introducing a new member who would require their own learning curve, for instance. The American method takes the perspective that the management personnel of the corporate debtor is best suited to reorganise the company and prevent it from liquidation. However, the IBC was enacted to bring in a consolidated CIRP methodology by replacing the previous “debtor-in-possession” model under the Sick Industrial Companies (Special Provisions) Act, 1985 with a “creditor-in-control” model.⁴¹ There were no notable changes made to the country’s credit discipline under the creditor-in-control system. The creditors who have a stake in keeping the debtor operating as a going concern currently hold the advantage in the balance of convenience.⁴² According to the IBC, decisions about the CIRP are made by the CoC⁴³, whose business judgment has consistently been accepted by the courts. It is also an accepted practice in the Indian scenario to consider a particular transaction of a holding company and subsidiary company separately in a particular time frame to evaluate the debt obligations of the corporate debtor. This is starkly in contrast to the practice of joint consideration of holding and subsidiary companies as a single legal entity as per the doctrine of substantive

³⁸ Unnati Khanna, “Analysing the Journey of Group Insolvency in India: An Inquiry into Codification-Related Considerations”, 3 Indian J.L. & Legal Rsch. 1 (2021-2022) [https://heinonline.org/HOL/LandingPage?handle=hein.journals/injlolw3&div=518&id=&page=last accessed 1 Dec 2023](https://heinonline.org/HOL/LandingPage?handle=hein.journals/injlolw3&div=518&id=&page=last%20accessed%201%20Dec%202023).

³⁹ *Nesbit v. Gears Unlimited*, 347 F.3d 72, 86-87 (3d Cir. 2003); *Sampsell v. Imperial Paper & Colour Corporation*, 313 U.S. 215, 219.

⁴⁰ *State Bank of India v. Videocon Industries*, 2018 SCC OnLine NCLT 13182; *See also Barlow & Ors. v. Polly Pech International Finance Ltd. & Anr.*, 1996 B.C.C. 486.

⁴¹ Baxi, A., “Interim Finance in Creditor-Oriented Bankruptcy Codes: A Study in the Context of Insolvency & Bankruptcy Code, India”, 48(3), *Vikalpa* 189-205, (2023) <https://doi.org/10.1177/02560909221150689> last accessed 30 Nov 2023.

⁴² Bose, U., et al., “Does bankruptcy law improve the fate of distressed firms? The role of credit channels”, 68 *JCF*, (2021) <https://doi.org/10.1016/j.jcorpfin.2020.101836> last accessed 30 Nov 2023.

⁴³ The Insolvency and Bankruptcy Code, 2016, Chapter II, No. 31 of 2016, Acts of Parliament, 2016 (India).

consolidation. Corporate debtors are often found in situations where debt obligations are divided between creditors of poorer estates and those of richer estates. Although the practice of substantive consolidation results in several advantages⁴⁴ like resolution of cross debts and increment of value of assets, courts often hesitate to consider substantive consolidation because such a practice results in debts being shared between two economically distinct classes of creditors. Also, the basic principles of separate legal entity and limited liability are infringed by such application.⁴⁵ Therefore, the consolidation of bankruptcy procedure in India vide the IBC shares a certain element of precision and exactment with foreign legislation but also starkly differs in certain areas of operation.

VI. Legislative intent behind enactment of the Code

A. Argumentative outlook:

The position of the Apex Court in interpreting its law-making counterpart's aim and design has been remarkably clear. Without crossing the boundaries of judicial review, but perhaps closing in on the border of this constitutional duty of the Judiciary, the Apex Court considered the contentions of unconstitutionality of specific clauses of the IBC wherein the contentions were based on several precedents⁴⁶ passed by the NCLT, NCLAT, and the Supreme Court itself on previous such occasions. The Court pronounced finality on these questions of law *inter alia* by upholding the constitutional validity of the provisions thereunder, and in the process, made such other significant observations relevant to that matter. The landmark case of *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*⁴⁷ pronounced the legislative intent behind the enactment of the IBC by perusing the Preamble and Long Title of the Code:

“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.”

