

DUA ASSOCIATES

IN BRIEF - INSOLVENCY & BANKRUPTCY



CONSTITUTIONAL VALIDITY OF THE PERSONAL INSOLVENCY RESOLUTION PROCESS UPHOLD

In a recent decision of the Hon'ble Supreme Court in *Dilip B Jiwrajka v. Union of India & Ors* Writ Petition (Civil) No 1281 of 2021, the constitutional validity of Sections 95 to 100 of the Insolvency and Bankruptcy Code 2016 (IBC) faced scrutiny, and were decided by the Supreme Court in a batch of petitions, totalling 384. The Petitioners had primarily contended that, prior to initiating personal insolvency proceedings under the IBC, a judicial determination of the existence of a debt was essential. The crux of the argument rested on opposing the automatic interim moratorium, immediate appointment of a resolution professional, and the submission of a report without a prior assessment of the creditor-debtor relationship, which stemmed from the provisions of Sections 95 to 100.

Key Findings

1. Resolution Professionals role in Individual Insolvency is not adjudicatory

Distinguishing between corporate and individual insolvency, the Court underscored the limited powers of resolution professionals in Part III of the IBC.

The Court observed that unlike their counterparts in corporate insolvency, resolution professionals in individual insolvency, play a facilitative role, gathering information and making non-binding recommendations for the acceptance or rejection of insolvency applications. The Court observed that 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.

II. Interim Moratorium under Section 96 is only in relation to the ‘Debt’ and not the ‘Debtor’

The Court observed that 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.

III. No violation of the principles of Natural Justice

The court rejected the contentions of the Petitioners that filing of a report by the Resolution Professional, even prior to granting an opportunity to the debtors to be heard is in violation of the principles of natural justice. The Court observed that the right of debtors to file representations under Section 99 to the IRP, is sufficient compliance of the audi alterum partem requirements. The court emphasized that the true adjudicatory process begins under Section 100 after the submission of the resolution professional's report.

CONCLUSION

In conclusion, the court clarified several critical points which were proving a point of contention in every application filed under Section 95 of the IBC. The summary of the Courts findings are narrated below:

1. No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;
2. The role of the resolution professional is facilitative, involving submission of a non-binding 'recommendatory' report.
3. 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;
4. The judicial determination happens only under Section 100 by the adjudicating authority.
5. Sections 95 to 100 of the IBC are constitutional, not violating Articles 14 and 21 of the Constitution.

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