The simple formula applied therein was the one established categorically by the Supreme Court

⁴⁴ Re Gulfeo Investment Corporation, 593 F.2d 921 (10th Cir. 1979); Re Flora Mir Candy Corporation, 423 F.2d 1060 (2d Cir. 1870); Re Continental Vending Machine Corporation, 517 F.2d at 997; Chemical Bank New York Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966).

⁴⁵ Salomon v. Salomon, 1897 AC 22; Lee v. Lee's Air Farming Ltd., (1960) 3 WLR 758.

⁴⁶ Madras Bar Association v. Union of India, (2015) 8 SCC 583; Shayara Bano v. Union of India, (2017) 9 SCC 1; Uttara Foods & Feeds Pvt. Ltd. v. Mona Pharmachem, (2018) 15 SCC 587; Union of India v. R. Gandhi, President, Madras Bar Association, (2010) 11 SCC 1; Innoventive Industries Ltd. v. ICICI Bank & Anr., (2018) 1 SCC 407.

⁴⁷ Swiss Ribbons Pvt. Ltd. and Ors. v. Union of India (UOI) and Ors., AIR 2019 4 SCC 17, at para. 11; Binani Industries Ltd. v. Bank of Baroda & Anr., 2018 SCC OnLine NCLAT 457.

itself in several previous cases.⁴⁸ The Preamble and the Long Title were observed to be the “key to open the minds of the law-makers”. A careful perusal of the Preamble and Long Title were held necessary to determine “the policy and purpose of every legislation.”⁴⁹ However, a simple counter-intuition would be that such perusal would be required only in circumstances of ambiguity and silence of the legislation. But the Supreme Court removed such doubts regardless of the Preamble and held:

*“It could thus be seen that one of the principal objectives of the IBC is providing for the revival of the Corporate Debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern; liquidation is the last resort...”*⁵⁰

All such observations of the Supreme Court could be possible only because of perusing several Reports of Law Committees, the Insolvency Bankruptcy Board of India, the Ministry of Company Affairs, etc. The Ministry on one occasion observed that “the law should strike a balance between rehabilitation and liquidation process. It should provide an opportunity for genuine efforts towards revival. Only where revival/rehabilitation is not feasible, winding up should be resorted to.”⁵¹ As a matter of prudence, the structure of the IBC in India is aimed at reviving the Corporate Debtor rather than permitting its liquidation. The structures of other insolvency laws around the world are unmistakably dissimilar.

B. Consequences of delayed CIRP – contravening the legislative intent:

As of 31st December 2022, there were about 2000 corporate insolvency resolution processes pending in India.⁵² In light of this, the strict compliance of the statutory time period laid out in Section 12⁵³ for the conclusion of CIRP has formed the foreground of several judgements of the Apex court. One of the important remarks stated by the Apex court is that “*Section 12 of IBC mandates that all CIRP including legal proceedings, should be completed within a time period of 330 days.*” Holding further, the Court mentioned that “*if the Adjudicating Authority is allowed to extend the timelines while exercising its power under Section 60(5)(c)*⁵⁴, it would be

⁴⁸ Maharashtra Land Development Corporation v. State of Maharashtra, (2011) 15 SCC 616; Union of India v. Ranbaxy Laboratories Ltd., (2008) 7 SCC 502; Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424.

⁴⁹ Re: Kerala Education Bill, 1957, 1959 1 SCR 995.

⁵⁰ K.N. Rajakumar v. V. Nagarajan, (2022) 4 SCC 617; See also Ghanashyam, Misra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657.

⁵¹ Ministry of Company Affairs, “*Report of the Expert Committee on Company Law, 2005*”, May 2005.

⁵² IBBC, [138597264c97f5fe167e1250e1e1e4bf.pdf \(ibbi.gov.in\)](https://ibbi.gov.in/138597264c97f5fe167e1250e1e1e4bf.pdf) last accessed 23 Nov 2023.

⁵³ The Insolvency and Bankruptcy Code, 2016, § 12, No.31, Acts of Parliament, 2016 (India).

⁵⁴ The Insolvency and Bankruptcy Code, 2016, § 60(5)(c), No.31, Acts of Parliament, 2016 (India).

antithetical to the objectives of the IBC.”⁵⁵ But a plethora of conflicting stances taken by the Tribunals as well as the Supreme Court on this point reveal an intricate fact-based application of Section 12. One instance is where the NCLT's Delhi Bench sanctioned the resolution proposal of the corporate debtor, which was submitted approximately seven years after the initiation of the Corporate Insolvency Resolution Process (CIRP).⁵⁶ The reason for such delay was litigation before several fora.

The extension beyond 270 days to a maximum of 330 days for the completion of CIRP is inclusive of “time taken for all legal proceedings in relation to such resolution process.”⁵⁷ The Supreme Court had ordered liquidation of the corporate debtor on many occasions where valid resolution plans were not submitted within the statutory extended period, “... *the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the Corporate Debtor must take place, beyond which it is to be driven into liquidation.*”⁵⁸ Where no valid resolution plan was submitted or the submitted plan was not approved by the requisite per cent of the CoC before the end of the statutory period, the Supreme Court observed that “*the inevitable sequel is initiation of liquidation process against the Corporate Debtor concerned in the manner specified in Chapter III of the I&B Code.*”⁵⁹ Where the statutory period is extended beyond 330 days, the Courts generally tend to identify exceptional circumstances to permit the CIRP. Yet another restriction on CIRP procedures is laid out in Section 29A of the Code in the form of ineligibilities to propose resolution plans.

VII. Reading Section 29A of IBC into Sections 230-232 of the Companies Act

A. Ineligibility to propose Resolution Plans – Section 29A:

Turning the pages to Section 29A of the Code⁶⁰, The intent behind this ineligibility is to establish safeguards and prevent these individuals from pursuing their personal interests during the resolution process. If they seek to satisfy their personal debts, it would be prejudicial to the

⁵⁵ Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. & Ors., 2020 SCC OnLine SC 1168

⁵⁶ IDBI Bank Ltd. v. Jaypee Infratech Ltd., 2020 SCC OnLine SC 1429.

⁵⁷ The Insolvency and Bankruptcy Code, 2016, § 12(2), No.31, Acts of Parliament, 2016 (India).

⁵⁸ Committee of Essar Steel India Ltd. through Authorised Signatory v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531.

⁵⁹ K. Sashidhar v. Indian Overseas Bank & Ors., (2019) 12 SCC 150; *See also* DBS Bank Ltd. v. Sharad Sanghi, (2022) 5 SCC 694.

⁶⁰ Inserted vide the Insolvency and Bankruptcy Code (Amendment) Act, 2018, s. 29A, w.e.f., 23.11.2017.

corporate debtor's interests and the purpose of CIRP would be defeated⁶¹. The landmark judgement of the Supreme Court in the case of *Chitra Sharma v. Union of India*⁶² threw light on this point:

“Parliament was evidently concerned over the fact that persons whose misconduct has contributed to the defaults on the part of the debtor companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29A has now specified a list of persons who are not eligible to be resolution applicants.”

Laying emphasis on the time frame under Section 12, the Supreme Court observed *inter alia*:

*“The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of assets of such persons will be depleted. Therefore, maximization of value of assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs.”*⁶³

Moreover, the NCLAT also observed with respect to the purpose of inserting such ineligibilities that a certain “*death by liquidation*” can be avoided and the corporate debtor would be protected from its own faulty management.⁶⁴ A matter that sparked debate while witnessing an in-depth and argumentative articulation at the Supreme Court was whether any such ineligibility under Section 29A of the IBC can be read into such other provisions under a neighboring, but not too distinct a legislation, namely the Companies Act, 2013. There are several layers of this aspect that needs breaking down.

B. Section 29A read with Sections 230 to 232 – Arun Kumar Jagatramka⁶⁵:

In a general consideration of statutes which are consolidations of rules in that law, like the IBC,⁶⁶

⁶¹ M.P. Ram Mohan et al., “Section 29A of India’s Insolvency and Bankruptcy Code: an instance of hard cases making bad law?”, 22 JCL Studies 365-390, (2022) <https://doi.org/10.1080/14735970.2022.2083771> last accessed 25 Nov 2023.

⁶² (2018) 18 SCC 575.

⁶³ Swiss Ribbons, *supra*, note 39.

⁶⁴ Y. Shivaram Prasad v. S. Dhanapal, 2019 SCC OnLine NCLAT 172; *See also* S.C. Sekaran v. Amit Gupta & Ors., 2019 SCC OnLine NCLAT 517.

⁶⁵ Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) 7 SCC 474.

⁶⁶ The Insolvency and Bankruptcy Code, 2016, Long Title.

the Indian Penal Code, etc., the scope of the provisions thereunder would be applicable only to the subject matters considered under or governed by that statute. Applying that logic, it could be argued that the ineligibilities as mentioned in the IBC would bind only the procedures thereunder and not those under any other statute. The restraints placed on judicial review are bulky and the judicial interpretation cannot introduce meanings or provisions that the legislature has not explicitly included in the law. The boundaries of judicial review with respect to constitutional disqualifications *per se* were established in the case of *Manoj Narula v. Union of India*⁶⁷ wherein it was verbatim observed,

“... where a disqualification was not provided under the Constitution or by Parliament by law, the same could not be read in by recourse to principles of implied limitation, silence of the Constitution, constitutional morality, good governance, or constitutional trust.”

Where such principles were applied to arrive at a creative interpretation, “it would tantamount to crossing the boundaries of judicial review”.⁶⁸

In another instance, the observation of the Supreme Court was on the line that extrapolating the intention of the legislature is not the role of the Court, but merely clarifying the lines marked by the legislature is. The Supreme Court held:

*“There is no doubt a marginal area in which the courts mould or creatively interpret legislation which comes to them in a state requiring varying degrees of further processing. But by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature.”*⁶⁹

However, on the other end of the spectrum lies the aspects of purposive interpretation and harmonious construction. The underlying object of Section 29A is to disallow indirect entry of the management that resulted in the mounting debts of the corporate debtor, mainly because the probability of revival of the company to make it a going concern is significantly lessened by such entry.⁷⁰ If such a backdoor for ineligible entities is allowed, such members may pursue self-

⁶⁷ *Manoj Narula v. Union of India and Anr.*, (2014) 9 SCC 1.

⁶⁸ See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Minerva Mills Ltd. v. UOI.*, (1980) 3 SCC 625; *Centre for PIL v. UOI.*, (2011) 4 SCC 1; *N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1; *Arun Kumar Agarwal v. UOI.*, (2014) 2 SCC 609; *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1; *Shrikant v. Vasantrao*, (2006) 2 SCC 682; *Inderpreet Singh Kahlon v. State of Punjab*, (2006) 11 SCC 356.

⁶⁹ *Union of India v. Elphinstone Spinning & Weaving Co. Ltd.*, (2001) 4 SCC 139; *Corocraft Ltd. v. Pan American Airways Inc.*, (1968) 3 WLR 714; *State of Haryana v. Sampuran Singh*, (1975) 2 SCC 810.

⁷⁰ *Rishabh Govila et al., Bar on Phoenix Arrangements: An Analysis of Layers of Ineligibility Under Section 29A*, 1(2), *Indian Journal of Integrated Research in Law* 1, 18 (2021) <https://hcommons.org/deposits/item/hc:43311> last accessed 3 Dec 2023.

interests and the purpose of the Code would be vitiated.⁷¹ The Supreme Court put into perspective the intent of Parliament in this regard:

“Parliament was evidently concerned over the fact that persons whose misconduct has contributed to the defaults on the part of debtor companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29A has now specified a list of persons who are not eligible to be resolution applicants.”⁷²

A purposive interpretation requires comprehensive theories put through statutory provisions and/or precedents which relate to the proposed conjoint interpretation. The several pointers are dealt with in the section below.

C. Purposive Construction:

An observable pattern characteristic of the purposive construction theory is the method of reading a provision into the constituents of another. In the present scenario, the need for purposive interpretation falls under the guidance of Section 35 of the IBC listing out the powers and duties of the liquidator is pertinent. A bare perusal of clause (f) of sub-section (1) and the *proviso* appended thereto⁷³ reveals the following:

“Section 35. Powers and duties of liquidator. —

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties namely: --

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.”

The purpose of the appended *proviso* is with reference to a continuum “when the Court observes

⁷¹ Agrawal et al., *Liquidation As Going Concern Under Insolvency and Bankruptcy Law*, Papers SSRN 1, 1-11(2020) <http://dx.doi.org/10.2139/ssrn.3527389> last accessed 3 Dec 2023.

⁷² Chitra Sharma, *supra*, note 54; ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1; TK Vishwanathan et al., *The Report of the Bankruptcy Law Reforms Committee – Vol. 1: Rationale and Design*, (2015) https://ibbi.gov.in/BLRCReportVol1_04112015.pdf last accessed 3 Dec 2023.

⁷³ Inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 which is replaced by Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.e.f., 23 Nov 2017.

that the erstwhile promoters of the corporate debtor in liquidation. The values which animate Section 29A, continue to provide sustenance to the rationale underlying the exclusion of the same category of persons from the process of liquidation involving the sale of assets, by virtue of the provisions of Section 35(1)(f).⁷⁴ Yet another incorporation of a similar ineligibility is in Regulation 32 of the Liquidation Process Regulations⁷⁵, Sale of Assets, etc. Moreover, a bare perusal of Regulation 32A⁷⁶ reveals an emphasis laid on the transfer of corporate debtor or its business on a going concern basis. This signifies the characteristics and objectives of the different procedures designed to occur either during the liquidation stage or when the accumulating debts of a corporate debtor reaches a critical level. Based on this, the purpose of the ineligibilities under Section 29A was deduced to be in consonance with the legislative intent of the Code in order to promote sustainable revival. The ingredient of non-performing asset⁷⁷ as a characteristic of a promoter, for instance, leads to such an ineligibility as stated thereunder.

Following up on this, the Apex Court reiterated the need for a purposive interpretation in several instances.⁷⁸ It was highlighted in *ArcelorMittal India (P) Ltd.*⁷⁹:

“A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same... the opening lines of Section 29A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned therein. This is a typical instance of a “see-through provision”, so that one is able to arrive at persons who are actually in “control”, whether jointly, or in concert, with other persons. A wooden, literal interpretation would obviously not permit a tearing of the corporate veil when it comes to the “person” whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs.”⁸⁰

The observable pattern previously stated hereinabove is justified by relating the purpose of the

⁷⁴ Arun Kumar Jagatramka, *supra*, note 57, at para. 52.

⁷⁵ Substituted vide the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018, 22 Oct 2018.

⁷⁶ Inserted vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 applicable prospectively only to liquidation processes, which commenced on or after 25 Jul 2019.

⁷⁷ Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000, § 2(o), No.54, Acts of Parliament, 2002 (India)

⁷⁸ *Phoenix ARC Pvt. Ltd. v. Spade Financial Service*, 2021 SCC OnLine SC 51, ¶103-104; *Ramesh Kymal v. M/s. Siemens Gamesa Renewable Power Pvt. Ltd.*, (2021) 3 SCC 224; *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Ltd.*, (2020) 8 SCC 401, ¶28.4-28.5.

⁷⁹ *ArcelorMittal India (P) Ltd.*, *supra*, note 64.

⁸⁰ *Ibid*, at para. 30 – 32.

said provisions to the purpose of the statute. Two independent provisions belonging to different Chapters of the Code and governing two different procedures thereunder are linked through a *proviso* (to Section 35(1)(f)) inserted vide an amendment. The establishment of such a link poses the question as to the regulatory framework connecting this with compromises and arrangements as under Companies Act 2013.

D. Regulatory framework connecting the dots – Regulation 2B:

No eligibility or ineligibility which is not intended so to be, by the legislature can be established by judicial determination.⁸¹ But where the legislature has established a link specifically between two seemingly unconnected provisions vide a rule or regulation, then the concern of a far-fetched judicial review vanishes. Taking the limelight is Regulation 2B⁸² of the Liquidation Process Regulations⁸³ which links liquidation process under the Code with compromises and arrangements under the Companies Act. A bare perusal of Regulation 2B (1) and the appended *proviso* thereto reveals that there is a time period for the completion of compromise or arrangement proposed under Section 230 of the Act. A bare perusal of the *proviso* reveals:

*“Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.”*⁸⁴

The above *proviso* entails a retrospective effect dealing with proposals of compromise and arrangement before 06th January 2020. The ratio behind this is that there is a possibility that the entities held ineligible under Section 29A are responsible for the corporate death of the company. In such an event, the purpose of the established law would be defeated. Given that “it is fundamental that a rule-making body cannot frame rules in conflict with or derogating from the substantive provisions of the law or statute under which the rules are framed”⁸⁵, it is important to note the emphasis laid by legislature in furtherance of the conjoint interpretation of the above-said provisions. However, the extent and scope of importing such ineligibilities across two statutes that operate on considerably different grounds must be tested. This question of interpretation fell before the consideration of the Apex Court on a few occasions.

⁸¹ Manoj Narula, *supra*, note 59.

⁸² Inserted vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f., 25.07.2019 applicable only to liquidation processes, which commenced on or after 25th July, 2019.

⁸³ The Insolvency and Bankruptcy Board of India Liquidation Process Regulations, 2016.

⁸⁴ Inserted vide the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020 dated 06 Jan. 2020.

⁸⁵ Abdul Gani v. Settlement Officer, AIR 1955 Gau 45; See also K. Narayanan & Ors. v. State of Karnataka & Ors., AIR 1994 SC 55.

Moreover, such a provision may suffer from a vice of arbitrariness in some contexts, in violation of Articles 14, 19, and 21 of the Constitution. The primary contentions in this regard⁸⁶ were, firstly that Regulation 2B was *ultra vires* Section 230 of the Act, and secondly that the provision suffered from a vice of arbitrariness. The Apex Court has categorically upheld in a recent case:

*“The doctrine of ultra vires envisages that the rule making body must function within the purview of the rule making authority conferred on it by the parent Act. As the body making rules or regulations has no inherent power of its own to make rules, but derives such power only from the statute, it has to necessarily function within the purview of the statute.”*⁸⁷

On the line of arbitrariness, it was contended that Regulation 2B successfully imports an ineligibility provided under the IBC to a provision that operates in a different area under the Companies Act. The opposite set of contentions thereunder was that Regulation 2B is merely clarificatory in nature. The purpose of the Regulation was connected to that of Sections 29A and 35(1)(f) of the Code.

The Court pronounced its judgement upon the conjoint perusal of Sections 196(1)(t) and 240(1) of the Code. Under Section 196(1)(t), the Insolvency and Bankruptcy Board of India (IBBI) is empowered to “make regulations and guidelines on matters relating to insolvency and bankruptcy”, and under Section 240(1), the IBBI is empowered to “make regulations consistent with this Code and rules made thereunder, to carry out the provisions of this Code.” The Court observed that “Regulation 2B met both the requirements, of being consistent with the provisions of IBC and of being made in order to carry out the provisions of the IBC...”⁸⁸, and thereby rejected all contentions of unconstitutionality.

E. Curing defects and covering loopholes – the Mischief Rule:

The method of interpretation which specifically imposes “the duty of every Judge to make such construction of a statute as to suppress the mischief and advance the remedy”⁸⁹ is known as the mischief rule of interpretation. Any defect in law for which a cure can be found by judicial interpretation is referred to as a ‘mischief’.⁹⁰ Where the ineligibilities under the Code are read

⁸⁶ See Arun Kumar Jagatramka, *supra*, note 57.

⁸⁷ Kerala State Electricity Board v. Thomas Joseph Alias Thomas M J, 2022 LiveLaw (SC) 1034.

⁸⁸ Arun Kumar Jagatramka, *supra*, note 57, at ¶83.

⁸⁹ Maxwell, “*Interpretation of Statutes*”, 11th Ed., p. 66; See also Heydon’s case, (1584) 3 Co Rep 7; Smith v. Hughes, 1960 WLR 830; Rex v. Ramdayal; I.L.R. 1950 All 935.

⁹⁰ Bradley, “*Getting into Mischief: Reflections on Statutory Interpretation and the Mischief Rule*”, 109 Geo. L.J. Online (2020-2021)

into the Companies Act, 2013, a counter-intuitive theory because the capacity and qualifications required for proposing a resolution plan under insolvency law might not align with the purposes and objectives of compromises or arrangements under corporate law. It would be that the mischief sought to be remedied is not achieved because the capacity of a person proposing a resolution plan under the Code compared to that of a person proposing a compromise or an arrangement under the Act are on different footings. That the mischief which was sought to be remedied by the insertion and interpretation of Section 29A is demarcated to the resolution process under Chapter II of the Code, and the object of this provision is that those accountable for leading the company to liquidation should not benefit from their own misconduct. Disallowing a defaulting member from participating in the resolution process might be considered justifiable, as it prevents an advantage that could compromise the interests of creditors.⁹¹ The provision regarding compromises and arrangements on the other hand, must be sanctioned by the Adjudicating Authority and operates in a different area.

However, the Apex Court considered in preponderance, the set of contentions that “to make an exception in a plan for revival under Section 230 of the Act in the context of a scheme of compromise or arrangement will defeat the object and intent of the amendment to the IBC and lead to an absurdity. This indeed would perpetrate the mischief which was sought to be obviated.”⁹² The new IBC framework replaces the debtor’s paradise with a creditor-centric regime which ensures corporate justice.⁹³ In lieu of acts which led to the company’s death by liquidation, it would be justified to ensure that those persons whose poor decision-making schemes led to such a situation hinging on the corporate debtor, should not be a part of the process of finding a solution.⁹⁴ Moreover, the disallowed entities under Section 29A are susceptible to favouring the CoC, thus not exercising their best judgement in what is best for the corporate debtor. On these lines, the Supreme Court observed thus:

“A harmonious construction between the two statutes would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/gljon109&div=10&id=&page=> last accessed 5 Dec 2023.

⁹¹ Choubey, *Interplay of IBC with Other Relevant Laws*, 4(4) Indian J.L. & Legal Rsch 1 (2022) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/injlolw7&div=185&id=&page=> last accessed 10 Dec 2023.

⁹² Arun Kumar Jagatramka, *supra*, note 57 at para. 32.

⁹³ Baxi, A., *supra*, note 33.

⁹⁴ Mundhra et al., “*Gujarat NRE Coke Ltd.: Revival of Companies in Distress*”, Emerging Economies Cases Journal, 3(1), 35-45. <https://doi.org/10.1177/25166042211029135> last accessed 12 Nov 2023.

because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC. As such, the company has to be protected from its management and a corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013."⁹⁵

VIII. Concluding remarks

Having compared the *modus operandi* in lieu of insolvency matters in other countries, the Indian scenario has laid, not a clean road, but one with quite a few puddles. The matters dealt with by the IBC are of such nature that careful drafting of provisions with exceptions and appended rules is necessary. Tracing the backdrop of the IBC, as already mentioned above, the Code came into existence as a saviour of the creditor where the previously existing statutes were being exploited by the debtor's regiment. Matters concerning corporate law were being subject to out-of-court settlements due to the inability to constrain factual matters within the 'four walls' of codified law. Yet somehow, the legislators have managed to close the "front door opportunity" to the debtor regiment to take the benefit of the new framework vide amendments, rules, and regulations assisting its interpretation, clarifying procedures, and covering loopholes in the vast subject of corporate law. Even the recent order of the Apex Court upholding the constitutional validity of Sections 95 to 100 of the Code⁹⁶, regarding insolvency of personal guarantors is an example of a constant surveillance by the Top Court of happenings around such legislation. Fulfilling its constitutional duty and upholding the principles of natural justice, the Court has delivered several verdicts on questions of law above and beyond the 'four walls of statute' of the IBC. The best and most suitable instance of an exceptional interplay between the two pillars, Judiciary and Legislature, is the present one: comprehensively limiting a colored act prohibited by law, preventing the assets of a legal entity from being usurped by a poor management, and ensuring revival of the corporate debtor in line with the legislative intent.

⁹⁵ Arun Kumar Jagatramka, *supra*, note 57, at para. 68.

⁹⁶ Surendra B. Jiwrajika & Anr. v. Omkara Assets Reconstruction Pvt. Ltd., SLP(C) No. 016464/2021 and other connected matters.